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Attorneys for Plaintiffs

OPTICAL SERVICES USA/JC1,
OPTICAL SERVICES USA, LLC,
OPTICAL SERVICES USA-WO, RE &
LE HOLDING LLC, STONG OD EWING
NJ, LLC,

Plaintiffs,

v.

FRANKLIN MUTUAL INSURANCE
COMPANY,

Defendant.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION

BERGEN COUNTY

Docket No.: BER-L-

Civil Action

COMPLAINT

Plaintiffs Optical Services USA/JC1 (“Optical Services USA/JC1”), Optical Services USA, LLC (“Optical Services USA”), Optical Services USA-WO (“Optical Services USA-WO”), Re & Le Holding, LLC (“Re & Le”), and Stong OD Ewing NJ, LLC (“Stong OD”) (collectively “Plaintiffs”), by and through their attorneys, OlenderFeldman LLP, says by way of Complaint against Defendant Franklin Mutual Insurance Company (“Franklin Mutual”), as follows:

NATURE OF ACTION

1. Plaintiffs are owners and operators of businesses in New Jersey that have been forced by recent orders issued by the State of New Jersey to cease their operations as part of the State’s efforts to slow the spread of the novel coronavirus—otherwise known as COVID-19 (also known as “SARS-CoV-2” or the “Coronavirus”).

2. The closures mandated by these orders present an existential threat to small, local businesses such as Plaintiffs. To protect their businesses from such situations which threaten their livelihoods based on factors wholly outside of their control, Plaintiffs obtained insurance policies from Franklin Mutual that included, among other things, coverage for losses due to a “necessary interruption” of their operations, including when their businesses are forced to close due to a government order.

3. In blatant breach of its insurance obligations that it voluntarily undertook in exchange for Plaintiffs’ premium payments, Franklin Mutual has denied Plaintiffs’ claims arising from the State-ordered interruption of their businesses.

4. As a result, Plaintiffs bring this action against Franklin Mutual for its failure to honor its obligations under commercial businessowners insurance policies issued to Plaintiffs.

PARTIES

5. Plaintiff Optical Services USA/JC1 is a New Jersey limited liability company with its principal place of business located at 195.5 Newark Avenue, Jersey City, New Jersey 07302. Optical Services USA/JC1 operates a comprehensive optometric practice that, among other things, examines, diagnoses, manages, and treats ocular diseases and related systemic conditions.

6. Optical Services USA is a New Jersey limited liability company with its principal place of business located at 2010 Morris Avenue, Union, New Jersey 07083. Optical Services USA operates a comprehensive optometric practice that, among other things, examines, diagnoses, manages, and treats ocular diseases and related systemic conditions.

7. Optical Services USA-WO is New Jersey limited liability company with its principal place of business located at 235 Prospect Avenue West Orange, New Jersey 07052.

Optical Services USA-WO operates a comprehensive optometric practice that, among other things, examines, diagnoses, manages, and treats ocular diseases and related systemic conditions.

8. Plaintiff Re & Le is a New Jersey limited liability company with its principal place of business located at 155 N Washington Avenue, Suite 323, Bergenfield, New Jersey 07621. Re & Le manufactures, fabricates, and distributes lenses.

9. Plaintiff Stong OD is a New Jersey limited liability company with its principal place of business located at 860 Lower Ferry Road, Ewing, NJ 08628. Stong OD also operates a comprehensive optometric practices that, among other things, examines, diagnoses, manages, and treats ocular diseases and related systemic conditions (Optical Services USA/JC1, Optical Services USA, Optical Services USA-WO, Re & Le, and Stong OD's businesses are collectively the "Businesses").

10. Defendant Franklin Mutual is an insurance company organized under the laws of the State of New Jersey having its principal place of business in the State of New Jersey at 5 Broad Street, PO Box 400, Branchville, New Jersey.

JURISDICTION AND VENUE

11. This Court has jurisdiction over all parties to this action. Plaintiffs are New Jersey limited liability companies operating in New Jersey and Franklin Mutual is a New Jersey corporation that issues insurance in New Jersey.

12. This Court has jurisdiction over all claims asserted in this action, which consist of New Jersey common law claims and claims asserted under the New Jersey Declaratory Judgments Act, N.J.S.A. 2A:16-50, *et seq.*

13. Venue is proper in this county pursuant to *R. 4:3-2(a)* and (b), because one or more of the parties to this litigation conducts business in this county.

ALLEGATIONS COMMON TO ALL COUNTS

A. Franklin Mutual Issues Policies To Plaintiffs.

14. On or about October 5, 2019, Franklin Mutual issued policy no. SBP2598006-02 to Optical Services USA/JC1, Optical Services USA, Optical Services USA-WO, and Re & Le.

