

**UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

ATCM OPTICAL, INC., OMEGA OPTICAL,  
INC., OMEGA OPTICAL AT COMCAST  
CENTER LLC d/b/a OMEGA OPTICAL,

Plaintiff,

v.

TWIN CITY FIRE INSURANCE  
COMPANY,

Defendant.

**COMPLAINT**

**JURY TRIAL DEMANDED**

**Civil Action No.**

Plaintiff, ATCM Optical, Inc., Omega Optical, Inc., Omega Optical at Comcast Center LLC d/b/a Omega Optical (“Omega” and “Plaintiff”) brings this Complaint against Defendant, Twin City Fire Insurance Company (“Defendant” or “Twin City”) and alleges as follows:

**NATURE OF THE CASE**

1. This is a civil action seeking declaratory relief arising from Plaintiff’s contract of insurance with Defendant.
2. In light of the Coronavirus global pandemic and state and local orders mandating that all non-essential in-store businesses must shut down, and the suffering of physical harm and impact and damages, within Plaintiff’s business premises and/or within the immediate area surrounding and outside its business premises, Plaintiff shut the doors of his business to customers on March 16, 2020.
3. Plaintiff’s insurance policy provides coverage for all non-excluded business losses and thus provides coverage here.

4. As a result, Plaintiff is entitled to declaratory relief that its business is covered for all business losses that have been suffered and sustained, which losses are in an amount greater than \$150,000.00.

### **JURISDICTION**

5. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332, because there is complete diversity of citizenship between Plaintiff and Defendant. Further, Plaintiff has suffered business losses in an amount greater than \$150,000.00. The amount in controversy necessary for diversity jurisdiction over a declaratory judgment action is measured by the value of those business losses. *Id.* at § 1332(a).

6. This Court has personal jurisdiction over Defendant Twin City. At all relevant times Defendant has engaged in substantial business activities in the Commonwealth of Pennsylvania. At all relevant times Defendant transacted, solicited, and conducted business in Pennsylvania through its employees, agents, and/or sales representatives, and derived substantial revenue from such business in Pennsylvania. Defendant purposefully availed itself of personal jurisdiction in Pennsylvania because it contracted to provide insurance to Plaintiff in Pennsylvania which is the subject of this case.

7. Venue is proper in this district pursuant to 28 U.S.C. § 1391(c) because Defendant is a corporation that has substantial, systematic, and continuous contacts in Pennsylvania and within the Eastern District of Pennsylvania. Further, the insurance sold to Plaintiff which is the subject of this case was sold in the Eastern District of Pennsylvania.

### **PARTIES**

8. At all relevant times, Plaintiff was authorized to do business and was doing business in the Commonwealth of Pennsylvania, in Philadelphia County. Plaintiff operates, manages and owns two optical offices located at 3212 West Cheltenham Ave., Philadelphia PA 19150 and 1701

John F. Kennedy Blvd., Philadelphia PA 19103. Plaintiff is a citizen of Pennsylvania. These two locations will be referred to at times in this Complaint as the “Plaintiff’s Insured Properties” or the “Insured’s Properties.”

9. Defendant, Twin City is an insurance carrier who provides business interruption insurance to Plaintiff. Twin City is headquartered at 501 Pennsylvania Parkway, Indianapolis, Indiana 46280. Twin City is a citizen of Indiana.

10. Defendant issued an insurance policy with Policy Number 13 SBA IN4046 DW to Plaintiff for the period July 20, 2019 to July 20, 2020. *See* Policy Declaration, attached hereto as Exhibit 1. Defendant transacts business of insurance in the Commonwealth of Pennsylvania and within the County of Philadelphia, and the basis of this suit arises out of such conduct.

11. Plaintiff submitted a claim for a date of loss of March 8, 2020 pursuant to its policy 13 SBA IN4046 DW seeking coverage under this policy. Defendant rejected Plaintiff’s coverage finding that the Civil Authority Coverage did not apply because Plaintiff did not suffer damage to its property. Defendant also denied coverage under the Contingent Business Interruption provisions because of lack of damage to the property. *See* Denial letter, attached hereto as Exhibit 2.

