

JEFF FINE
Clerk of the Superior Court
By Vanessa Garcia, Deputy
Date 08/28/2020 Time 16:00:41
Description Amount
CASE# CV2020-010495
CIVIL NEW COMPLAINT 333.00
TOTAL AMOUNT 333.00
Receipt# 27926785

GUTTILLA MURPHY ANDERSON, P.C.

Ryan W. Anderson (Ariz. No. 029749)
5415 E. High Street, Suite 200
Phoenix, Arizona 85054
Email: randerson@gamlaw.com
Phone: (480) 304-8300
Fax: (480) 304-8301

UDELMAN LAW FIRM, P.L.C.

Randall S. Udelman (Ariz. No. 014685)
7150 E. Camelback Road, Suite 415
Scottsdale, Arizona 85251
Email: info@udelmanlaw.com
Phone: (480) 970-5600
Fax: (480) 970-5626

Attorneys for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

ABT Performing Arts Association, Inc.,

Plaintiff,

vs.

The Cincinnati Insurance Company;
Glendale Insurance, L.L.C.

Defendants.

Case No. CV2020-010495

VERIFIED COMPLAINT

(Declaratory Judgment, Breach of
Contract, Bad Faith, Conversion,
Promissory Estoppel, Negligent
Misrepresentation, Producer Malpractice)

(Commercial Court Assignment Requested)

Plaintiff ABT Performing Arts Association, Inc. (ABT), for its complaint against
Defendants Cincinnati Insurance Company (Cincinnati) and Glendale Insurance, L.L.C.
(Glendale) states and alleges as follows:

INTRODUCTION

1. This action arises out of an insurance dispute over the insurance coverage available for business losses suffered by ABT flowing from an insurance policy issued by Cincinnati and sold by independent insurance producers with Glendale. ABT seeks a declaration of its rights and Defendant Cincinnati's obligations under the insurance policy, damages for breach of contract for its refusal to agree to coverage for certain business losses and extra expenses arising from the current COVID-19 pandemic, resulting employee exposures and risk mitigation expenses, governmental restrictions on its operations and extra expenses, restrictions on ingress and/or egress to its premises as a result of the current pandemic, business income losses occasioned by such restrictions, damages for Cincinnati's breach of the implied covenant of good faith and fair dealing, damages for promissory estoppel as an alternative theory of recovery, and conversion, along with interest, attorneys' fees, costs and such other relief as this Court may deem just and proper.

2. This action also arises out of claims versus Glendale arising out of its failure to use professional care and diligence required of it during the course and scope of its sale of a renewal policy of insurance to Plaintiff effective around January 1, 2020.

JURISDICTION AND VENUE

3. The acts and omissions, complained of herein, by Cincinnati occurred within and were directed at its insured which maintained an office located within the State of Arizona, County of Maricopa and within the jurisdiction of this Court.

4. The acts and omissions, complained of herein, by Glendale occurred within and

1 were likewise directed at its client ABT within the State of Arizona and within the jurisdiction
2 of this Court.

3 5. Cincinnati conducts business in the State of Arizona and has been conducting
4 such business at all relevant times alleged in this Complaint giving rise to the harm alleged
5 herein. Cincinnati is an Ohio corporation with its principal place of business in Ohio authorized
6 to issue commercial insurance policies within the State of Arizona. It has therefore availed
7 itself to the personal jurisdiction of this Court.

8 6. Glendale is an Arizona limited liability company with its principal place of
9 business in Arizona and is authorized to conduct business and sell insurance products as a
10 licensed independent insurance producer within the state of Arizona.

11 7. The amount in controversy exceeds the minimal jurisdictional amount for this
12 Court. Accordingly, this Court has subject matter jurisdiction over this controversy.

13 8. The allegations set forth in this Complaint arise out of and relate to a dispute
14 between business organizations; a business organization on the one hand (ABT) and its insurer
15 under a commercial insurance policy (Cincinnati) as well as an insurance producer (Glendale)
16 on the other; therefore the case is eligible for consideration by the specialized "commercial
17 court" program within this County pursuant to Ariz. R. Civ. P. 8.1(a)(1)(A)-(C), (b)(13).

18 9. Venue is proper within the Maricopa County Superior Court, State of Arizona.

19 10. This Court has jurisdiction over the dispute as it arises out of a policy sold, issued
20 and distributed to an Arizona non-profit corporation and all acts occurred in or were directed
21 to persons or entities within Maricopa County, Arizona.

1 11. Pursuant to Local Rule 26.2(c)(3)(C), Tier three discovery is proper in this
2 action due to its complex nature and because the amount in controversy exceeds \$300,000 in
3 value.

4 **GENERAL ALLEGATIONS**

5 12. **Plaintiff.** ABT is an Arizona non-profit corporation organized and existing
6 under the laws of the State of Arizona, and maintains its principal place of business in
7 Maricopa County, Arizona.

8 13. **Defendant.** Defendant Cincinnati throughout the relevant time periods
9 identified in this Complaint is an Ohio corporation, with its statutory home offices located in
10 Fairfield, Ohio. At all times relevant to this action, Cincinnati was licensed and authorized to
11 engage in the insurance business in the State of Arizona and did engage in and conduct
12 business within the state of Arizona.

13 14. **Defendant.** Defendant Glendale is an Arizona limited liability company with
14 its home office located in Peoria, Arizona. At all times relevant to this action, Glendale was
15 licensed and authorized to engage in the insurance business in the State of Arizona and did
16 engage in and conduct business within the state of Arizona.

17 15. Around January 2020, Glendale sold and Cincinnati issued and renewed a
18 commercial insurance policy in Arizona to ABT, policy number EPP0107115 for policy period
19 January 1, 2020 through January 1, 2021. The insurance policy provided in relevant part,
20 coverage for business personal property and business income loss coverage with extra expense
21 coverage for up to twelve months of Actual Losses Sustained.

1 16. The policy was issued to ABT Performing Arts Association Inc. and included
2 losses sustained at either of the following locations:

3 7701 W PARADISE LN
4 PEORIA, AZ 85382-4959

5 17374 N 89TH AVE
6 PEORIA, AZ 85382-8118

7 222 E MONROE ST
8 PHOENIX, AZ 85004-2335

9 17. Plaintiff timely paid premiums for this policy believing that Cincinnati would
10 provide coverage as required by the terms and conditions of the policy and that Defendant
11 Glendale sold Plaintiff a policy that would provide all coverage consistent with its timely and
12 necessary needs around January 2020.

