

GluckWalrath LLP

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<p>GLUCK WALRATH LLP, MICHAEL H. GLUCK, and CHRISTOPHER M. WALRATH,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>ALLIED WORLD ASSURANCE COMPANY,</p> <p style="text-align: center;">Defendant.</p>	<p>SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MONMOUTH COUNTY</p> <p>Docket No. MON-L-</p> <p style="text-align: center;">Civil Action</p> <p style="text-align: center;">COMPLAINT FOR DECLARATORY JUDGMENT</p>
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Plaintiffs, GluckWalrath LLP, Michael H. Gluck (“Michael Gluck”) and Christopher M. Walrath (“Christopher Walrath”) with a principal place of business located at 11 Wharf Avenue, Suite 4, Red Bank, New Jersey 07701, by way of complaint for declaratory judgment and other relief, hereby allege as follows:

PARTIES

1. Plaintiff GluckWalrath LLP is a New Jersey limited liability partnership with a principal place of business located at 11 Wharf Avenue, Suite 4, Red Bank, New Jersey 07701 (the “Firm”).
2. Plaintiff Michael Gluck is a principal and managing partner of the Firm.
3. Plaintiff Christopher Walrath is a principal and managing partner of the Firm.

4. Allied World Assurance Company ("Allied"), is, upon information and belief, an insurance company licensed to do business in the State of New Jersey and issues Lawyers Professional Liability Policies ("malpractice coverage") to lawyers in the State of New Jersey.

FACT RELEVANT TO ALL COUNTS

5. Since on or about January 1, 2015, the Firm has purchased its legal malpractice coverage from Allied and has maintained legal malpractice coverage continuously through Allied at all times relevant to this litigation.

6. From January 1, 2018, through December 31, 2018, the Firm had malpractice coverage through Allied pursuant to Policy Number 0308-7603 (the "Policy"). A true and correct copy of said Policy is attached hereto as Exhibit A.

7. From in or about 2014, the Firm represented a number of corporate entities owned in whole or in part by Margaret Brunette ("Burnette"), Kyle LePree ("LePree"), James Watt ("Watt"), and, Jason Watt ("J. Watt") including, but not limited to, the Smith Group ("Smith"), Pink & Red, LLC, Brickwall at Campus Town, LLC ("Brickwall") and Porta at Asbury Park ("Porta").

8. Brunette, LePree, Watt, and, J. Watt individually and through Smith, Pink & Red and Porta are successful restauranteurs in the State of New Jersey, operating several restaurants in Asbury Park, Jersey City and Burlington with an additional two restaurants in Philadelphia, Pennsylvania.

9. In or about April 2015 Michael Gluck and Christopher Walrath advised Brunette, LePree, Watt, and, J. Watt of a potential restaurant/tavern opportunity on property being developed on the campus of the College of New Jersey ("TCNJ"). This project was commonly referred to as Campus Town.

10. The property in question was being developed by PRC Campus Centers, LLC (“PRC”), which had entered into a ground lease for the Campus Town space with TCNJ.

11. In or about May 2015 the Firm, at the direction of Brunette, LePree, Watt, and, J. Watt, provided legal services to Smith in negotiations with PRC for an entity to be owned by Brunette, LePree, Watt, and, J. Watt to lease space from PRC for a proposed restaurant/tavern at Campus Town.

12. Those negotiations resulted in a lease being executed on June 26, 2015 (the “lease”) between PRC and Brickwall at TCNJ, LLC, which subsequently, at the request of TCNJ, was succeeded by Brickwall at Campus Town, LLC (“Brickwall”), a single purpose entity owned by Brunette, LePree, Watt, and, J Watt.

13. After execution of the lease, Brunette, LePree, Watt, and, J. Watt contacted Michael Gluck and Christopher Walrath seeking to discuss investing in Brickwall through an LLC owned by Michael Gluck and Christopher Walrath.

14. On or about October 6, 2015 a Letter of Investment was entered into between Brickwall and Union Street at Ewing, LLC, an entity owned by Michael Gluck and Christopher Walrath. A true and correct copy of said letter is attached hereto as Exhibit B.

15. After Union Street Investments Ewing, LLC made the initial Eighty Thousand Dollar (\$80,000.00) investment, it made no further investment in Brickwall.

16. Between October 2015 and April 2017, PRC erected components of the Project in accordance with specifications given to it by Brickwall and approved by Brickwall.

17. On information and belief, on or about April 27, 2017, Brickwall retained new counsel to send a letter to PRC by which it purported to terminate the Lease.

