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Attorneys for Plaintiff

11 **UNITED STATES DISTRICT COURT**

12 **DISTRICT OF ARIZONA**

13
14 THE CINCINNATI INSURANCE
15 COMPANY,

16 Plaintiff,

17 v.

18 RECREATION CENTERS OF SUN CITY,
19 INC.,

20 Defendant.

Civil No.

**COMPLAINT FOR DECLARATORY
JUDGMENT**

(Jury Trial Demanded)

21 Plaintiff alleges:

22 **I. JURISDICTION – VENUE**

23 1. This court has jurisdiction over this action pursuant to 28 U.S.C. § 1332 and
24 28 U.S.C. § 2201 as set forth more fully herein.

25 2. Plaintiff, The Cincinnati Insurance Company (hereinafter “Cincinnati
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1 Insurance”), is a corporation organized under the laws of the State of Ohio, with its
2 principal place of business in Cincinnati, Ohio. Plaintiff is a foreign citizen for purposes
3 of diversity jurisdiction.

4 3. Defendant Recreation Centers of Sun City, Inc. (“RCSC”) is doing business
5 as Recreation Centers of Sun City, Inc., and is a corporation organized under the laws of
6 Arizona, with a principal place of business in the city of Sun City, Arizona.

7 4. The amount in controversy between plaintiff and defendant is in excess of
8 \$75,000.

9 5. This court is the proper venue for this action under 28 U.S.C. § 1391
10 because the property at issue is located within this court’s jurisdiction, and the defendant
11 is subject to jurisdiction in this District.

12 6. Federal subject matter jurisdiction is also conferred by 28 U.S.C. § 2201 as
13 the relief requested is declaratory in nature and there is a justiciable controversy between
14 the parties.

15 **II. GENERAL ALLEGATIONS**

16 7. This lawsuit arises from Cincinnati Insurance’s denial of defendant
17 RCSC’s first-party coverage claim under Cincinnati Insurance Contract
18 No. CPP 074 40 66, which had an insurance contract period of June 30, 2003 through
19 June 30, 2006 (“Insurance Contract”).

20 8. Defendant is the owner of the Sun Dial Recreation Center located at 14801
21 North 103rd Avenue, Sun City, Arizona.

22 9. On or about June 19, 2006, RCSC reported a partial roof collapse, which
23 involved approximately 9,000 square feet of the roof at the Sun Dial Recreation Center.
24 The loss was timely reported by RCSC to Cincinnati Insurance.

25 10. Subject to a full and continuing reservation of all rights and defenses,
26 Cincinnati Insurance promptly investigated the defendant’s claim, retained qualified

1 experts to inspect the loss, and at all times acted in good faith to determine whether
2 coverage existed for RCSC's claim.

3 11. Upon completion of its good faith investigation of defendant's claim,
4 Cincinnati Insurance sent RCSC a letter explaining why there is no coverage for this claim
5 and sent the claimant a courtesy copy of this Declaratory Judgment Complaint.

6 12. Anticipating that RCSC would dispute Cincinnati Insurance's coverage
7 position, Cincinnati Insurance has filed this declaratory judgment Complaint because
8 genuine issues of coverage exist, and judicial determination of the parties' rights and
9 obligations under the applicable Contract of Insurance is appropriate.

10 **III. FIRST CLAIM – HIDDEN OR LATENT DEFECT**

11 13. Cincinnati Insurance reincorporates the preceding paragraphs 1 through 12.

12 14. The loss and damage claimed by defendant is barred by Insurance Contract
13 Exclusion 3b(2)(d)(2) because the claimed loss and damages were caused by a hidden or
14 latent defect or any quality of property that caused it to damage or destroy itself.

15 **IV. SECOND CLAIM – NEGLIGENT WORK**

16 15. Cincinnati Insurance reincorporates the preceding paragraphs 1 through 14.

17 16. The loss and damage claimed by defendant is barred by Insurance Contract
18 Exclusion 3b(3)-(c)(2) and (3) because the claimed loss and damages were caused by or
19 resulted from faulty, inadequate or defective materials used in the repair, construction,
20 renovation or remodeling of the building in question.

21 **V. THIRD CLAIM – COLLAPSE**

22 17. Cincinnati Insurance reincorporates the preceding paragraphs 1 through 16.

