

1 **Husch Blackwell LLP**
2 **Joshua Grabel** (AZ Bar No. 018373)
3 2415 E. Camelback Road, Suite 500
4 Phoenix, AZ 85016
5 Telephone: 480.824.7890
6 Email: Josh.Grabel@huschblackwell.com
7 *Attorney for Plaintiff, Valley Forge*
8 *Insurance Company*

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Valley Forge Insurance Company,

Plaintiff,

v.

i2i Optique LLC,

Defendants.

No.:

**DECLARATORY JUDGMENT
COMPLAINT**

DECLARATORY JUDGMENT COMPLAINT

Plaintiff, Valley Forge Insurance Company (“Valley Forge”), by and through its undersigned counsel, Husch Blackwell, LLP, submits the following Declaratory Judgment Complaint, and alleges as follows:

NATURE OF THE CASE

1. Valley Forge brings this declaratory judgment action pursuant to 28 U.S.C. §§ 2201 and 2202 in order to determine its relative rights, liabilities, and obligations under a commercial property insurance policy (“Policy”) issued to Defendant, i2i Optique LLC (“i2i”).

1 2. In two separate lawsuits, each withdrawn by Defendant i2i or dismissed
2 without prejudice, Defendant i2i has alleged that it lost business income due to the COVID-
3 19 pandemic and claims those losses are compensable under the Policy.

4 3. On June 25, 2020, Defendant i2i filed a Complaint in this Court against
5 “CNA” seeking a declaratory judgment for coverage under the Policy (Case No. 2:20-cv-
6 01258) (“i2i Original Complaint”). *See* i2i Original Complaint Dkt. 1. In that lawsuit, i2i
7 expressly alleged that this Court had both diversity jurisdiction related to this lawsuit
8 pursuant to 28 U.S.C. § 1332, and venue pursuant to 28 U.S.C. § 1391(a). *See* i2i Original
9 Complaint Dkt. 1 ¶¶ 5, 7. On July 2, i2i filed an amended complaint, substituting Valley
10 Forge as the Defendant. *See* i2i Original Complaint Dkt. at 10. On July 7, 2020, i2i filed a
11 notice of dismissal of action without prejudice. *See* i2i Original Complaint Dkt. at 12-13.

12 4. In a blatant display of forum shopping, on July 9, 2020, i2i filed a new
13 Complaint in the United States District Court for the Eastern District of Pennsylvania against
14 Valley Forge (Case No. 2:20-cv-03360-GAM), making virtually identical allegations as
15 those in the i2i Original Complaint (“i2i PA Complaint”). *See generally* i2i PA Complaint
16 Dkt. 1.

17 5. Valley Forge filed a motion to dismiss pursuant to Rule 12(b)(6). In the
18 briefing on that motion, the parties agreed that Arizona law governed the interpretation of
19 the Policy. *See* i2i PA Complaint Dkt. 9, 11.

20 6. On January 27, 2021, the Eastern District of Pennsylvania dismissed the
21 complaint without prejudice, declining to exercise jurisdiction under the Declaratory
22 Judgment Act, and holding that it was not appropriate for the Pennsylvania federal court to
23 decide issues of Arizona law. *See* i2i PA Complaint Dkt. at 25-26.

24 7. Valley Forge now brings this action, where i2i originally filed suit, so that
25 Arizona law can be applied to the Policy by an Arizona court, in order to bring an end to the
26 burden and expense caused by i2i’s litigation strategy.

27 8. i2i’s alleged economic losses were not caused by or related to “direct physical
28 loss of or damage to” property, as required to trigger coverage under the Policy.

1 Furthermore, the actual or threatened presence of the SARS-CoV-2 virus, whether at i2i's
2 premises or elsewhere, is not sufficient to trigger coverage under the Policy.

3 9. Defendant's alleged damages, to the extent they can be proven, would be the
4 result of statewide public health measures implemented to curb the spread of the SARS-
5 CoV-2 virus, including orders issued by Arizona Governor Doug Ducey encouraging
6 physical distancing and limiting – but not prohibiting – the manner in which businesses such
7 as Defendant's could operate.

8 10. Additionally, for the reasons outlined below, i2i's claims are barred by several
9 of the Policy's exclusions.

10 **PARTIES**

11 11. Valley Forge is a corporation duly organized and existing under the laws of
12 the Commonwealth of Pennsylvania, maintaining a principal place of business at 151 North
13 Franklin Street, Floor 9, Chicago, Illinois 60606. It is a citizen of both Pennsylvania and
14 Illinois.

