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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

JOHN KELLY, M.D., a Professional Medical Corporation;	COMPLAINT AND DEMAND FOR JURY TRIAL (Tier 3)
Plaintiff,	
v.	Civil No.
AMRITSAR INSURANCE COMPANY, a Utah Corporation.	Judge
Defendant.	

Plaintiff John Kelly, M.D., a Professional Medical Corporation (“Dr. Kelly”), by and through undersigned counsel, complains against Amritsar Insurance Company (“Amritsar”) as follows:

PARTIES

1. Plaintiff Dr. Kelly is a California Professional Medical Corporation, engaged in providing healthcare services with a principal business location in Fountain Valley, California.

2. Amritsar is a Utah insurance company engaged in the business of providing insurance to policyholders like Dr. Kelly.

JURISDICTION AND VENUE

3. This Court has jurisdiction over the subject matter in this action pursuant to Utah Code §§ 78A-5-102 and 78B-6-401.

4. Venue is proper in this Court pursuant to Utah Code § 78B-3-307.

5. Dr. Kelly designates this as a Tier 3 action under the Utah Rules of Civil Procedure because the amount in controversy exceeds \$300,000.

FACTUAL BACKGROUND

Dr. Kelly's Business

6. Dr. Kelly operates eight successful orthopedic service facilities in Southern California.

7. These facilities generate millions of dollars in income annually, providing orthopedic services across Southern California.

8. Consistent with industry standards, Dr. Kelly's business operates on a cash accounting basis, with income accounted for upon receipt, typically ninety (90) days or more after Dr. Kelly provides the services in question.

Amritsar Issued a Policy Covering Interruptions to Dr. Kelly's Business.

9. Amritsar was at all relevant times engaged in the business of selling insurance. Amritsar entered an insurance contract for Special Business Interruption (Reimbursement) (the "Policy"), providing Business Interruption Coverage to Dr. Kelly for the period of January 1, 2019 to December 30, 2020.

10. Dr. Kelly paid the premiums for this coverage, as part of a more comprehensive coverage package, that required nearly a half-million-dollar annual premium payment. A copy of the Policy is attached as Exhibit A.

11. The Policy provides Business Interruption Coverage to Dr. Kelly subject to an individual claim limit of liability of \$1,000,000 and an aggregate claim limit of \$2,000,000.

12. Specifically, Amritsar “shall reimburse [Dr. Kelly] for a Loss to the extent of the Limits of Insurance with respect to an Insured Event occurring with the Policy Period.” *Id.* at ¶ A.1.

13. An “Insured Event” means “the suspension of Operations and the consequent loss of gross income arising out of Business Interruption.” *Id.* at ¶ B.11.

14. “Loss,” in turn, means “loss of gross income over one percent (1%) per year [of] gross income average for the last three (3) years” “with respect” to an Insured Event. *Id.* at ¶ B.15.

15. The Policy does not require anything more than a Loss with respect to an Insured Event, i.e., the suspension of operations, for coverage to apply. *Id.*

16. The Policy additionally defines Business Interruption to specifically include the following: “Damage to . . . real property arising out of a Covered Peril;” “Damage to . . . machinery and equipment;” “Governmental Action;” or “loss of any off-premises utility services.” *Id.* ¶ B.1(a)-(d).

17. The broad language of the Policy is also not limited by any virus specific riders, addendums, or exceptions often found in standard form business interruption policies.

The Pandemic and Subsequent Government Intervention Shutter Dr. Kelly's Business.

18. On March 3, 2020, Governor Gavin Newsom of California issued a press release which states that the spread of Covid-19 has caused a “nationwide shortage[] of respirator face masks for medical professionals....” See March 3, 2020 Press Release, attached as Exhibit B.

19. The press release also states that the California Department of Health & Emergency Officials are addressing this shortage by “taking steps to protect healthcare professionals on the frontlines of the fight against novel coronavirus.” *Id.* (emphasis added).

20. On March 4, 2020, Dr. Kelly placed an order for medical supplies with its supplier, McKesson, including personal protective equipment (“PPE”) such as N95 respirator masks essential to the continuation of Dr. Kelly’s orthopedic practices. See March 4, 2020 Order, attached as Exhibit C.

21. At the time this order was placed, all eight of Dr. Kelly’s locations were in operation, but because the supply of PPE was limited, additional PPE had to be ordered for such operations to continue.

