

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

DUMONT BROTHERS, INC.,
505 ROCHESTER INC. BOTH
D/B/A ROCHESTER INN &
HARDWOOD GRILL INDIVIDUALLY
AND ON BEHALF OF A CLASS OF
SIMILARLY SITUATED PERSONS,

CIVIL ACTION NO. 2:20-cv-997

Plaintiffs,

v.

NAUTILUS INSURANCE COMPANY,

Defendant.

NOTICE OF REMOVAL

NOW, comes Defendant, Nautilus Insurance Company (“Nautilus”), by and through its attorneys, Spilman Thomas and Battle, PLLC, and files the within Notice of Removal of this action from the Court of Common Pleas of Allegheny County to the United States District Court for the Western District of Pennsylvania pursuant to 28 U.S.C. §§ 1332, 1441, and 2201. As set forth more fully below, this Honorable Court has original diversity jurisdiction over this civil action and this matter is properly removed to the District Court in accordance with the procedures provided at 28 U.S.C. § 1446. In further support of this Notice of Removal, Nautilus states as follows:

1. Plaintiffs, DuMont Brothers, Inc. ("DuMont") and 505 Rochester, Inc., d/b/a Rochester Inn & Hardwood Grill ("Rochester Inn"), initiated this action on June 5, 2020 by filing a pleading styled as a "Class Action Complaint" (the "Complaint") in the Court of Common Pleas of Allegheny County, Pennsylvania, at Docket No. GD-20-006542. A true and correct copy of the Complaint is attached hereto at Exhibit 1.

2. Attached as Exhibit B to the Complaint is a copy of insurance policy number NN1000793 (the "Policy") issued by Nautilus to Plaintiffs.

3. The Complaint seeks declaratory and injunctive relief related to a previous denial of insurance coverage by Nautilus for business income, extra expense, contamination, civil authority, and other coverages under the Policy, and seeks similar relief for putative class members insured by Nautilus. Plaintiffs sought coverage due to impacts on their business due to COVID-19 and the resulting March 19, 2020 order of Gov. Tom Wolf requiring closure of non-life sustaining businesses. (Exhibit 1, ¶¶ 30-32).

4. Despite pleading a single count for "Declaratory Relief," all factual and material allegations of the Complaint are dependent upon an allegation that Nautilus breached its contract with Plaintiffs by denying coverage for Plaintiffs' COVID-19 related losses. See Exhibit 1.

5. The dispute between the parties arose after Plaintiffs tendered the aforementioned claim for coverage to Nautilus on May 1, 2020. Nautilus subsequently denied coverage following an investigation on May 7, 2020. (Exhibit 1, ¶ 33, Exhibit C).

6. The Complaint expressly alleges that the "denial and refusal to acknowledge coverage" to Plaintiffs are material breaches of the Policy. (Exhibit 1, ¶ 72). The Complaint also alleges the same breach of the insurance contract on behalf of the purported class. (Exhibit 1, ¶ 74).

7. The "common questions of law and fact" alleged by Plaintiffs include: "The denial or refusal to acknowledge coverage is illegal and a breach of the terms and provisions of the policy at issue." (Exhibit 1, ¶ 47 (e)).

The Removal Request is Timely and All Pleadings, Process, and Orders Filed in Connection with the Complaint are Present

8. On June 17, 2020, Plaintiffs filed a Proof of Service suggesting that service of the Complaint was completed via certified mail. A true and correct copy of the Proof of Service is attached hereto as Exhibit 2.

9. The certified mail receipt attached to Exhibit 2 is illegible; however, it is believed and therefore averred that the purported date of delivery printed on the certified mail receipt is June 9, 2020.

10. This Notice of Removal is timely under 28 U.S.C. § 1446(b). The Complaint was filed on June 5, 2020, and served on June 9, 2020. Because removal is made within thirty days of service, this Notice of Removal is timely. See Exhibits 1, 3.

11. A true and correct copy of the docket from the Court of Common Pleas of Allegheny County is attached hereto as Exhibit 3.

12. As of the date of this filing, the Complaint and Proof of Service (Exhibits 1 and 2) comprise all the pleadings, process, and orders filed in connection with the Complaint. See Exhibit 3. As such, the requirements of 28 U.S.C. § 1446(a) have been satisfied.

Citizenship of the Parties

13. DuMont is a Pennsylvania corporation, organized and existing under the laws of the Commonwealth of Pennsylvania, with a registered corporate address of 499 Huron Avenue, Pittsburgh, Allegheny County Pennsylvania, 15237. A true and correct copy of a printout from the Pennsylvania Department of State, Corporations Bureau, that depicts the corporate organization and history of DuMont is attached hereto as Exhibit 4.

14. The Rochester Inn is a Pennsylvania corporation, organized and existing under the laws of the Commonwealth of Pennsylvania, with a registered corporate address of 505 Rochester Road, Pittsburgh, Allegheny County, Pennsylvania, 15237. A true and correct copy of a printout from the Pennsylvania Department of State, Corporations Bureau, that depicts the corporate organization and history of the Rochester Inn is attached hereto as Exhibit 5.

15. The principal place of business for both DuMont and Rochester Inn is 505 Rochester Road, Pittsburgh, Allegheny County, Pennsylvania, 15237.