15 12. Upon information and belief, Defendant i2i is a limited liability company
16 organized and existing under the laws of the State of Arizona, located at 8300 N Hayden Rd.
17 B112, Scottsdale, Arizona 85258. It is a citizen of Arizona. *See* i2i Original Complaint Dkt.
18 ¶ 9.

19 13. Upon information and belief, i2i has two (2) members, Sabrina Krasnov and
20 Joseph Krasnov, both of whom are citizens of Arizona. *See* i2i Original Complaint Dkt. 1
21 ¶ 9.

22 14. Upon information and belief, Defendant i2i is a business providing optical and
23 eye care services, including but not limited to the retail sale of prescription eyewear. *See* i2i
24 Original Complaint Dkt. at 1, 10.

25 **JURISDICTION AND VENUE**

26 15. This action is brought pursuant to 28 U.S.C. § 2201 and 2201 and Fed. R. Civ.
27 P. 57 (relating to declaratory judgments) for the purpose of determining an actual
28 controversy between the parties as hereinafter more fully appears.

1 16. This Court has subject matter jurisdiction pursuant to 28 U.S.C.A. § 1332
2 (diversity of citizenship) because there is complete diversity of citizenship and the amount
3 in controversy is in excess of \$75,000, exclusive of interest and costs. Valley Forge is a
4 citizen of Pennsylvania and Illinois, whereas i2i is a citizen of Arizona. This Court has
5 personal jurisdiction over Defendant i2i as it is organized as an LLC in Arizona where all of
6 its members reside, it maintains its principal place of business in Scottsdale, and all of the
7 operative events giving rise to the claim occurred in Arizona. i2i has alleged these facts as
8 part of the i2i Original Complaint, where it alleged that this Court has diversity jurisdiction.
9 See i2i Original Complaint Dkt. at 1, 10.

10 17. Venue is proper in this Court pursuant to 28 U.S.C.A. § 1391 because i2i is
11 deemed to reside in this District, the property that is the subject of the underlying insurance
12 claim is located in this District, and the alleged loss of business income occurred in Maricopa
13 County, Arizona. See also i2i Original Complaint Dkt. at 1, 10.

14 **FACTUAL BACKGROUND**

15 **Timeline and Relevant Orders**

16 18. On or about January 30, 2020, following reports of widespread illness and
17 fatalities caused by a viral outbreak in Wuhan, China, the World Health Organization
18 (“W.H.O.”) declared a “public health emergency of international concern.”

19 19. The W.H.O. subsequently named the disease “COVID-19,” which represents
20 the illness caused by the virus. The specific coronavirus that causes the disease was
21 identified as SARS-CoV-2.

22 20. Beginning in early March 2020, countries around the world, including the
23 United States, began to impose travel restrictions and other prophylactic measures designed
24 to prevent or slow the spread of the virus.

25 21. On March 11, 2020, Arizona Governor Douglas Ducey declared a public
26 health emergency in response to the COVID-19 pandemic. See Ex. 2, Order of March 11,
27 2020.

28

1 22. In an effort to contain the transmission of the virus, Governor Ducey issued
2 an executive order limiting the operation of certain businesses and mandated the closure of
3 bars, movie theaters, indoor gyms and fitness clubs. *See* Ex. 3, Order of March 19, 2020.

4 23. However, businesses providing “essential functions” were expressly allowed
5 to remain open by order of the Governor. This included healthcare and public health
6 operations, such as “eye care centers, including those that sell eyeglasses and contact
7 lenses”. *See* Ex. 4, Order of March 23, 2020, para. 3(a).

8 24. On March 30, 2020, Governor Ducey issued an order directing non-essential
9 businesses cease in-person transactions. *See* Ex. 5, Order of March 30, 2020.

10 25. At no time were the principals or employees of i2i ever *prohibited* from
11 entering the insured property, nor was Defendant’s business ordered to entirely cease
12 operations. Indeed, the March 30, 2020 Order of Governor Ducey allowed the physical
13 locations of non-essential businesses to operate as follows:

14 Non-essential businesses may continue to operate those activities that do
15 not require in-person, on-site transactions and are encouraged to maintain
16 at least minimum basic operations that maintain the value of the business’
17 inventory, preserve the condition of the business’ physical plant and
18 equipment, ensure security, process payroll and employee benefits,
19 facilitate employees of the business being able to continue to work
remotely from their residences, and related functions to include mail
pickup.