22. The same day, Governor Newsom declared a State of Emergency in the State of California. See March 4, 2020 Declaration, attached as Exhibit D.

23. The Emergency Order recognizes the need to prepare California communities and the healthcare system for the spread of the virus and Governor Newsom announced the release of “N95 masks to address shortages caused by Covid-19.” *Id.*

24. By March 9, 2020, Dr. Kelly’s practices began to experience an onset of sick employees with symptoms consistent with Covid-19, with ten different employees becoming ill between March 9, 2020 and March 19, 2020.

25. On March 11, 2020, Dr. Kelly again ordered additional medical supplies, including PPE, orders that went similarly unfulfilled.

26. On March 15, 2020, California Governor Newsom issued Executive Order N-27-20.

27. That Order prioritizes the provision of the most critical healthcare, including that the California Department of Social Services, the California Division of Occupational Safety and Health, and the California Department of Public Health are to “focus on those individuals who are most vulnerable and on the most serious health and safety issues at licensed facilities.” *See* Order, attached as Exhibit E.

28. The Order also directs these California Departments and Division to “redirect resources to facilities identified.” *Id.* (emphasis added).

29. Three days later, on March 18, 2020, the Centers for Medicare & Medicaid Services (“CMS”) “announced that all elective surgeries, non-essential medical, surgical, and dental procedures be delayed during the 2020 Novel Coronavirus (Covid-19) outbreak.”

30. The CMS stated that “it is critical that ... non-essential surgeries and procedures ... be delayed so [as to] preserve personal protective equipment (PPE), beds, and ventilators.”

31. Due to the seizure of PPE and the directives of CMS and Governor Newsom, Dr. Kelly was required on March 19, 2020 to shutter all practice locations except for one: Fountain Valley, Suite 310. That location remained open for emergencies only and with a limited supply of PPE.

32. On April 19, 2020, CMS issued a recommendation for limited re-opening of some facilities to provide non-emergent non-Covid-19 healthcare under a Phase 1 plan.

33. The CMS directive states that conservation of “staff and supplies, especially personal protective equipment...” must be pursued in connection with any re-opening.

34. In other words, reopening could occur only once the supply of PPE is sufficient in the involved area to allow for such reopening.

35. On April 22, 2020, Governor Newsom announced a plan regarding deferred healthcare stating that “hospitals and health systems can consider resuming medical care that residents have delayed during this crisis, such as heart valve replacements, angioplasty, and tumor removals, when such care can be delivered safely and with the appropriate protections for healthcare workers.”

36. The care provided at Dr. Kelly’s facilities does not meet the criteria of Governor Newsom’s plan.

37. On April 28, 2020, Dr. Kelly attempted to order additional PPE from McKesson, but the order was again left unfulfilled due to “REDIRECT DUE TO SEIZURE/GOVT ORDER.”

38. On April 29, 2020, Dr. Kelly received from the County of Orange Healthcare Agency (“COHA”) a directive stating as follows:

This letter is to inform you that person with novel coronavirus (Covid-19) was present at Platinum Orthopedics at 11190 Warner Ave., Suite 310, Fountain Valley, CA on 04/20/2020. Due to contamination and physical damage at this location, this location should remain closed to patients for 14 days after this exposure, until 05/04/2020.

39. As a result of this COHA direction, Fountain Valley Suite 310 was closed on April 29, 2020, and Fountain Valley Suite 300 reopened on that day to handle emergencies with a limited supply of PPE.

40. Because of the government mandated absence of sufficient PPE and the directions of Governor Newsom and CMS, Dr. Kelly’s other operations remain closed.

41. To date, Dr. Kelly's practices have not received the PPE necessary to reopen and these orthopedic procedures cannot be performed in accordance with Governor Newsom's directives and the CMS' guidance.

42. As a result, all such operations, except the location that services orthopedic emergencies, remain closed.

43. Dr. Kelly has not received critical PPE necessary to reopen practices since the beginning of the coronavirus pandemic.

Dr. Kelly Provides Notice to Amritsar of Severe Business Interruption.

44. On March 30, 2020, Dr. Kelly reached out to Amritsar and notified it that he needed to file claims under the Policy. *See* March 30, 2020 to April 16, 2020 Email chain, attached as Exhibit F.

45. Dr. Kelly, faced with an unprecedented business interruption that had no end in sight, completed and returned the claim questionnaires Active provided to him that same day. *See id.*; *see also* Claim Forms, attached as Exhibit G.