13 18. Plaintiff purchased insurance from Cincinnati believing they had business
14 income and extra expense coverage that would apply for all risks including but not limited to
15 risks of business loss in the tragic event of a business exposure to a virus, losses flowing from
16 closure orders and losses flowing from virus related restrictions to ingress or egress.

17 19. Plaintiff purchased insurance from Cincinnati believing that they had protection
18 for business income and extra expenses required in the untenable event of a shutdown or
19 business interruption resulting from a global pandemic.

20 20. Plaintiff purchased insurance from Cincinnati and paid premiums believing that
21 the policy language would provide them with protection in the event of either accidental
physical loss or accidental physical damage to the insured premises.

1 21. The policy provides its insured with coverage for "all risks" except for those
2 risks which have been specifically excluded.

3 22. The policy does not contain any specific exclusion for loss caused by a virus
4 such as COVID-19.

5 23. The policy provides coverage for accidental physical loss or accidental physical
6 damage to covered property.

7 24. The policy includes coverage for loss of business income resulting from a
8 covered cause of loss during a necessary suspension of operations during a period of
9 restoration.

10 25. Period of restoration means the time period when losses begin through the time
11 period they end and business operations can resume.

12 26. "Suspension" means the slowdown or cessation of business activities and a part
13 or all of the business premises are rendered untenable.

14 27. The policy provides coverage if an insured must suspend its operations due to a
15 covered cause of loss.

16 28. Cincinnati promised its insured that it would pay for up to twelve months of
17 actual loss sustained by its insured due to a covered cause of loss.

18 29. Cincinnati also promised it would pay for extra expenses that would not have
19 been incurred if there had been no direct loss. Extra expenses promised to its insureds included
20 but are not limited to costs needed to avoid or minimize suspension of business and to continue
21 operations and costs to repair or replace property needed to reduce otherwise payable losses.

1 30. Cincinnati promised to provide its insured with extended business income
2 coverage, civil authority coverage and ingress and egress coverage.

3 31. Cincinnati promised to pay for ingress and egress losses sustained by its insureds
4 including business income and necessary extra expenses resulting from prevention of existing
5 ingress or egress to a premises listed on the insurance policy declarations page issued to its
6 insureds.

7 32. Coverage under the policy Cincinnati issued to Plaintiff provides business
8 income and extra expense coverage for loss relating to prevention of ingress or egress to
9 property specified in the policy declarations page not otherwise prohibited by a civil authority.

10 33. Lost business income means net income plus continuing normal operating
11 expenses sustained and payroll.

12 34. Loss means accidental physical loss or accidental physical damage.

13 35. In early January 2020, after receiving substantial public information about risk
14 of a pandemic, persons within the United States became infected with a highly contagious
15 virus. On January 31, 2020, the United States Department of Health and Human Services
16 Secretary declared a public health emergency to address the 2019 novel coronavirus
17 (COVID-19).

18 36. According to the World Health Organization, "The disease spreads primarily
19 from person to person through small droplets from the nose or mouth, which are expelled when
20 a person with COVID-19 coughs, sneezes, or speaks. These droplets are relatively heavy, do
21 not travel far and quickly sink to the ground. People can catch COVID-19 if they breathe in

1 these droplets from a person infected with the virus. This is why it is important to stay at least
2 1 [meter] away from others. *These droplets can land on objects and surfaces around the*
3 *person such as tables, doorknobs and handrails.* "How does COVID-19 spread?," World
4 Health Organization (April 17, 2020) (emphasis added), available at [https://www.who.int/](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-coronaviruses)
5 [emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-coronaviruses)
6 [coronaviruses](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/q-a-coronaviruses).

7 37. On January 26, 2020, the Arizona Department of Health Services confirmed the
8 first case of coronavirus in the State of Arizona.

9 38. On January 28, 2020, surgical mask sales sold out in Tempe, Arizona after public
10 reports disclosed that the first case of coronavirus was a student at Arizona State University.

11 39. By January 31, 2020, it was common knowledge that the COVID-19 virus is
12 highly contagious and easily spread affecting millions in a matter of months and spreading
13 through respiratory droplets and lingering on surfaces.

14 40. On February 26, 2020, Arizona State University cancelled its study abroad
15 programs in South Korea after the United States Centers for Disease Control and Prevention
16 elevated South Korea to a level three status, discouraging all non-essential travel to that
17 country.

18 41. On February 27, 2020, the Governor of the State of Arizona in an interview with
19 KTAR news radio explained that Arizona had a coronavirus response plan in place and that
20 he receives daily briefing on the infection, its contagiousness and community spread.

21 42. On March 2, 2020, Dr. Cara Christ, Director of the Arizona Department of

1 Health Services announced at a press conference that Arizona was monitoring 250 returning
2 travelers for coronavirus explaining that "we can expect additional cases in Arizona."

3 43. On March 3, 2020, another reported infection was made public concerning a
4 presumed positive case originating from contact with a person presumed to have tested
5 positive outside Arizona.

6 44. On March 11, 2020, the Governor of the State of Arizona declared a Public
7 Health Emergency due to the need to prepare for, prevent, respond to and mitigate the spread
8 of COVID-19.

9 45. On March 16, 2020, the United States Centers for Disease Control and
10 Prevention issued guidance recommending individuals avoid social gatherings of more than
11 ten people and avoid any businesses that allow gathering of more than ten people; instead
12 recommending the use of drive-thru, pickup or delivery options at business, restaurants and
13 bars, all of which were designed to slow the spread of the COVID-19 virus.

14 46. Plaintiff operates a theater providing Broadway style productions of shows and
15 plays in Arizona throughout the year. The public health emergencies identified by state and
16 federal agencies directly impacted Plaintiff's ability to operate.

17 47. On March 19, 2020, seeking to slow the community spread of the COVID-19
18 virus the Governor of the State of Arizona issued an executive order requiring certain
19 businesses to close operations until further notice.

20 48. Plaintiff was forced to cease normal operations after the March 19, 2020
21 executive order and after it became clear that the COVID-19 virus had been spreading rapidly.

1 49. The Governor of the State of Arizona issued another executive order on March
2 30, 2020 expanding the closure order to apply to all but non-essential businesses.

3 50. On July 9, 2020, the Governor of the State of Arizona issued Executive Order
4 2020-47 which dictated strict rules regarding the operation of restaurants and, further,
5 provided additional provisions and requirements for all businesses.