20 Ex. 5, p. 4.

21 26. By order dated April 29, 2020, the Governor permitted all non-essential businesses
22 to resume activities without any restrictions. *See* Order attached as Ex. 6.

23 **Insurance Claim**

24 27. On March 24, 2020, i2i presented a claim seeking recovery of alleged
25 economic losses due the reduction of business resulting from the orders issued by Governor
26 Ducey in response to the COVID-19 pandemic, with a reported date of loss of March 17,
27 2020, to which Valley Forge assigned claim number E2F53100 (the “Claim”).

28

1 28. In a March 26, 2020 telephone call, a principal of i2i, Sabrina Krasnov,
2 advised Valley Forge that i2i closed its store due to the orders of the Governor.

3 29. Ms. Krasnov reported that she was not aware of any damage to the insured
4 property and did not report that anyone entered the property before or after testing positive
5 for COVID-19.

6 30. After completing its investigation and analysis, Valley Forge advised i2i that
7 based on the facts of the reported claim, the Policy did not provide coverage. *See* Ex. 7,
8 April 27, 2020 Coverage Position Letter.

9 **THE POLICY**

10 **Pertinent Provisions**

11 31. Valley Forge issued a Businessowners Insurance Policy to i2i bearing policy
12 number B 6025313905 for policy period August 31, 2019 through August 31, 2020. The
13 property located at 8300 N. Hayden Rd., Ste B112, Scottsdale, Arizona 85258 (the
14 “Property”) is listed as an insured location under the Policy. A copy of the Policy is attached
15 as Ex. 1.¹

16 32. As an initial matter, Defendant is seeking coverage under the Businessowners
17 Special Property Coverage Form, which states:

18 **A. COVERAGE**

19 We will pay for direct physical loss of or damage to Covered Property at the
20 premises described in the Declarations caused by or resulting from a Covered
Cause of Loss.

21 Policy, Ex. 1 at 14.

22 33. The Policy provides Business Income and Extra Expense coverage as follows:

23 **1. Business Income**

24 * * * * *

25 **b.** We will pay for actual loss of Business Income you sustain due to the
26 necessary suspension of “operations” during the “period of restoration.”

27
28 ¹ Page numbers have been added to the upper right-hand corner of the Policy for ease of identification. The
Complaint references the relevant Policy language in the form of “Policy, Ex. 1 at xx.”

1 The “suspension” must be caused by direct physical loss of or damage to
2 property at the described premises. The loss or damage must be caused
3 by or result from a Covered Cause of Loss. With respect to loss of or
4 damage to personal property in the open or personal property in a vehicle,
5 the described premises include the area within 1,000 feet of the site at
6 which the described premises are located.

7 **2. Extra Expense**

8 * * * * *

9 **a.** Extra Expense means reasonable and necessary expenses you incur
10 during the “period of restoration” that you would not have incurred if
11 there had been no direct physical loss of or damage to property caused by
12 or resulting from a Covered Cause of Loss.

13 **b.** We will pay Extra Expense (other than the expense to repair or
14 replace property) to:

15 (1) Avoid or minimize the “suspension” of business and to continue
16 “operations” at the described premises or at replacement
17 premises or temporary locations, including relocation expenses
18 and costs to equip and operate the replacement premises or
19 temporary locations;

20 or

21 (2) Minimize the “suspension” of business if you cannot continue
22 “operations.”

23 Policy, Ex. 1 at 36 - 37.

24 34. Pursuant to the terms of the Policy, “Covered Cause of Loss” means “RISKS
25 OF DIRECT PHYSICAL LOSS” unless excluded or limited by the Policy. Policy, Ex. 1 at
26 15-16.

27 35. The following definitions are contained in the Policy:

28 **19. “Operations”** means the type of your business activities occurring
at the described premises and tenantability of the described
premises.

* * * * *

20. “Period of restoration” means the period of time that:

a. Begins with the date of direct physical loss or damage caused
by or resulting from any Covered Cause of Loss at the
described premises; and

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b. Ends on the earlier of:

(1) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or

(2) The date when the business is resumed at a new permanent location.

“Period of restoration” does not include any increased period required due to the enforcement of any law that:

(a) Regulates the construction, use or repair, or requires the tearing down of any property; or

(b) Regulates the prevention, control, repair, clean-up or restoration of the environmental damage.

The expiration date of this policy will not cut short the “period of restoration.”

* * * * *

29. “Suspension” means:

a. partial or complete cessation of your [the insured’s] business activities; or

b. that a part or all of the described premises is rendered untenable.

Policy, Ex. 1 at 30-31, 33.