23 18. There is no coverage for the loss and claimed damages under the Collapse
24 Extension 5c(1) and (2) because none of the enumerated causes of loss necessary to
25 trigger the collapse extension are present.
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VI. FOURTH CLAIM – LACK OF FORTUITY

19. Cincinnati Insurance reincorporates the preceding paragraphs 1 through 18.

20. The loss and damage claimed by defendant is not covered by the Cincinnati Insurance Contract because the loss and damage was inevitable and therefore not fortuitous.

VII. FIFTH CLAIM – PRE-EXISTING LOSS

21. Cincinnati Insurance reincorporates the preceding paragraphs 1-20.

22. The loss and damage claimed by defendant at the time of the original construction and/or during the course of the 1987 remodel commenced when defective materials were used in the construction of the roof causing an immediate economic loss. As a result, the loss or damage existed, in whole, or in substantial part, prior to the inception of Cincinnati Insurance’s policy and there is no coverage.

VIII. SIXTH CLAIM – IN THE ALTERNATIVE – APPRAISAL

23. Cincinnati Insurance reincorporates the preceding paragraphs 1 through 22.

24. In the alternative, should this Court find that coverage exists for any part of the claim, the plaintiff seeks a declaration and order from the Court that the parties resolve the remaining issues concerning the value of the claim through the contractually required Appraisal provisions of the Insurance Contract, § D, ¶ 2 of the Insurance Contract quoted below:

“2. Appraisal

If we and you disagree on the value of the property or the amount of “loss”, either may make written demand for an appraisal of the “loss”. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of “loss”. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding. Each party will:

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- a. Pay its chosen appraiser; and
- b. Bear the other expenses of the appraisal and umpire equally.

If there is an appraisal, we still retain our right to deny the claim.”

IX. PRAYER

WHEREFORE, plaintiff prays for the following relief:

- 1. For a declaration:
 - a. That plaintiff has fulfilled its obligations under the Insurance Contract, with respect to defendant’s claim;
 - b. That plaintiff is not liable to defendant under the terms, conditions, deductible, limitations and exclusions of the Insurance Contract; and
 - c. Plaintiff owes defendant nothing as the result of this claim;
 - d. In the alternative, in the event this Court finds coverage for any part of the claim to exist, that an Appraisal be held pursuant to the terms of the Insurance Contract to resolve any dispute as to the amount of value or loss.
- 2. For costs of suit.
- 3. For such other and further relief as the Court may deem appropriate.

DATED this 12th day of February, 2007.

BULLIVANT HOUSER BAILEY PC
Douglas G. Houser, OSB #60038
Lloyd Bernstein, OSB #00203

THE CAVANAGH LAW FIRM, P.A.

By/s/George H. Mitchell
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Attorneys for Plaintiff

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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

THE CINCINNATI INSURANCE
COMPANY,

Plaintiff,

vs.

RECREATION CENTERS OF SUN
CITY,

Defendant.

Case No.: CV 07-0329-PHX-ECV

**ANSWER AND COUNTERCLAIM
AND DEMAND FOR JURY TRIAL**

As and for its Answer to the Plaintiff's Complaint herein the Defendant,
Recreation Centers of Sun City, Inc. (hereafter "RCSC") hereby admits, denies, and
alleges as follows:

1. The Defendant RCSC admits the allegations set forth in Paragraph 1 of
Plaintiff's Complaint.

2. The Defendant RCSC admits the allegations set forth in Paragraph 2 of
Plaintiff's Complaint.

1 3. The Defendant RCSC admits the allegations set forth in Paragraph 3 of
2 Plaintiff's Complaint.

3 4. The Defendant RCSC admits the allegations set forth in Paragraph 4 of
4 Plaintiff's Complaint.

5 5. The Defendant RCSC admits the allegations set forth in Paragraph 5 of
6 Plaintiff's Complaint.

7 6. The Defendant RCSC admits the allegations set forth in Paragraph 6 of
8 Plaintiff's Complaint.

9 7. The Defendant RCSC admits the allegations set forth in Paragraph 7 of
10 Plaintiff's Complaint.

