

Velva L. Price
District Clerk
Travis County
D-1-GN-20-003659
Victoria Benavides

CAUSE NO. D-1-GN-20-003659

NATIVE HOSTEL AUSTIN LLC	§	IN THE DISTRICT COURT
	§	
V.	§	419TH
	§	_____ JUDICIAL DISTRICT
	§	
SENECA INSURANCE COMPANY, INC.	§	TRAVIS COUNTY, TEXAS

PLAINTIFF’S ORIGINAL PETITION & REQUEST FOR DISCLOSURE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Plaintiff, NATIVE HOSTELS AUSTIN LLC and files this Original Petition against SENECA INSURANCE COMPANY, INC., (“Seneca”) and in support thereof, would show as follows:

I.
DISCOVERY CONTROL PLAN LEVEL

1. Plaintiff intends for discovery to be conducted under Level 3 of Rule 190 of the Texas Rules of Civil Procedure. This case involves complex issues and will require extensive discovery. Therefore, Plaintiff will ask the Court to order that discovery be conducted in accordance with a discovery control plan tailored to the particular circumstances of this suit.

II.
PARTIES AND SERVICE

2. Plaintiff is doing business in Travis County, Texas.
3. Seneca is in the business of insurance in the State of Texas. The insurance business done by Seneca in Texas includes, but is not limited to, the following:

- The making and issuing of contracts of insurance with the Plaintiff;
- The taking or receiving of application for insurance, including the Plaintiff’s application for insurance;
- The receiving or collection of premiums, commissions, membership fees,

assessments, dues or other consideration for any insurance or any part thereof, including any such consideration or payments from the Plaintiff; and

- The issuance or delivery of contracts of insurance to residents of this state or a person authorized to do business in this state, including the Plaintiff.

4. Defendant **Seneca Insurance Company, Inc.** can be served at through its registered agent, Mike Hicks, at the following address: 2400 Lakeside Blvd., Suite 200, Richardson, Texas 75082-4733. Service is requested at this time.

III. JURISDICTION AND VENUE

5. Venue is appropriate in Travis County, Texas because all or part of the conduct giving rise to the causes of action were committed in Travis County, Texas and Plaintiff and Property which are the subject of this suit are located in Travis County, Texas. Accordingly, venue is proper pursuant to Texas Civil Practice & Remedies Code §15.002.

IV. BACKGROUND FACTS

6. Plaintiff is the owner of an Insurance Policy (hereinafter referred to as "the Policy"). Defendant provided the Plaintiff's business insurance for the business located at 807 E. 4th Street, Austin, Texas (hereinafter referred to as "the Property"). Seneca sold the Policy insuring the Property to Plaintiff. The Declarations pages for the Policy and the policy provided to Plaintiff are attached hereto as Exhibit A. The Policy has been continuously in full force and effect since inception, providing coverage for property, business personal property, business income, and extra expense.

7. During the terms of said Policy, Plaintiff has sustained and will sustain covered losses during the Covid-19 outbreak and subsequent Travis County and State of Texas Orders (hereinafter the "Orders"), attached hereto as Exhibits B and C, and Plaintiff reported same

to Seneca pursuant to the terms of the Policy. Plaintiff asked that Seneca cover the cost for business interruption pursuant to the Policy. Seneca assigned Kristopher West to adjust the claim and investigate the loss related to business interruption; however, no investigation or adjustment of the claim was done and the claim has been wrongfully denied. To date, Seneca and West have mishandled Plaintiff's claim and caused and will continue to cause Plaintiff further and additional damages.

8. The World Health Organization ("WHO") identified the disease caused by the 2019 Novel Coronavirus as "COVID-19" on February 11, 2020. On March 11, WHO characterized COVID-19 as a pandemic. WHO saw "alarming levels of spread and severity, and by the alarming levels of inaction." WHO representatives stated, "[W]e have never before seen a pandemic sparked by a coronavirus. This is the first pandemic caused by a coronavirus. And we have never before seen a pandemic that can be controlled, at the same time." The Center for Disease Control ("CDC") has stated that a "pandemic is a global outbreak of disease. Pandemics happen when a new virus emerges to infect people and can spread between people sustainably. Because there is little to no pre-existing immunity against the new virus, it spreads worldwide."

9. Plaintiff is in the hotel and restaurant business. On March 21, 2020, Clay Jenkins, Travis County Judge, issued an executive order closing all businesses unless "exempted" beginning on March 21, 2020. *See* Exhibit B. Plaintiff's business was not exempt. *Id.* On March 31, 2020, the State of Texas Governor Greg Abbott signed an executive order closing all "non-essential" businesses beginning April 2, 2020. *See* Exhibit C. Plaintiff's business is not considered "essential" by Governor Abbott's order even though Plaintiff could offer take out service. *Id.* Plaintiff was beginning to lose business income even before March 23, 2020 because of peoples' fear of Covid-19.

10. The described purposes of the Orders are to protect the “health, safety and welfare” of Travis County and Texas residents, and to slow the spread of Covid-19 by “minimizing social gatherings” and “minimize in-person contact.” *See* Exhibits B and C. According to the Texas Department of Health and Human Services, Covid-19 has been and continues to be present in Travis County.