## **FACTUAL BACKGROUND**

### **I. Insurance Coverage**

12. Defendant entered into a contract of insurance with Plaintiff, whereby Plaintiff agreed to make payments to Defendant in exchange for Defendant’s promise to indemnify Plaintiff for losses including, but not limited to, business income losses at Plaintiff’s Insured Properties.

13. The Insured Properties are covered under a policy issued by Defendant. *See* Ex. 1 (hereinafter “Policy”).

14. The Policy provides, among other things property, business personal property, business income and extra expense, contamination coverage, and additional coverages.

15. Plaintiff faithfully paid policy premiums to Defendant, specifically to provide, among other things, additional coverages in the event of business interruption or closures for a variety of reasons, including by order of Civil Authority.

16. Under the Policy, business interruption insurance coverage is extended to apply to, *inter alia*, the actual loss of business income sustained, and the actual, necessary and reasonable extra expenses incurred.

17. The Policy is an all-risk policy, insofar as it provides for coverage in the broadest sense and thereby providing coverage, unless the loss sustained is specifically and unambiguously excluded or limited in the Policy.

18. An all-risk policy such as that purchased by Plaintiff is one that protects against catastrophic events, such as the one occurring now, globally, involving the Covid-19 Pandemic that has resulted in the widespread, omnipresent and persistent presence of Covid-19 in and around Plaintiff's Insured Properties, including adjacent properties. Coverage under an all-risk Policy is to be broadly interpreted and provided.

19. Plaintiff's all-risk policy includes coverage for business interruption, which is standard in most all-risk commercial property insurance policies, along with coverage for extended expenses.

20. Plaintiff purchased the Policy expecting to be insured against losses, including, but not limited to, business income losses suffered at the Insured Properties.

21. Plaintiff purchased, among other coverages, business interruption coverage for closure by Order of Civil Authority.

22. Based upon information and belief, the Policy provided by Defendant included language that is essentially standardized language adopted from and/or developed by the ISO (“Insurance Service Office”). The ISO, founded in 1971, provides a broad range of services to the property and casualty insurance industry. In addition to form policies, ISO collects and manages databases containing large amounts of statistical, actuarial, underwriting, and claims information, fraud-identification tools, and other technical services. ISO describes itself as follows: “ISO provides advisory services and information to many insurance companies. ... ISO develops and publishes policy language that many insurance companies use as the basis for their products.” ISO General Questions, Verisk, <https://www.verisk.com/insurance/about/faq/> (last visited June 5, 2020); see also Insurance Services Office (ISO), Verisk, <https://www.verisk.com/insurance/brands/iso/> (last visited June 5, 2020).

23. The language in the Policy is language that is “adhesionary” in that Plaintiff was not a participant in negotiating or drafting its content and provisions.

24. Plaintiff possessed no leverage or bargaining power to alter or negotiate the terms of the Policy, and more particularly, Plaintiff had no ability to alter, change or modify standardized language derived from the ISO format. Upon information and belief, the “Virus Exclusion” in the Policy was never intended by the ISO nor Defendant to pertain to a situation like the present global Pandemic of the Coronavirus and therefore does not apply to exclude coverage in this matter.

25. Upon information and belief, the Virus Exclusion in the policy was developed by the ISO in response to the SARS situation that occurred in or around 2005-2006, which was not a Pandemic and not a global Pandemic as is the present COVID-19 Pandemic situation, and therefore was never intended to exclude coverage for a circumstance as presented in this matter.

26. Upon information and belief, the Virus Exclusion was first permitted by state insurance departments due to misleading and fraudulent statements by the ISO that property insurance policies do not and were not intended to cover losses caused by viruses, and so the Virus Exclusion offers mere clarification of existing law. To the contrary, before the ISO made such baseless assertions, courts considered contamination by a virus to be physical damage. Defendant's use of the Virus Exclusion to deny coverage here shows that the Virus Exclusion was fraudulently adopted, adhesive, and unconscionable. See <https://www.propertycasualty360.com/2020/04/07/here-we-go-again-virus-exclusion-for-covid-19-and-insurers/> (last visited June 12, 2020).

27. Upon information and belief, the Virus Exclusion was improperly added to policies by insurance carriers to expand the exclusions of coverage in their policies without disclosing to insurance commissioners/state insurance regulators that the provision was reducing coverage. The reason that insurance carriers did not disclose the actual effect of the Virus Exclusion clauses to reduce coverage was so that insurance carriers could maintain premium levels as though coverage levels was not being reduced.

