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

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| **GASTON & MURRELL FAMILY DENTISTRY, PLLC,** | ) | |
| **Plaintiff,** | ) | |
| **v.** | ) | **CASE NO. _____** |
| **THE CINCINNATI INSURANCE COMPANY, THE CINCINNATI CASUALTY COMPANY, AND THE CINCINNATI INDEMNITY COMPANY,** | ) | **JURY TRIAL DEMANDED** |
| **Defendants.** | ) | |

# COMPLAINT

Plaintiff Gaston & Murrell Family Dentistry, PLLC, for its Complaint against The Cincinnati Insurance Company, The Cincinnati Casualty Company and The Cincinnati Indemnity Company (the "Defendants"), alleges as follows:

1. Plaintiff is the owner and operator of a dentistry practice in Nashville, Tennessee who has been forced, by recent orders issued by the City of Nashville ("City") and the State of Tennessee ("State"), to cease and/or curtail its non-emergency operations—through no fault of its own—as part of the State's efforts to address the COVID-19 crisis. The closures mandated by these orders present an existential threat to small local businesses such as Plaintiff's. To protect its business from situations like these, which threaten its livelihood based on factors wholly outside of its control, Plaintiff obtained business interruption insurance from Defendants. In a blatant breach of their insurance obligations that they voluntarily undertook in exchange for Plaintiff's premium payments, Defendants denied Plaintiff's claims arising from the State and City-ordered interruption of its business.

2. As a result, Plaintiff now brings this action against Defendants for their intentional failure to honor their obligations under the commercial businessowners insurance policy issued to Plaintiff, which provides coverage for losses incurred due to a suspension of its operations, including when its business is forced to close due to a government order.

3. On or about March 23, 2020, Tennessee Governor Bill Lee issued Executive Order No. 18 that prohibited dentistry practices in the State from performing any non-emergency dental or oral procedures including hygiene visits, cosmetic procedures, and other elective procedures. These restrictions remained in effect until May 6, 2020 due to extensions through Executive Orders No. 25 and No. 31. (Executive Order No. 18 and its extensions through Orders No. 25 and No. 31 are attached hereto as **Collective Exhibit 1**). On or about March 30, 2020, during the term of the policy issued by Defendants to Plaintiff, Tennessee Governor Bill Lee issued Executive Order No. 22, and later an extension through Order No. 27, which ordered all Tennesseans to stay home unless otherwise engaged in an enumerated essential service/activity to avoid exposure to and the spread of COVID-19. These Orders remained in effect until April 30, 2020. (Executive Order No. 22 and its extension through Order No. 27 are attached hereto as **Collective Exhibit 2**.) These State Orders are hereinafter collectively referred to as the "Closure Orders."

4. As a result of the Closure Orders, Plaintiff has been forced to halt ordinary operations, resulting in substantial lost revenues and forcing Plaintiff to furlough or lay off its employees.

5. Despite Defendants' express promise in their policy to cover their insureds' business interruption losses when a government forces them to close, Defendants began issuing blanket denials to insureds for any losses related to the Closure Orders without first conducting

any meaningful coverage investigation, let alone a "reasonable investigation based on all available information" as required under Tennessee law.

6. The speed with which Defendants denied these claims indicate that Defendants already decided and put into place procedures for the blanket denial of claims, regardless of the particular facts of any given insured restaurant.

7. Defendants denied Plaintiff's claim by letter dated April 15, 2020. *See* Denial Letter attached here as "**Exhibit 3**."

8. But Defendants' conclusory statements are contrary to applicable law. The presence of a dangerous substance in a property constitutes "physical loss or damage." The physical closing and/or inability of Plaintiff to open due to the Closure Orders also constitutes a physical loss so as to entitle it to coverage under the policy.