18. On or about August 20, 2018, Union Street Investments, LLC (“Union Street”) as successor in interest to Union Street Investments Ewing, LLC, filed a lawsuit entitled Union Street Investments, LLC as successor in interest to Union Street Investments Ewing, LLC v. Smith Group; Brickwall at Campus Town, LLC (formerly known as and/or successor in interest to Brickwall at TCNJ, LLC) (“Brickwall”); Pink & Red, LLC; Margaret Brunette; Kyle LePree; James Watt; and Jason Watt, and docketed as MON-L-3007-18 (the “Union Street litigation”) seeking damages for breach of contract, fraud and other relief from the named defendants in that action. A true and correct copy of the Complaint is attached hereto as Exhibit C.

19. On or about November 5, 2018 the Firm received a copy of a Third Party Complaint brought by Brunette, LePree, Watt, and J. Watt (Collectively referred to as the “Third Party Plaintiffs”) in the Union Street litigation naming the Firm, Michael Gluck and Christopher Walrath as Third Party Defendants. The Third Party Complaint contained two counts: tortious interference with prospective economic advantage and legal malpractice. A true and correct copy of the Answer, Counterclaim and Third Party Complaint is attached hereto as Exhibit D.

20. The Third Party Complaint was filed only by the individual Defendants Brunette, LePree, Watt, and J. Watt. Neither Brickwall, nor any other entities owned by the Third Party Plaintiffs, joined in the Third Party Complaint.

21. In the Third Party Complaint the Third Party Plaintiffs alleged in paragraph 6 that

Gluck Walrath, L.L.P., Michael Gluck, and Christopher Walrath (1) failed to properly draft a Termination Provision that would be immune from arguments of estoppel, waiver and breach of implied covenant of good faith and fair dealing; (2) failed to timely apply for and obtain a Special Concessionaires Permit and liquor license; (3) failed to properly advise and counsel James Watt, Jason Watt, Margaret Brunette and Kyle LePree as to a potential impact of taking further time and action on the transaction beyond the 180 day termination timetable; (4) orchestrated and took further time and action on the transaction beyond the 180 day termination timetable; (5) created, and pursued self interest in numerous conflicts of

interests and contrary business and financial interests relative to the Third Party Plaintiffs; (6) failed to disclose to the Third Party Plaintiffs the many self-interested positions taken in the LLC formation documents; (7) failed to properly form the LLCs, (8) failed to properly and timely implement the simple requirements imposed on Brickwall at TCNJ, LLC by the 6/26/2015 Lease Agreement, (9) failed to properly negotiate and prepare the Lease, amendments to the Lease, the Special Concessionaire Agreement and the application for liquor license, (10) failed to obtain knowing and voluntary waivers of attorney conflicts of interest, (11) failed to make a written retainer with Third Party Plaintiffs or other legal services agreement, (12) failed to provide invoices for legal services, (13) failed to properly discharge notary services, (14) violated numerous rules, canons and standards of professional legal ethics pertaining to competence, diligence, communication, fees and conflict of interest.

22. On November 12, 2018 the Firm, Michael Gluck and Christopher Walrath provided Allied with a Notice of the Claim as required by the Policy and sought coverage for the malpractice claim asserted in Count Two of the Third Party Complaint.

23. By letter dated December 10, 2018 Allied denied malpractice coverage to the Firm, Michael Gluck and Christopher Walrath. A true and correct copy of Allied's denial of coverage is attached hereto as Exhibit E.

24. By letter dated December 21, 2018, counsel for Allied, reiterated Allied's reasons for denial of coverage. A true and correct copy of Allied's counsel's letter is attached hereto as Exhibit F.

COUNT ONE
(Declaratory Judgment)

25. Plaintiffs repeat and replead each and every allegation of paragraphs 1 through 24 of the Complaint as if fully set forth herein.

26. Under the Declaratory Judgment Statute, N.J.S.A. 2A:16-53, Plaintiffs are interested parties under the Policy issued by Allied and are entitled to declaratory relief.

27. Pursuant to the Policy, Allied provided malpractice coverage to the Firm, Michael Gluck and Christopher Walrath for the following:

I. INSURING AGREEMENT

The Insurer will pay on behalf of an Insured, subject to the applicable Limit of Liability set forth in Item 3.I. of the Declarations, all amounts in excess of the Retention shown in the Declarations, that an Insured becomes legally obligated to pay as Damages and Claim Expenses because of a Claim arising out any of the following Wrongful Acts by an Insured first made during the Policy Period or any Extended Reporting Period:

A. Legal Services Wrongful Act

28. Pursuant to the Policy **LEGAL SERVICES WRONGFUL ACT** means:

“1. [A]ny actual or alleged act, error or omission committed by any Insured, solely in the performance of or failure to perform **Legal Services**.”

29. **LEGAL SERVICES** are defined in the Policy to mean “those services performed on behalf of the **Named Insured** for others by an **Insured** ... as a licensed lawyer in good standing ... but only where such services were performed in the **Insured’s** activities as a lawyer.”