6 51. Executive Order 2020-47, Paragraph 8, also set forth the enforcement provision
7 that the failure to comply with the Executive Order and any other guidance issued by the
8 Arizona Department of Health Services related to precautions to mitigate the spread of
9 COVID-19 shall constitute a public nuisance pursuant to A.R.S. § 36-601(A) and action shall
10 be taken to "abate the nuisance" including "immediate closure of the facility."

11 52. Carriers of the COVID-19 virus may be asymptomatic and when persons
12 become ill, the outcome can be deadly, creating a destructive public health crisis not seen in
13 years.

14 53. Upon information and belief, physical presence of COVID-19 has been shown
15 to exist at Plaintiff's property as demonstrated by a positive infection occurring in at least one
16 of Plaintiff's employees.

17 54. The public health crisis and community spread of COVID-19 infected at least
18 one key ABT employee and required Plaintiff to continue to cease its operations, which to the
19 date of this Complaint have still not yet been fully restored.

20 55. Plaintiff's property and business locations have been rendered unsafe and
21 unusable as a result of the COVID-19 exposure issues raised during this health crisis and due

1 to the risk of and actual physical presence of the COVID-19 virus at its premises. The presence
2 of a few patrons or many patrons on site results in further contagion risk and renders property
3 unsafe.

4 56. The mere presence of infectious COVID-19 and risk of presence of COVID-19
5 at Plaintiff's premises requires risk mitigation cost and rendered its premises unusable as
6 intended.

7 57. The mere presence of and risk of presence of COVID-19 as well as government
8 shutdown orders and/or separate prevention of ingress and/or egress to the premises
9 occasioned by the presence of COVID-19 at Plaintiff's premises rendered it unusable as
10 intended triggering coverage on the Cincinnati insurance policy.

11 58. Plaintiff's risk mitigation costs and sanitation strategies also require additional
12 expense and cost.

13 59. The expenses and business income loss resulting from government shutdown
14 orders, from prevention of ingress and/or egress to its premises, and from the COVID-19 virus
15 triggered ABT's business income coverage that it purchased from Cincinnati believing that
16 because it timely paid its insurance premiums, its insurer would provide protection and
17 coverage to it in times of need.

18 60. Harm to the property by infectious COVID-19 located on surfaces on Plaintiff's
19 premises together with Arizona government shutdown orders and/or prevention of
20 ingress/egress due to presence of and risk of COVID-19 at Plaintiff's premises demonstrates
21 a sufficient showing of direct accidental physical loss or accidental physical damage to the

1 premises insured by Cincinnati which should have triggered coverage for claims

2 61. Cincinnati promised to pay Plaintiff for its business income and necessary extra
3 expenses occurring as a result of prevention of ingress or egress to Plaintiff's business
4 locations not specifically caused by an order from a civil authority or government shutdown
5 order.

6 62. The extra expenses and business income losses not directly resulting from
7 government shutdown orders resulting from the COVID-19 virus triggered ABT's business
8 income and extra expense coverage that it purchased from Cincinnati believing that because
9 it timely paid its insurance premiums, its insurer would provide protection and coverage to it
10 in times of need.

11 63. During any and all time periods in which the Arizona Governor's Executive
12 orders did not specifically limit or prohibit ingress or egress access to Plaintiff's business
13 operations, Plaintiff nevertheless suffered loss of business income and necessary extra expense
14 while existing ingress or egress to its property was rendered unsafe during a time of the
15 COVID-19 virus pandemic and major health crisis and during the time in which infectious
16 COVID-19 were upon information and belief present at the premises creating unnecessary risk
17 to patrons and employees and preventing ingress and egress access.

18 64. Upon information and belief, Cincinnati did not reasonably consider applicable
19 ingress or egress coverage when it denied Plaintiff's claims and Plaintiff suffered substantial
20 losses in business income and necessary extra expenses as a result.

21 65. The Cincinnati Insurance April 14, 2020 claim denial letter did not refer to

1 ingress or egress coverage.

2 66. The Cincinnati Insurance April 14, 2020 claim denial letter did not construe
3 coverage in a manner that gives equal consideration to the interest of its insureds.

4 67. Physical, tangible or structural destruction or alteration of property is not a
5 prerequisite for a showing of accidental physical loss or accidental physical damage to
6 property triggering coverage on an all risk insurance policy. *See, e.g., Western Fire Ins. Co.*
7 *v. First Presbyterian Church*, 165 Colo. 34, 36-37, 437 P.2d 52, 54-55 (1968); *Largent v. State*
8 *Farm Fire & Cas. Co.*, 116 Or. App. 595, 597-98, 842 P.2d 445, 446 (Or. App. 1992); *Gregory*
9 *Packaging, Inc. v. Travelers Prop. Cas. Co. of America*, 2014 U.S. Dist. LEXIS 165232, *19
10 (D. N.J. Nov. 25, 2014); *Cooper v. Travelers Indem. Co.*, 113 Fed. Appx. 198, 200 (9th Cir.
11 Mem. 2004); *Mehl v. The Travelers Home & Marine Ins. Co.*, 2018 U.S. Dist. LEXIS 74552,
12 No. 16-cv-1325 (E.D. Mo. May 2, 2018); *General Mills v. Gold Medal Ins. Co.*, 622 N.W.2d
13 147, 152 (Minn. Ct. App. 2001).

14 68. In its claim denial letter dated April 14, 2020 and its overall claim evaluation
15 process, Cincinnati unreasonably construed its insurance policy to require tangible or
16 structural alteration of property before concluding that coverage applies.

17 69. Upon information and belief, in its claim denial letter dated April 14, 2020 and
18 its overall claim evaluation process, Cincinnati unreasonably concluded that the terms
19 “accidental physical loss” and “accidental physical damage” should be given the same
20 meaning when construing coverage for loss.

21 70. In its claim denial, Cincinnati did not consider that the terms “accidental

1 physical damage” and “accidental physical loss” must be given different meanings when
2 construing coverage on the policy Cincinnati issued to Plaintiff.

3 71. Cincinnati unreasonably rejected that “accidental physical loss” is not
4 synonymous with “accidental physical damages.”

5 72. Cincinnati unreasonably failed to consider that even absent a physical alteration,
6 a physical loss may occur when the premises is uninhabitable or unusable for its intended
7 purpose.

8 73. Cincinnati unreasonably failed to conclude that accidental physical loss occurs
9 if there exists an imminent threat of the release of COVID-19 that causes physical loss of
10 utility to the premises insured by Plaintiff.