9. Moreover, unlike many commercial property policies available in the market, the policy sold by Defendants does not include an exclusion for loss caused by a virus. Furthermore, none of the defendants' other policy exclusions apply to Plaintiff's claim. Thus, Plaintiff reasonably expected that the insurance it purchased from Defendants would and did include coverage for property damage and business interruption losses caused by viruses like the COVID-19 coronavirus.

10. If Defendants wanted to exclude pandemic-related losses under its various insureds' policies—as many other insurers have done in other policies—they easily could have attempted to do so on the front-end with an express exclusion. Instead, Defendants waited until after they collected Plaintiff's premiums, and after a pandemic and the resulting Closure Orders caused catastrophic business losses to Plaintiff, to try to limit its exposure on the back-end through

their erroneous and improper assertion that the presence of the coronavirus is not "physical loss" and therefore is not a covered cause of loss under its Policy.

11. The fact that the insurance industry has created specific exclusions for pandemic-related losses under similar commercial property policies undermines Defendants' assertion that the presence of a virus, like the coronavirus, does not cause "physical loss or damage" to property. Indeed, if a virus could never result in a "physical loss" to property, there would be no need for such an exclusion. Moreover, Defendants' assertion ignores the fact that their policies promised to provide coverage for losses incurred due to government actions "taken in response to dangerous physical conditions," even if those dangerous physical conditions cause damage to property at locations other than those insured under its policies.

12. Thus, Defendants' wholesale, cursory coverage denial is arbitrary and unreasonable, and inconsistent with the facts and plain language of the issued policy. These denials appear to be driven by Defendants' desire to preempt their own financial exposure to the economic fallout resulting from the COVID-19 crisis, rather than to initiate, as Defendants are obligated to do, a full and fair investigation of the claims and a careful review of the policy they sold to Plaintiff in exchange for valuable premiums.

13. As a result of Defendants' wrongful denial of coverage, Plaintiff files this action for a declaratory judgment establishing that it is entitled to receive the benefit of the insurance coverage it purchased, for indemnification of the business losses it has sustained, for breach of contract, and for bad faith claims handling.

## PARTIES

14. Plaintiff Gaston & Murrell Family Dentistry, PLLC is a Tennessee limited liability company, with its principal places of business in Nashville, Tennessee. Plaintiff's member is a

citizen of Tennessee. Plaintiff operates its business at 2211 Crestmoor Road, Nashville, Tennessee 37215. Plaintiff has a Businessowners Policy from Defendants, Policy No. ECP 0202737, which covers losses for occurrences at that dentistry practice.

15. Defendants are insurance companies qualified and authorized to do business in the State of Tennessee and are, in fact, engaged in the business of selling insurance contracts to commercial entities such as Plaintiff in Tennessee and elsewhere. Defendants are incorporated in the State of Ohio and maintain their principal place of business in Ohio.

## JURISDICTION & VENUE

16. This Court has subject matter jurisdiction under 28 U.S.C. § 1332 because there is complete diversity between the parties and the amount in controversy exceeds $75,000, exclusive of interest and costs.

17. This Court has personal jurisdiction over Defendants because they are qualified and authorized to do business in Tennessee through the office of the Commissioner of the Tennessee Department of Commerce and Insurance. As such, they have therefore appointed the Commissioner, the Commissioner's Chief Deputy or their successors its true and lawful attorneys upon either of whom all lawful process in any action or legal proceeding against them pursuant to T.C.A. § 56-2-103. In addition, this Court has personal jurisdiction over Defendants because Defendants have submitted to jurisdiction in this state by: (a) transacting business in Tennessee; (b) contracted to insure the Plaintiff located within Tennessee at the time of contracting; and (c) entering into a contract substantially connected within Tennessee.

18. This Court has jurisdiction to grant declaratory relief under 28 U.S.C. § 2201 because an actual controversy exists between the parties as to its respective rights and obligations

under the Policy with respect to the loss of business arising from the Closure Orders detailed in this Complaint.

19. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omission giving rise to Plaintiff's claims occurred within the Middle District of Tennessee.