46. The first claim was for the closure of seven of Dr. Kelly's eight practices because of the pandemic. The second was for the separate and distinct cancellation of all elective procedures in California. *Id.*

47. Having received no response, Dr. Kelly followed up with Active on April 12, 2020, requesting a call the following day to inquire about the submitted claims. *Id.*

48. Unfortunately, it became clear on the call that Active and Amritsar had not yet opened a claim, let alone begun the process of adjusting the claim or requesting additional information from Dr. Kelly.

49. In response, Dr. Kelly inquired what additional information Amritsar and Advanced needed to adjust the claim. *See* April 13, 2020 Email Chain, attached as Exhibit H.

50. By April 16, 2020, Dr. Kelly had still received no response from Amritsar and again followed up, making clear the delay was a serious issue, and Dr. Kelly was continuing to suffer extreme losses in gross revenue, as the business had effectively stopped.

Without Follow Up, Amritsar Initially Denies Dr. Kelly's Claims.

51. Despite Dr. Kelly's express offer to provide further information to Amritsar for evaluation of claims or the clear public record of the suspension of elective surgical procedures in California and the nationwide shortage and seizure of PPE, Amritsar did not request any further information.

52. Instead, on April 27, 2020, Dr. Kelly received a letter from an insurance claims adjuster with Utah Captive Insurance ("UCI"), Amritsar's claims agent.

53. In this letter, UCI denied Dr. Kelly's claims, stating that Dr. Kelly "did not experience any suspension of its business activities at its premises arising out of . . . Governmental Action." *See* April 27, 2020 denial letter, attached as Exhibit I.

54. This denial came even though Amritsar knew or should have known that Governor Newsom's Order and the CMS directives had effectively shut down Dr. Kelly's business operations and the operations of all other similarly situated orthopedic providers and prevented Dr. Kelly from acquiring the PPE necessary to continue to operate during the pandemic.

55. Following the denial of coverage, the letter urged Dr. Kelly to "promptly submit" any additional information that may affect "Amritsar's position," despite having failed to request any of the same in response to Dr. Kelly's prior inquiry.

Dr. Kelly Promptly Responds to Amritsar's Baseless Denial.

56. Shocked by Amritsar's response and left with hundreds of thousands of dollars in monthly losses piling up, Dr. Kelly retained counsel and began to immediately compile the information identified at the end of UCI's letter.

57. On May 14, 2020, counsel for Dr. Kelly formally responded to UCI's letter, outlining the applicability of the Policy's language to Dr. Kelly's situation, and providing exhaustive identification of how both governmental action and damage to property from the pandemic had shut down Dr. Kelly's business. *See* May 14, 2020 Letter attached as Exhibit J.

Amritsar Continues to Request Unnecessary Information to Delay Covering Dr. Kelly's Claim.

58. Nearly a month later, and more than two months after Dr. Kelly's claim was initially submitted, Amritsar responded to Dr. Kelly's letter, requesting a host of additional information, including descriptions of Dr. Kelly's various business locations, identification of Dr. Kelly's suppliers, additional dates of closure, identification of government orders, further documentation of Dr. Kelly's gross income, and questions regarding business loans Dr. Kelly may have received. *See* June 11, 2020 Email, attached as Exhibit K.

59. While much of this information was irrelevant to Dr. Kelly's claims, Dr. Kelly nonetheless worked to compile the information requested in Amritsar's response, and on August 7, 2020, formally responded. *See* August 7, 2020 Email, attached as Exhibit L.

60. Along with the requested information, this response also included a calculation of Dr. Kelly's loss in gross income at that point, which was more than \$823,656. *Id.*

61. The calculations were prepared from Dr. Kelly's bank records, which Dr. Kelly offered to provide, and made clear that Dr. Kelly's losses were going to exceed the Policy's limit in short order. *Id.*

62. Another month passed without further response from Amritsar or UCI, forcing Dr. Kelly to follow up, yet again. *See* September 3, 2020 Email, attached as Exhibit M.

63. As anticipated, by this point, Dr. Kelly's business losses now exceeded \$1,500,000, for which calculations were once again provided. *Id.*

64. Amritsar once again requested additional information, all of which could have been requested in response to the initial claim, including business names, related company information, number of employees, and additional loss information. *See* September 3, 2020 Email attached as Exhibit N.