16. The verified Complaint expressly confirms that the place of organization, place of citizenship, and principal place of business of Plaintiffs is solely and exclusively in Pennsylvania. (See, Exhibit 1, ¶ 1).

17. As such, all Plaintiffs are citizens of the Commonwealth of Pennsylvania.

18. Defendant Nautilus Insurance Company is a corporation organized under the laws of the State of Arizona, with a principal place of business located at 7233 Butherus Drive, Scottsdale, Arizona, 85260.

19. Nautilus is a citizen of the State of Arizona and does not maintain an office in the Commonwealth of Pennsylvania.

20. Nautilus is the sole defendant in this matter.

21. Based on the foregoing, complete diversity of the parties exists pursuant to 28 U.S.C. § 1332, *et seq.*

Amount in Controversy

22. Section 1332 confers original jurisdiction over all civil matters where the amount in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and the claim

is between citizens of different states. As stated above, the diversity requirement in this case is satisfied.

23. A notice of removal may "assert the amount in controversy if the initial pleading seeks nonmonetary relief." 28 U.S.C. 1332(A)(i).

24. Plaintiffs in their Complaint allege a single count for declaratory relief. That requested declaration, however, is that Nautilus has an obligation to provide coverage to Plaintiffs for their COVID-19 related losses. Indeed, the civil cover sheet attached to the Complaint clearly requests money damages and states that the amount at issue is in excess of the compulsory arbitration monetary limit of \$35,000 (Exhibit 1).

25. Further, other information Plaintiffs provided to Nautilus makes clear that the value of Plaintiffs' claim exceeds the amount of \$75,000. On March 15, 2020, Davies & Davies Insurance, Inc., Plaintiffs' insurance agent, submitted to Nautilus a Property Loss Notice (the "Loss Notice") on behalf of Plaintiffs in the amount of \$233,515.00 for "Loss [sic] profit due to Covid-19 shut-down." A true and correct copy of the Loss Notice is attached hereto as Exhibit 6.

26. The Loss Notice indicates that Todd J. DuMont reported the claim to Davies & Davies Insurance, Inc. See, Exhibit 6.

27. Todd J. DuMont, upon information and belief, is an officer and owner of both DuMont and Rochester Inn and executed the Complaint Verification as a "representative" of both entities. (Exhibits 1, 4, and 5).

28. Accordingly, the amount in controversy—based upon the Loss Notice demand of \$233,515.00—is in excess of the \$75,000 jurisdictional threshold set forth in 28 U.S.C. § 1332(a) and exceeds the amount in controversy threshold per 28 U.S.C. § 1332(a).

29. Nautilus also can rely upon the face value of its policy to establish an amount in controversy. The United States Court of Appeals for the Third Circuit measures the amount in controversy in declaratory and injunctive actions by reference to "the value of the rights which the plaintiff seeks to protect." Columbia Gas Transmission Corp. v. Tarbuck, 62 F.3d 538, 539 (3d Cir. 1995). See also, Cty. of Wash. v. United States Bank Nat'l Ass'n, No. 11-1405, 2012 U.S. Dist. LEXIS 125748, at *54 (W.D. Pa. Aug. 17, 2012) (internal citation omitted).

30. The face value of insurance policies can also be used to establish the amount in controversy. See Sallada v. Nationwide Mut. Ins. Co., Civil No. 1:CV-99-0381, 1999 U.S. Dist. LEXIS 21670, at *5 (M.D. Pa. June 2, 1999) (internal citation omitted) ("Where plaintiffs seek equitable relief pertaining to the enforcement of insurance policies, the face value of the policy is the measure of the amount in controversy.") (emphasis added).

31. The property coverage under the Nautilus Policy features a coverage limit of \$300,000 for business income claims such as that asserted by Plaintiffs.

32. As such, the amount in controversy requirement of 28 U.S.C. § 1332 is satisfied.

**Removal is Appropriate and Necessary in this Case, as this Court
Has Original Jurisdiction**

33. Plaintiffs' assertion of a single count seeking a declaration that Nautilus must cover its claim, rather than asserting a breach of contract claim for the \$233,515.00 it represents its claim is worth, does not control the Court's jurisdiction and/or deprive Nautilus of its right to remove this matter to federal court. See generally United Jersey Banks v. Parell, 783 F.2d 360, 367 (3d Cir. 1986) (artful pleading cannot deprive a party of a federal forum) (citing 14A Wright & Miller, Federal Prac. and Proc. § 3722 at 270); Eitmann v. New Orleans Public Service, Inc., 730 F.2d 359, 365 (5th Cir. 1984) (plaintiff cannot defeat removal by artful pleading).

34. The facts alleged and the relief sought in the Complaint expose the true nature of the "declaratory judgment" claim for what it is: a breach of contract claim for a past harm. Schodle v. State Farm Mut. Auto. Ins. Co., No. 17-407, 2017 WL 1177133, at *2 (E.D. Pa. Mar. 30, 2017) (denying remand where "breach of contract claim is the essence of this lawsuit," such that the court "need not decide if it is an effort at artful pleading designed to defeat federal jurisdiction"); Rarick v. Federated Serv. Ins. Co., 852 F.3d 223, 229 (3d Cir. 2017) (citing the court's virtually unflagging obligation to hear independent legal claims); see also Walsh/Granite JV v. HDR Eng'g, Inc., No. 2:17-558, 2017 WL 11485584, at *2 (W.D. Pa. Nov. 7, 2017) (acknowledging the independent nature of breach of contract and declaratory judgment claims).