15. On or about April 1, 2020, Franklin Mutual issued policy no. SBP2613680-01 to Strong OD (collectively the “Policies”).

16. Plaintiffs have paid all premiums and the Policies were in force at all relevant times.

17. The Policies issued to Plaintiffs are “all risk” commercial policies which covers all loss or damage to the Businesses’ covered premises other than those expressly excluded.

18. Among the coverages provided by the Policies was insurance for “Loss of Income” during a “necessary interruption” of Plaintiffs’ Businesses caused by an order of a civil authority.

19. To illustrate, the Businessowners Coverage Form in the Policies (BU 04 01 01 10) provides:

**COVERAGE C • LOSS OF INCOME RESULTING FROM
*DIRECT COVERED LOSS***

This agreement covers *your* following loss of business income and related expenses, subject to all applicable provisions in this policy.

A. Coverage

1. Your following loss of business income (that otherwise would have been earned) and related incurred expenses are covered during a necessary interruption of your business operations or untenability of the premises at the described premises.

a. The reduction in net profit, plus continuing usual operating expenses (such as payroll, utilities, rents, and the like) to the extent such are necessary to restore your business operations. This includes loss which results from the

cancellation or suspension of any written agreement which was made prior to the loss, provided that you can demonstrate that you otherwise would have been able to satisfy and meet all the requirements of the agreement had the direct covered loss not occurred.

...

c. Reasonable extra expenses in excess of your usual operating expenses to the extent such are necessary to continue your business /operations.

...

2. Coverage applies only to loss and expenses that directly result from a direct covered loss at the described premises which causes the necessary interruption or untenability.

Coverage also applies, for up to 14 consecutive days from the date of loss, when occupancy of the described premises is prohibited by civil authorities because of loss (as would be covered under this policy) at a local premises not owned or occupied by you. (emphasis added)

20. Per the Policies, Franklin Mutual agreed to indemnify Plaintiffs for lost income and the actual, necessary, and reasonable extra expenses incurred when access to the insured properties are specifically prohibited by order of civil authority as the result of a direct covered loss.

B. The COVID-19 Pandemic.

21. On March 11, 2020, the World Health Organization (the “WHO”) declared that the emerging threat from the spread of COVID-19 constituted a global pandemic.

22. Emerging research on COVID-19 indicates that the virus is primarily transmitted from symptomatic and asymptomatic people who are infected to others who are in close contact through respiratory droplets, and/or by contact with contaminated objects and surfaces.

23. Without a vaccine to protect against COVID-19, control of the outbreak has relied on measures designed to reduce human-to-human and surface-to-human exposure (commonly referred to as “social distancing”).

24. The exposure of the surface-to-humans is particularly acute in places where the public gathers to, among other things, shop, socialize, or receive non-essential care and services.

25. To combat the spread of COVID-19, governmental authorities across many states issued orders closing many business establishments, including optometry practices, restaurants, bars, hotels, theaters, personal care salons, gyms, and schools; and mandating social distancing among the population.

C. New Jersey Orders Non-Essential Businesses Like Plaintiffs To Temporarily Close Due To Danger Posed By COVID-19.

26. To slow the spread of COVID-19 in New Jersey, on March 21, 2020, Governor Phil Murphy signed Executive Order No. 107 (the “Closure Order”), directing, among other things, the temporary closure of all “non-essential” retail businesses.

27. “Essential businesses,” as defined in Governor Murphy’s Executive Order No. 104, is defined as to include “grocery/food stores, pharmacies, medical supply stores, gas stations, healthcare facilities, and ancillary stores within healthcare facilities.”

28. The Closure Order closing all “non-essential” businesses in New Jersey, including Plaintiffs’ Businesses, was made in direct response to the continued and increasing risk of the presence of COVID-19 in or around Plaintiffs’ premises.

D. Franklin Mutual Refuses Coverage Of Plaintiffs’ Claims.

29. As a result of the Closure Order, Plaintiffs temporarily closed their businesses on March 20, 2020.

30. As of June 19, 2020, Plaintiffs businesses have yet to re-open.

31. By being forced to close the Businesses, Plaintiffs suffered loss of business income that Plaintiffs reasonably would have expected to earn, but for the “necessary interruption” of their businesses required by the Closure Orders.

32. Because the Closure Orders concluded that (1) Plaintiffs premises are unsafe and unfit for their intended use, and (2) required Plaintiffs to temporarily close the Businesses and lose business income, Plaintiffs have suffered a direct physical loss of, and damage to, their property because they have been unable to use their respective property for its intended commercial purpose (the “Covered Loss”).

33. Thus, following the Closure Order, Plaintiffs submitted a claim to Franklin Mutual requesting coverage for the Covered Loss as promised under the Policies (Claim Nos. FM430039 and FM430037) (collectively, the “Claims”).

