



CASE NO: A-20-817641-C
Department 1

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DISTRICT COURT
CLARK COUNTY, NEVADA

VICKIE'S DINER, a Nevada corporation;
Plaintiff,

CASE NO.:
DEPT. NO.:

v.

CAPITAL INSURANCE GROUP, a
California Company; NEVADA CAPITAL
INSURANCE GROUP, a Nevada domiciled
property and casualty insurance company and
member of the Capital Insurance Group;
AUTO-OWNERS INSURANCE
COMPANY, a Michigan corporation and the
parent company of Capital Insurance Group;
NEVADA WEST BUSINESS INSURANCE
AGENCY, a Nevada corporation and
authorized agent of Nevada Capital Insurance
Group, DOES I through X, inclusive; and
ROE BUSINESS ENTITIES I through X,
inclusive,

Defendants

COMPLAINT

COMES NOW, Plaintiff, Vickie's Diner, Inc., by and through its attorneys, Marc P. Cook,
Esq. of Cook & Kelesis, Ltd., and complains against Defendants as follows:

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I.

Parties

1. Vickie's Diner, Inc. is a Nevada corporation that operates as a restaurant, which conducts business in Las Vegas Nevada, and currently manages Palomino LLC.

2. Capital Insurance Group ("CIG") is a California property and casualty insurer, which currently knowingly, and intentionally conducts business in the state of Nevada by and through its subsidiary insurance companies.

3. Nevada Capital Insurance Company ("NCIC") is a Nevada corporation, and a subsidiary of CIG, which underwrites property and casualty insurance in the State of Nevada.

4. Auto-Owners Insurance Company is a Michigan domiciled corporation, and is the parent company of CIG and NCIG, and through its subsidiaries, knowingly, and intentionally conducts business in the state of Nevada.

5. Nevada West Business Insurance Agency, Inc. is a Nevada corporation, that acts as an insurance broker in the State of Nevada.

6. The true names or capacities of Defendants, DOES I through X are unknown to Plaintiff who, therefore, sues said Defendants by such fictitious names; Plaintiff is informed and believes and thereon alleges that each of the Defendants designated herein as DOE are responsible in some manner for the events and happenings referred to herein and caused damages proximately to Plaintiff as herein alleged, and that Plaintiff will ask leave of this Court to amend this Complaint to insert the true names and capacities of DOES I through X when the same have been ascertained and to join such Defendants in this action.

7. The true names or capacities of Defendants, ROE BUSINESS ENTITIES I through X are unknown to Plaintiff who, therefore, sues said Defendants by such fictitious names; Plaintiff is informed and believes and thereon alleges that each of the Defendants designated herein as DOE are responsible in some manner for the events and happenings referred to herein and caused damages proximately to Plaintiff as herein alleged, and that Plaintiff will ask leave of this Court to amend this Complaint to insert the true names and capacities of ROE BUSINESS ENTITIES I through X when the same have been ascertained and to join such Defendants in this action.

8. Venue is proper in this jurisdiction because all, if not most of the acts and omissions complained in this action took place in the state of Nevada.

II.

Nature of Action

9. Plaintiff purchased a policy of insurance with the Defendant companies with effective period September 2, 2019 through September 2, 2020 (“Policy”).

10. This Policy protects Plaintiff against loss of business income due to a suspension of operations generally identified as business interruption coverage.

11. The Policy also provides extra coverage for similar business losses.

12. On March 20, 2020, Nevada's Governor, Steve Sisolak, issued Declaration of Emergency Directive 003 which, among other directives, orders the cessation of "non-essential" business and for the purpose of this Complaint, all businesses conducted on the Palomino premises.

13. Section 11 of the Declaration of Emergency Directive 003 provides that the Directive lasts until April 16, 2020. On March 27h, 2020 Governor Sisolak issued a Guidance for Declaration of Emergency Directive 003 which continued the necessity of Plaintiff company's closure as it was identified as "non-essential" business, "where the risk of transmission of COVID-19 is high."