35. The Complaint alleges that the "denial and refusal to acknowledge coverage" to Plaintiffs are material breaches of the Policy and that "[t]he denial or refusal to acknowledge coverage is illegal and a breach of the terms and provisions of the policy at issue." (Exhibit 1, ¶¶ 47 (e), 72, 74).

36. Breach of contract claims are generally independent from declaratory judgment claims concerning contract provisions because the breach of contract claim can be decided without need for a declaration. See Walsh/Granite JV, 2017 WL 11485584, at *2. ("Legal claims are independent of the declaratory judgment claim because 'they are alone sufficient to invoke the court's subject matter jurisdiction and can be adjudicated without the requested declaratory relief.'")(quoting Rarick, 852 F.3d at 228). The same is true of claims for breach of an insurance policy. Schodle, 2017 WL 1177133, at *2.

37. In the context of an insured seeking a declaration that an insurer must pay an insurance claim that the insurer has denied, the request for damages is independent of any claim for declaratory relief and is not subject to abstention in the absence of a parallel state court

proceeding. Griggs Rd., L.P. v. Selective Way Ins. Co. of Am., No. 4:17-cv-214, 2017 WL 2645542, at *4 (M.D. Pa. June 19, 2017) (citing Schodle, 2017 WL 1177133, at *2 ("because Plaintiffs are undoubtedly seeking monetary relief they aver is owed under the policy, a resolution of the instant controversy can be fully accomplished through the adjudication of the breach of contract claim.")). No parallel state court proceeding exists here.

38. Declaratory judgments are intended to proclaim that one party is liable to another. Andela v. Admin. Office of U.S. Courts, 569 F. App'x 80, 83 (3d Cir. 2014).

39. Indeed, the alleged "declaratory relief" sought by Plaintiffs is not a prospective remedy to establish the rights and responsibilities of the parties going forward (which is what it should be). Plaintiffs' declaratory judgment count seeks to litigate an alleged breach of contract that already occurred.

40. As such, removal of this matter is appropriate and this Court's exercise of jurisdiction is mandatory.

This Court Should Not Abstain Even if Jurisdiction is Discretionary

41. In the event this Honorable Court decides that exercising jurisdiction is discretionary pursuant to the Declaratory Judgment Act (28 U.S.C. § 2201) and the holdings in Reifer v. Westport Ins. Corp., 751 F.3d 129, 146 (3d Cir. 2014), and Kelly v. Maxum Specialty Ins. Group, 868 F.3d 274, 282 (3d Cir. 2017), abstention nonetheless would be inappropriate.

42. The very first issue this Honorable Court should note is the lack of a parallel state proceeding that would interfere with removal. On some occasions, an insurance coverage declaratory judgment action will involve liability insurance and seek a declaration whether an insurer must defend a party in an underlying state-court proceeding. Here, by contrast, the dispute

involves a claim seeking coverage under first-party property policy, and does not relate to an underlying or parallel case pending in state court. Although the existence of a parallel state proceeding is but one factor for courts to consider, it is a significant factor that is treated with "increased emphasis." Reifer, 751 F.3d at 144; see also Sherwin-Williams Co. v. Holmes Cty., 343 F.3d 383, 394 (5th Cir. 2003) (noting that "the presence or absence of a pending parallel state proceeding is an important factor.").

43. The Kelly court also cited to eight factors courts should consider when exercising discretion to retain jurisdiction in actions seeking only declaratory relief:

- (1) the likelihood that a federal court declaration will resolve the uncertainty of obligation which gave rise to the controversy;
- (2) the convenience of the parties;
- (3) the public interest in settlement of the uncertainty of obligation;
- (4) the availability and relative convenience of other remedies;
- (5) a general policy of restraint when the same issues are pending in a state court;
- (6) avoidance of duplicative litigation;
- (7) prevention of the use of the declaratory action as a method of procedural fencing or as a means to provide another forum in a race for *res judicata*; and
- (8) (in the insurance context), an inherent conflict of interest between an insurer's duty to defend in a state court and its attempt to characterize that suit in federal court as falling within the scope of a policy exclusion.

Kelly at 283.

44. All of the Kelly factors are neutral or weigh in Nautilus's favor.

45. First, the federal court declaration will resolve the uncertainty that gave rise to the controversy. This is a matter of contract interpretation on an insurance policy, which is something

that a federal court is inherently equipped to do. There are no new or unresolved issues of state law to be addressed in this dispute. It is a breach of contract claim on an insurance policy.

46. Second, the convenience of the parties is met by federal jurisdiction, or this factor is at least neutral. The federal courthouse in Pittsburgh is physically three blocks from the City-County Building and ease of access is equal.