11 8. The Defendant RCSC admits the allegations set forth in Paragraph 8 of
12 Plaintiff's Complaint.

13 9. The Defendant RCSC admits the allegations set forth in Paragraph 9 of
14 Plaintiff's Complaint.

15 10. The Defendant RCSC denies the allegations set forth in Paragraph 10 of
16 Plaintiff's Complaint.

17 11. The Defendant RCSC admits that the Plaintiff forwarded a denial letter
18 together with simultaneously with a copy of the Declaratory Complaint; and as for the
19 remainder of the allegations set forth in Paragraph 11, the Defendant denies the same.

20 12. The Defendant RCSC is without knowledge or information sufficient to
21 form a belief as to what the Plaintiff was "anticipating" and therefore denies the same;
22 although genuine issues of coverage exist, the Plaintiff has already denied the
23 Defendant's claim for coverage effectively setting the parties rights and responsibilities
24 and Defendant's claim for damages for breach of contract and/or otherwise; and that
25 although the declaratory relief action may be "permissible" it is, nevertheless,
26 superfluous in that by its denial the Plaintiff has either breached the contract or not.

1 13. The Defendant RCSC hereby reiterates the admissions and denials as
2 herein before set forth.

3 14. The Defendant RCSC denies the allegations of Paragraph 14 and
4 Paragraph 15.

5 15. The Defendant RCSC hereby reiterates the admissions and denials as
6 herein before set forth.

7 16. The Defendant denies the allegations of Paragraph 16 of Plaintiff's
8 Complaint.

9 17. The Defendant RCSC hereby reiterates the admissions and denials as
10 herein before set forth.

11 18. The Defendant RCSC denies the allegations as set forth in Paragraph 18
12 of Plaintiff's Complaint.

13 19. The Defendant RCSC hereby reiterates the admissions and denials as
14 herein before set forth.

15 20. The Defendant RCSC denies the allegations in Paragraph 20 of Plaintiff's
16 Complaint.

17 21. The Defendant RCSC hereby reiterates the admissions and denials as
18 herein before set forth.

19 22. The Defendant RCSC denies the allegations set forth in Paragraph 22 of
20 Plaintiff's Complaint.

21 23. The Defendant RCSC hereby reiterates the admissions and denials as
22 herein before set forth.

23 24. The Defendant RCSC denies the allegations and opposes the relief
24 requested in Paragraph 24 of Plaintiff's Complaint; and the Defendant further and
25 affirmatively alleges that the Plaintiff has either waived enforcement of the appraisal
26 provisions and/or is estopped from asserting it by reason of Plaintiff's denial of

1 coverage and resort to litigation; and that Plaintiff is further not entitled to enforcement
2 of the appraisal provision by reason of its breach of contract which renders it as the non-
3 performing party without a legal basis for enforcement of the contract against the
4 performing party, the Defendant herein.

5 **Affirmative Defenses**

6 25. The Defendant RCSC hereby sets for the following separate and
7 affirmative defenses;

- 8 a. Waiver;
- 9 b. Estoppel;
- 10 c. Failure to state a claim upon which relief can be granted;
- 11 d. Although, arguably permissible within the discretion of the District
12 Court, the instant declaratory relief action is, nevertheless, unnecessary and superfluous,
13 in that the rights and obligations of the parties and any actual breaches thereof including
14 any damages sustained thereby will be determined by the Defendant's counterclaims
15 herein.

16 **COUNTERCLAIMS**

17 26. As and for the Defendant/Counterclaimant, RCSC's claims and causes of
18 action against the Plaintiff/Counterdefendant, Cincinnati Insurance Company, the
19 Counterclaimant RCSC sets forth the following:

20 **COUNT I: BREACH OF CONTRACT**

21 27. The Counterclaimant hereby repeats and realleges the admissions and
22 denials as herein before set forth.

23 28. That the insurance policy between these parties constituted a lawful
24 contract.

25 29. That the Counterclaimant, RCSC demanded performance under said
26 contract for payment of damages covered thereby.

1 30. That the Counterdefendant, Cincinnati Insurance Company, failed and
2 refused to perform its obligations thereunder and, in fact, “denied” coverage “in full.”

3 31. That the Counterdefendant’s actions and omissions constituted a breach of
4 the insuring agreement between the parties thereto.