11 74. At the time it submitted claims for coverage and continuing forward, the
12 premises insured by Plaintiff was and continues to be uninhabitable and/or unusable for its
13 intended purpose and should be considered a physical loss under the Cincinnati insurance
14 policy.

15 75. Cincinnati rejected Plaintiff’s claim for coverage unreasonably with an eye
16 toward denying claims as a cost mitigation strategy rather than acting with equal consideration
17 toward its insured.

18 76. Based on the lack of an explicit virus exclusion in its insurance policy with
19 Cincinnati, Plaintiff had a reasonable expectation of coverage for losses related to a virus
20 pandemic in its “all risk” insurance policy with Cincinnati.

21 77. Cincinnati could have but did not add an endorsement to Plaintiff’s insurance

1 policy excluding any coverage for losses occasioned by virus or bacteria exposure.

2 78. Upon information and belief, Cincinnati issued the commercial policy to
3 plaintiff drawing on specific policy language, endorsements, exclusions and terms directly
4 from the trade association known as the Insurance Services Office (ISO).

5 79. Upon information and belief, ISO provides a range of services to its customers
6 in the property casualty insurance industry maintaining actuarial data, underwriting guidance,
7 claims information and other tools to its insurance carrier clients.

8 80. According to its web site, "ISO provides advisory services and information to
9 many insurance companies. On your insurance policies, you may see notices showing ISO
10 (Insurance Services Office, Inc.) as the copyright owner. That's because ISO develops and
11 publishes policy language that many insurance companies use as the basis for their
12 products." www.verisk.com/insurance/about/faq.

13 81. Cincinnati's policy issued to Plaintiff contained references to ISO as the
14 copyright holder drawing from copyrighted material provided to it from ISO with its
15 permission.

16 82. Cincinnati's policy form FM 101 05 16 contains the following language on each
17 of the forty pages of this form: "Includes copyrighted material of Insurance Services Office,
18 Inc. with its permission."

19 83. Cincinnati controlled all policy language in the insurance policy issued to
20 Plaintiff choosing what ISO language to include or not to include and Plaintiff did not
21 participate in nor did it have any bargaining power to alter or negotiate specific terms of the

1 Policy Cincinnati issued to it; Plaintiff had no ability to change or modify policy terms chosen
2 or omitted from the policy issued to it.

3 84. Upon information and belief, in 2006, ISO issued an information circular to its
4 insurance company customers recommending that insurers include a policy exclusion form
5 adding an endorsement specifically excluding coverage for losses due to bacteria and viruses.

6 85. Upon information and belief, in 2006, ISO recommended to its insurance
7 company clients that its clients/insurance carriers exclude claims for coverage "caused by or
8 resulting from any virus, bacterium or other microorganism that induces or is capable of
9 inducing physical distress, illness or disease."

10 86. Upon information and belief, in 2006, ISO recommended carriers exclude
11 coverage for claims relating to bacteria or viruses based in part on SARS, rotavirus and
12 influenza infections which alerted ISO to possible exposure to costly claims for coverage that
13 existed at the time.

14 87. Upon information and belief, in 2006, at the time it recommended coverage
15 exclusions for virus and bacteria exposure, the organization recognized that generalized policy
16 exclusions may be wholly insufficient to limit coverage for "all risk" insurance policies that
17 did not exclude coverage for viruses or bacteria exposure.

18 88. Upon information and belief, ISO provided sample virus/bacteria exclusion
19 forms to its customers as far back as 2006 and Cincinnati had access to these forms yet did not
20 adopt any exclusion endorsement excluding coverage for losses due to viruses or bacteria
21 exposure.

1 89. Upon information and belief, Cincinnati had access to proposed policy
2 exclusions for loss due to viruses or bacteria exposure from ISO over the past fourteen years
3 but did not adopt any endorsements excluding coverage to Plaintiff.

4 90. Around March 26, 2020, ABT reported that it suspended all business operations
5 and presented a claim for all applicable coverage to Cincinnati.

6 91. Nineteen days after presenting a claim for coverage, on April 14, 2020,
7 Cincinnati Insurance denied ABT's claim.

8 92. Because Cincinnati did not include any exclusions or endorsements excluding
9 coverage for losses due to viruses or bacteria exposure, and because Plaintiff submitted a claim
10 for coverage for direct accidental physical loss or accidental physical damages to its premises,
11 Cincinnati wrongfully denied claims presented to it.

12 93. Upon information and belief, Cincinnati wrongfully denied Plaintiff's claims for
13 coverage related to the COVID-19 virus based not upon a reasonable interpretation of its
14 policy but instead as a risk and cost mitigation strategy to protect its financial position rather
15 than acting reasonably and complying with its insurance contract obligations owed to its
16 insured.

17 94. Upon information and belief, Cincinnati neither sought nor considered any
18 sworn statements of loss in connection with its denial of coverage.

19 95. Upon information and belief, Cincinnati conducted no witness interviews to
20 support its denial of ABT's claim for coverage.

21 96. Upon information and belief, Cincinnati did not consider or request any

1 examinations under oath to support its denial of ABT's claim for coverage.

2 97. Upon information and belief, Cincinnati did not consider any records or loss
3 reports to understand the business income claim and to support its denial of ABT's claim for
4 coverage.

5 98. Upon information and belief, after receiving ABT's claim for coverage,
6 Cincinnati did not request or consider any ABT business records supporting extra expenses
7 that ABT had been facing as a result of cessation of its operations.

8 99. Upon information and belief, after receiving ABT's claim for coverage,
9 Cincinnati did not inspect the insureds premises to confirm the extent of and presence of
10 infectious COVID-19 located at the premises and preventing it from use for its intended
11 purposes.

12 100. Upon information and belief, after receiving ABT's claim for coverage,
13 Cincinnati did not engage any professionals to assist in a determination of how risk of and
14 actual presence of infectious COVID-19 could be remediated during a period of restoration as
15 well as the costs to remediate and expenses to make the premises usable for its intended
16 purposes.

17 101. Upon information and belief, before systematically denying ABT's claim for
18 coverage, Cincinnati could have but did not ask ABT for a sworn statement seeking the
19 following types of information:

- 20 ▪ Whether its insured claims accidental direct physical loss of or damage to real
21 property, personal property, stock and supplies, and/or merchandise.