47. Third, the public interest will be satisfied with a declaration by a federal court.

48. Fourth, the availability and relative convenience of other remedies is neutral.

49. Fifth, the issue of Nautilus's obligations under the Policy is not pending in a state court.

50. Sixth, there is no concern about duplicative litigation, as Plaintiffs are asserting claims on their behalf and on a putative class. Therefore, all claims will be disposed in one proceeding, assuming a class is proper, which Nautilus denies.

51. Seventh, there is no issue of "procedural fencing" or a "race for *res judicata*." No improper motive exists.

52. Eighth, there is no conflict related to a duty to defend as this is a first-party claim and not a claim seeking a defense against a third-party's suit against the insured.

53. Based upon the foregoing, even if this Honorable Court were to exercise its discretion, removal is appropriate and necessary.

Similar Cases Have Been Removed to or were Originally Filed in this Court

54. Counsel for Plaintiffs filed a nearly identical complaint seeking nearly identical relief in the United States District Court for the Western District of Pennsylvania in an action styled as Windber Hospital v. Travelers, No. 3:20-cv-00080 (W.D. Pa.).

55. A recent case by counsel for Plaintiffs that involved nearly identical facts and legal issues was removed from the Court of Common Pleas of Allegheny County to this Court. See HTR Restaurants, Inc. et al. v. Erie Insurance Exchange, No. 2:20-CV-819 (W.D. Pa.).

56. Dozens of other cases are currently pending in the federal district courts in Pennsylvania in which the plaintiffs claim an entitlement to coverage for economic losses they have allegedly suffered as a result of the COVID-19 pandemic. See, e.g., ECF #24, LH Dining v. Admiral Indem. Co., No. 2:20-cv-1869 (E.D. Pa.) (listing 25 such suits pending in the Eastern District of Pennsylvania); Geneva Foreign & Sports, Inc. v. Erie Ins. Co. of N.Y., No. 1:20-cv-00093 (W.D. Pa.); The Lock Loft, LLC v. Erie Prop. & Cas. Co., No. 1:20-cv-122 (W.D. Pa.); Argenas v. Nationwide Mut. Ins. Co., 2:20-cv-770 (W.D. Pa.); Liberty Corner Tavern, Inc. v. Scottsdale Ins. Co., 2:20-cv-771 (W.D. Pa.); Close Enters., Inc. v. Erie Ins. Co., No. 1:20-cv-147 (W.D. Pa.); Kahn v. Penn Nat'l Ins. Co., No. 1:20-cv-00781 (M.D. Pa.).¹ Thus,

Reservation of Rights and Statement of Non Waiver

57. Nautilus does not waive any defenses available to it by filing this removal.

58. By filing this Notice of Removal, Nautilus does not admit any of the allegations in the Complaint and reserves all rights to challenge all aspects of that pleading, to include any request to form a class action.

¹ To ensure full disclosure to the Court, it should be noted that Judge Nora Barry Fischer remanded the matter of Dianoia's Eatery, LLC v. Motorists Mutual Insurance Company, No. 2:20-cv-706 (WD. Pa.), *sua sponte* on the issue of subject matter jurisdiction and pursuant to her discretion related to the Declaratory Judgment Act (28 U.S.C. § 2201). Plaintiffs referenced this decision in their Complaint (Exhibit 1, ¶ 5, Ex. A). However, the defendant in that matter filed a second removal on May 29, 2020, which was assigned to Judge Fischer and docketed as Case No. 2:20-cv-787. That removal notice more comprehensively explained the basis for federal jurisdiction. Notably, Judge Fischer **did not** abstain *sua sponte* on this second filing, despite the underlying complaint and the parties remaining the same. The plaintiff has filed a motion to remand in that case and the parties are briefing the issue.

Nautilus Has Complied With all Removal Procedures

59. In accordance with 28 U.S.C. § 1446(d), a copy of this Notice of Removal is being served upon all counsel of record as well as the Clerk of the Court for the Court of Common Pleas of Allegheny County.

60. In accordance with 28 U.S.C. § 1446(a), a true copy of all state court process, pleadings, and orders served on Nautilus are attached to this Notice of Removal.

61. Because this notice is timely, Plaintiffs and Nautilus are citizens of different states and the amount in controversy exceeds \$75,000, the United States District Court for the Western District of Pennsylvania has original jurisdiction over this matter. *See* 28 U.S.C. § 1332(a)(1).

62. As such, this matter may be removed to the United States District Court for the Western District of Pennsylvania pursuant to 28 U.S.C. § 1441, which permits removal of any civil action to the district courts that have original jurisdiction.

63. Alternatively, Nautilus submits that removal also is proper pursuant to 28 U.S.C. § 2201.²

² Additionally, and alternatively, Nautilus submits that removal is appropriate under the Class Action Fairness Act (28 U.S.C. § 1453) as there is minimal diversity, more than 100 class members, and the amount in controversy exceeds \$5,000,000. The number of insureds in Pennsylvania who hold Nautilus policies that Plaintiffs allege have similar business income coverage is 774, and the combined coverage limits of those policies is in excess of \$50,000,000. Of course, Nautilus disputes any liability on Plaintiffs' or the purported class's claims, and denies that a class action is appropriate. But Plaintiff's class action allegations provide another basis for removal to this Court.

WHEREFORE, Defendant, Nautilus Insurance Company removes this civil action to the United States District Court for the Western District of Pennsylvania, pursuant to 28 U.S.C. § 1441.