14. On April 1, 2020 Governor Sisolak extended the Declaration of Emergency Directive 003 to April 30, 2020.

15. On April 30, 2020 Governor Sisolak extended this Declaration of Emergency Directive 003 to mandate the closure of Plaintiff's business operations for what appears to be an indefinite period of time.

16. In accordance with the above-referenced directives, as well as the issues otherwise associated there with, Plaintiff has been forced to suspend business operations for an ongoing period of time. This closure has cost Plaintiff to suffer significant losses and incur significant expenses.

17. Under the policy, Plaintiff has paid substantial premiums to Defendants and Defendants, in turn, had promised to pay these losses and expenses as they are obligated to pay for them. Defendants have breached the terms of the policy and have failed to pay for those losses and expenses.

18. Defendants have refused to pay the losses and expenses.

19. Further, notwithstanding the Defendants' obligation to read and construe this policy in favor of the policy holder, Defendants have misconstrued, contorted, and manipulated the language of these policies in a manner to prevent the obligation of paying out to Plaintiff on this policy.

20. Defendants are a fiduciary of Plaintiff, and owe Plaintiff an obligation of good faith and fair dealing.

21. Plaintiff has been forced to bring this lawsuit to obtain insurance coverage wrongfully denied by Defendants at a time when Plaintiff is at one of its most vulnerable business positions and in need of such coverage to survive its loss of business income following the Order prohibiting plaintiffs from operating. Due to the suspension of business, Plaintiff has been forced to furlough and/or pay with no income to offset, all of its staff and has been forced to close its doors to its customers. Plaintiff sought coverage for its loss of business income from Defendants through a policy that provided coverage for loss of business income and food spoilage, including the salaries and other expenses owed and income earned. Defendants denied coverage of any losses, making taking action even more difficult and creating even further delay that is unsustainable for this small business and jeopardizes its ability to open its doors in the future and operate successfully.

III.

Factual Background

22. Vickie's Diner has successfully operated a well-known restaurant in Las Vegas, Nevada.

23. On September 2, 2019 Defendants, and each of them, sold, issued and/or produced a Commercial Lines Policy, which included business interruption coverage.

24. At all times relevant hereto, Plaintiff has timely paid its insurance premiums.

25. Defendants are aware of the business enterprises of Plaintiff's establishment.

26. The policy declarations provides for an aggregate limit of coverage of \$2,000,000 and the excess policy provides an additional \$2,000,000.

27. This policy contains business interruption coverage.

1 28. On or about April 21, 2020 Plaintiff contacted Defendants and filed a claim for
2 business interruption related to the COVID-19 pandemic.

3 29. The insurance policy further provides coverage for food spoilage for the “actual loss
4 sustained” up to \$25,000.00.

5 30. Upon receiving a claim from Plaintiff, Defendants, by and through CIG issued an
6 April 24, 2020 letter, advising that the claim would be processed.

7 31. On May 7, 2020, a representative of Defendants conducted an investigatory
8 interview with Plaintiff’s representative with respect to that claim.

9 32. On May 7, 2020 and May 15, 2020, Plaintiff provided supplemental information
10 requested by Defendants.

11 33. On May 19, 2020 another representative of Defendants contacted Plaintiff, again
12 requesting information that was duplicative of what had already been provided. Plaintiff again
13 produced the requested information to this second representative.

14 34. In May 2020, Defendants, and each of them, forwarded a letter dated April 21, 2020
15 – the very day of Plaintiff’s verbal notice of claim – denying Plaintiff’s claims in their entirety, on
16 the basis that no coverage existed for this claim, notwithstanding the Plaintiff’s payment of
17 premiums for such coverage.

18 35. Defendants letter denying coverage is dated prior to the date of the investigatory
19 interview, prior to Defendants two requests for information, and prior to Plaintiff’s production of
20 the requested information.

21 36. The denial letter advises that:

22 **After carefully reviewing** the coverage benefits and limitations of [Vickie’s
23 Diner’s] policy, Nevada Capital Insurance Company must respectfully decline
24 coverage and payment for this loss and claim in its entirety because all causes of
25 loss and damage either do not fall within the policy’s insuring clause or are excluded
26 from coverage under your policy. Accordingly, for the reasons explained in detail
27 below, no coverage applies under your policy and related endorsements.