- 1 ▪ Describe the nature of that physical loss or damage.
- 2 ▪ Whether any confirmed cases of COVID-19 occurred at the premises.
- 3 ▪ Whether the premises been tested for the presence of COVID-19.
- 4 ▪ Whether the premises is currently closed and when it closed.
- 5 ▪ Whether the premises can only open with physical and structural alterations,
- 6 protective partitions, air system modifications and other physical alteration of
- 7 the premises to protect members of the public and employees so that the
- 8 premises could be used for its intended purpose.
- 9 ▪ Whether ingress or egress to its premises has been prevented rendering its
- 10 premises unusable for its intended purpose.
- 11 ▪ Whether suppliers or customers have been prevented from providing or
- 12 receiving services or information.

13 102. Upon information and belief, to support its claim denial, Cincinnati used a claim
14 denial template form it used regularly during this time period in March and April, 2020 as a
15 tool to deny all pandemic related claims without conducting a detailed investigation of the loss
16 claims submitted by its insured.

17 103. In its Corporate Financial Highlight Section of its 10Q report filed with the
18 Securities and Exchange Commission in March 2020, Cincinnati contends that “[v]irtually
19 all of our commercial property policies do not provide coverage for business interruption
20 claims unless there is direct physical damage or loss to property. Because a virus does not
21 produce direct physical damage or loss to property, no coverage exists for this peril –

1 rendering an exclusion unnecessary. For this reason, most of our standard market
2 commercial property policies in states where we actively write business do not contain a
3 specific exclusion for COVID-19. While we will evaluate each claim based on the specific
4 facts and circumstances involved, our commercial property policies do not provide coverage
5 for business interruption claims unless there is direct physical damage or loss to property.”

6 [https://www.sec.gov/ix?doc=/Archives/edgar/data/20286/000002028620000041/cinf-](https://www.sec.gov/ix?doc=/Archives/edgar/data/20286/000002028620000041/cinf-2020331x10q.htm#sAD30F707ECD655FBB68006C22F92C146)
7 [2020331x10q.htm#sAD30F707ECD655FBB68006C22F92C146.](https://www.sec.gov/ix?doc=/Archives/edgar/data/20286/000002028620000041/cinf-2020331x10q.htm#sAD30F707ECD655FBB68006C22F92C146)

8 104. Upon information and belief, Cincinnati wrongfully adopted a national standard
9 to support claim denials for business interruption claims submitted to it and relied upon an
10 improper legal standard and an unreasonable claims evaluation process to deny ABT’s claim
11 for coverage.

12 105. Upon information and belief, Cincinnati’s nineteen-day claim investigation
13 process did not act with an eye toward acting reasonably toward its insured, but instead with
14 an eye toward cherry-picking records and information allegedly supporting a denial of the
15 claim for coverage of prospectively costly pandemic claims and without evaluating the claim
16 presented to it based on the specific facts and circumstances involved.

17 106. By cherry-picking records and information allegedly supporting a denial of the
18 claim for coverage and/or ignoring its obligations to conduct a reasonable investigation,
19 Cincinnati failed to give due consideration to the interests of its insureds.

20 107. During its investigation, Cincinnati ignored and/or misinterpreted relevant and
21 material insurance policy terms which should have verified coverage exists for this claim.

1 108. As a part of its investigation, Cincinnati could have received and reviewed
2 documents, business records to verify loss, and had the opportunity to conduct examinations
3 under oath.

4 109. Upon request, Cincinnati could have had access to all business records and
5 personnel to verify the loss and could have received and reviewed records showing the efforts
6 undertaken to mitigate loss which would have confirmed that coverage existed under the
7 Policy.

8 110. Cincinnati relied upon an unreasonable and/or ambiguous interpretation of the
9 Policy by insisting that its insured has no claim for coverage because the COVID-19 did not
10 cause accidental loss or damage to property.

11 111. The Policy at issue in this Complaint is an "all-risk" policy meaning that it
12 provides coverage for virus related claims unless it expressly excludes coverage, which it does
13 not.

14 **COUNT I**
15 **(DECLARATORY RELIEF**
 VERSUS CINCINNATI ONLY)

16 112. Plaintiff hereby repeats, reiterates, and realleges all of the foregoing allegations
17 as if more fully set forth herein.

18 113. Plaintiff seeks declaratory relief pursuant to A.R.S. Section 12-1831 et. seq. and
19 Ariz. R. Civ. P. 57.

20 114. The rights, status and legal relations of the parties are affected due to
21 Cincinnati's improper contention that it may deny coverage for the loss claim made by ABT.

1 122. Cincinnati promised to provide coverage for claims presented to it in case of
2 losses covered by the terms and conditions of the Policy listing ABT as insured on its Policy
3 Number EPP0107115.

4 123. Cincinnati accepted timely payment of insurance premiums from its insureds
5 promising to provide coverage in times of loss.

6 124. Notwithstanding its promise to provide coverage for claims presented to it in
7 times of loss, Cincinnati wrongfully and in breach of its agreement to pay for losses, rejected
8 the claim for coverage for business income, extra expense, ingress/egress, civil authority and
9 any other sources of coverage for losses at issue in this Complaint.

10 125. Cincinnati breached the Policy by failing to and refusing to pay benefits for a
11 claim involving losses which occurred during the applicable policy coverage period beginning
12 in March, 2020.

13 126. ABT has been damaged and continues to suffer damages as a result of the unpaid
14 claims and interest on these unpaid claims.

15 127. As a result of the claim denial, ABT has been compelled to hire counsel and pay
16 fees and costs in an attempt to recover unpaid benefits due under the policy.

17 128. In addition to unpaid benefits due on the Cincinnati policy issued to its insured,
18 ABT suffered additional damages representing the amount of the fees incurred to recover
19 damages flowing from said breach including costs and attorneys' fees incurred therein.

20 129. This action arises out of an insurance contract dispute between the parties and
21 the Plaintiff ABT is entitled to an award of reasonable attorneys fees and costs incurred

1 pursuant to A.R.S. §§ 12-341 and -341.01.

2 **COUNT III**
3 **(BREACH OF THE IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING**
4 **VERSUS CINCINNATI ONLY)**

5 130. Plaintiff hereby repeats, reiterates, and realleges all of the foregoing allegations
6 as if more fully set forth herein.

7 131. The Policy providing coverage to ABT includes an implied obligation to act in
8 good faith and deal fairly with regard to its investigation of claims, coverage determinations
9 and with regard to treatment of its insureds with equal consideration to its own interests.

10 132. The duty of good faith and fair dealing is non-delegable and belongs to
11 Cincinnati and all of its agents acting on its behalf.

12 133. Cincinnati continues to owe its insured an obligation of good faith and fair
13 dealing.