30. Pursuant to the terms of the Policy the **Name Insured** is Gluck Walrath, LLP.

31. The Policy requires Allied to defend any Claim against the Firm “seeking **Damages** that are covered by this Policy and made against an **Insured** even if any of the allegations of the **Claim** are groundless, false or fraudulent.”

32. Plaintiffs have been sued in the Union Street litigation for legal malpractice by Third Party Plaintiffs Brunette, LePree, Watt, and J. Watt for **Legal Services** provided to them by the Firm, Michael Gluck and Christopher Walrath.

33. Under the clear Policy language the allegations of legal malpractice made in the Union Street litigation constitute a **Legal Services Wrongful Act** as defined in the Policy.

34. While the claims asserted by the Third Party Plaintiffs against Plaintiffs are groundless, false and fraudulent, Plaintiffs had a reasonable expectation that they were covered against claims of legal malpractice, including the claims set forth against them in Count Two of the Third Party Complaint, and that Allied would provide legal malpractice coverage under the plain language of the Policy.

35. Defendant Allied has wrongfully denied Plaintiffs coverage under the Policy, relying upon Exclusions B 2 and B 3 of the Policy.

36. In denying coverage to Plaintiffs for the claims asserted by Third Party Plaintiffs, Allied took the position that the Policy Exclusions B 2 and 3 applied barring coverage.

37. Exclusions, B 2 states in pertinent part:

B. This Policy does not cover any **Claim or Disciplinary Proceeding** based upon, arising out of, directly or indirectly resulting from, in consequence of, or in any way involving, in whole or in part:

* * *

2. the **Insured's** capacity or status as:

(a) an officer, director, partner, trustee, shareholder, manager or employee of a: (i) business enterprise; (ii) charitable organization; (iii) pension fund or trust; (iv) welfare fund or trust; (v) profit sharing fund or trust; (vi) mutual fund or trust; or (viii) investment fund or trust;

38. In connection with Exclusion B 2, Allied has asserted that the exclusion applied because "Mr. Gluck and Mr. Walrath invested in the business enterprise [Brickwall] giving rise to this lawsuit such that they were either partners, shareholders or manager in the business." See Exhibit F.

39. Allied's assertion in this regard is factually and legally incorrect. Michael Gluck and Christopher Walrath never invested in, or had any ownership interest in Brickwall. Union Street, a separate legal entity owned by Michael Gluck and Christopher Walrath, invested in Brickwall.

40. Based on Allied's own interpretation of Exclusion B 2, the exclusion does not factually or legally apply to the malpractice allegations of the Third Party Complaint because neither Michael Gluck nor Christopher Walrath were ever owners of Brickwall.

41. Although Allied has never taken the position that Exclusion B 2 applies to Union Streets' investment in Brickwall, and any attempt to do so would render the Exclusion meaningless, ambiguous and contrary to the positions taken by Allied and their counsel.

42. Allied has also asserted that Exclusions, B 3 of the Policy applies. That exclusion states in pertinent part:

3. any actual or alleged **Wrongful Acts** of an **Insured**, whether or not such **Legal Services** are performed with or without compensation, for any business enterprise, whether for profit or not-for-profit, in which any **Insured**, or a member of an **Insured's Immediate Family**, has a "Material Interest."

For purposes of this Exclusion B.3., a "Material Interest" shall mean the right of an **Insured** or a member of an **Insured's Immediate Family** directly or indirectly to:

- (a) own 10% or more of an interest in an entity;
- (b) vote 10% or more of the issued and outstanding voting stock in an incorporated entity;
- (c) elect 10% or more of the directors of an incorporated entity;
- (d) receive 10% or more of the profits of an unincorporated entity; or
- (e) act as general partner of a limited partnership, managing general partner of a general partnership, or comparable positions in any other business enterprise.

43. Neither the Firm, nor Michael Gluck and/or Christopher Walrath, who are the **Insureds** under the Policy, owned any interest in Brickwall such that Exclusion B 3 would apply.

44. To the extent that Allied contends the claims arise out of Union Street's investment in Brickwall, Union Street is not an **Insured** under the Policy. Moreover, Union Street did not invest in Brickwall until after the lease was negotiated.

45. Based on the undisputed facts, neither Exclusion B 2 or B 3 apply and Allied is obligated to provide malpractice coverage to the Firm, Michael Gluck and Christopher Walrath for the allegations of legal malpractice contained in the Third Party Complaint.

46. Even if Allied questioned whether some of the allegations were covered, Allied had an obligation to provide a defense for those allegations clearly covered by the policy language and reserve its rights on any claims which it believed might not be covered.

47. Allied's position in denying coverage is contrary to the language of the policy and no reasonable **Insured** would interpret the Policy in the manner in which Allied has.

