

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

SWORDFISH FITNESS OF)
FRANKLIN, INC. DBA Burn)
Bootcamp Franklin, TN,)
)
SWORDFISH FITNESS OF)
NOLENSVILLE, INC. DBA Burn)
Bootcamp Nolensville, TN, and)
)
SWORDFISH FITNESS OF)
SPRINGHILL, INC. DBA Burn)
Bootcamp Spring Hill, TN.)
)
Plaintiffs,)
)
vs.)
)
MARKEL INSURANCE)
COMPANY, and HERBERT W.)
SINER III DBA Trey Siner,)
)
Defendants.)

Docket No.: _____

JURY DEMAND

COMPLAINT

Plaintiffs, SWORDFISH FITNESS OF FRANKLIN, INC. DBA Burn Bootcamp Franklin, TN, SWORDFISH FITNESS OF NOLENSVILLE, INC. DBA Burn Bootcamp Nolensville, TN, and SWORDFISH FITNESS OF SPRINGHILL, INC. DBA Burn Bootcamp Spring Hill, TN, pursuant to Fed. R. Civ. P. 3 and by and through their undersigned counsel, file this action against Defendant, MARKEL INSURANCE COMPANY and HERBERT W. SINER III DBA Trey Siner, and alleges:

NATURE OF ACTION

1. This is an action for Declaratory Judgment pursuant to 28 U.S.C. § 2201 to determine questions of insurance coverage under policies of insurance issued by Defendants to Plaintiffs.

2. This is also an action for breach of insurance contracts for Defendant Markel's failure to pay insurance policy proceeds that were due and owing to Plaintiffs under the policies of insurance.

3. This is also an action for negligence against Defendants for failing to properly disclose insurance coverage, limitations, and exclusions to Plaintiff.

JURISDICTION AND VENUE

4. Plaintiff Swordfish Fitness of Franklin is a Tennessee corporation d/b/a Burn Boot Camp Franklin, TN with its principal place of business at 1113 Murfreesboro Road, Franklin, TN 37064.

5. Plaintiff Swordfish Fitness of Nolensville is a Tennessee corporation d/b/a Burn Boot Camp with its principal place of business at 7166 Nolensville Rd, Ste 110 Nolensville, TN 37135.

6. Plaintiff Swordfish Fitness of Springhill is a Tennessee corporation d/b/a Burn Boot Camp Spring Hill with its principal place of business at 2001 Campbell Station Pkwy, Ste 7, Spring Hill, TN 37174.

7. Defendant Markel Insurance Company is a "for profit" corporation with a principal place of business at 4521 Highwoods Parkway, Glen Allen, VA 23060. At all times material, Defendant was licensed to do business in the State of Tennessee. Defendant was and is engaged in a course of conduct in which revenue was derived from providing goods and/or services

throughout Tennessee and maintained one or more agents and/or representatives in Tennessee. Defendant Markel entered into insurance contracts with insureds located in Tennessee, including Franklin, Tennessee, Nolensville, Tennessee and Spring Hill, Tennessee.

8. Defendant Herbert W. Siner III d/b/a Trey Siner is a licensed insurance agent in Tennessee, License No. 2333959, National Producer No. 6560144, with a principal office at 247 Church Street NE, Concord, NC 28025.

9. The action also seeks damages in excess of Seventy-Five Thousand Dollars (\$75,000), exclusive of interest, costs and attorney's fees.

10. Venue is proper in this Court because Plaintiff's principal place of business is in the Middle District of Tennessee; the Policies were entered into, issued, and covers property located in the Middle District of Tennessee; and this cause of action arose in the Middle District of Tennessee.

11. Venue is properly situated in the United States District Court for the Middle District of Tennessee under 28 U.S.C. § 123(b)(1).

12. This Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1332.

POLICY – SWORDFISH FITNESS OF FRANKLIN, INC.

13. Defendant issued Plaintiff Swordfish Fitness of Franklin, Inc. a "Commercial Lines" policy of insurance, Policy Number HCP1450-02 (the "Swordfish Franklin Policy"). The Policy had an effective date of December 19, 2019, to December 19, 2020. A certified copy of the Policy in Plaintiff's possession is attached as Exhibit "A."