65. Like its prior request, this information was largely unnecessary for purposes of evaluating coverage under the Policy, which was clearly established given the orders from CMS and Governor Newsom, the seizure of PPE, and the closure of Dr. Kelly's business due to damage to property including contamination, nor was this information required to determine that Dr. Kelly's Loss, as defined by the Policy, had exceeded the Policy's limits.

66. However, to continue to cooperate and persuade Amritsar to reverse its prior decision denying coverage under the Policy, Dr. Kelly again provided the requested information to the extent it was available. *See* October 16, 2020 Email, attached as Exhibit O.

67. This included monthly bank statements, tax returns for the three prior years, and additional background related to loans Dr. Kelly received to keep the business afloat.

68. Two-and-a-half weeks later, Amritsar returned with yet another request for additional information, seeking more background related to entities, explanations of emergency loans that were unrelated to the Policy's Loss calculations, and cumulative requests about Dr. Kelly's business closures. *See* November 5, 2020 Email, attached as Exhibit P.

69. Dr. Kelly once again responded with the requested information but made clear that the information requested had no legitimate relationship to Amritsar's adjustment of Dr. Kelly's claim. *See* November 9, 2020 Email, attached as Exhibit Q.

Amritsar Reverses Its Coverage Determination, but Continues to Delay Payment.

70. Two days after this response, Amritsar and UCI reversed their prior coverage determination, finding that coverage did exist under the Policy for both the governmental seizure of equipment and the damage to Dr. Kelly's property from viral contamination. *See* November 13, 2020 Letter, attached as Exhibit R.

71. Specifically, Amritsar recognized that, at minimum, "coverage for the claim is triggered under Section 1.a and 1.B of the definition of Business Interruption" because "the presence of the COVID-19 virus contamin[ated Dr. Kelly's] locations, machinery, and equipment." *Id.* at pg. 9.

72. This was in complete contradiction to the prior coverage denial issued months earlier.

73. The letter also explicitly recognized that Dr. Kelly "experienced a suspension of its business activities arising out of . . . Governmental Action." *Id.*

74. However, despite having admitted that multiple Insured Events triggered coverage, Amritsar was inexplicably only willing to cover loss of gross income between "March 2020 to June 2020 due to the suspension of [Dr. Kelly's] business activities," *Id.* at pg. 10.

75. This limitation came even though Amritsar defines Loss in the Policy as the "loss of gross income over one percent (1%) per year (a) based on the gross income average for the last three (3) years; and (b) related to an Insured Event," without any reference to the length of time that a triggering condition may occur.

76. Amritsar was also unwilling to provide any identification of the amount of coverage it believed existed for this period, claiming that Dr. Kelly had not yet provided “sufficient documentation to substantiate the loss.” *Id.*

77. However, by that time, Dr. Kelly had provided multiple loss calculations, as well as back up data for these calculations, all of which demonstrated that Dr. Kelly has suffered a loss of gross income well in excess of the Policy’s limits by this point.

78. Although encouraged by Amritsar’s reversal on its coverage position, Dr. Kelly was again forced to incur legal fees and provide additional information once again in response to Amritsar’s letter. *See* December 1, 2020 Letter, attached as Exhibit S.

79. In doing so, Dr. Kelly made clear that Amritsar’s limitation of coverage for losses between March and June 2020 was completely without basis or rationale, but that this was largely irrelevant, as the losses associated with the Business Interruption caused during those months still exceeded the Policy’s limit. *See id.*

80. This was because the losses arising out of Dr. Kelly’s closures in March through June are realized in June through August and beyond as the payments for these services are actually received (or not received). *Id.*

81. Dr. Kelly made this clear in his response, pointing out for Amritsar that Dr. Kelly uses cash accounting, consistent with the industry standard for orthopedic practices like Dr. Kelly’s. *Id.*

82. Dr. Kelly also demanded that Amritsar identify the exact coverage amount Amritsar believed exists if it does not believe the Policy’s limit has been reached. *Id.*

83. Incredibly, Amritsar once again requested additional information, including further description of loans unrelated to the gross income losses at issue, and additional bank statement information. *See* December 10-22, 2020 emails, attached as Exhibit T.

84. Dr. Kelly again responded, making clear the information requested was unnecessary and that Amritsar's delay in paying Dr. Kelly's claim under the Policy was unwarranted, but providing as much information as possible. *See id.*

After Eight Months of Delay, Amritsar Improperly Limits Coverage to Less than \$200,000.