28. Upon information and belief, the Virus Exclusion cause was promoted as being part and parcel of prior provisions that limited coverage without causing a change when in fact that was not the case.

29. Upon information and belief, the Virus Exclusion was marketed by insurance carriers to insurance regulators as being nothing more than a clarification of the microorganism or bacterium language in policies when in fact the Virus Exclusion was added to policies to constitute an expansion of exclusionary language without disclosure.

30. Upon information and belief, the Virus Exclusion attempts to make losses or damage suffered or caused by a virus to be on equal footing with damages suffered or caused by a bacterium or microorganism so as to enable insurance carriers to assert the virus exclusion as a defense in the same manner as asserting bacterium or microorganism as a defense when there was no disclosure of this subterfuge to insurance regulators.

31. Regulatory estoppel applies and Defendant should not be permitted to rely on the Virus Exclusion because of its conduct and any associated conduct of the ISO to inappropriately obtain the permission of state insurance commissioners or departments to include the language of the Virus Exclusion in its policies.

32. Even so, the Virus Exclusion applies only to “loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease.”

33. The Policy does not have an exclusion for a Pandemic. As an all-risks policy, coverage is presumed unless clearly and unambiguously excluded. There is no such exclusion for a Pandemic or for action taken in response to a Pandemic such as the entry of Civil Authority Orders.

34. Plaintiff purchased the Policy with an expectation that it was purchasing a policy that would provide coverage in the event of business interruption and extended expenses, such as that suffered by Plaintiff as a result of Covid-19.

35. At no time had Defendant, or its agents, notified Plaintiff that the coverage that Plaintiff had purchased pursuant to an all-risk policy that included business interruption coverage, had exclusions and provisions that purportedly undermined the very purpose of the coverage, of providing benefits in the occurrence of business interruption and incurring extended expenses.

36. The purported exclusions of the Policy that Defendant has or is expected to raise in defense of Plaintiff's claim under the Civil Authority coverage of the Policy are contradictory to the provision of Civil Authority Order coverage and violates public policy of the Commonwealth of Pennsylvania as a contract of adhesion and hence not enforceable against Plaintiff.

37. Access to Plaintiff's business was prohibited by Civil Authority Orders and the Policy provides for coverage for actual loss of business sustained and actual expenses incurred as a covered loss caused by the prohibitions of the Civil Authority Orders in the area of Plaintiff's Insured Properties.

38. The reasonable expectations of Plaintiff, *i.e.*, an objectively reasonable interpretation by the average policyholder of the coverage that was being provided, was that the business interruption coverage included coverage when a civil authority forced closure of the business for an issue of public safety involving the COVID-19 pandemic in the immediate area surrounding the Insured Property.

39. The Policy does not exclude the losses suffered by Plaintiff and therefore, the Policy does provide coverage for the losses incurred by Plaintiff.

40. Plaintiff suffered direct physical loss or damage within the definitions of the Policy. Further, the loss of use of property, as here, also constitutes a covered loss and/or covered damage under the terms of the Policy.

41. The virus and bacterium exclusions do not apply because Plaintiff's losses were not directly caused by a virus, bacterium or other microorganism. Instead, Plaintiff's losses were caused by the entry of Civil Authority Order, particularly those by Governor Wolf of Pennsylvania, by the Pennsylvania Department of Health, and Mayor Kenney of Philadelphia to mitigate the spread of COVID-19. The Civil Authority Orders were issued because of damage to individuals



and property caused by COVID-19. The Civil Authority Orders were more than mere social distancing enactments but required closure of business to protect against further physical impact and losses and damages.

42. The Civil Authority Order prohibited access to Plaintiff's Insured Properties, and the area immediately surrounding Covered Property, in response to dangerous physical conditions described above resulting from COVID-19.

43. Covid-19 is omnipresent, impacting the environment causing the entry of Civil Authority Orders for the protection of businesses and the population from physical contact by Covid-19.

44. As a result of the presence of COVID-19 and the Civil Authority Order, Plaintiff lost Business Income and incurred Extra Expense.

