

<b>STATE OF MICHIGAN</b> <b>3rd JUDICIAL CIRCUIT</b> <b>COUNTY OF WAYNE</b>	<b>VERIFICATION OF</b> <b>BUSINESS COURT ELIGIBILITY</b> <b>AND NOTICE OF ASSIGNMENT</b>	<b>CASE NO.</b> 2020 -     - CB
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Court address: 2 Woodward Ave., Detroit, MI 48226

Plaintiff(s)  
 Richard Kirsch, DDS

v

Defendant(s)  
 Aspen American Insurance Company

I am the attorney for the [check one]  plaintiff  defendant and per *MCR 2.114(B)(2) and MCR 2.114(D)* declare to the best of my information, knowledge, and belief that this case meets the statutory requirements to be assigned to the business court, *MCR 2.112(O), MCL 600.8031 et seq.*, and request assignment to the Business Court for the following reasons:

**[Both Sections 1 and 2 must be completed to be accepted by the Court (check all that apply)]**

1. **Parties.** This is a qualifying business or commercial dispute as defined by *MCL 600.8031(1)(c)* because,

- all of the parties are business enterprises
- one or more of the parties is a business enterprise and the other parties are its or their present or former owners, managers, shareholders, members, directors, officers, agents, employees, suppliers, or competitors, and the claims arise out of those relationships
- one of the parties is a non-profit organization, and the claims arise out of that party's organizational structure, governance, or finances
- It is an action involving the sale, merger, purchase, combination, dissolution, liquidation, organizational structure, governance, or finances of a business enterprise.

**AND**

2. **Actions.** This business or commercial action as defined by *MCL 600.8031(2)* involves,

- information technology, software, or website development, maintenance, or hosting
- the internal organization of business entities and the rights or obligations of shareholders, partners, members, owners, officers, directors, or managers
- contractual agreements or other business dealings, including licensing, trade secret, intellectual property, antitrust, securities, noncompete, nonsolicitation, and confidentiality agreements if all available administrative remedies are completely exhausted, including but not limited to, alternative dispute resolution processes prescribed in the agreements
- commercial transaction, including commercial bank transactions
- business or commercial insurance policies
- commercial real property
- other type of business or commercial dispute (explain):

June 10, 2020  
 Date

David H. Fink  
 Digitally signed by David H. Fink  
 Date: 2020.06.10 17:39:02 -04'00'  
 Signature

David H. Fink  
 Name (type or print) 28235  
 Bar no.

**STATE OF MICHIGAN  
WAYNE COUNTY CIRCUIT COURT**

RICHARD KIRSCH, DDS,

Plaintiff,

Case No. 20 -     - CB  
Hon.

vs.

ASPEN AMERICAN INSURANCE  
COMPANY,

Defendant.

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Attorneys for Plaintiff and Putative Class:

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There is no pending or resolved civil action arising out of  
the transaction or occurrence alleged in this complaint.

This case meets the statutory requirements to be assigned to the  
Business Court pursuant to MCR 2.112(O) and MCL 600.8031.

/s/ David H. Fink  
David H. Fink (P28235)

## **VERIFIED CLASS ACTION COMPLAINT**

Plaintiff Richard Kirsch, DDS, by and through counsel, brings this action against Defendant Aspen American Insurance Company on behalf of himself and those similarly situated, and states the following for his Class Action Complaint.

### **INTRODUCTION**

1. Plaintiff Richard Kirsch, DDS, is a dental practitioner who provides services to patients in and around Dearborn Heights, Michigan.

2. Dr. Kirsch has insurance through Defendant, including coverage for business interruption or lost business income relating to the suspension or slowdown of operations.

3. Beginning in or around March 2020, as a result of the novel COVID-19 pandemic (“COVID-19”) and related Orders issued by the Governor, Dr. Kirsch’s practice suffered an unprecedented decline in patient treatment volume. His practice was essentially shut down except for a limited number of emergency procedures.

4. As a result of the COVID-19 pandemic, Dr. Kirsch’s business was interrupted and his practice lost a significant amount of profit.