14 134. During the course of its investigation for coverage, Cincinnati breached its duty
15 of good faith and fair dealing owed to ABT.

16 135. Specifically, Cincinnati breached the duty of good faith and fair dealing by
17 denying a legitimate claim presented by ABT, cherry-picking and misinterpreting various
18 policy terms, failing to conduct a reasonable investigation including reviewing records and
19 information that supports a claim denial and failing to construe policy provisions properly and
20 reasonably.

21 136. Cincinnati further breached its duty of good faith and fair dealing by failing to
adequately and timely investigate claims and information tending to support payment of

1 claims submitted to it by the Plaintiff.

2 137. Cincinnati further breached its duty of good faith and fair dealing by
3 unreasonably denying adjustment and payment of claims for payment presented to it and
4 forcing its insured to jump through arbitrary, costly and unnecessary litigation hoops to
5 consider its claim and to attempt to force litigation to save it from costly claims that could
6 have but were not excluded before it issued ABT a policy of insurance.

7 138. Cincinnati further breached its duty of good faith and fair dealing by failing to
8 treat ABT reasonably and with the equal consideration to that of its own interests in saving
9 expense and minimizing claims payments.

10 139. Cincinnati further breached its duty of good faith and fair dealing owed to its
11 insured ABT by failing to consider that coverage exists when as here, it produced direct
12 physical damage or loss to property.

13 140. Upon information and belief, Cincinnati breached its duty of good faith and fair
14 dealing owed to its insured ABT by unreasonably relying on an improper national standard to
15 deny claims presented to it by its Arizona insured and by conducting an unreasonable and
16 improper claims evaluation with an eye toward denying coverage rather than treating its
17 insured fairly.

18 141. Cincinnati systematically and unreasonably denied ABT's claims for coverage
19 presented to it without conducting any reasonable investigation of specific facts and
20 circumstances involved.

21 142. Cincinnati did not reasonably consider all applicable and relevant facts and

1 circumstances involved in the claim presented by ABT based upon its own financial interests
2 without giving equal consideration to the interest of its insured.

3 143. Cincinnati's claims investigation process was wholly unreasonable, omitted any
4 reasonable consideration for the facts and circumstances involved and failed to give due
5 consideration to ABT's claims and interests presented to it.

6 144. Cincinnati continues to improperly stand by its claim denial and continues to act
7 unreasonably knowing that its conduct has been and continues to be unreasonable.

8 145. Cincinnati knew, should have known and/or was conscious of the fact that its
9 conduct denying the claim presented to it for loss has been and continues to be unreasonable.

10 146. As a direct and proximate result of Defendant's conduct, ABT suffered damages,
11 and will continue to suffer damages in the amount of the unreasonably delayed benefits due
12 under the policy in an amount to be proven at trial.

13 147. As a further direct and proximate result of the Defendant's conduct, ABT
14 suffered and continues to suffer damages in the amount of pre- and post-judgment interest
15 upon the amount of benefits that Defendant has unreasonably denied and in amount to be
16 proven at trial.

17 148. As a result of the claim denial, ABT has been compelled to hire counsel and pay
18 fees and costs in an attempt to recover unpaid benefits due under the policy. So in addition to
19 unpaid benefits due on the Cincinnati policy, ABT suffered additional damages representing
20 the amount of the fees incurred to recover damages flowing from said breach including costs
21 and attorneys' fees incurred therein.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21

**COUNT IV
(CONVERSION
VERSUS CINCINNATI ONLY)**

149. Plaintiff hereby repeats, reiterates, and realleges all of the foregoing allegations as if more fully set forth herein.

150. The elements of conversion are essentially the act of wrongful dominion or control; over personal property; in denial of or inconsistent; and with the rights of another. *Case Corp. V. Gehrke*, 208 Ariz. 140, 143, 91 P. 3d 362, 365 (App. 2004).

151. Cincinnati intentionally exercised dominion and control over the claims savings resulting from its denial of coverage but which should have been used to pay and adjust the property loss claim that ABT presented to it.

152. Cincinnati acted inconsistent with its duties of control to act with the same consideration to its insureds and to act in way that recognizes obligations owed to policyholders during the claims administration process.

153. Cincinnati acted in a manner inconsistent with its policy obligations to refrain from taking actions in its claims administration process which were designed to maximize carrier profitability without regard to the interests of insureds.

154. Cincinnati intentionally interfered with the rights of its insured by cherry-picking policy interpretation to support a claims denial, ignoring investigation obligations and efforts and records and information that would have supported accepting the claim and instead acting inconsistent with proper claims administrative process.

155. ABT was deprived possession or use of the claims proceeds misappropriated by

1 Cincinnati.

2 156. Cincinnati's interference with ABT's rights caused damages in an amount to be
3 proven at trial, but at least in the reasonable estimated value of the business income and extra
4 expense loss claims presented but denied.

5 **COUNT V**
6 **(PROMISSORY ESTOPPEL**
7 **VERSUS CINCINNATI ONLY)**

8 157. ABT hereby repeats, reiterates, and realleges all of the foregoing allegations as
9 if more fully set forth herein.

10 158. Elements of a claim for promissory estoppel are, a promise made by the
11 Defendant (to provide coverage in case of loss); which the promisor should reasonably foresee
12 would cause the Plaintiff, the promisee to rely (insurer should reasonably believe its insured
13 would expect payment on a claim for coverage in case of loss); upon which the promisee
14 actually relies to its detriment (insured submits a claim for coverage and carrier denies the
15 claim) and injustice can be avoided only by enforcement of the promise. *Johnson Int'l v. City*
16 *of Phoenix*, 192 Ariz. 466, 474, 967 P.2d 607, 615 (App. 1998); citing Restatement (Second)
17 of Contracts § 90.

18 159. As an alternative claim for recovery, all these elements of promissory estoppel
19 claim have been met under these circumstances.

20 160. Cincinnati made a promise to provide coverage in case of loss in exchange for
21 premium payments that ABT made to it.

22 161. Cincinnati should have reasonably foreseen that ABT would rely to its detriment

1 on Defendant's promise to provide coverage in case of loss.

2 162. ABT actually relied upon Cincinnati's promise to pay for claims in times of loss
3 by continuing its business operations and renewing its insurance coverage in a time of
4 heightened exposure to a pandemic.

5 163. ABT relied to its detriment upon Cincinnati's promise to provide coverage for
6 losses occurring within the applicable policy coverage period because the insurer denied its
7 claim for coverage involving the loss presented to it.