Respectfully submitted,

SPILMAN THOMAS & BATTLE, PLLC

By: /s/ Julian E. Neiser

Julian E. Neiser
Pa. Id. No. 87306

T: 412-325-1116

F: 412-325-3324

E: jneiser@spilmanlaw.com

One Oxford Centre, Suite 3440
301 Grant Street
Pittsburgh, PA 15219

**Attorneys for Defendant Nautilus
Insurance Company**

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on July 2, 2020, the within **NOTICE OF REMOVAL** was filed electronically and will be served upon all counsel via first class mail, addressed as follows:

JAMES C. HAGGERTY, Esquire
HAGGERTY, GOLDBERG, SCHLEIFER &
KUPERSMITH, P.C.
1835 Market Street, Suite 2700
Philadelphia, PA 19103

JOHN P. GOODRICH, Esquire
JACK GOODRICH & ASSOCIATES
429 Fourth Avenue
Pittsburgh, PA 15219

SCOTT B. COOPER, Esquire
SCHMIT KRAMER, P.C.
209 State Street
Harrisburg, PA 17101

JONATHAN SHUB, Esquire
KOHNSWIFT
1600 Market Street, Suite 2500
Philadelphia, PA 19103

/s/ Julian E. Neiser
Julian E. Neiser

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

DUMONT BROTHERS, INC.,
505 ROCHESTER INC. BOTH
D/B/A ROCHESTER INN &
HARDWOOD GRILL INDIVIDUALLY
AND ON BEHALF OF A CLASS OF
SIMILARLY SITUATED PERSONS
505 Rochester Road
Pittsburgh, PA 15237,

Plaintiff,

vs.

NAUTILUS INSURANCE COMPANY
7233 East Butherus Drive
Scottsdale, AZ 85260,

Defendant.

CIVIL DIVISION

No.: GD 20 6942

CLASS ACTION COMPLAINT

Counsel of Record for Plaintiff:

John P. Goodrich, Esquire
Pa. I.D. #49648
429 Fourth Avenue, Suite 900
Pittsburgh, PA 15219

James C. Haggerty, Esquire
Pa. I.D. #30003
1835 Market Street, Suite 2700
Philadelphia, PA 19103

Scott B. Cooper, Esquire
Pa. I.D. #70242
209 State Street
Harrisburg, PA 17101

Jonathan Shub, Esquire
Pa. I.D. #53965
1600 Market Street, Suite 2500
Philadelphia, PA 19103

FILED
2020 JUN -5 PM 1:56
DEPT OF COURT RECORDS
CIVIL/FAMILY DIVISION
ALLEGHENY COUNTY PA

OPS\$KELLY1
5 June 2020
14:1:23
GD-20-006542

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

DUMONT BROTHERS, INC.,
505 ROCHESTER INC. BOTH
D/B/A ROCHESTER INN &
HARDWOOD GRILL INDIVIDUALLY AND
ON BEHALF OF A CLASS OF
SIMILARLY SITUATED PERSONS
505 Rochester Road
Pittsburgh, PA 15237,

No.:

Plaintiff,

vs.

NAUTILUS INSURANCE COMPANY
7233 East Butherus Drive
Scottsdale, AZ 85260,

Defendant.

CLASS ACTION COMPLAINT

Parties

1. Plaintiff, Dumont Brothers, Inc., 505 Rochester, Inc. both d/b/a Rochester Inn & Hardwood Grill (“Rochester Inn”) is a corporation organized and existing in the Commonwealth of Pennsylvania with its principal place of business located at 505 Rochester Road, Pittsburgh, Allegheny County, Pennsylvania 15237; as such, Plaintiff is a citizen and resident of the Commonwealth of Pennsylvania.
2. Plaintiffs own and operate Rochester Inn, a restaurant in Pittsburgh, Pennsylvania.
3. Defendant, Nautilus Insurance Company (“Nautilus”) is a corporation organized

and existing under the laws of the State of Arizona with its principal place of business located at 7233 East Butherus Drive, Scottsdale, Arizona 85260, and is dully authorized to and regularly conducts business in the Commonwealth of Pennsylvania.

4. Defendant, Nautilus, regularly and routinely conducts business in Allegheny County, Pennsylvania.

5. The present action seeks declaratory and injunctive relief on behalf of the individual plaintiff, Rochester Inn, and on behalf of a class of similarly situated persons, under identical insurance policies issued by Defendant, Nautilus, in the Commonwealth of Pennsylvania. Federal diversity jurisdiction was declined by Judge Nora Barry Fischer in a similar case which was remanded *sua sponte* by the court. DiAnoia's Eatery, LLC v. Motorists Mutual Insurance Company, No. 20-706 (W.D. Pa. May 19, 2020). See Exhibit "A."

Insurance Coverage

6. At all times material hereto, there existed, in full force and effect, a Commercial Lines Policy (No. NN100793) ("Nautilus Policy") issued by Defendant, Nautilus, to Plaintiff, Rochester Inn, providing, *inter alia*, property, business, personal property, business income, extra expense, continuation, civil authority and additional coverages applicable to the losses, damages, and expenses clamed in this action. A true and correct copy of the Nautilus Policy is attached hereto and marked as Exhibit "B."