5. Dr. Kirsch filed an insurance claim for business interruption and lost business income.

6. Defendant wrongfully denied Dr. Kirsch’s insurance claim.

7. Defendant’s denial of the claim constitutes a breach of the parties’ insurance agreement.

8. Dr. Kirsch brings this action to obtain an order compelling Defendant to comply with the requirements of the business interruption and lost business income provisions of their

uniform policy, for all dentists in the State of Michigan insured by Defendant, who lost business income as a result of the COVID-19 pandemic.

### **PARTIES**

9. Plaintiff Dr. Kirsch is a dentist whose primary practice is located in a building in Dearborn Heights (“the Dearborn Heights Building”), County of Wayne, State of Michigan.

10. Defendant Aspen American Insurance Company is a global insurance provider incorporated and domiciled in the State of Texas, with its principal place of business located in Rocky Hill, Connecticut.

### **JURISDICTION AND VENUE**

11. This Court has jurisdiction over this action pursuant to MCL 600.601.

12. This Court has jurisdiction pursuant to MCR 2.605 because Plaintiff and the proposed members of the Class (as defined below) seek a declaratory judgment, there is an actual controversy between the parties, and the Court would have jurisdiction if relief other than a declaratory judgment were sought.

13. This Court has jurisdiction pursuant to MCL 600.715 because the Defendant has contracted to insure property located within the State of Michigan at the time of contracting.

14. Venue is proper in this Court pursuant to MCL 600.1621 because at least some of the actions giving rise to these causes of action occurred in Wayne County and at least some of the injuries suffered by Plaintiff and the proposed Class members occurred and will continue to occur in Wayne County.

### **FACTUAL ALLEGATIONS**

#### **COVID-19**

15. On or about March 23, 2020, Michigan Governor Gretchen Whitmer issued Executive Order 2020-17 (the “Order”), the first of a series of “stay home, stay safe” executive orders (collectively, the “Orders”) aimed at curbing the impact of COVID-19 within the State.

16. Under Executive Order 2020-17, Michigan residents were prohibited from seeking medical treatment, including dental care, for any reason other than to address a medical emergency. The Order stated that “all hospitals, freestanding surgical outpatient facilities, and dental facilities . . . must implement a plan to temporarily postpone . . . all non-essential procedures . . . .” The Order defined “non-essential procedure” as “a medical or dental procedure that is not necessary to address a medical emergency or to preserve the health and safety of a patient, as determined by a licensed medical provider.”

17. As a result of Executive Order 2020-17, in March 2020, Plaintiff was forced to suspend operation of dental activities at the Dearborn Heights Building.

18. Through a series of subsequent executive orders issued by Governor Whitmer, the prohibition on non-emergency medical and dental services was extended into late May.

19. Despite the suspension of his dental practice, Plaintiff continued to incur the expenses associated with operating the practice. However, Plaintiff was prevented from operating out of the Dearborn Heights Building and generating the business income necessary to cover these expenses.

20. Plaintiff’s dental practice and use of the Dearborn Heights Building for dental activities was suspended for more than two months because of the Governor’s Executive Orders and the COVID-19 pandemic.

21. On May 26, 2020, the Governor issued Executive Order 2020-96, which permitted medical and dental practices around the State to reopen for non-emergency services beginning on May 29, 2020.

### **Plaintiff's Insurance Coverage**

22. A copy of Plaintiff's insurance policy is attached as Exhibit 1.

23. Plaintiff has "Building, Blanket Dental Practice Personal Property and Income Coverage" which provides business income coverage. The policy states:

We will pay for the actual loss of practice income you sustain ... due to the necessary suspension of your practice during the period of restoration.<sup>1</sup> The suspension must be caused by direct physical damage to the building or blanket dental practice personal property at the described premises caused by or resulting from a covered cause of loss ....

We will only pay for loss of practice income that occurs within 12 consecutive months after the date of direct physical damage .... Practice income coverage shall apply separately to each location affected by such suspension of practice.

The "Limits of Insurance" section of the policy (III.E.6.) similarly provides:

Actual Loss Sustained - If your practice is suspended due to physical damage at the described ... we will pay for the actual loss of practice income you sustain [or up to an amount specified in a specific policy declaration that may be elected by a specific insured]

24. The policy defines "damage" as "partial or total loss of or damage to your covered property."

25. The policy provides coverage with respect to "covered causes of loss" which is defined as "all risk of direct physical loss" except as excluded in the policy. There is no exclusion in the policy that could apply to the COVID-19 pandemic.