## FACTUAL ALLEGATIONS

20. Plaintiff incorporates by reference, as if fully set forth herein, the allegations in the foregoing paragraphs.

### A. The Defendants' Policy

21. In exchange for substantial premiums, Defendants sold a commercial property insurance policy promising to indemnify the Plaintiff for losses resulting from occurrences, including the "necessary suspension" of business operations at any insured location caused by a government order, during the relevant time period (the "Policy").

22. The Policy was issued to Plaintiff at its principal place of business in Tennessee.

23. The relevant provisions setting forth the scope of coverage for business interruption losses are attached here as "**Exhibit 4**."

24. The Policy is an "all risk" policy that provides broad coverage for losses caused by any cause unless expressly excluded.

25. The Defendants' Policy does not exclude losses from viruses or pandemics. Thus, the all-risk Policy purchased by the Plaintiff covers losses caused by viruses, such as COVID-19.

26. In addition to property damage losses, Defendants also agreed to "pay for the actual loss of Business Income" sustained by Plaintiff due to "the necessary suspension" of Plaintiff's operations during the period of business interruption caused by "by direct 'loss' to property" at the insured's premises.

27. With respect to business interruption losses, "suspension" means: (a) "The slowdown or cessation of your business activities"; and (b) "that a part or all of the 'premises' is rendered untenantable."

28. "Business Income" is defined in relevant part under the Policy as (a) "the Net Income (net profit or loss before income taxes) that would have been earned or incurred"; and (b) "the Continuing normal operating expenses sustained, including payroll."

29. Defendants also promised to "pay Extra Expense during the 'period of restoration.'" "Extra Expense" is defined in relevant part under the Policy as "necessary and reasonable expenses you incur during the 'period of restoration' that you would not have incurred if there had been no 'loss' due to a Covered Cause of Loss to Covered Property."

30. The Defendants' Policy also includes "Civil Authority" coverage, pursuant to which Defendants promised to pay for the loss of Business Income and necessary Extra Expense sustained by Plaintiff "caused by action of civil authority that prohibits access" to Plaintiff's premises.

31. This Civil Authority coverage is triggered when any non-excluded cause results in "damage to property other than Covered Property" at the Plaintiff's premises, and is intended to cover losses resulting from governmental actions "taken in response to dangerous physical conditions."

**B. The Plaintiff's Losses Due to the Coronavirus Pandemic and the Closure Orders.**

32. On March 11, 2020, the World Health Organization, an organization funded primarily by the U.S. Government, declared that the emerging threat from the novel coronavirus—otherwise known as COVID-19 - constituted a global pandemic.

33. Initial research on the virus and reports from the CDC indicated that the COVID-19 strains physically infect and can stay alive on surfaces for at least 17 days, a characteristic that renders property exposed to the contagion potentially unsafe and dangerous. Other research indicated that the virus may linger on surfaces for up to four weeks in low temperatures.

34. While infected droplets and particles carrying COVID-19 may not be visible to the naked eye, they are physical objects which travel to other objects and cause harm.

35. China, Italy, France, and Spain have implemented the cleaning and fumigating of public areas prior to allowing them to re-open publicly due to the intrusion of microbials.

36. The scientific community, and those personally affected by the COVID-19 Pandemic, recognize COVID-19 as a cause of real physical loss and damage. Contamination of the Plaintiff's property would be a direct physical loss requiring remediation to clean the surfaces of the Plaintiff's dentistry practice.

37. Plaintiff's dentistry practice is not a closed environment. People, including staff, customers, and others constantly, cycle in and out of the establishment. Businesses like the Plaintiff's are more susceptible to being or becoming contaminated, as both respiratory droplets and fomites are more likely to be retained on the Insured Property and remain viable for far longer compared to a facility with open-air ventilation. Therefore, there is an ever-present risk that the Plaintiff's property is contaminated and will continue to be contaminated.