36. Subject to applicable terms, conditions and exclusions, the Policy provides Civil Authority coverage as follows:

Civil Authority

1. When the Declarations show that you have coverage for Business Income and Extra Expense, you may extend that insurance to apply to the actual loss of Business Income you sustain and reasonable and necessary Extra Expense you incur caused by an action of civil authority that prohibits access to the described premises. The civil authority action must be due to direct physical loss of or damage to property at locations, other than described premises, caused by or resulting from a Covered Cause of Loss.

Policy, Ex. 1 at 62.

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37. The Policy also contains the following exclusions:

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

m. Fungi, Wet Rot, Dry Rot and Microbes

Presence, growth, proliferation, spread or any activity of "fungi," wet or dry rot, or "microbes."

* * * * *

"**Microbe(s)**" means any non-fungal micro-organism or non-fungal, colony-form organism that causes infection or disease. "Microbe" includes any spores, mycotoxins, odors, or any other substances, products, or byproducts produced by, released by, or arising out of the current or past presence of "microbes."

Policy, Ex. A at 17-18, 99-100.

* * * * *

2. We will not pay for loss or damage caused by or resulting from any of the following:

* * * * *

b. Consequential Loss

Delay, loss of use or loss of market.

Policy, Ex. 1 at 19.

* * * * *

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

a. Ordinance or Law

(1) The enforcement of any ordinance or law:

(a) Regulating the construction, use or repair of any property;

or

(b) Requiring the tearing down of any property, including the cost of removing its debris.

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(2) This exclusion applies whether the loss results from:

- (a) An ordinance or law that is enforced even if the property has not been damaged; or
- (b) The increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition of property, or removal of its debris, following a physical loss to that property.

Policy, Ex. 1 at 17.

* * * * *

3. We will not pay for loss or damage caused by or resulting from any of the following Paragraphs a. through c. But if an excluded cause of loss that is listed in Paragraphs a. through c. results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

* * * * *

b. Acts or Decisions

Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body.

Policy, Ex. 1 at p. 20.

* * * * *

2. We will not pay for loss or damage caused by or resulting from any of the following:

* * * * *

(8) Contamination by other than “pollutants.”

Policy, Ex. 1 at p. 21.

Without Demonstrable, Physical Loss of or Damage to Defendant’s Property, No Coverage Is Available Under the Policy’s Business Income or Extra Expense Provision

38. In order to trigger coverage under the Policy’s Business Income and Extra Expense provisions, i2i must prove the “suspension” of its business was caused by direct physical loss of or damage to property at the described premises.

1 39. Any alleged limitation on the operation of Defendant i2i's business was not
2 caused by physical loss of or damage to the Property located at 8300 N Hayden Rd. B112,
3 Scottsdale, Arizona 85258. To the contrary, to the extent the restrictions in Governor
4 Ducey's Orders applied to i2i, if at all, those restrictions were not caused by physical loss of
5 or damage at i2i's Property.

6 40. Because i2i cannot demonstrate any direct physical loss of or damage to its
7 Property, the Policy's Business Income and Extra Expense provisions do not afford coverage
8 for i2i's claimed economic losses.

9 **Defendant Is Not Entitled to Coverage Under the Policy's Civil Authority Provision**

10 41. Coverage under the Policy's Civil Authority provision applies only if 1) the
11 action of civil authority *prohibits* access to the Property, and 2) the civil authority action was
12 "due to direct physical loss of or damage to property at locations, other than described
13 premises", as stated in Paragraph 36 above.

14 42. At all times relevant to the underlying claim, the applicable government orders
15 did not prohibit i2i from entering its Property. To the contrary, the orders acknowledged the
16 need for the physical presence of individuals in order to maintain business continuity. Ex.
17 6, p. 4.

18 43. Further, as the language of the orders issued by the Governor make clear, the
19 purpose of the orders was to prevent the further spread of the virus by limiting close person-
20 to-person contact. The orders were not issued in response to physical loss or damage at a
21 specific property. Nor was there any such physical loss or damage at any other specific
22 property.

23 **The Policy's Exclusions Bar Coverage**

24 44. The Policy contains exclusions for losses caused directly or indirectly by the
25 presence of "microbes", defined in the Policy as "any non-fungal micro-organism or non-
26 fungal, colony-form organism that causes infection or disease." Coronavirus is a microbe
27 that undeniably causes both infection and disease. (*See* CENTERS FOR DISEASES CONTROL
28 AND PREVENTION, GLOSSARY OF TERMS RELATED TO ANTIBIOTIC RESISTANCE (defining

1 microbes as “[l]iving organisms, like bacteria, fungi, or viruses, which can cause infections
2 or disease”), <https://www.cdc.gov/narms/resources/glossary.html>.)