14. At all times material the Policy was in full force and effect and provided coverage to Plaintiff's property at 1113 Murfreesboro Road, Franklin, TN 37064.

15. The Policy provides coverage for Plaintiff's loss of business income and other losses and damages.

POLICY – SWORDFISH FITNESS OF NOLENSVILLE, INC.

16. Defendant issued Plaintiff Swordfish Fitness of Nolensville, Inc. a "Commercial Lines" policy of insurance, Policy Number HCP1736-02 (the "Swordfish Nolensville Policy"). The Policy had an effective date of March 5, 2020, to March 5, 2021. A certified copy of the Policy in Plaintiff's possession is attached as Exhibit "B."

17. At all times material the Policy was in full force and effect and provided coverage to Plaintiff's property at 7166 Nolensville Rd, Ste 110 Nolensville, TN 37135.

18. The Policy provides coverage for Plaintiff's loss of business income and other losses and damages.

POLICY – SWORDFISH FITNESS OF SPRING HILL, INC.

19. Defendant issued Plaintiff Swordfish Fitness of Spring Hill, Inc. a "Commercial Lines" policy of insurance, Policy Number HCP20035601-03 (the "Swordfish Spring Hill Policy"). The Policy had an effective date of November 1, 2019, to November 1, 2020. A certified copy of the Policy in Plaintiff's possession is attached as Exhibit "C."

20. At all times material the Policy was in full force and effect and provided coverage to Plaintiff's property at 2001 Campbell Station Pkwy, Ste 7, Spring Hill, TN 37174.

21. The Policy provides coverage for Plaintiff's loss of business income and other losses and damages.

AGENCY/VICARIOUS LIABILITY

22. Markel Insurance Company (hereafter referred to as “Markel”) furnished Trey Siner (hereafter referred to as “Siner”) with blank forms, applications, and other supplies to be used in soliciting, negotiating, or effecting contracts of insurance on its behalf.

23. Markel authorized Siner to sell and market Markel’s insurance policies to members of the public. The authorization was within the course and scope of Siner’s appointment with Markel.

24. Additionally, Siner was the actual agent for Markel, as evidenced by:

- a) An acknowledgement by Markel that Siner would act for Markel;
- b) Siner’s acceptance of the undertaking; and
- c) Markel’s control over Siner’s actions, including providing Siner with the means and ends to procure insurance for third persons.

25. Additionally, Siner was the actual agent for Markel, as evidenced by Siner having binding authority for Markel.

26. In the alternative to being the actual agent, Siner was the apparent agent for Markel, as evidenced by:

- a. A representation by Markel that Siner was its insurance agent and could provide insurance or otherwise act on Markel’s behalf;
- b. A reliance on that representation by others, including Plaintiffs; and
- c. A change in position by others, in reasonable reliance of the representation, including reasonable reliance by Plaintiffs, evidenced by Plaintiffs’ purchase of Markel’s insurance policies from Siner.

27. Pursuant to the doctrine of respondeat superior and Tennessee common and statutory law, including but not limited to Tenn. Code Ann. § 56-6-115(b), Markel is subject to civil liability to Plaintiffs to the same extent and in the same manner as if Siner had been appointed or authorized by Markel to act on its behalf.

28. Pursuant to the doctrine of respondeat superior and Tennessee common and statutory law, including but not limited to Tenn. Code Ann. § 56-6-115(b), Markel is vicariously liable for all acts and omissions of Siner.

VIRUS/PANDEMIC

29. As this Court is well aware, the SARS-CoV-2 virus (commonly called by the disease it causes, “COVID-19”) is a most recent strain of coronavirus. It is publicly acknowledged that COVID-19 is highly contagious and appears to have a higher mortality rate than other more common strains of virus, and the prevalence of COVID-19 has resulted in a pandemic. The pandemic became widespread in the United States at the beginning of the calendar year 2020.