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<sup>1</sup> According to the policy, "Period of restoration" means the period of time that begins 24 hours immediately following direct physical damage caused by or resulting from any covered cause of loss at the described premises and ends on the date when the property should be repaired, rebuilt or replaced with reasonable speed and similar quality.

26. Plaintiff has an additional “*civil authority*” coverage which states Defendant will pay for the actual loss of practice income caused by action of civil authority that prohibits access to the described premises due to the direct physical damage to property, other than at the described premises, caused by or resulting from any covered cause of loss.

27. Plaintiff has an additional “Ordinance or Law Coverage Extension” coverage which is related to the loss of dental practice income. Under this provision, if Plaintiff has purchased coverage for “Business Income and Extra Expense,” and Plaintiff suffers a “covered loss,” Plaintiff has insurance for “the amount of actual loss of Business Income” sustained during the increased period of suspension of operations “caused by or resulting from the enforcement of any ordinance or law” which meets certain qualifying conditions.

28. Plaintiff has the required Business Income and Extra Expense coverage and Plaintiff sustained a covered loss under the insurance policy due to the Governor’s Executive Orders which mandated the temporary suspension of Plaintiff’s dental practice and prevented the use of the Dearborn Heights Building for dental activities.

29. At the time of the Governor’s Orders, Plaintiff had made all the required payments and fulfilled all other obligations under the insurance policy.

30. Plaintiff filed a claim with Defendant for business interruption loss, in accordance with the terms of his policy.

31. On May 27, 2020, Defendant issued a letter denying coverage for Plaintiff’s loss.

32. Upon information and belief, Defendant is denying coverage for all other insured Michigan dentists similarly situated to Dr. Kirsch.

## CLASS ALLEGATIONS

33. Plaintiff brings this action as a class action, pursuant to Michigan Court Rule 3.501, individually and on behalf of the proposed class (“Class”) enumerated in the following paragraph under Class Definition.

34. **Class Definition.** Plaintiff brings this case for damages and equitable relief on behalf of the Class, defined as:

**Class:** All dental professionals and dental practices located in the State of Michigan which had valid insurance policies provided by Defendant which include provisions providing coverage for lost business income at any time from March 1, 2020 through the present and who suffered lost business income or profit as a result of the COVID-19 pandemic.

35. Excluded from the proposed Class are the judicial officers assigned to this matter, and their immediate family members; and, Court staff assigned to this case. Plaintiff reserves the right to modify or amend the Class Definitions, as appropriate, during the course of this litigation.

36. This action has been brought and may properly be maintained on behalf of the Class proposed herein under the criteria of Michigan Court Rule 3.501.

37. **Numerosity – Michigan Court Rule 3.501(A)(1)(a).** The number of members of the Class is so numerous that individual joinder of all members of the Class is impracticable. The precise number of members of the Class is unknown to Plaintiff, but may be ascertained from Defendant’s records. Members of the Class may be notified of the pendency of this action by recognized, Court-approved notice dissemination methods, which may include U.S. Mail, electronic mail, Internet postings, and/or published notice.

38. **Commonality – Michigan Court Rule 3.501(A)(1)(b)** The action involves questions of law and fact common to the Class, which predominate over any individual questions, including:

- a. Whether Plaintiff and the other Class members are entitled to compensation under their insurance policies for business losses sustained as a result of the COVID-19 pandemic and the related Governor's orders;
- b. Whether the COVID-19 pandemic, the Governor's orders related to same and the loss of business related to same qualify as Covered Causes of Loss as defined by the insurance policies;
- c. Whether losses sustained because of the COVID-19 pandemic, the Governor's orders related to same and the loss of business related to same qualify as "loss" or "damage" under the insurance policies;
- d. Whether Defendant breached its contract with Plaintiff and the other Class members by refusing to issue payment for business income losses sustained because of the COVID-19 pandemic.

**39. Typicality – Michigan Court Rule 3.501(A)(1)(c).** Plaintiff's claims are typical of the claims of the other members of the Class because Plaintiff and the other members each purchased insurance policies from Defendant but have not been provided the insurance coverage to which they are entitled. Plaintiff and the other members of the Class suffered damages as a direct and proximate result of Defendant's failure to provide the required insurance coverage. Plaintiff's claims arise from the same practices and course of conduct that give rise to the claims of the other members of the Class.