85. The following day, Amritsar responded, claiming that Dr. Kelly had suffered only \$162,262.75 in lost gross revenue, based on its calculation of losses from March to June. *See* December 23, 2020 Email and calculation attachment, attached as Exhibit U.

86. Amritsar's limitation of loss from March to June has no basis in the Policy's language and is incorrectly completed.

87. Further, even if limited to a four-month period, Amritsar's calculation fails to accurately account for losses, as Dr. Kelly made clear in his correspondence, given the cash accounting method used to account for Dr. Kelly's services.

88. Amritsar was aware of this issue and it is abundantly clear from the financial statements Dr. Kelly provided, which show a drastic loss of income from June 2020 onward. *See id.*

89. Amritsar also chose to improperly treat Dr. Kelly's receipt of a loan through the Paycheck Protection Program ("PPP") as "income," despite explicit federal guidance that such a

loan is not income. *See* IRS Notice 2020-32 (making clear PPP loan proceeds are not considered taxable, even if forgiven).¹ *Id.*

90. On February 12, 2021, Dr. Kelly sent yet another response to Amritsar's baseless limitation of the coverage available to Dr. Kelly and offering to resolve the matter for less than the Policy's limit to avoid litigation. *See* February 12, 2021 email, attached as Exhibit V.

91. Dr. Kelly also made clear that if Amritsar was unwilling to promptly respond and resolve his claim, he would be forced to pursue litigation to vindicate his rights.

92. Amritsar failed to respond to Dr. Kelly's request, beyond providing the limited amount it previously identified. So, after more than eight months of answering Amritsar's repeated requests for irrelevant information and millions of dollars in losses piling up, Amritsar's improperly limited coverage determination left Dr. Kelly with no other choice but to file this Complaint.

FIRST CAUSE OF ACTION

(Breach of Contract)

93. Dr. Kelly incorporates the allegations contained in paragraphs 1 – 90 as though set forth herein verbatim.

94. The Policy obligates Amritsar to pay Dr. Kelly for Loss caused by Business Interruption arising out of the Insured Events that Amritsar has recognized occurred.

95. The Policy identifies how such a Loss is calculated, which is to provide for the loss of gross revenue arising out of an Insured Event, as compared to an average of the three prior years.

¹ While treatment of Dr. Kelly's PPP loan proceeds as income is inappropriate, even if it is considered, Dr. Kelly had still suffered a demonstrable Loss of more than \$1,500,000 by September 2020, far surpassing the Policy's claim limit. This Loss has only increased since and now exceeds \$2,500,000 and continues to grow by the day.

96. Amritsar has admitted that multiple Insured Events occurred.

97. Dr. Kelly has suffered more than \$1,000,000 in lost gross income as a result of these Insured Events.

98. Amritsar has breached the Policy by failing to timely pay Dr. Kelly's Loss arising out of these Insured Events.

99. As a direct and proximate result of Amritsar's breach of contract, Dr. Kelly has suffered damages in the amount to be proven at trial.

SECOND CAUSE OF ACTION

(Breach of Covenant of Good Faith and Fair Dealing)

100. Dr. Kelly incorporates the allegations contained in paragraphs 1 - 97 as though set forth herein verbatim.

101. The Policy contains an implied covenant of good faith and fair dealing.

102. Amritsar has breached its obligation of good faith and fair dealing as a result of the conduct described above, including its initial denial of coverage, the subsequent delay in adjusting Dr. Kelly's claim, and its willful miscalculation of the losses Dr. Kelly suffered as a result of the Insured Events that Amritsar recognizes occurred.

103. As a direct and proximate result of the breach of the covenant of good faith and fair dealing, Dr. Kelly has suffered damages in an amount to be proven at trial. These damages include, but are not limited to, business losses, attorneys' fees, and emotional distress.

WHEREFORE, Dr. Kelly requests judgment as follows:

1. On the First Cause of Action, for a judgment as follows:
 - (a) For damages according to proof at trial; and
 - (b) For pre- and post-judgment interest according to law;

- (c) For such other and further relief as the Court deems just and proper.
2. On the Second Cause of Action, as follows:
- (a) For damages according to proof at trial;
 - (b) For pre- and post-judgment interest according to law;
 - (c) For Dr. Kelly's attorneys' fees, costs and expenses of this action;
 - (d) For business losses and/or other consequential damages;
 - (e) For emotional distress damages; and
 - (f) For such other and further relief as the Court deems just and proper.

DATED this 29th day of February, 2021.

**MANNING CURTIS BRADSHAW
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