28 (Bolded emphasis added.)

 37. Defendants, and each of them, conspired to construct each and every word and
phrase of the agreement in a manner such that if all language in the agreement was construed in the

1 same manner Defendants, they would not have to provide coverage for virtually any incident.
2 Defendants manner in contorting the English language and to with the benefit of hindsight hide
3 behind exclusions to the expense of accepting premiums would make this contract illusory.

4 38. By way of example, Defendants' denial letter represents the "Nuclear, Biological,
5 Chemical and Radioactive Agent Exclusion" as a basis for denial whereas the COVID-19 ordered
6 shut-down is not based on a nuclear, biological, chemical or radioactive agent.

7 IV.

8 Business Information

9 39. Plaintiff's business operates at 1700 Las Vegas Blvd. South, Las Vegas Nevada
10 89104, which is located in Clark County Nevada.

11 40. The ability to have patrons inside the premises is inherent to the nature of the
12 business.

13 41. As a business establishment operating with the pleasure of, and pursuant to Nevada's
14 relevant health and safety laws, it is subject to the compliance with the Governor's directives.

15 42. On March 13, 2020, Donald Trump, the President of the United States, declared a
16 National Emergency concerning the novel Coronavirus disease (COVID-19).

17 43. On March 20, 2020 Steve Sisolak, the Governor of the State of Nevada issued a
18 Declaration of Emergency - Directive 003 declaring a state public health emergency in the State of
19 Nevada. These directives created risks of direct physical loss or damage by a covered loss of a
20 covered property to Plaintiff.

21 44. All risk insurance policies are to be interpreted broadly in favor of coverage.
22 Notwithstanding this directive, Defendants, and each of them, interpreted and contorted the contract
23 to avoid providing coverage.

24 45. Policy exclusions are construed narrowly and against insurers. Notwithstanding this
25 legal maxim, Defendants, and each of them, have construed the exclusions as broadly as possible
26 to, in effect, create an insurance policy under which coverage could be denied under virtually any
27 condition.
28

1 46. Physical loss or damage to property occurs when a hazardous condition renders the
2 insured property unsafe where the property can not be used for its intended purpose.

3 47. “Direct physical loss” does not require a tangible injury to the structure of the
4 building.

5 48. “Direct physical loss” may exist in the absence of structural damage to an insured’s
6 property.

7 49. The presence of COVID-19 alone triggers coverage because it renders the insured’s
8 property unsafe or makes it unusable for the intended purpose.

9 50. The government directives in this matter and the social distancing restrictions of this
10 matter further created a business loss for this particular business model creating a business loss
11 covered under the policy.

12 51. The orders of the United States government and the State of Nevada constitute a
13 valid exercise of governmental powers.

14 52. Plaintiff, as a Nevada corporation and operator of a business within the State of
15 Nevada was subject to the orders of the federal and state government.

16 53. The orders of the government and the state of Nevada apply to both its citizens and
17 businesses.

18 54. With respect to the business establishments, the government directives prevented
19 the business operations of the Plaintiff. With respect to the citizens of the state of Nevada, and non-
20 citizens in the state of Nevada at the relevant times hereto, all were prevented from “non-work
21 related gatherings of 10 persons or more, or non-work related gatherings of any size that can not
22 maintain a consistent 6-foot distance between the persons.”

23 55. As a result of these directives Plaintiff was prevented from operating, earning
24 income, paying salaries, and paying debts.

25 56. The exercise of the government’s police power resulted in the direct physical loss
26 to Plaintiff company.

27 57. The government directives deprives Plaintiff of the value and functions of the
28 premises, thereby impairing said premises resulting in a direct physical loss of Covered Property.

58. The government orders as described herein and above triggered coverage because it resulted in direct physical loss of Covered Property.

59. Plaintiff's damages began on or about March 20th and continue on a day-to-day basis.

60. The orders of the government in the State of Nevada, and the federal government resulted in direct physical loss of Covered Property and that loss of Covered Property resulted in necessary suspension of Plaintiff's business operations.