38. The continuous presence of the coronavirus on or around Plaintiff's premises rendered the premises unsafe and substantially unusable for its intended use and, therefore, caused physical property damage or loss under the Policy.

39. The Closure Orders, which prohibited all non-emergency dental procedures and ordered all Tennesseans to remain home unless engaged in an enumerated essential activity, were

likewise made in direct response to the continued and increasing presence of the coronavirus on property on or around Plaintiff's premises.

40. The Closure Orders prohibited the public from accessing Plaintiff's dentistry practice unless seeking an emergency service, thereby causing the necessary suspension of its non-emergency operations and triggering the Civil Authority coverage under the Policy.

41. As a result of the Closure Orders, Plaintiff has suffered substantial Business Income losses.

42. Following the Closure Orders, Plaintiff promptly reported the loss to Defendants and Defendants assigned claim number 3525819 thereto (the "Claim") requesting coverage for its business interruption losses promised under the Policy.

43. Defendants responded to Plaintiff's claim with a denial letter dated April 15, 2020. The letter states, "The claim asserts a loss of business income due to COVID-19 closure Cincinnati has determined that coverage is unavailable for the claimed loss." The letter goes further and emphasizes that the Policy provides coverage for "direct physical loss of or damage to Covered Property at the premises," and that Cincinnati "has found no evidence of direct physical loss or damage at your premises." Finally, the letter indicates a conclusory denial under the civil authority coverage. Upon information and belief, Defendants have uniformly refused to pay its insureds under its standard policy for losses related to COVID-19.

## COUNT I: DECLARATORY JUDGMENT

44. Plaintiff incorporates by reference, as if fully set forth herein, the facts set forth in the foregoing paragraphs.

45. This Policy is an insurance contract under which Defendants were paid premiums in exchange for their promises to pay Plaintiff's losses for claims covered by the Policy, such as business losses incurred as a result of the government orders forcing it to close its business.

46. Plaintiff has complied with all applicable provisions of the Policy, including payment of the premiums in exchange for coverage under the Policy.

47. Defendants have arbitrarily and without justification refused to reimburse Plaintiff for any losses incurred by Plaintiff in connection with the covered business losses related to the Closure Orders and the necessary interruption of its businesses stemming from the COVID-19 pandemic.

48. An actual case or controversy exists regarding Plaintiff's rights and Defendants' obligations under the Policy to reimburse Plaintiff for the full amount of losses incurred by Plaintiff in connection with Closure Orders and the necessary interruption of its businesses stemming from the COVID-19 pandemic.

49. Pursuant to 28 U.S.C. § 2201, Plaintiff seeks a declaratory judgment from this Court declaring the following:

(a) Plaintiff's losses incurred in connection with the Closure Orders and the necessary interruption of its businesses stemming from the COVID-19 pandemic are insured losses under the Policy;

(b) Defendants waived any right they may have had to assert defenses to coverage or otherwise seek to bar or limit coverage for Plaintiff's losses by issuing blanket coverage denials without conducting a claim investigation as required under Tennessee law; and

(c) Defendants are obligated to pay Plaintiff for the full amount of the losses incurred and to be incurred in connection with the covered business losses related to the Closure Orders during the indemnity period and the necessary interruption of its businesses stemming from the COVID-19 pandemic.

## COUNT II: BREACH OF CONTRACT

50. Plaintiff incorporates by reference, as if fully set forth herein, the facts set forth in the foregoing paragraphs.

51. This Policy is an insurance contract under which Defendants were paid premiums in exchange for its promise to pay Plaintiff's losses for claims covered by the Policy, such as business losses incurred as a result of the government orders forcing it to close its business.

52. Plaintiff has complied with all applicable provisions of the Policy, including payment of the premiums in exchange for coverage under the Policy, and yet Defendants have abrogated their insurance coverage obligations pursuant to the Policy's clear and unambiguous terms.

53. By denying coverage for any business losses incurred by Plaintiff in connection with the Closure Orders and the COVID-19 pandemic, Defendants breached their coverage obligations under the Policy.