5 32. That the Counterdefendant has sustained and continues to sustain actual
6 damages by reason of the Counterdefendant’s breach in an amount to be determined
7 upon the trial of this action.

8 33. That the Counterclaimant has incurred and continues to incur reasonable
9 attorneys fees arising out of said breach.

10 34. That Counterclaimant is entitled to a further award of its reasonable
11 attorneys fees pursuant to A.R.S. § 12-340.1.

12 **COUNT II: BREACH OF THE DUTY OF GOOD FAITH AND FAIR**
13 **DEALING (“BAD FAITH”)**

14 35. That the aforesaid insuring agreement imputed to the
15 insurer/Counterdefendant, Cincinnati Insurance Company, an implied duty of good faith
16 and fair dealing.

17 36. That the actions and omissions of the Counterdefendant, Cincinnati
18 Insurance Company, were intentional and unreasonable and thereby in breach of duty of
19 good faith and fair dealing.

20 37. That the actions of the Counterdefendant which were committed in breach
21 of the duty of faith and fair dealing or otherwise done in “bad faith” included but not
22 limited to the following:

- 23 a. Failing to perform a full, fair and competent investigation;
24 b. Unreasonably denying coverage to the Counterclaimant, its
25 insured, RCSC;

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1 c. Failing to give the interests of its insured consideration equal to its
2 own, i.e., breaching the duty of equal consideration;

3 d. Unreasonably instituting litigation against its insured, the
4 Counterclaimant RCSC;

5 e. Such other actions as may come to light through discovery in this
6 matter.

7 38. But as a result of Counterdefendant's breach of its duty of good faith and
8 fair dealing the Counterclaimant has sustained actual damages thereby in an amount to
9 be proven upon the trial.

10 39. That is further result of the Counterdefendant's breach of the duty of good
11 faith and fair dealing the Counterclaimant has sustained consequential damages in an
12 amount to be proven upon the trial of this action.

13 40. That the Counterclaimant has further incurred and will incur reasonable
14 and necessary attorneys fees by virtue of the Counterdefendant's breach of the duty of
15 good faith and fair dealing.

16 WHEREFORE, the Defendants/Counterclaimant, RCSC prays for the following
17 relief:

18 1. For a dismissal of the declaratory relief action against the
19 Defendants/Counterclaimants;

20 2. For a determination, in the alternative, that the Plaintiff/Counterdefendant
21 is liable to Defendant under the terms of the applicable insurance policy; that the
22 Plaintiff/Counterdefendant has failed to fulfill under said policy; that the
23 Plaintiff/Counterdefendant owes the Defendant/Counterclaimant damages thereby; and
24 that the Defendant/Counterclaimant be awarded its damages pursuant to a jury trial of
25 this matter.
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1 **COUNT I: BREACH OF CONTRACT**

2 1. For a determination that the Plaintiff/Counterdefendant has breached its
3 obligations under the insurance policy to the Defendant/Counterclaimant.

4 2. For an award of the actual damages sustained by said breach;

5 3. For an award of reasonable attorneys fees incurred for virtue of said
6 breach;

7 4. For its costs of suit;

8 5. For such other and further relief as the Court deems appropriate under the
9 circumstances.

10 **COUNT II: "BAD FAITH"**

11 1. For a determination that the Plaintiff/Counterdefendant has breached the
12 duty of good faith and fair dealing;

13 2. For an award of actual damages sustained by the
14 Plaintiff/Counterdefendant's breach of the duty of good faith;

15 3. For an award of consequential damages sustained by the
16 Plaintiff/Counterdefendant's breach of the duty of good faith;

17 4. For a further award of the reasonable attorneys fees incurred by the
18 Defendant/Counterclaimant by reason of the Plaintiff/Counterdefendant's breach of the
19 duty of good faith;

20 5. For the costs of suit;

21 6. For such other and further relief as the Court deems appropriate under the
22 circumstances.

23 DEMAND IS HEREBY MADE FOR TRIAL BY JURY ON ALL ISSUES IN
24 THE ABOVE-ENTITLED ACTION.

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DATED: April 6, 2007.

SURRANO LAW OFFICES

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CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2007, I electronically transmitted the attached documents to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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