FIRST CAUSE OF ACTION

Declaratory Relief

61. Plaintiff realleges and incorporates herein by this reference each and every allegation contained in Paragraphs 1 through 61, as though specifically set forth herein.

62. On September 2, 2019 Defendants issued a policy for which they received all required premiums. The policy was a binding contract between the parties.

63. Plaintiff paid said premium in exchange for promises to pay certain covered losses.

64. Beginning on or about March 20, 2020, Plaintiff was prohibited from operating its business. Based on the directives as described herein and above, Plaintiff's business is unable to function and operate.

65. As such, Plaintiff has suffered and continues to suffer a loss of business income causing by a “direct physical loss” to the business premises.

66. Plaintiff timely asserted a claim for damages against the policy.

67. On April 21, 2020 Defendants refused to cover these losses and have failed to pay for these losses which are ongoing and continuing.

68. An actual case in controversy exists that is ripe for declaratory judgement.

69. The facts as alleged, under all circumstances, show that there is a substantial controversy between the parties having at risk legal interest of sufficient immediate reality to warrant the issuance of a declaratory judgment.

70. The courts entry of a declaratory judgement would terminate the uncertainty and/or controversy giving rise to the instant dispute.

71. Plaintiff is currently being damaged due to this controversy to the extent that covered losses are not being paid to Plaintiff in this matter, and Plaintiff seeks direction from this court for determination to resolve Defendants failure to honor the contract and instead delay/deny coverage.

72. Plaintiff requests this court declare that the contract at issue in this case covers the losses claimed as a direct loss to Plaintiff's businesses as covered by the insurance policy and the representations and readings associated there with.

SECOND CAUSE OF ACTION

Breach of Contract

73. Plaintiff realleges and incorporates herein by this reference each and every allegation contained in Paragraphs 1 through 73, as through specifically set forth herein.

74. The parties entered into a valid contract for insurance.

75. Plaintiff paid all required premiums and met all conditions precedent to the performance of this contract.

76. There is a binding contract for insurance coverage between the parties.

77. Defendants, and each of them, have breached their obligations under this agreement.

78. Specifically, Defendants have failed to cover any actual damages for business loss.

79. As a direct and proximate result of the foregoing, Plaintiff has been damaged in an amount in excess of \$15,000.00.

THIRD CAUSE OF ACTION

Breach of Fiduciary/Quasi-Fiduciary Duty

80. Plaintiff realleges and incorporates herein by this reference each and every allegation contained in Paragraphs 1 through 80 as though specifically set forth herein.

81. Plaintiff's relationships with the Defendant insurance companies was as a fiduciary or quasi-fiduciary relationship.

82. Plaintiff submitted a reasonable and verifiable claim; Defendants refusal to pay the sums associated with said claim resulted in withholding the funds that were no longer the

1 Defendants to retain or control, and by refusing to pay those sums to the Plaintiff, the defendants,
2 and each of them, breached their obligations and duties as fiduciary.

3 83. As a direct and proximate result of the foregoing, Plaintiff has been damaged in the
4 amount in excess of \$15,000 to be more specifically determined at the time of trial.

5 **FOURTH CAUSE OF ACTION**

6 **(Breach of Covenant of Good Faith and Fair Dealing)**

7 84. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1
8 through 84 hereinabove as though set forth fully herein.

9 85. As a result of the agreements between the parties, Defendants had an obligation to
10 the Plaintiff to act in good faith and deal fairly.

11 86. Defendants, and each of them, breached their obligation of good faith and fair
12 dealing as described hereinabove, including but not limited to paragraphs 28 - 38 hereinabove.

13 87. The insurer's duty to deal in good faith is an obligation imposed by law, which does
14 not arise from the terms of the insurance contract. An insurer fails to act in good faith when it
15 refuses to compensate the insured for a covered loss.