3 45. The Policy exclusion for consequential losses such as “delay, loss of use or
4 loss of market” also bars coverage for Defendant i2i’s claims arising from the inability to
5 use its Property without restriction or limitation, as well as any reduction in business
6 stemming from reduced consumer demand.

7 46. Each of the exclusions set forth in Paragraph 37 are applicable and preclude
8 coverage for Defendant’s claims.

9 **COUNT I – DECLARATORY RELIEF – BUSINESS INCOME AND EXTRA**
10 **EXPENSE**

11 47. Valley Forge reiterates and incorporates by reference paragraphs 1 through 46
12 as if set forth here.

13 48. Defendant i2i submitted claims for economic losses experienced during the
14 COVID-19 pandemic, has asserted such claims are covered under the business income and
15 extra expense endorsements in the Policy issued by Valley Forge, and made a demand for
16 payment.

17 49. Valley Forge denied i2i’s claims on the basis that they do not trigger coverage
18 under the Policy and/or are otherwise excluded.

19 50. An actual, justiciable controversy exists as to whether Defendant’s claims are
20 covered pursuant to the terms, conditions, and exclusions contained in the Valley Forge
21 Policy.

22 51. Based on the foregoing, Valley Forge is entitled to an order entering judgment
23 in its favor, declaring that it has no obligation to provide coverage to i2i for its claimed losses
24 under the business income and extra expense endorsements.

25 **COUNT II – DECLARATORY RELIEF – CIVIL AUTHORITY**

26 52. Valley Forge reiterates and incorporates by reference paragraphs 1 through
27 51 as if set forth here.

28

1 53. Defendant i2i submitted claims for economic losses experienced during the
2 COVID-19 pandemic, has asserted such claims are covered under the civil authority
3 endorsement in the Policy issued by Valley Forge, and made a demand for payment.

4 54. Valley Forge denied i2i's claims on the basis that they do not trigger coverage
5 under the Policy and/or are otherwise excluded.

6 55. An actual, justiciable controversy exists as to whether Defendant's claims are
7 covered pursuant to the terms, conditions, and exclusions contained in the Valley Forge
8 Policy.

9 56. Based on the foregoing, Valley Forge is entitled to an order entering judgment
10 in its favor, declaring that it has no obligation to provide coverage to i2i for its claimed losses
11 under the civil authority endorsement.

12 **COUNT III – DECLARATORY RELIEF – EXCLUSIONS**

13 57. Valley Forge reiterates and incorporates by reference paragraphs 1 through 56
14 as if set forth here.

15 58. Defendant i2i submitted claims for economic losses experienced during the
16 COVID-19 pandemic, has asserted such claims are covered under the Policy issued by
17 Valley Forge, and made a demand for payment.

18 59. Valley Forge denied i2i's claims on the basis that they do not trigger coverage
19 under the Policy and/or are otherwise excluded.

20 60. An actual, justiciable controversy exists as to whether Defendant's claims are
21 covered pursuant to the terms, conditions, and exclusions contained in the Valley Forge
22 Policy.

23 61. Based on the foregoing, Valley Forge is entitled to an order entering judgment
24 in its favor, declaring that it has no obligation to provide coverage to i2i for its claimed losses
25 because such losses fall within the Policy's exclusions.

26 **WHEREFORE**, Plaintiff, Valley Forge Insurance Company respectfully requests
27 that this Honorable Court grant judgment in its favor and against Defendant, i2i Optique
28 LLC, and prays for the following relief:

1 (a) A declaration that the Policy issued by Plaintiff, Valley Forge Insurance
2 Company, does not provide coverage for i2i's claimed losses, including but not limited to
3 claims submitted under the Business Income, Extra Expense and Civil Authority provisions;

4 (b) An award of its reasonable attorneys' fees and costs pursuant to A.R.S. §§ 12-
5 332, 12-341, 12-341.01 and 12-349; and,

6 (c) Such other relief as the Court deems just and equitable.
7

8 Dated: February 1, 2021

HUSCH BLACKWELL LLP

BY: /s/ Joshua Grabel

Joshua Grabel

2415 E. Camelback Road, Suite 500

Phoenix, AZ 85016

(480) 824-7890

Josh.grabel@huschblackwell.com

*Attorney for Plaintiff, Valley Forge Insurance
Company*

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