30. ~~As~~ a result of the SARS-CoV-2 virus and COVID-19 pandemic, state and local governments issued executive orders, decrees, and mandates which prohibited and/or limited patrons, customers, vendors, employees and others from going to business establishments, including Plaintiff’s business, resulting in the suspension of operations at the insured premises.

31. As a result, Plaintiffs sustained business losses (“Loss”).

32. The Loss is covered under the Policy.

EXECUTIVE ORDERS

33. On March 12, 2020, Tennessee Governor Lee issued Executive Order No. 14 and declared a state of emergency in Tennessee as a result of COVID-19. A copy of Executive Order No. 14 is attached as Exhibit “D.”

34. On March 22, 2020, Governor Lee issued Executive Order No. 17, directly addressing “gyms and fitness centers.” A copy of Executive Order No. 17 is attached as Exhibit “E.” Executive Order No. 17 states, in pertinent part: “Gyms or fitness/exercise centers or substantially similar facilities shall not be open to members or the public.” Exhibit E.

35. On March 30, 2020, Governor Lee issued Executive Order No. 22 and ordered all persons in Tennessee to practice “safer at home,” including limiting movements and interactions to *only* those necessary to obtain or provide essential services or conduct essential activities. A copy of Executive Order No. 22 is attached as Exhibit “F.”

DIRECT PHYSICAL LOSS, EXTRA EXPENSE, AND CIVIL AUTHORITY

36. Due to the existence of COVID-19 and the related pandemic, and the Executive Orders issued by Governor Lee that ban gatherings of more than 10 people, ordering the closure of fitness centers (including Plaintiffs’ fitness centers), and requiring the public to practice “safer at home,” the insured properties were not able to function as intended by Plaintiffs and Defendants. Plaintiffs lost the use of the insured properties and as a result, Plaintiffs lost the ability to operate as fitness centers and necessarily had to suspend its business activities occurring at the insured properties.

37. Plaintiffs’ loss of use of the insured properties and insured properties’ inability to function as intended by Plaintiffs and Defendants is a direct physical loss. As a result of this direct physical loss, Plaintiffs have suffered loss of business income, have incurred “extra expense” to minimize the suspension of business and continue its operations, and have suffered other losses and damages. Plaintiffs have further suffered loss of business income and extra expense due to the action of civil authority that prohibits access to Plaintiffs’ insured premises. The action of civil authority was a result of direct physical loss of or damage to other property, other than at the described premises, due to COVID-19, the related pandemic, and other covered causes of loss.

COUNT I – DECLARATORY JUDGMENT

38. Plaintiffs incorporate by reference all allegations herein.

39. Plaintiffs believe that the Loss is covered under the Policies. Defendants disagree. As a result, Plaintiffs seek a declaration from this Court that the Loss is covered under the Policy.

WHEREFORE, pursuant to 28 U.S.C. § 2201, Plaintiffs, SWORDFISH FITNESS OF FRANKLIN, INC. DBA Burn Bootcamp Franklin, TN, SWORDFISH FITNESS OF NOLENSVILLE, INC. DBA Burn Bootcamp Nolensville, TN, and SWORDFISH FITNESS OF SPRINGHILL, INC. DBA Burn Bootcamp Spring Hill, TN, respectfully request that this Court grant Declaratory Judgment for Plaintiffs, declaring:

- A. Plaintiffs' Loss is a covered loss under the Policy
- B. Plaintiffs suffered damages as a result of Markel's improper denial of coverage.

COUNT II – BREACH OF THE INSURANCE POLICIES

- 40. Plaintiffs incorporate by reference all allegations herein.
- 41. Plaintiffs complied with all conditions precedent to entitle Plaintiffs to recover under the Policies, or Markel waived compliance with such conditions.
- 42. Markel chose not to pay Plaintiffs for the Loss.
- 43. Markel's choice not to pay for the Loss is a material breach of contract.
- 44. Defendant Markel's acts and omissions were a direct and proximate cause of the Plaintiffs' damages described herein.