7. The Nautilus Policy was in effect and provided coverage for the period February 9, 2020 to February 9, 2021.

8. The Nautilus Policy provides, *inter alia*, Business Income, Extra Expense, Civil Authority and other coverages applicable to the losses, damages, and expenses caused by the COVID-19 pandemic and the related governmental orders.

9. The Nautilus Policy is an “All Risks” policy which provides coverage for losses, damages, and expenses to the insured premises unless specifically excluded.

10. The Nautilus Policy does not exclude the losses, damages, and expenses caused by the COVID-19 Pandemic.

11. The Nautilus Policy provides coverage for the losses, damages, and expenses incurred by Plaintiff, Rochester Inn, as a result of the COVID-19 Pandemic and the actions of the government in response thereto.

12. Plaintiff, Rochester Inn’s, claims arise out of a Pandemic.

COVID-19 Pandemic

13. The Center for Disease Control and the World Health Organization has for years warned of the possibility of an airborne virus which could cause a worldwide pandemic.

14. Coronavirus COVID-19 is a highly contagious airborne virus which has rapidly spread and continues to spread across the United States.

15. COVID-19 has been declared a pandemic by the World Health Organization.

16. The COVID-19 virus remains stable and transmittable in aerosols and various surfaces for prolonged periods of time, up to two to three days on some surfaces.

17. The COVID-19 virus is a public health crisis that has profoundly affected all aspects of society, including the ability of the public to congregate and gather.

18. The COVID-19 pandemic has been exacerbated by the fact that the virus infects and stays on the surfaces of objects and materials for prolonged periods.

19. The Center for Disease Control has issued guidance that gatherings of more than ten (10) people should not occur; such gatherings increase the danger of contracting the COVID19 virus.

20. On March 6, 2020, Governor Tom Wolf issued a Proclamation of Disaster Emergency as a result of the COVID-19 virus.

21. On March 19, 2020, Governor Tom Wolf issued an Order requiring all non-life sustaining businesses in the Commonwealth to cease operation and to close all physical locations.

20. On March 23, 2020, Governor Tom Wolf issued a Stay at Home Order for citizens of various counties including Allegheny County.

21. On March 23, 2020 the Pennsylvania Department of Health issued a similar Order noting that the “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.”

22. On April 1, 2020, Governor Tom Wolf extended the March 23, 2020 Stay at Home Order to the entire Commonwealth of Pennsylvania.

23. The COVID-19 virus, as evidenced by these Orders, causes damage to property, particularly in places of business, such as that of Plaintiff, Rochester Inn, and other similarly situated persons and organizations, where the operation of the business requires inter-action, gatherings and contact in areas where there exists a heightened risk of contamination by the COVID-19 virus.

Impact of COVID-19 Pandemic

24. As a result of the impact of the COVID-19 pandemic and the referenced Orders of the Governor, Plaintiff, Rochester Inn, has sustained partial loss of use of its premises, was forced stop all seated and eat-in food service as of March 19, 2020, has seen a near-total cessation of its business, and has been forced to furlough employees, thereby incurring losses, damages, and expenses.

25. As a result of the impact of the COVID-19 pandemic and the referenced Orders of the Governor, many similarly situated businesses have been ordered to close, thereby incurring losses, damages, and expenses similar to Plaintiff.

26. The business of Plaintiff, Rochester Inn, like many businesses, operates in “closed environment” where many persons, including employees and customers, cycle in and out thereby creating a risk of contamination to the insured premises.

27. As a result of the COVID-19 pandemic, the business of Plaintiff, Rochester Inn, like other similarly situated businesses, is susceptible to person to person, person to property, and property to person transmittal and contamination.

28. The COVID-19 pandemic has directly and adversely affected the business operations of Plaintiff, Rochester Inn, and other similarly situated businesses, by causing damage and the risk of further harm to the property and its occupants.

29. Plaintiff, Rochester Inn, and other similarly situated persons, have suffered Business Income, Civil Authority and other related losses, damages, and expenses which are covered by policies of insurance issued by Defendant, Nautilus.

Claim for Recovery

30. Plaintiff, Rochester Inn, has made claim upon Defendant, Nautilus, for recovery of losses, damages, and expenses caused by the COVID-19 pandemic and the referenced Orders.

31. Plaintiff, Rochester Inn, is entitled to a declaration that it is covered under the Nautilus Policy for, *inter alia*, business income, extra expense, contamination, civil authority and other coverages under the Nautilus Policy.

32. All similarly situated persons and organizations to whom Defendant, Nautilus, have issued policies of insurance are entitled to a declaration that he or she is covered for business income, extra expense, contamination, civil authority and other coverage under the policies issued by Defendant, Nautilus.

33. Defendant, Nautilus, has wrongfully denied the claims of Plaintiff, Rochester Inn, and similarly situated persons, for recovery of damages caused by the COVID-19 pandemic and referenced Orders. See Denial Letter at Exhibit "C

34. Plaintiff, Rochester Inn, and all similarly situated persons, are entitled to a declaration that the policies of insurance issued by Defendant, Nautilus, provide coverage for the losses, damages, and expenses caused by the COVID-19 pandemic and referenced Orders.