8 164. Injustice can be avoided by enforcing the promise made by Cincinnati to provide
9 coverage for the claim made for at least the loss of business income plus extra expense.

10 165. No reasonable justification exists for the Cincinnati's decision to deny the claim
11 presented to it for payment of the loss.

12 166. As an alternative theory of recovery regarding the allegations set forth in this
13 lawsuit, there is an absence of a remedy provided by law.

14 167. Plaintiff suffered damages arising out of the claim for promissory estoppel in an
15 amount to be proven at trial.

16 **COUNT VI**
17 **(NEGLIGENT MISREPRESENTATION**
VERSUS CINCINNATI ONLY)

18 168. ABT hereby repeats, reiterates, and realleges all of the foregoing allegations as
19 if more fully set forth herein.

20 169. Elements of a claim for negligent misrepresentation follow: a Defendant
21 provides false information in a business transaction; the Defendant intended for Plaintiff to

1 rely or knew it would reasonably rely on incorrect information, Defendant failed to exercise
2 reasonable care in obtaining or communication the incorrect information, Plaintiff justifiably
3 relied on the incorrect information; and resulting damage. *KB Home Tucson, Inc. v. Charter*
4 *Oak Fire Ins. Co.*, 236 Ariz. 326, 334, 340 P.3d 405, 413 n. 7 (App. 2014).

5 170. Cincinnati Insurance promises to members of the public and to its policyholders
6 that it has a Pandemic Team in place during the COVID-19 pandemic.
7 <https://www.cinfin.com/covid-19/business-resiliency> (last accessed 7/30/2020).

8 171. Cincinnati promises that "Currently the team is using our business continuity
9 plans to ensure associates can serve agents and policyholders and that vendor and supplier
10 risks are mitigated *so business operations may continue.*" (emphasis added). *Id.*

11 172. Cincinnati promises its policy holders and the public that "Our detailed
12 pandemic plans allow for our associates to care for themselves and their family, *while*
13 *maintaining business operations.* Cincinnati Insurance stands ready to serve you during this
14 unprecedented time in our company's – and country's – history." (emphasis added). *Id.*

15 173. Cincinnati promises to its policyholders and to the public that during the current
16 COVID-19 pandemic that it is "Fulfilling the Insurance Promise" to its policyholders. *Id.*

17 174. Cincinnati represents to the public and its policyholders, "We are in the business
18 of helping policyholders recover financially after a loss. *We look for coverage, not exceptions,*
19 *when paying claims.* You'll appreciate the prompt and personal service our local claims
20 representatives deliver to help you get back on track." (emphasis added). *Id.*

21 175. Cincinnati promises its policyholders, "We continuously strengthen service by

1 offering agents and policyholders a stronger local presence, unparalleled claims service, and
2 competitive insurance products for your business, home, auto and life insurance needs." *Id.*

3 176. By making these promises to its policyholders, Cincinnati intended for ABT to
4 rely or knew it would reasonably rely on representations it made publicly. *Id.*

5 177. In its marketing materials and business proposal provided to ABT before
6 renewing its policy of insurance to ABT, Cincinnati represented to ABT that its "business is
7 helping people recover financially after losses, [and] working to preserve their dignity in the
8 process."

9 178. In its business proposal, Cincinnati promised to provide business income and
10 extra expense as well as extra costs benefits with no waiting period.

11 179. In its marketing and business proposal materials, Cincinnati promised to provide
12 ABT with coverage for "common pollutants [and] uncommon protection."

13 180. Cincinnati's marketing materials and business proposal for coverage renewal
14 extended to ABT included overall coverage for "everyday pollutants ...found in everyday
15 businesses... [including] gaseous or airborne pollutants released from machinery, equipment
16 or materials you took to your work site... [and/or] [f]umes from machinery, equipment or
17 materials used to maintain your premises." (emphasis added).

18 181. Cincinnati explained in its marketing materials and business insurance renewal
19 proposal to ABT that "[t]he common substances you use in your business expose you to
20 financial loss."

21 182. Notwithstanding representations made that gave the impression to its insured

1 that coverage would be provided for pollutants found in its business, in its coverage denial
2 letter to ABT dated April 14, 2020, Cincinnati denied coverage for claims made to it on the
3 basis of a claimed policy exclusion for pollutants.

4 183. In its coverage denial letter dated April 14, 2020, Defendant Cincinnati provided
5 false information to Plaintiff about lack of insurance coverage to Plaintiff in the course of its
6 insurance business transaction with ABT.

7 184. Cincinnati intended for ABT to rely or knew it would reasonably rely on
8 incorrect coverage conclusions communicated in its coverage denial letter dated April 14,
9 2020.

10 185. By failing to conduct a reasonable investigation into the facts and circumstances
11 of claims for coverage presented to it, Cincinnati failed to "fulfill its insurance promise" to its
12 policyholder ABT.

13 186. Cincinnati failed to exercise reasonable care in obtaining or communicating the
14 correct information to its policyholder about both its coverage investigation process and its
15 claims evaluation process to help get its customers "back on track."

16 187. By denying coverage for claims made by ABT within less than three weeks of
17 receiving a notice of claim and without taking one examination under oath, without reviewing
18 a proof of loss statement and without evaluating the coverage claims as applied to the specific
19 facts and circumstances presented to it by ABT, and without examining the extent to which
20 remediation efforts during the period of restoration could return the premises to a position
21 where it could be used for its intended purpose, Cincinnati failed to "look for coverage, not

1 exceptions" and negligently misrepresented the promises made to ABT in the course of its
2 business relationship.

3 188. When it made claims for coverage, ABT justifiably relied on Cincinnati's
4 representations that it would serve policyholders, look for coverage, not exceptions and would
5 find a way for business operations to continue in a manner to "fulfill the insurance promise."

6 189. ABT suffered damages as a direct and proximate result of Cincinnati's negligent
7 misrepresentations made to its policyholders about coverage, coverage investigation, the
8 COVID-19 pandemic continuity plans, fulfilling promises to policyholders and finding
9 coverage not exceptions when claims are made.

10 **COUNT VII**
11 **(PRODUCER MALPRACTICE**
VERSUS GLENDALE ONLY)

12 190. ABT hereby repeats, reiterates, and realleges all of the foregoing allegations as
13 if more fully set forth herein.

14 191. As a licensed insurance producer, Defendant Glendale and its licensed insurance
15 producer employees owed a duty to Plaintiff ABT to exercise reasonable care, skill and
16 diligence in carrying out duties in procuring commercial insurance coverage for Plaintiff.