54. As a result of Defendants' breaches of the Policy, Plaintiff has sustained substantial damages for which Defendants are liable, in an amount to be established at trial.

55. Defendants' breach of contract was intentional, fraudulent, malicious, and/or reckless, therefore justifying an award of punitive damages. See, e.g., Riad v. Erie Ins. Exchange, 436 S.W.3d 256, 276 (Tenn. Ct. App. Oct. 31, 2013). Specifically, Defendants intentionally, fraudulently, maliciously, and/or recklessly: (1) failed to effectuate a prompt and fair settlement of Plaintiff's claim when liability was clear; (2) refused and failed to conduct a reasonable investigation of Plaintiff's claim based on all available information; (3) unjustly refused to pay Plaintiff's claim for their own financial preservation with no reasonable or justifiable basis; (4) refused and failed to obtain all reasonably available information and generally ignored Plaintiff's

claim; (5) failed to adopt, implement, and enforce reasonable standards for the prompt investigation and settlement of claims arising under the insurance policy; (6) failed to treat Plaintiff's interests equal to that of their own; (7) filed to timely and fully pay all amounts due and owing under the Policy with no reasonable or justifiable basis; (8) misrepresented facts and/or provisions of the Policy relating to coverage of the Loss; (9) engaged in premature and outcome determinative decision-making process engineered to result in the ultimate denial of Plaintiff's Claim even prior to Plaintiff making said Claim; and (10) engaged in such other acts toward Plaintiff that are contrary to the duties owed to Plaintiff as established by the customs and practices in the industry, the law, and the Policy. Defendants knew, or reasonably should have known, that Plaintiff was justifiably relying on the money and benefits due it under the terms of the Policy. Nevertheless, acting with conscious disregard for Plaintiff's rights and with the intention of causing or willfully disregarding the probability of causing unjust and cruel hardship on Plaintiff, Defendants consciously refused to compensate Plaintiff for its losses, and withheld monies and benefits rightfully due Plaintiff. In so acting, Defendants intended to and did injure Plaintiff in order to protect their own financial interests and should be punished. Plaintiff seeks and is entitled to punitive damages.

## PRAYER FOR RELIEF

**WHEREFORE,** Plaintiff respectfully prays that the Court:

1. Enter a declaratory judgment in favor of Plaintiff and against Defendants, declaring as follows:

(a) Plaintiff's losses incurred in connection with the Closure Orders and the necessary interruption of its businesses stemming from the COVID-19 pandemic are insured losses under the Policy;

(b) Defendants waived any right it may have had to assert defenses to coverage or otherwise seek to bar or limit coverage for Plaintiff's losses by issuing blanket coverage denials without conducting a claim investigation as required under Tennessee law; and

(c) Defendants are obligated to pay Plaintiff for the full amount of the losses incurred and to be incurred in connection with the covered business losses related to the Closure Orders during the indemnity period and the necessary interruption of its businesses stemming from the COVID-19 pandemic.

2. Enter a judgment on Count II of the Complaint in favor of Plaintiff and against Defendants and award damages for breach of contract in an amount to be determined by the jury;

3. Enter an award for punitive damages in an amount the jury may find appropriate;

4. Enter a judgment in favor of Plaintiff and against Defendants in an amount equal to all attorneys' fees and related costs incurred for the prosecution of this coverage action against Defendants, which amount to be established at the conclusion of this action;

5. Award to Plaintiff and against Defendants prejudgment interest, to be calculated according to law, to compensate Plaintiff for the loss of use of funds caused by Defendants' wrongful refusal to pay Plaintiff for the full amount in costs incurred in connection with Closure Order Claims.

6. Award Plaintiff such other, further, and additional relief as this Court deems just and appropriate.

**JURY DEMAND**

Plaintiff hereby demands trial by jury on all issues so triable.

Respectfully submitted,

*/s/ T. Roe Frazer II*
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