35. Plaintiff, Rochester Inn, and all similarly situated persons are entitled to an Order enjoining Defendant, Nautilus, from denying coverage to insureds for business income, extra expense, contamination, civil authority and other coverages for losses, damages, and expenses caused by the COVID-19 pandemic and referenced Orders.

Class Action Allegations

36. Plaintiff, Rochester Inn, brings this action individually and on behalf of a class of similarly situated persons as a class action pursuant to the Pennsylvania Rules of Civil Procedure.

37. Defendant, Nautilus, has wrongfully denied and/or failed to acknowledge the coverage to persons or organizations who have sustained covered losses, damages, and expenses caused by the COVID-19 pandemic and the referenced Orders.

38. Plaintiff, Rochester Inn, seeks to represent a class of Pennsylvania citizens who have sustained covered losses, damages, and expenses caused by the COVID-19 pandemic and the referenced Orders where: (a) Defendant, Nautilus, issued a policy of insurance providing, *inter alia*, business income, extra expense, contamination, civil authority and other applicable coverages to each class member; (b) the putative class member has suffered covered losses, damages, and expenses under those policies by reason of the COVID-19 pandemic and referenced Orders; and (c) Defendant, Nautilus, have disclaimed coverage and/or refused to acknowledge coverage under the policy in question for the loss.

39. Plaintiff, Rochester Inn, reserves the right to amend the definition and/or identify subclasses upon completion of class certification.

40. The putative class is limited to citizens of the Commonwealth of Pennsylvania in numbers sufficient to allow class certification.

41. The members of the class are so numerous that joinder of them is impracticable.

42. Identification of the members of the class can be ascertained in and through discovery of the files and/or computer data base of Defendant, Nautilus.

43. A class action is the only practicable means available for the members of the class to pursue the appropriate remedies and receive the necessary underinsured motorist benefits under the policies of insurance in question.

44. A class action is the only practicable means available to prevent the Defendant, Nautilus, from engaging in the continuous and systematic denial and disclaimer of coverage for losses, damages, and expenses caused by the COVID-19 pandemic and referenced Orders.

45. The questions of law and fact are common to the members of the class which Plaintiff, Rochester Inn, seeks to represent.

46. The questions of law and fact common to the members of the class predominate over questions that may affect only individual members.

47. The common questions of law and fact which control this litigation predominate over any individual issues include, but are not limited to:

- (a) Each member of the class suffered losses, damages, and expenses as a result of the COVID-19 pandemic and referenced Orders;
- (b) Each member of the class is an insured under a policy of insurance issued by Defendant, Nautilus, which provided business income, extra expense, contamination, civil authority and other coverages applicable to the loss;
- (c) Each class member is eligible to recover under the policy issued by Defendant, Nautilus, for the losses, damages, and expenses caused by the COVID-19 pandemic and the referenced Orders;
- (d) Defendant, Nautilus, has denied or refused to acknowledge coverage for the loss;
- (e) The denial or refusal to acknowledge coverage is illegal and a breach of the terms and provisions of the policy at issue; and
- (f) Each member of the class is entitled to a declaration that he or she is entitled to recover under the policy of insurance issued by Defendant, Nautilus, for the losses, damages, and expenses caused by the COVID-19 pandemic and referenced Orders.

48. Plaintiff, Rochester Inn, is a member of the class that it seeks to represent.

49. The claims of Plaintiff, Rochester Inn, are typical of the claims of other members of the class which it purports to represent.

50. Plaintiff, Rochester Inn, is well qualified to act as class representative.

51. Plaintiff, Rochester Inn, will fairly and adequately protect the interests of the members of the class.

52. Plaintiff, Rochester Inn, has no interest that is adverse or antagonistic to the interests of the members of the class.

53. Plaintiff, Rochester Inn, is committed to prosecuting the class action.

54. Plaintiff, Rochester Inn, has retained competent counsel who are experienced in litigation of this nature.

55. A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

56. Joinder of all class matters is impracticable and the likelihood of individual class members prosecuting separate claims is remote due to the fact that the members of the class do not know that they are entitled to as a result of the COVID-19 pandemic and referenced Orders.

57. The expense and burden of individual litigation makes it unlikely that a substantial member of the class members will individually seek redress for the wrongs done to them.

58. It is desirable for all concerned to concentrate the litigation in this particular forum for adjudication.

59. Plaintiff, Rochester Inn, anticipates no difficulty in the management of this action as a class action.

60. The class action brought by Plaintiff, Rochester Inn, is a convenient and proper forum in which to litigate the claim.

61. The prosecution of separate actions by individual class members would create the risk of bearing inconsistent determinations that could confront Defendant, Nautilus, with incompatible standards of conduct and which could prejudice non-parties to any adjudication or substantially impede their ability to protect their own interests because of the overriding common questions of law and fact involved in the matter.

62. Prosecution of these claims as a class action will result in an orderly and expeditious administration of the claims and will foster economies of time, effort and expense.

63. Prosecution of these claims as a class action will contribute to uniformity of decisions concerning the practices of Defendant, Nautilus.