45. Based on information and belief, Defendant has accepted the Policy premiums with no intention of providing any coverage for business losses or the Civil Authority extension due to a loss and shutdown from a pandemic. Plaintiff made a claim under the Policy, and upon information and belief, Defendant has no intention of paying the claim. Plaintiff submitted a claim for a business loss pursuant to its Policy, seeking coverage under the Policy. Defendant issued a reservation of rights letter to Plaintiff, wherein, Defendant identified many provisions of the Policy that it purportedly will rely on for determining that coverage for the types of claims that Plaintiff was making would not be covered. Essentially, Defendant's reservation of rights letter implied that there would be a rejection of Plaintiff's business loss and business interruption claims and other claims, contending, inter alia, that Plaintiff did not suffer physical damage to its property directly and stating other reasons why Plaintiff is not purportedly entitled to coverage for the losses and damages claimed.

## II. The Coronavirus Pandemic

46. The scientific community, and those personally affected by the Coronavirus pandemic, recognize COVID-19 as a cause of real physical loss and damage. It is clear that contamination of the Insured Property would be a direct physical loss requiring remediation to clean the surfaces of the offices and retail store constituting the Insured Property.

47. The virus that causes COVID-19 remains stable and transmittable in aerosols for up to three hours, up to four hours on copper, up to 24 hours on cardboard and up to two to three days on plastic and stainless steel. See <https://www.nih.gov/news-events/news-releases/new-coronavirus-stable-hours-surfaces> (last visited April 9, 2020).

48. The CDC has issued a guidance that gatherings of more than 10 people must not occur. People in congregate environments, which are places where people live, eat, and sleep in close proximity, face increased danger of contracting COVID-19.

49. On March 11, 2020 the World Health Organization (“WHO”) made the assessment that COVID-19 shall be characterized as a pandemic. See <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> (last visited July 16, 2020).

50. The global Coronavirus pandemic is exacerbated by the fact that the deadly virus physically infects and stays on surfaces of objects or materials where it can fomite. Human coronaviruses can remain infectious on inanimate surfaces at room temperature for up to 9 days. At a temperature of 30 degrees Celsius (86 degrees F) or more the duration of persistence is shorter. *See* <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7132493/> (last visited July 16, 2020).

51. A particular challenge with the novel coronavirus is that it is possible for a person to be infected with COVID-19 but be asymptomatic. Thus, seemingly healthy people unknowingly spread the virus via speaking, breathing, and touching objects.

52. While infected droplets and particles carrying COVID-19 may not be visible to the naked eye, they are physical objects which travel to other objects and cause harm. Habitable surfaces on which COVID-19 has been shown to survive include, but are not limited to, stainless steel, plastic, wood, paper, glass, ceramic, cardboard, and cloth.

53. The virus is thought to spread mainly from person-to-person: between people who are in close contact with one another (within about 6 feet); through respiratory droplets produced when an infected person coughs, sneezes or talks; these droplets can land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs; and some recent studies have suggested that COVID-19 may be spread by people who are not showing symptoms. *See* <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html> (last visited July 16, 2020).

54. The CDC has noted that it may be possible that a person can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or possibly their eyes but that this is not thought to be the main way the virus spreads, but we [the CDC] are still learning more about how this virus spreads.

55. The CDC has said that the best way to prevent illness is to avoid being exposed to this virus and that steps can be taken to slow its spread: Maintain good social distance (about 6 feet). This is very important in preventing the spread of COVID-19; Wash your hands often with soap and water. If soap and water are not available, use a hand sanitizer that contains at least 60% alcohol; Routinely clean and disinfect frequently touched surfaces; and Cover your mouth and nose with a cloth face covering when around others.

56. The CDC has noted that the primary and most important mode of transmission for COVID-19 is through close contact from person-to-person. Based on data from lab studies on COVID-19 and what we [the CDC] know about similar respiratory diseases, it may be possible that a person can get COVID-19 by touching a surface or object that has the virus on it and then touching their own mouth, nose, or possibly their eyes, but this isn't thought to be the main way the virus spreads. <https://www.cdc.gov/media/releases/2020/s0522-cdc-updates-covid-transmission.html> (last edited May 23, 2020).