17 192. Defendant Glendale and its licensed insurance producer employees should have
18 taken reasonable steps to consult with its client before expiration of commercial insurance
19 during late 2019 and early 2020 to ensure that the Cincinnati policy provided business income
20 and extra expense coverage for pandemic related losses or that ABT had other options to
21 consider for such coverage.

1 193. Glendale did not take any steps before renewing coverage to ascertain whether
2 coverage existed for business income and extra expense coverage on the Cincinnati policy or
3 provide ABT with other options before renewing the policy with Cincinnati.

4 194. Defendant Glendale breached its duty of care owed to ABT by failing to properly
5 advise its customer on coverage and options during a time period when businesses faced
6 heightened risks to COVID-19 exposure.

7 195. Glendale's breach of its duty owed to ABT to use reasonable skill and render
8 thorough and complete advice to its client and recommend various coverage to ABT was both
9 an actual and proximate cause of ABT's losses it sustained from Cincinnati's claim denial.

10 196. As a direct and proximate result of its failure to use reasonable care owed to its
11 client, Plaintiff suffered damages in an amount to be proven at trial.

12 **WHEREFORE**, ABT respectfully requests that the Court grant the following relief
13 against Cincinnati and Glendale as follows:

14 A. Entering a declaratory judgment that the Policy provides coverage to ABT for
15 the claim presented to Cincinnati and ordering it to reimburse ABT for the full extent of its
16 losses required by the terms and conditions of the policy;

17 B. Entering judgment in favor of ABT on its breach of contract claim against
18 Cincinnati, ordering Defendant to pay all compensatory and consequential damages arising or
19 resulting from the Cincinnati's breach of the terms of its policy;

1 C. Entering judgment in favor of ABT for compensatory damages occurring as a
2 direct and proximate result of Cincinnati's breach of its implied covenant of good faith and
3 fair dealing;

4 D. Entering a judgment representing the amount wrongfully converted by
5 Cincinnati resulting from its decision to wrongfully deny the claim for damages flowing from
6 the losses sustained and premiums retained during the coverage period as specified in this
7 Complaint;

8 E. Entering a judgment for damages flowing from the promissory estoppel claim
9 as an alternative theory of recovery and representing the amount of the loss;

10 F. Awarding ABT prejudgment interest;

11 G. Awarding ABT its costs and reasonable attorneys' fees incurred herein pursuant
12 to A.R.S. § 12-341 *et seq.* and or other applicable rule, statute and the Policy;

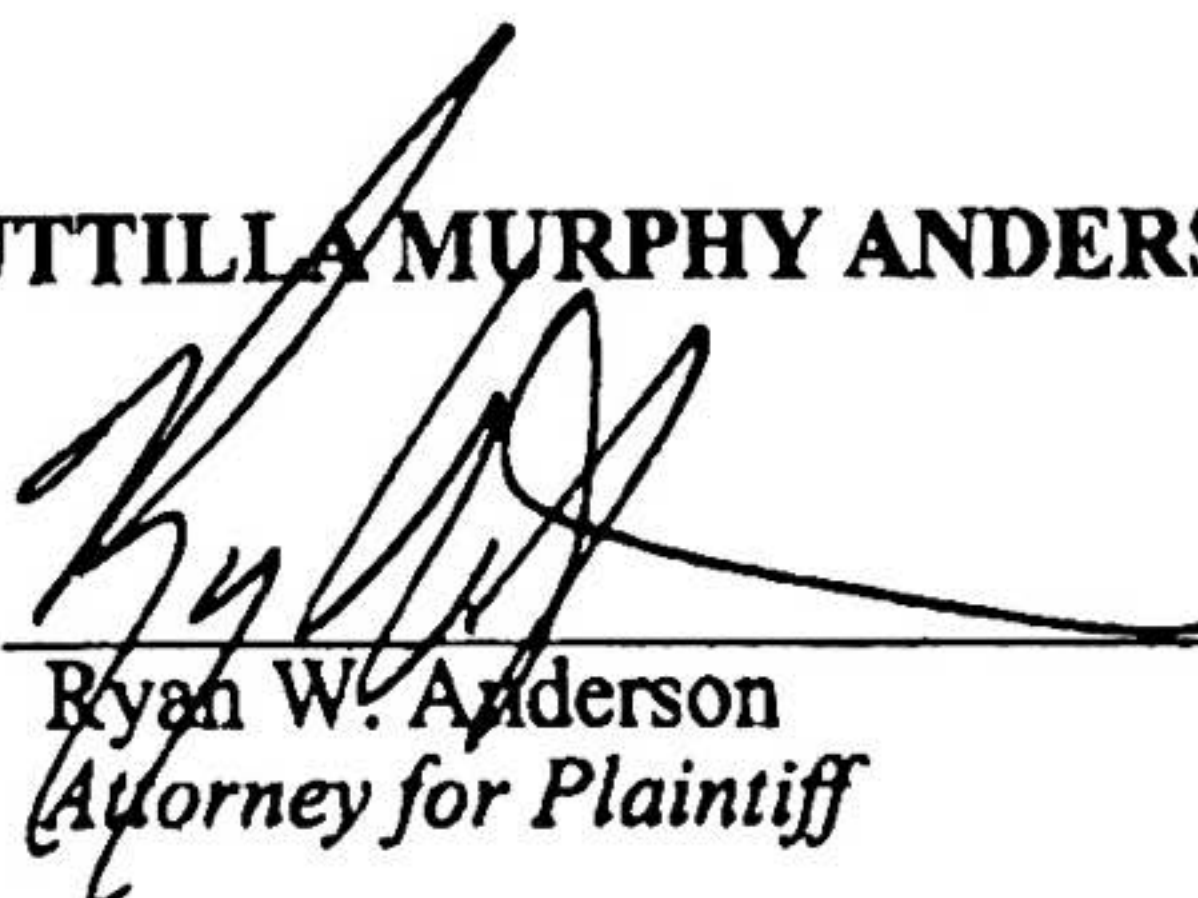
13 H. Awarding ABT its general and special damages resulting from Glendale's
14 breach of its insurance producer duties owed to it in an amount to be proven at trial; and

15 I. For such other relief as the Court deems just and proper.

16 RESPECTFULLY SUBMITTED this 28th day of August 2020.

17 GUTTILLA MURPHY ANDERSON, P.C.

18
19 By:


Ryan W. Anderson
Attorney for Plaintiff