16 88. Nevada law recognizes an implied covenant of good faith and fair dealing in every
17 contract. To prevail on a theory of breach of the covenant of good faith and fair dealing, a plaintiff
18 must establish each of the following: (1) plaintiff and defendant were parties to a contract; (2)
19 defendant owed a duty of good faith to plaintiff; (3) defendant breached that duty by performing in
20 a manner that was unfaithful to the purpose of the contract; and (4) plaintiff's justified expectations
21 were denied.

22 89. In failing to pay for losses duly covered, Defendants breached their duty of good
23 faith and fair dealing by performing in a manner that was unfaithful to the purpose of the contract.

24 90. In failing to pay for losses duly covered for the insurance claims and damages arising
25 on or about March 20, 2020, Defendants breached their duty of good faith and fair dealing by
26 performing in a manner that was unfaithful to the purpose of the contract.

27 91. Having obtained the binder and paid the premium, Plaintiff expected that the claim
28 was covered.

1 92. Having obtained the binder and paid the premium, Plaintiff had a reasonable and
2 justified expectation that the insurance claim arising on or about 3/20/20 was covered and would
3 be paid from the policy.

4 93. As a direct and proximate result of the foregoing, Plaintiff has been damaged in an
5 amount in excess of \$15,000.00 to be more specifically determined at the time of trial.

6 **FIFTH CAUSE OF ACTION**

7 **(Bad Faith)**

8 94. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 1
9 through 94 hereinabove as though set forth fully herein.

10 95. Defendants, and each of them, unreasonably refused to interplead the policy limits
11 and settle the claim with Plaintiff.

12 96. As a result of Defendants' breach of covenant of good faith and fair dealing, Plaintiff
13 is entitled to consequential damages, including an amount sufficient to satisfy the Judgment,
14 attorney's fees and emotional distress of the principal.

15 97. Defendants' breach of the covenant of good faith and fair dealing was done with a
16 conscious disregard for the rights and welfare of Plaintiff, subjecting it to cruel and unjust hardship.
17 Plaintiff is therefore entitled to punitive damages.

18 98. As a direct and proximate result of the conduct of Defendants, Plaintiff has sustained
19 substantial compensable losses, including benefits withheld, and economic losses, such as attorney's
20 fees, all to its detriment and damage.

21 **SIXTH CAUSE OF ACTION**

22 **(Violation of NRS 686A.310)**

23 99. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1
24 through 99 hereinabove as though set forth fully herein.

25 100. Plaintiff is informed and believe and therefore allege that Defendants, and each of
26 them, have knowingly committed the following acts, among others, defined by law as unfair claims
27 settlement practices, with such frequency as to indicate general business practices in violation of
28 the following provisions of the Insurance Code of the State of Nevada:

- 1 a) NRS § 686A.310(e): Failing to effectuate prompt, fair and equitable settlements of
2 claims in which liability of the insurer has become reasonably clear.
- 3 b) NRS § 686A.310(f): Compelling insureds to instigate litigation to recover amounts
4 due under an insurance policy by offering substantially less than the amounts
5 ultimately recovered in action brought by such insureds, when the insureds have
6 made claims for amounts reasonably similar to the amounts ultimately recovered.
- 7 c) NRS § 686A.310(n): Failing to provide promptly to an insured a reasonable
8 explanation of the basis in the insurance policy, with respect to the facts of the
9 insured's claim and the applicable law, for the denial of his claim or for an offer to
10 settle or compromise his claim.
- 11 d) NAC §686A.675(7): Except for a claim involving health insurance, any case
12 involving a claim in which there is a dispute over any portion of the insurance policy
13 coverage, payment for the portion or portions not in dispute must be made
14 notwithstanding the existence of the dispute where payment can be made without
15 prejudice to any interested party. [Comm'r of Insurance, m-9 NAC § 8, eff. 2021-80]
16 - (NAC A by Div. of Insurance by R089-98, 9-25-98).

17 101. In Nevada, insurance contracts are directly regulated by statutes, which encompass
18 the prohibition of unfair trade practices. Chapter 686A of the Nevada Revised Statutes regulates
19 insurance practice in Nevada. NRS § 686A.020 provides that an insurer, “shall not engage in this
20 state in any practice which is . . . an unfair method of competition or an unfair or deceptive act or
21 practice in the business of insurance.”