COUNT III – NEGLIGENCE (IN THE ALTERNATIVE)

- 45. Plaintiffs incorporate by reference all allegations herein.
- 46. This Count applies if the Court determines that the Loss is not covered under the Policy.
- 47. Defendant Siner undertook and agreed to place a businessowner insurance policy on the Properties of the Plaintiffs.

A. Special Relationship

48. The parties had a special relationship which is identified, in part, as follows:

- a. The parties had a relationship as the Insurance Company, the Insurance Company's Agent, and Insured (Plaintiffs).
- b. The Insurance Company and the Insurance Company's Agent are experts in insurance, ascertaining risks of loss, and providing appropriate insurance coverage for those risks. Plaintiffs are not.
- c. Plaintiffs needed to procure and maintain adequate and appropriate insurance coverage for its business.
- d. Adequate insurance coverage could save Plaintiffs' businesses. Inadequate insurance coverage could destroy Plaintiffs' businesses. Therefore Plaintiffs engaged the Insurance Company and the Insurance Company's Agent's services for the specific purposes of advising, helping make an informed decision, and procuring, providing and maintaining adequate and appropriate insurance coverage for its business to provide it against risks of loss.
- e. The Insurance Company and the Insurance Company's Agent undertook the duties to provide adequate insurance advice, ascertain Plaintiffs' risks of loss, and procure, provide, and maintain adequate and appropriate insurance coverage for Plaintiffs.
- f. The parties had a fiduciary relationship in that Plaintiffs placed its trust in the Insurance Company and the Insurance Company's Agent to procure, provide, and maintain adequate and appropriate insurance coverage for Plaintiffs, and the Insurance Company and the Insurance Company's Agent accepted that trust.

B. Duties of Reasonable Care

49. As a result of the relationship of the parties, Markel and Siner owed Plaintiffs many duties including, but not limited to:

- a. The duties of reasonable care that reasonably careful insurance companies and insurance agents would exercise under the circumstances. This duty includes the duty to explain relevant risks of loss; coverage; coverage options; limits; exclusions; and endorsements, and that insurance policies can be purchased without certain limits, exclusions, and endorsements.
- b. The Insurance Company and the Insurance Company's Agent undertook the duties to provide adequate insurance advice, ascertain Plaintiff's risks of loss, and procure, provide, and maintain adequate and appropriate insurance coverage for Plaintiff. Therefore, Insurance Company and the Insurance Company's Agent owed

duties to act carefully in providing those services and coverages, and to not put Plaintiff at an undue risk of harm by having inadequate and inappropriate insurance coverage in the event of a foreseeable loss.

c. Since the parties had a fiduciary relationship, the Insurance Company and the Insurance Company's Agent owed a fiduciary duty to Plaintiff to act for Plaintiff's benefit, while subordinating their own personal benefit to the interests of Plaintiff. Included in this duty was a duty to disclose all essential or material facts pertinent or material to the transaction in hand, including relevant risks of loss; coverage; coverage options; limits; exclusions; and endorsements, and the duty to explain that insurance policies could be purchased in the marketplace without certain limits, exclusions, and endorsements.

50. Defendant Siner, through his acts, omission, or both, failed to inform and explain to Plaintiffs the nature of the virus exclusions on Plaintiffs' policies.

51. Defendant Siner did not use reasonable and due care and diligence in ensuring Plaintiff was aware of the virus exclusions applicable to Plaintiffs' policies.

52. Plaintiffs justifiably relied on Defendant Siner to explain relevant risks of loss; coverage; coverage options; limits; exclusions; and endorsements, and that insurance policies can be purchased without certain limits, exclusions, and endorsements.

53. As a direct and proximate result of Defendant Siner's negligence, there was no coverage for the losses that the Plaintiffs incurred.

54. As a direct and proximate result of Defendant Siner's negligence, Plaintiffs sustained damages as described herein.

55. Defendant Siner is vicariously liable for the acts, omission, or both, of its agents, employees, or both, under the doctrine of respondeat superior.

56. At all times relevant to the matters alleged herein, Defendant Siner was an agent of Defendant Markel.

57. At all times relevant to the matters alleged herein, Defendant Siner was operating in the course and scope of his agency relationship with Defendant Markel.