48. Pursuant to N.J.S.A. 2A:16-51, a justiciable controversy exists between the parties and Plaintiffs seeks a determination as to the parties' respective rights and legal obligations under the Policy, including, but not limited to, Plaintiffs' right to coverage for the allegations contained in Count Two of the Third Party Complaint.

WHEREFORE, Plaintiffs demand judgment for the following:

- A. Declaring that the Allied Policy provides legal malpractice coverage to the Plaintiffs for the allegations of Count Two of the Third Party Complaint in MON-L-3007-18;
- B. Compelling Allied to defend and indemnify Plaintiffs against the claims of legal malpractice set forth in Count Two of the Third Party Complaint in MON-L-3007-18;
- C. For Compensatory and Consequential Damages;
- D. For all Attorneys Fees, Costs and Expenses in connection with this action, as well as all Attorneys Fees, Costs and Expenses that Plaintiffs have incurred in defending against the Third Party Complaint;

E. For such other relief as the Court may deem just and equitable.

COUNT TWO
(Bad Faith)

49. Plaintiffs repeat and replead each and every allegation of paragraphs 1 through 24 and Count One of the Complaint as if fully set forth herein.

50. Every insurance contract in New Jersey carries with it an obligation of good faith and fair dealing.

51. To act in good faith and deal fairly, a party must act in a way that is honest and faithful to the agreed purposes of the contract and consistent with the reasonable expectations of the parties, and must not act in bad faith, dishonestly, or with improper motive to destroy or injure the right of the other party to receive the benefits or reasonable expectations of the contract.

52. Allied's denial of coverage is contrary to the clear language of the Insuring Provision of the Policy and is not consistent with the language and intent of Exclusions B 2 and 3 of the Policy.

53. Allied's stated position in denying coverage is based upon a factual assertion by Allied that Michael Gluck and Christopher Walrath individually invested in Brickwall, which Allied knows, or, with the exercise of due diligence, should have known, was not true.

54. Michael Gluck and Christopher Walrath never individually invested in Brickwall.

55. None of the **Insureds** under the Allied Policy ever owned any interest in Brickwall.

56. To the extent relevant to the coverage issues, the investment made by Union Street was made after most of the alleged acts of malpractice asserted by the Third Party Plaintiffs occurred.

57. Even if Allied questioned whether some of the allegations of malpractice were covered, Allied had a good faith obligation to provide a defense for those allegations clearly covered by the policy language and to reserve its rights on any claims which Allied believed might not be covered.

58. In denying coverage to the Firm, Michael Gluck and Christopher Walrath, Allied breach its obligation of good faith and fair dealing and acted in bad faith and denied Plaintiffs from receiving the benefits and/or reasonable expectations of the Policy.

WHEREFORE, Plaintiffs demand judgment for the following:

- A. Declaring that the Allied Policy provides legal malpractice coverage to the Plaintiffs for the allegations of Count Two of the Third Party Complaint in MON-L-3007-18;
- B. Compelling Allied to defend and indemnify Plaintiffs against the claims of legal malpractice set forth in Count Two of the Third Party Complaint in MON-L-3007-18;
- C. For Compensatory and Consequential Damages;
- D. For Punitive Damages;
- E. For all Attorneys Fees, Costs and Expenses in connection with this action as well as the Attorneys Fees, Costs and Expenses that Plaintiffs have incurred in defending against the Third Party Complaint;
- F. For such other relief as the Court may deem just and equitable.

DESIGNATION OF TRIAL COUNSEL

Pursuant to R. 4:25-4, Robyn B. Gigl is hereby designated as trial counsel on behalf of Plaintiffs, GluckWalrath LLP, Michael H. Gluck and Christopher M. Walrath.

RULE 4:5-1 AND R. 1:38-7 CERTIFICATION

Robyn B. Gigl, of full age, hereby certifies and states as follows: I am an attorney at law of this State in good standing and a partner of GluckWalrath LLP, attorneys for Plaintiffs, GluckWalrath LLP, Michael H. Gluck and Christopher M. Walrath.

The matter in controversy herein is not the subject of any pending action or arbitration proceeding. It is related to Union Street Investments, LLC as successor in interest to Union Street Investments Ewing, LLC v. Smith Group; Brickwall at Campus Town, LLC (formerly known as and/or successor in interest to Brickwall at TCNJ, LLC) ("Brickwall"); Pink & Red, LLC; Margaret Brunette; Kyle LePree; James Watt; and, Jason Watt, and docketed as MON-L-3007-18. I am not aware of any additional party which may need to be joined in this action.

In addition, I certify that confidential personal identifiers have been redacted from documents now submitted to the court, if any, and will be redacted from all documents submitted in the future in accordance with R. 1:38-7.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

GluckWalrath LLP
Attorneys for Plaintiffs

By: /s/ Robyn B. Gigl
Robyn B. Gigl

Dated: January 22, 2019