22 102. NRS §686A.310 lists identified acts which are declared to be unfair practices.
23 Pursuant to NRS §686A.310(2), a private cause of action is available to an insured for violations
24 of NRS §686A.310 by the insurer.

25 103. Defendants, and each of them, engaged in an unfair practice, pursuant to NRS
26 §686A.310(b) and (d), by failing to acknowledge the validity of Plaintiff’s claims and delaying the
27 denial of said claims.

1 104. Defendants, and each of them, engaged in unfair practices, pursuant to NRS
2 §686A.310(m), by failing to comply with the provisions of NRS §§687B.310 to 687B.390,
3 inclusive, or §687B.410 respecting the policy.

4 105. Defendants conduct with respect to the denial of the claim constituted violations of
5 NRS §686A.310 which rose to the level of bad faith, predicated on conduct involving oppression,
6 fraud, or malice, express or implied, and Plaintiff is entitled to actual, compensatory, and punitive
7 damages.

8 106. Pursuant to NRS §42.005(1), Nevada law authorizes an award of punitive damages
9 for the breach of an obligation not arising from contract, where the defendant has been guilty of
10 oppression, fraud, or malice, express or implied.

11 107. Pursuant to NRS 42.005(2)(b), the statutory caps on punitive damages do not apply
12 to an insurer who acts in bad faith regarding its obligations to provide insurance coverage.

13 108. Plaintiff was damaged by Defendants' breach and are entitled to just and equitable
14 compensation for the breach, in an amount which will compensate Plaintiff for the detriment
15 proximately caused thereby, or which, in the ordinary course of things would be likely to result
16 therefrom, to be determined at trial.

17 109. As a direct and proximate result of the conduct of Defendants, and each of them,
18 Plaintiff has sustained compensable losses, including benefits withheld, and economic losses, such
19 as attorney's fees, and has suffered mental, emotional distress and discomfort, and financial hardship
20 all to their detriment and damage.

21 110. At all material times and in doing things alleged herein, Defendants, and each of
22 them, knew Plaintiff was injured and was relying on the financial assistance due from the benefits
23 due from Defendants. Nevertheless, acting fraudulently, oppressively, maliciously, and outrageously
24 towards Plaintiff, with conscious disregard for Plaintiff's known rights and with the intention of
25 causing, or willfully disregarding the probability of causing unjust and cruel hardship to Plaintiff,
26 Defendants withheld benefits as alleged. In so acting, Defendants intended to and did vex, injure
27 and annoy Plaintiff such that an award of punitive or exemplary damages, in an amount to be set
28 forth and proven at the time of trial.

1 **SEVENTH CAUSE OF ACTION**

2 **(Punitive Damages)**

3 111. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1
4 through 111 hereinabove as though set forth fully herein.

5 112. The conduct of Defendants, and each of them, as described herein, has been willful,
6 wanton, and/or minimally, conducted with reckless disregard to the extent that punitive damages
7 are necessary and appropriate under Nevada law.

8 113. As a result thereof, Plaintiff is entitled to an award of punitive damages in an amount
9 in excess of \$10,000.00 to be more specifically determined at the time of trial.

10 Wherefore, Plaintiff, expressly reserving the right to amend its Complaint at the time of trial
11 herein to include all items of damage not yet ascertained, pray Judgment against Defendants, and
12 each of them, as follows:

13 1. For general damages in an amount in excess of \$15,000.00 and in an amount
14 conforming to Plaintiff's proof at the time of trial;

15 2. For specific damages in an amount in excess of \$15,000.00 and in an amount
16 conforming to Plaintiff's proof at the time of trial;

17 3. For punitive damages in an amount in excess of \$15,000.00;

18 4. For reasonable attorney's fees, costs and interest thereon;

19 5. For such other and further relief as the Court may deem just and proper.

20 Dated this 7 day of July, 2020.

21 COOK & KELESIS, LTD.

22
23 By: 

24 MARC P. COOK, ESQ.
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26 Las Vegas, Nevada 89101
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