58. Defendant Markel is vicariously liable for the acts, omissions, or both, of Defendant Siner under the doctrine of respondeat superior and Tennessee common and statutory law, including but not limited to Tenn. Code Ann. § 56-6-115(b).

COUNT IV – BREACH OF FIDUCIARY DUTY (IN THE ALTERNATIVE)

59. Plaintiff incorporates by reference all allegations herein.

60. This Count applies if the Court determines that the Loss is not covered under the Policy.

61. Plaintiffs and Defendant Siner had a fiduciary relationship based on Defendant Siner's undertaking and assuming responsibility to obtain business owner insurance on the Properties.

62. Defendant Siner had a duty to act for and to give advice for the benefit of the Plaintiffs on obtaining Businessowner insurance on the Properties.

C. Breach of the Duties

63. The Insurance Company and the Insurance Company's Agent breached their duties in numerous ways including, but not limited to:

- a. Failing to exercise the reasonable care that insurance companies and insurance agents would exercise under the circumstances;
- b. Failing to explain relevant risks of loss; coverage; coverage options; limits; exclusions; and endorsements;
- c. Failing to explain that insurance policies can be purchased without certain limits, exclusions, and endorsements.
- d. Failing to provide adequate insurance advice, ascertain Plaintiff's risks of loss, and procure, provide, and maintain adequate and appropriate insurance coverage for Plaintiff.
- e. Failing to act carefully in providing services and coverages to Plaintiff.
- f. Failing to provide and maintain adequate and appropriate insurance for Plaintiff, including failing to provide and maintain a policy and/or insurance coverage for

loss of business income related to foreseeable causes of loss including virus and pandemic.

g. Placing Plaintiff at an undue risk of harm by providing inadequate and inappropriate insurance coverage in the event of a foreseeable loss.

h. Failing to act as Plaintiff's fiduciary.

j. Failing to act for Plaintiff's benefit, while subordinating their own personal benefit to the interests of Plaintiff

k. Put their own personal benefit—commission on and sale of an insurance policy, and policy premiums—ahead of the interests of Plaintiff in having adequate and appropriate insurance in the event of foreseeable loss.

64. Defendant Siner, through its acts, omissions, or both failed to inform Plaintiffs that its insurance policies would not provide coverage for the type of loss the Plaintiffs sustained.

65. Defendant Siner did not use reasonable and due care and diligence in communicating with Plaintiffs about their business owner insurance policies and the types of losses not covered by Plaintiffs policies.

66. Defendant Siner breached his fiduciary duty to Plaintiffs.

67. Plaintiffs justifiably relied on Defendant Siner to ensure they had appropriate coverage for anticipated causes of loss.

68. As a direct and proximate result of Defendant Siner's breach of fiduciary duty, there was no coverage for the type of loss Plaintiffs sustained.

69. Defendant Siner is vicariously liable for the acts, omission, or both, of its agents, employees, or both, under the doctrine of respondeat superior.

70. At all times relevant to the matters alleged herein, Defendant Siner was an agent of Defendant Markel.

71. At all times relevant to the matters alleged herein, Defendant Siner was operating in the course and scope of his agency relationship with Defendant Markel.

72. Defendant Markel is vicariously liable for the acts, omissions, or both, of Defendant Siner under the doctrine of respondeat superior and Tennessee common and statutory law, including but not limited to Tenn. Code Ann. § 56-6-115(b).

PRAYER FOR RELIEF

WHEREFORE plaintiffs request the following relief:

- a. That this matter be set for trial before a jury of twelve (12);
- b. That Plaintiff be awarded all available tort and contract damages against Defendants, jointly and severally, for a fair and reasonable amount to be determined by the jury;
- c. That Plaintiff be awarded pre-judgment and post-judgment interest as allowed by law; and
- d. Such further relief as the Court may deem just and equitable.

Dated this 9th day of October, 2020.

Respectfully Submitted,



Alex S. Fisher (BPR #31391)

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