COUNT I
(Declaratory Relief – Individual and Class Claims)

64. Plaintiff, Rochester Inn, hereby incorporates by reference the foregoing Paragraphs 1 through 63 of this Complaint as though same were fully set forth herein.

65. Plaintiff, Rochester Inn, is entitled to coverage under the Nautilus Policy for the losses, damages, and expenses caused by the COVID-19 pandemic and referenced Orders.

66. Each member of the class is entitled to coverage under the applicable policy issued by Defendant, Nautilus.

67. Defendant, Nautilus, has denied and/or refused to acknowledge coverage for the losses, damages, and expenses of Plaintiff, Rochester Inn, caused by the COVID-19 pandemic and the referenced Orders.

68. Defendant, Nautilus, has wrongfully denied and refused to acknowledge coverage to each member of the class for the losses, damages, and expenses caused by the COVID-19 pandemic and referenced Orders.

69. Plaintiff, Rochester Inn, is entitled to recover for losses, damages, and expenses covered by the COVID-19 pandemic and the referenced Orders under the Nautilus Policy.

70. Each member of the class is entitled to recover for losses, damages, and expenses caused by the COVID-19 pandemic and the referenced Orders under the applicable policy.

71. Defendant, Nautilus, has wrongfully refused to provide coverage to Plaintiff, Rochester Inn, under the Nautilus Policy.

72. The denial and refusal to acknowledge coverage to Plaintiff, Rochester Inn, under the Nautilus Policy is a material breach of that policy.

73. The denial and refusal to acknowledge coverage to Plaintiff, Rochester Inn, under the Nautilus Policy is in direct violation of the specific terms and provisions of the Nautilus Policy.

74. The denial and refusal to acknowledge coverage to each member of the class under the applicable policy is a material breach of that policy.

75. Plaintiff, Rochester Inn, is entitled to a declaration that it is entitled to coverage for losses, damages, and expenses caused by the COVID-19 pandemic and the referenced Orders.

76. Each member of the class is entitled to a declaration that he and/or she is entitled to coverage for losses, damages, and expenses caused by the COVID-19 pandemic and the referenced Orders under the pertinent policy of insurance issued by Defendants, Chubb and ACE.

77. The controversy poses an issue for judicial determination under the Declaratory Judgment Act.

78. The controversy involves substantial rights of the parties to the action.

79. The controversy poses an issue for judicial determination which is not within the scope of authority of any arbitrator or arbitration panel pursuant to the policy of insurance in question.

80. A judgment of this court in this action will also be useful for the purpose of clarifying and settling the legal relations at issue between the parties.

81. A judgment of this court will determine, terminate and afford relief from the uncertainty and controversy giving rise to this action.

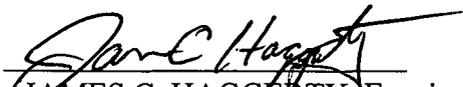
WHEREFORE, Plaintiff, Dumont Brothers, Inc., 505 Rochester, Inc. both d/b/a Rochester Inn & Hardwood Grill, respectfully requests that the Court enter an Order:

- (a) declaring that Plaintiff, Dumont Brothers, Inc., 505 Rochester, Inc. both d/b/a Rochester Inn & Hardwood Grill, is entitled to coverage for losses, damages, and expenses caused by the COVID-19 pandemic and the referenced Orders from Defendant, Nautilus Insurance Company;

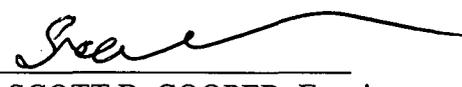
- (b) declaring that each member of the class is entitled to coverage for losses, damages, and expenses caused by the COVID-19 pandemic and the referenced Orders from Defendant, Nautilus Insurance Company; and
- (c) enjoining Defendant, Nautilus Insurance Company, from further denying coverage to Plaintiff, Dumont Brothers, Inc., 505 Rochester, Inc. both d/b/a Rochester Inn & Hardwood Grill., for losses caused by the COVID-19 pandemic and the governmental Orders;
- (d) enjoining Defendant, Nautilus Insurance Company, from denying or refusing to acknowledge coverage for losses caused by the COVID-19 pandemic and the governmental Orders; and
- (e) such other relief as the court deems appropriate.

Respectfully Submitted:

HAGGERTY, GOLDBERG, SCHLEIFER &
KUPERSMITH, P.C.

BY: 
JAMES C. HAGGERTY, Esquire
PA Attorney I.D. # 30003
1835 Market Street, Suite 2700
Philadelphia, PA 19103
(267) 350-6600

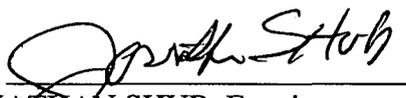
SCHMIT KRAMER, P.C.

BY: 
SCOTT B. COOPER, Esquire
PA Attorney I.D. #70242
209 State Street
Harrisburg, PA 17101
(717) 232-6300

JACK GOODRICH & ASSOCIATES

BY: 
JOHN P. GOODRICH, Esquire
Attorney I.D. #49648
429 Fourth Avenue
Pittsburg, PA 15219
(412) 261-4663

KOHN SWIFT

BY: 
JONATHAN SHUB, Esquire
PA Attorney I.D. # 53965
1600 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 238-1700

Attorneys for Plaintiffs