57. Compliance with the CDC recommendations, along with compliance with the Civil Authority Orders of Pennsylvania and local counties (see below), effectively made it impossible for Plaintiff to operate its business in the usual and customary manner causing the practice to suffer business losses and added expenses as provided for and covered under the Policy.

58. China, Italy, France, and Spain have implemented the cleaning and fumigating of public areas prior to allowing them to re-open publicly due to the intrusion of microbials.

59. A French Court has determined that business interruption coverage applies to the COVID-19 Pandemic. See <https://www.insurancejournal.com/news/international/2020/05/22/569710.htm> (last visited July 12, 2020).

60. The determination by a Court of another country that coverage exists is consistent with public policy that in the presence of a worldwide Pandemic, such as COVID-19, businesses that possess business interruption insurance coverage should recover their losses from the insurance carriers.

### **III. Civil Authority**

61. On March 6, 2020, Pennsylvania Governor Tom Wolf issued a Proclamation of Disaster Emergency, the first formal recognition of an emergency situation in the Commonwealth as a result of COVID-19. *See* Proclamation of Disaster Emergency, attached hereto at Exhibit 3.

62. On March 16, 2020, the City of Philadelphia announced the closure of non-essential businesses including salons like the Plaintiff's. <https://www.phila.gov/2020-03-16-city-announces-new-restrictions-on-business-activity-in-philadelphia/> (Last visited June 2, 2020).

63. On March 19, 2020, Governor Wolf issued an Order requiring all non-life-sustaining businesses in Commonwealth to cease operations and close all physical locations. Businesses that were permitted to remain open were required to follow “social distancing practices and other mitigation measures defined by the Centers for Disease Control.” *See* <https://www.governor.pa.gov/newsroom/all-non-life-sustaining-businesses-in-pennsylvania-to-close-physical-locations-as-of-8-pm-today-to-slow-spread-of-covid-19/#:~:text=Governor%20Tom%20Wolf%20today%20ordered,begin%20at%2012%3A01%20a.m.> (last visited June 2, 2020).

64. On March 23, 2020, Governor Wolf issued a Stay-at-Home Order for residents of Philadelphia, Allegheny, Bucks, Chester, Delaware, Monroe, and Montgomery Counties. *See* <https://www.governor.pa.gov/newsroom/governor-wolf-and-health-secretary-issue-stay-at-home-orders-to-7-counties-to-mitigate-spread-of-covid-19/> (last visited June 2, 2020). On that same date, the Pennsylvania Department of Health issued a similar Order, noting that “operation of non-

life-sustaining businesses present the opportunity for unnecessary gatherings, personal contact and interaction that will increase the risk of transmission and the risk of community spread of COVID-19.” See <https://www.governor.pa.gov/newsroom/waiver-extension-revised-timing-of-enforcement-monday-march-23-at-800-am/> (last visited June 2, 2020).

65. On April 1, 2020, Governor Wolf extended the March 23, 2020 Stay-at-Home Order to the entire Commonwealth of Pennsylvania. See <https://www.governor.pa.gov/newsroom/gov-wolf-sec-of-health-pennsylvania-on-statewide-stay-at-home-order-beginning-at-8-pm-tonight-most-prudent-option-to-stop-the-spread/> (last visited June 2, 2020).

66. On June 5, 2020, Philadelphia entered a modified version of the state’s yellow phase allowing businesses, like Plaintiff’s to gradually reopen, provided they follow protocols to keep employees, customers, and others safe. See <https://www.phila.gov/2020-05-29-what-the-yellow-phase-means-for-philadelphia/> (last visited June 8, 2020).

67. The Pennsylvania Supreme Court recently clarified the Governor’s Orders and supported Plaintiff’s position that physical loss and damage exists, resulting in coverage here. See *Friends of DeVito, et. al v. Wolf*, No. 68 MM 2020 (Pa. April 13, 2020).

68. Moreover, the United States District Court - Middle District of Pennsylvania also rejected a group of small business owners’ Motion for a Temporary Restraining Order, premised on due process and the First amendment, on May 21, 2020. The Court stated, “This pandemic has presented impossible choices to government officials and private citizens alike, and we are not unmoved by the hardships Petitioners currently face. [However,] Petitioners have failed to prove that the Governor violated constitutional strictures in their issuance.” See *Benner v. Wolf*, 1:20-cv-00775-JEJ (M.D. Pa. May 21, 2020), attached hereto as Exhibit 4.