34. By way of letters dated April 6, 2020 and April 14, 2020, Franklin Mutual denied Plaintiffs’ Claims for coverage for the Covered Loss, claiming, *inter alia*, that Plaintiffs had not suffered a physical loss or damage as a result of being shut down by the Closure Orders, and further, that Plaintiffs’ losses were caused by a virus and therefore excluded under the Policy.

35. The exclusion contained in the Virus and Bacteria endorsement is not applicable because Plaintiffs’ losses were not caused by a “contamination by any virus” or any requirement to remove a virus from the insured premises.

36. There is no known instance of COVID-19 transmission or contamination within the premises of Plaintiffs’ Businesses.

37. Rather, the actual cause of Plaintiffs’ Covered Loss was the measures taken by the State of New Jersey by way of the Closure Orders to prevent the spread of COVID-19 in the future, not because COVID-19 was found in, on, or around Plaintiffs’ insured properties.

38. A declaratory judgment determining that the “Loss of Income” coverage provided by Franklin Mutual’s Policies applies to the suspension, curtailment, and interruption of business operations resulting from measures put into place by civil authorities is necessary to prevent Plaintiffs from being denied critical coverage for which they have paid.

FIRST COUNT

**DECLARATORY JUDGMENT ON FRANKLIN MUTUAL
LOSS COVERAGE OBLIGATION**

39. Plaintiffs repeat each and every preceding allegation as if set forth fully herein.

40. As set forth above, the Covered Loss constitutes a “Direct Covered Loss” within the meaning of the Policies.

41. By way of non-exhaustive example, coverage must be afforded to Plaintiffs for the Covered Loss under a number of provisions contained in the Policies including, but not limited to:

**COVERAGE C • LOSS OF INCOME RESULTING FROM
*DIRECT COVERED LOSS***

This agreement covers *your* following loss of business income and related expenses, subject to all applicable provisions in this policy.

B. Coverage

1. Your following loss of business income (that otherwise would have been earned) and related incurred expenses are covered during a necessary interruption of your business operations or untenability of the premises at the described premises.

a. The reduction in net profit, plus continuing usual operating expenses (such as payroll, utilities, rents, and the like) to the extent such are necessary to restore your business operations. This includes loss which results from the cancellation or suspension of any written agreement which was made prior to the loss, provided that you can demonstrate

that you otherwise would have been able to satisfy and meet all the requirements of the agreement had the direct covered loss not occurred.

...

c. Reasonable extra expenses in excess of your usual operating expenses to the extent such are necessary to continue your business /operations.

...

2. Coverage applies only to loss and expenses that directly result from a direct covered loss at the described premises which causes the necessary interruption or untenability.

Coverage also applies, for up to 14 consecutive days from the date of loss, when occupancy of the described premises is prohibited by civil authorities because of loss (as would be covered under this policy) at a local premises not owned or occupied by you.

42. No valid exclusions exist to deny coverage to Plaintiffs' Covered Loss under these provisions or, for that matter, the whole of the Policies.

43. Nevertheless, Franklin Mutual denied Plaintiffs' Claims without legal or factual basis, whether at common law or under the Policies.

44. Plaintiffs are fully compliant with all obligations under the Policies and Franklin Mutual engaged in contractual breach and tortious conduct calculated to deny Plaintiffs' right to coverage and right to payment of the Covered Loss under the Policies.

45. Under N.J.S.A. 2A:16-50, *et seq.* an actual, present, and justiciable controversy has arisen between Plaintiffs and Franklin Mutual concerning the parties' respective rights and obligations under the Policies.

WHEREFORE, Plaintiffs respectfully demand judgment against Franklin Mutual as follows:

- (a) that this Court adjudge, determine, and declare that Franklin Mutual is estopped from denying coverage and payment of the Claims arising from the Covered Loss incurred by Plaintiffs;
- (b) that this Court adjudge, determine, and declare that Franklin Mutual is liable to pay and indemnify Plaintiffs at the coverage limits of the Policies for all costs, losses and liabilities associated with the Covered Loss;
- (c) that this Court adjudge, determine, and declare that Franklin Mutual is liable to pay and indemnify Plaintiffs for all costs, losses and liabilities associated with Covered Loss as a direct result of its bad faith refusal to pay Plaintiffs for the Covered Loss and resultant costs, losses, and liabilities associated with the Covered Loss;
- (d) that this Court adjudge, determine, and declare that Plaintiffs are entitled to costs and expenses in connection with this action, including but not limited to, reasonable attorneys' fees, and pre- and post-judgment interest; and
- (e) that this Court grant such other and further relief as this Court may deem just, proper, and equitable.