**40. Adequacy of Representation – Michigan Court Rule 3.501(A)(1)(d).** Plaintiff is an adequate Class representative because his interests do not conflict with the interests of the other members of the Class who he seeks to represent. Plaintiff has retained counsel competent and experienced in complex Class action litigation, and Plaintiff intends to prosecute this action

vigorously. The interests of the other members of the Class will be fairly and adequately protected by Plaintiff and his counsel.

**41. Superiority of Adjudication as a Class Action – Michigan Court Rules 3.501(A)(1)(e) and 3.501(A)(2).** Based on the aforementioned and in an effort to preserve judicial economy, this case will be best maintained as a Class Action, which is superior to other methods of individual adjudication of claims.

**42. Declaratory and Injunctive Relief – Michigan Court Rule 3.501(A)(2)(b).** Defendant has acted or refused to act on grounds generally applicable to Plaintiff and the other members of the Classes, thereby making appropriate final injunctive relief and declaratory relief, as described below, with respect to the members as a whole

### **FIRST CLAIM FOR RELIEF**

#### **BREACH OF CONTRACT**

43. Plaintiff repeats and re-alleges the allegations in the Paragraphs above, as if fully alleged herein.

44. Plaintiff and other Class members entered into contracts with the Defendant which provide that Plaintiff and other members of the Class would pay insurance premiums and, in exchange, the Defendant would provide coverage as outlined in the contracts.

45. Plaintiff and other Class members fulfilled their obligation by paying the insurance premiums as required by the contracts.

46. Defendant breached the contract with Plaintiff and Class members by refusing to issue payment for covered losses sustained by Plaintiff and Class members due to the COVID-19 pandemic and the Governor's orders.

47. Plaintiff and other Class members have been damaged in that they have not received the insurance protection that their premiums were intended to cover.

**SECOND CLAIM FOR RELIEF**

**DECLARATORY RELIEF**

48. Plaintiff repeats and re-alleges the allegations in the Paragraphs above, as if fully alleged herein.

49. Plaintiff and other Class members entered into contracts with the Defendant which provide that Plaintiff and other members of the Class would pay insurance premiums and, in exchange, the Defendant would provide coverage as outlined in the contracts.

50. Plaintiff and other Class members fulfilled their obligation by paying the insurance premiums as required by the contracts.

51. Plaintiff and the other Class members seek a declaratory judgment from this Court, stating that they are entitled to coverage for losses sustained as a result of the COVID-19 pandemic, the Governor's orders related to same and the business lost related to same.

**PRAYER FOR RELIEF**

Plaintiff, individually and on behalf of the other members of the Class, respectfully requests that the Court enter judgment in their favor and against Defendants as follows:

- a. Certifying the Class as requested herein, designating Plaintiff as Class Representative, and appointing the undersigned counsel as Class Counsel;
- b. Declaring that Defendant is financially responsible for notifying the members of the Class of the pendency of the suit;

- c. Declaring that Plaintiff and the other Class members are entitled to coverage, within their specific policy limits, for income lost as a result of the COVID-19 pandemic, the Governor's orders related to same and the business lost related to same;
- d. Declaring that Defendant has wrongfully refused to provide insurance coverage;
- e. Requiring Defendant to issue payments required under the insurance policies;
- f. Awarding injunctive relief as permitted by law or equity;
- g. Awarding Plaintiff's attorney's fees as a percent of any common fund or as is fair and reasonable;
- h. Awarding Plaintiff and its counsel all costs and expenses incurred in prosecuting this action;
- i. Awarding an incentive fee to Plaintiff for advancing the interests of the other Class members
- j. Awarding pre- and post-judgment interest on any amounts awarded; and
- k. Awarding such other and further relief as may be just and proper.

Respectfully submitted,

DATED: June 10, 2020

**FINK BRESSACK**

By: /s/ David H. Fink  
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**VERIFICATION**

I declare under the penalties of perjury that this Complaint has been examined by me and that its contents are true to the best of my information, knowledge and belief.

/s/ Richard Kirsch  
Richard Kirsch, DDS