69. Further, on April 10, 2020, President Trump seemed to support insurance coverage for business loss like that suffered by the Plaintiff:

REPORTER: Mr. President may I ask you about credit and debt as well. Many American individuals, families, have had to tap their credit cards during this period of time. And businesses have had to draw down their credit lines. Are you concerned Mr. President that that may hobble the U.S. economy, all of that debt number one? And number two, would you suggest to credit card companies to reduce their fees during this time?

PRESIDENT TRUMP: Well it's something that we've already suggested, we're talking to them. *Business interruption insurance*, I'd like to see these insurance companies—you know you have people that have paid. When I was in private I had business interruption. When my business was interrupted through a hurricane or whatever it may be, I'd have business where I had it, I didn't always have it, sometimes I had it, sometimes, I had a lot of different companies. *But if I had it I'd expect to be paid*. You have people. I speak mostly to the restaurateurs, where they have a restaurant, they've been paying for 25, 30, 35 years, business interruption. They've never needed it. All of a sudden they need it. And I'm very good at reading language. I did very well in these subjects, OK. And I don't see the word pandemic mentioned. Now in some cases it is, it's an exclusion. But in a lot of cases I don't see it. I don't see it referenced. And they don't want to pay up. I would like to see the insurance companies pay if they need to pay, if it's fair. And they know what's fair, and I know what's fair, I can tell you very quickly. But business interruption insurance, that's getting a lot money to a lot of people. And they've been paying for years, sometimes they just started paying, but you have people that have never asked for business interruption insurance, and they've been paying a lot of money for a lot of years for the privilege of having it, and then when they finally need it, the insurance company says 'we're not going to give it.' We can't let that happen.

<https://youtu.be/cMeG5C9TjU> (last visited on April 17, 2020) (emphasis added).

70. The President is articulating a few core points:
- a. Business interruption is a common type of insurance. It applies to a variety of business establishments, including the business here of Plaintiff's.
  - b. Businesses pay in premiums for this coverage and should reasonably expect they'll receive the benefit of the coverage.

- c. This pandemic should be covered unless there is a specific exclusion for pandemics.
- d. If insurers deny coverage, they would be acting in bad faith.
- e. Public policy considerations support a finding that coverage exists and that a denial of coverage would be in violation of public policy.

71. Governor Wolf and Pennsylvania Secretary of Health had extended the statewide stay-at-home orders through Friday, May 8, 2020. *See* <https://www.governor.pa.gov/newsroom/gov-wolf-sec-of-health-extend-statewide-stay-at-home-order-until-may-8/> (last visited April 22, 2020).

72. These Civil Authority Orders and proclamations, as they relate to the closure of all “non-life- sustaining businesses,” evidence an awareness on the part of both state and local governments that COVID-19 causes damage to property. This is particularly true in places where business is conducted, such as Plaintiff’s, as the requisite contact and interaction causes a heightened risk of the property becoming contaminated.

73. Plaintiff did not have the ability or right to ignore these Civil Authority Orders and proclamations as doing so would expose Plaintiff to fines and sanctions.

74. Plaintiff’s adherence to the requirements of these Civil Authority Orders and proclamations was in furtherance of the protecting the public, the public’s good, supportive of public policy to attempt to minimize the risk of spread of COVID-19 and consistent with it complying with the Civil Authority Orders entered.

#### **IV. Impact to Plaintiff**

75. As a result of the Civil Authority Orders referenced herein, access to Plaintiff’s Insured Property was in fact no longer available and its business suspended from its intended operations.



76. Plaintiff's business loss occurred when the Commonwealth of Pennsylvania Civil Authorities declared a State of Emergency on March 6, 2020. Plaintiff suffered further when the Pennsylvania Civil Authorities required all businesses to cease non-essential operations on March 16, 2020.

77. The Civil Authority Orders precluded doing any optical work unless the failure to do so would be detrimental to the health of a patient. However, Plaintiff never performed any emergency optical services. Further the performance of any optical services would have required Plaintiff to have necessary and needed PPE.