SECOND COUNT

BREACH OF CONTRACT

- 46. Plaintiffs repeat each and every preceding allegation as if set forth fully herein.
- 47. The Policies in force between Plaintiffs and Franklin Mutual are valid and enforceable contracts.
- 48. Franklin Mutual is obligated to insure Plaintiffs for "Loss of Income" due to "necessary interruptions" in Plaintiffs' businesses.

49. Plaintiffs have paid all premiums and complied with all obligations under the Franklin Mutual Policies.

50. Franklin Mutual breached its contractual obligation to make Plaintiffs whole for losses it incurred as a result of the Covered Loss by denying Plaintiffs' Claims and refusing to pay Plaintiffs related to, among other things, its lost income as a result of its forced closure.

51. As a direct, proximate, and legal result of Franklin Mutual's breach of contract with respect to the Covered Loss, Franklin Mutual has unjustly deprived Plaintiffs of the benefits of their insurance coverage for which they have paid substantial premiums.

52. Franklin Mutual is legally obligated to pay all damages caused by its breach of contract.

53. As a result, Franklin Mutual is liable to Plaintiffs for the payment of all losses suffered by Plaintiffs due to the Covered Loss and for any other costs and payments as well as sums incurred to date by Plaintiffs, including reasonable attorneys' fees and pre-judgment and post-judgment interest.

WHEREFORE, Plaintiffs respectfully demand judgment against Franklin Mutual as follows:

- (a) that this Court adjudge, determine, and declare that Franklin Mutual is estopped from denying coverage and payment of the claims arising from the Covered Loss and resultant losses incurred by Plaintiffs;
- (b) that this Court adjudge, determine, and declare that Franklin Mutual is liable to pay and indemnify Plaintiffs at the coverage limits of the Policies for all costs, losses, and liabilities associated with the Covered Loss;

- (c) that this Court adjudge, determine, and declare that Franklin Mutual is liable to pay and indemnify Plaintiffs for all costs, losses and liabilities associated with the Covered Loss as a direct result of its bad faith refusal to pay Plaintiffs for the Covered Loss;
- (d) that this Court adjudge, determine, and declare that Plaintiffs are entitled to costs and expenses in connection with this action, including but not limited to, reasonable attorneys' fees, and pre- and post-judgment interest; and
- (e) that this Court grant such other and further relief as this Court may deem just, proper and equitable.

THIRD COUNT

BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING

- 54. Plaintiffs repeat and realleges each and every preceding allegation as if set forth fully herein.
- 55. The Franklin Mutual Policies are valid and enforceable contracts.
- 56. There is, in all contracts, an implied covenant of good faith and fair dealing.
- 57. Franklin Mutual, by doing business with and accepting Plaintiffs' premium payments and issuing the Policies, had implied in their contracts and dealing with Plaintiffs a duty of good faith and fair dealing.
- 58. Franklin Mutual breached the duty of good faith and fair dealing it owed to Plaintiffs by willfully and in bad faith misinterpreted its policy provisions in denying the Claims.
- 59. Franklin Mutual's breach of the implied covenant of good faith and fair dealing has and will continue to cause Plaintiffs' substantial damages.

WHEREFORE, Plaintiffs respectfully demands judgment against Franklin Mutual as follows:

- (a) that this Court adjudge, determine, and declare that Franklin Mutual is estopped from denying coverage and payment of the claims arising from the Covered Loss incurred by Plaintiffs;
- (b) that this Court adjudge, determine, and declare that Franklin Mutual is liable to pay and indemnify Plaintiffs at the coverage limits of the Policies for all costs, losses and liabilities associated with the Covered Loss;
- (c) that this Court adjudge, determine, and declare that Franklin Mutual is liable to pay and indemnify Plaintiffs for all costs, losses, and liabilities associated with the Covered Loss as a direct result of its bad faith refusal to pay Plaintiffs for the Covered Loss;
- (d) that this Court adjudge, determine, and declare that Plaintiffs are entitled to costs and expenses in connection with this action, including but not limited to, reasonable attorneys' fees, and pre- and post-judgment interest; and
- (e) that this Court grant such other and further relief as this Court may deem just, proper and equitable.

DESIGNATION OF TRIAL COUNSEL

Christian J. Jensen, Esq. is hereby designated as trial counsel for Plaintiffs.

JURY DEMAND

Plaintiffs hereby demand a jury trial on all issues of fact.

Dated: June 25, 2020

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CERTIFICATION PURSUANT TO R. 4:5-1

In accordance with R. 4:5-1, I certify that based upon the information currently in my possession, the matter in controversy is not the subject of any other action pending in any Court or of a pending arbitration proceeding and that I know of no other person or persons at this time who should be joined in this action at this time.

Dated: June 25, 2020

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