78. Plaintiff could not use its property for its intended purpose. Therefore, the novel coronavirus has caused "direct physical loss of or damage to" Plaintiff's property insured under the policy.

79. Plaintiff's business is also highly susceptible to rapid person-to-property transmission of the virus, and vice-versa, because the activities of the patients and the staff require them to work in close proximity to the property.

80. The virus is physically impacting the Insured Properties. Any effort by Defendant to deny the reality that the virus causes physical loss and damage would constitute a false and potentially fraudulent misrepresentation that could endanger Plaintiff and the public.

81. The nature of Plaintiff's practice, as an optical practice, involved Plaintiff providing services in a close environment where patients, opticians and staff are in close proximity to one another, using tools and equipment and instruments that must be free from contaminants because of their direct use in the human body.

82. Plaintiff's practice including the Insured Properties, is highly susceptible to contamination and damage, from, among other things, the rapid person-to-person and person-to-

property contamination as COVID-19 is carried into the Insured Property from the surrounding area and other contaminated and damaged premises.

83. The virus is physically impacting the Insured Property. Plaintiff's property is contaminated by COVID-19. Plaintiff's Insured Property is still impacted by COVID-19 and is damaged by it. Any effort by Defendants to deny the reality that the virus causes physical loss and damage would constitute a false and potentially fraudulent misrepresentation that could endanger Plaintiff and the public.

84. Because of the nature of COVID-19 as described above, relating to its persistence in locations and the prospect of causing asymptomatic responses in some people, the risk of infection to persons is not only high, but could cause persons with asymptomatic responses to then come into contact with others who would not be so fortunate as to suffer merely an asymptomatic response, and instead suffer serious illness.

85. The Civil Authority Orders entered by the state and local government were in the exercise of authority to protect the public and minimize the risk of spread of disease.

86. Even with the entry of these Civil Authority Orders there remained physical impact not only in and within Plaintiff's business property but in and around the surrounding location of Plaintiff's business property in light of COVID-19 presence not being detectable other than through microscopic means, testing and/or occurrence of illness.

87. The entry of the Civil Authority Orders to mitigate health risks to the public by attempting to prevent COVID-19 contamination, through the closing of businesses and ordering persons to stay at home resulted in a physical impact on Plaintiff's business and Insured Properties.

88. Plaintiff specifically sought coverage for business interruption losses and extended expenses and paid premiums for such coverage and with an expectation that the Policy purchased

provided such coverage, with no disclosures to the contrary being made to Plaintiff by Defendant or its agents.

89. Plaintiff had no choice but to comply with the Civil Authority Orders, for failure to do so would have exposed Plaintiff and his business to fines and sanctions. Plaintiff's compliance with mandates resulted in Plaintiff suffering business losses, business interruption and extended expenses of the nature that the Policy covers and for which Plaintiff's reasonable expectation was that coverage existed in exchange for the premiums paid. As a result of these Civil Authority Orders, Plaintiff has incurred, and continues to incur, among other things, a substantial loss of business income and additional expenses covered under the Policy.

90. A declaratory judgment is necessary to be entered that determines that coverage exists under the Policy for the events and circumstances described herein. The entry of a declaratory judgment will prevent Plaintiff from being left without vital insurance coverage that was paid for through premiums to ensure the survival of the business which was significantly impacted due to the omnipresence of the Coronavirus, including Plaintiff's business and the surrounding areas, and because of the described shutdowns, the business and the impact that the civil authorities' response had on the communities where the business is located.

### **CAUSE OF ACTION**

### **DECLARATORY RELIEF**

91. Plaintiff re-alleges and incorporates by reference into this cause of action each and every allegation set forth in each and every paragraph of this Amended Complaint.

92. The Declaratory Judgment Act, 28 U.S.C. § 2201(a), provides that in "a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a); *see also Principal Life Ins. Co. v. Minder,*

No. CIV A 08-5899, 2009 WL 1917096 (E.D. Pa. July 1, 2009); *Miller v. Liberty Mut. Grp.*, 97 F. Supp. 2d 672 (W.D. Pa. 2000).

93. An actual controversy has arisen between Plaintiff and Defendant as to the rights, duties, responsibilities and obligations of the parties under the Policy in that Plaintiff contends and, on information and belief, Defendant disputes and denies, *inter alia*, that:

- a. The Civil Authority Orders constitute a prohibition of access to Plaintiff's Insured Property;
- b. The prohibition of access by the Orders has specifically prohibited access as defined in the Policy;
- c. The Civil Authority Orders trigger coverage;
- d. The Policy provides coverage to Plaintiff for any current and future closures in Philadelphia County due to physical loss or damage directly or indirectly from the Coronavirus and/or pandemic circumstance under the Civil Authority coverage parameters;
- e. The Policy's exclusions for virus and bacteria do not apply to the circumstances presented in the lawsuit and the kind and types of damages and losses suffered by Plaintiff;
- f. Defendant's denial of coverage for losses sustained that were caused by the entry of the Civil Authority Orders referenced, and Plaintiff's adherence to the Civil Authority Orders violates public policy;
- g. That under the circumstances of this Pandemic and the entry of the Civil Authority Orders referenced, Plaintiff's had no choice but to comply with the Civil Authority Orders, and that Plaintiff's compliance resulting in Plaintiff suffering business losses, business interruption and extended expenses is therefore a covered expense;
- h. That the Policy provides business income coverage in the event that Coronavirus has directly or indirectly caused a loss or damage at the insured premises or immediate area of the Insured Properties; and
- i. Resolution of the duties, responsibilities and obligation of the parties is necessary as no adequate remedy at law exists and a declaration of the Court is needed to resolve the dispute and controversy.

94. Plaintiff seeks a Declaratory Judgment to determine whether the Orders constitute a prohibition of access to Plaintiff's Insured Properties.

95. Plaintiff further seeks a Declaratory Judgment to affirm that the Civil Authority Orders trigger coverage.

96. Plaintiff further seeks a Declaratory Judgment to affirm that the Policy provides coverage to Plaintiff for any current and future closures of businesses such as Plaintiff's in Pennsylvania due to physical loss or damage from the Coronavirus and/or the pandemic and the Policy provides business income coverage in the event that Coronavirus has caused a loss or damage at the Insured Property.

97. Plaintiff further seeks a Declaratory Judgment to affirm that any reliance on the Virus Exclusion clause is estopped by the principles of regulatory estoppel.

98. Plaintiff does not seek any determination of whether the Coronavirus is physically in or at the Insured Properties, a specific amount of damages, or any other remedy other than declaratory relief.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff herein prays as follows:

- a. For a declaration that the Civil Authority Orders constitute a prohibition of access to Plaintiff's Insured Properties.
- b. For a declaration that the prohibition of access by the Civil Authority Orders is specifically prohibited access as defined in the Policy.
- c. For a declaration that the Civil Authority Orders trigger coverage under the Policy.
- d. For a declaration that the Policy provides coverage to Plaintiff for any current and future closures in Philadelphia County due to physical loss or damage directly or indirectly from the Coronavirus and/or pandemic circumstance under the Civil Authority coverage parameters.
- e. For a declaration that the Policy's exclusions for virus and bacteria do not apply to the circumstances presented in the lawsuit and the kind and types of damages and losses suffered by Plaintiff.

- f. For a declaration that Defendant's denial of coverage for losses sustained that were caused by the entry of the Civil Authority Orders referenced, and Plaintiff's adherence to the Civil Authority Orders violates public policy.
- g. For a declaration that under the circumstances of this Pandemic and the entry of the Civil Authority Orders referenced, Plaintiff's had no choice but to comply with the Civil Authority Orders, and that Plaintiff's compliance resulting in Plaintiff suffering business losses, business interruption and extended expenses is therefore a covered expense.
- h. For a declaration that the Policy provides coverage to Plaintiff for any current, future and continued closures of non-essential businesses due to physical loss or damage directly or indirectly from the Coronavirus.
- i. For a declaration that the Policy provides business income coverage in the event that Coronavirus has directly or indirectly caused a loss or damage at the Plaintiff's Insured Properties or the immediate area of the Plaintiff's Insured Properties.
- j. For such other relief as the Court may deem proper.

**TRIAL BY JURY IS DEMANDED**

Plaintiff hereby demands trial by jury.

Dated: August 28, 2020

Respectfully submitted,

*/s/ Daniel C. Levin*

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