11. Beginning on March 2020, Plaintiff could no longer open and conduct business and was losing all business income. Plaintiff submitted its claims to Seneca, and it denied the claim without conducting an investigation. The pandemic and health care crises has resulted in the Plaintiff suffering a direct physical loss of the insured Property, and alternatively damage to the insured Property and suspension of its business that are covered under the Business Income Loss provisions of the Policy.

12. Plaintiff’s Policy does not define what constitutes a “Covered Causes of Loss.” *See* Exhibit A. Further, Plaintiff’s Policy provides coverage for Loss of Business Income and Extra Expense as follows:

“You may extend the insurance provided by this coverage form for direct loss of or damage to Covered Property to apply to:

- (1) The actual loss of Business Income you sustain due to the necessary suspension of your operations at the described premises as a result of covered direct loss or damage; and
- (2) Necessary Extra Expense you incur that you would not have incurred if there had been no such covered direct loss or damage.

Id at pg. 73. Plaintiff suffered lost income when the Orders closed the business, and on information and belief Plaintiff will continue to suffer lost income even after the Orders are lifted due to fear of Covid-19. The pandemic, consumer fear, and the stay at home Orders have caused Plaintiff physical loss of the Property and loss of business income and are not specifically excluded by the Policy. Plaintiff’s business has been transformed by external events, not specifically excluded,

from a sustainable, revenue generating operation to the unsatisfactory state of closure and now slowed business. The presence of the Covid-19 in Travis County alone triggers coverage because it renders the Property unsafe or makes it unusable for its intended purpose. Plaintiff's inability to physically operate and physically occupy its Property is a physical loss.

15. Seneca and West made no request to Plaintiff for documents or information relating to the claim, and Seneca denied Plaintiff's claim shortly after the claim was presented meaning it could not have done a proper or thorough investigation or have any evidence that any exclusions apply.

16. Seneca's denial was based, in part, on a lack of "physical damage" to Plaintiff's Property. *See Exhibit D.* But the Policy does not require a loss solely caused by physical "damage" as it also provides coverage for physical "loss." The Policy does not define "physical loss" and that term has been broadly defined in property policies for decades to include losses that are not actual tangible damage to physical property. At the very least, Plaintiff suffered a physical loss of the covered Property as a result of fear and actions taken to limit the impact of the pandemic on the health, safety and welfare of Travis County citizens. Further, Plaintiff clearly suffered physical loss to Covered Property because it was unable to operate.

17. Seneca relies on the exclusion for "Virus or Bacteria" as a basis for denial, but contrary to its assertion, this is not a pandemic exclusion. *See Exhibit D.* Seneca ignores the fact that the exclusion applies only where a virus is the fully realized and actual cause of the loss. It does not state that it applies to a loss caused by the need to prevent against the threat of transmission or fear of Covid-19. Seneca's denial admits that this claim relates to concern over the spread of the Covid-19 and preventing exposure. *See Exhibit D.* Preventing the threat or risk of the presence or recurring presence of Covid-19 is not specifically excluded under

the Policy.

18. The exclusion for virus has no application to Plaintiff's claim in light of its plain language. Alternatively, the exclusion is vague and ambiguous and must be construed in the light most favorable to Plaintiff.

19. Seneca failed to give proper, advance notice and disclosure of the exclusion and is thus barred from reliance upon it.

20. On information and belief, Seneca is barred from relying on the exclusion as a result of regulatory and/or administrative estoppel.

21. Alternatively, the exclusion as interpreted by Seneca is unconscionable and/or contrary to public policy and cannot be enforced as written.

22. Seneca made material misrepresentations about Policy provisions, coverage and the law in Texas applying thereto with regard to Plaintiff's Loss of Business Income additional coverage.

23. Seneca considered only its own interests, proceeded only according to its one-sided and self-serving interpretation of the Policy, and attempted to conceal from Plaintiff that Seneca made no effort to consider its interests. Seneca pre-textually looked only for ways to avoid coverage rather than first trying to find coverage.

24. Seneca wrongfully denied Plaintiff's claims for business interruption even though the Policy provides coverage for losses such as those suffered by Plaintiff. Furthermore, by information and belief, Seneca engaged its agents to misrepresent Policy provisions and coverage. To date, Seneca continues to deny the payment for Plaintiff's loss of business.

V.
CAUSES OF ACTION

A. BREACH OF CONTRACT

25. Plaintiff re-alleges the foregoing paragraphs. Seneca and its agents' conduct constitute a breach of the insurance contracts between it and Plaintiff. Seneca's failure and/or refusal, as described above, to pay Plaintiff adequate compensation as it is obligated to do under the terms of the Policy in question pursuant to the additional coverage of Loss of Business Income, and under the laws of the State of Texas, constitutes a breach of the insurance contracts with Plaintiff.

26. Seneca failed to perform its contractual duty to adequately compensate Plaintiff under the terms of the Policy pursuant to the additional coverage of Loss of Business Income. Specifically, Seneca wrongfully denied coverage and refused to offer the full proceeds of the Policy, although due demand was made for proceeds to be paid in an amount sufficient to cover Plaintiff's business loss, and all conditions precedent to recovery under the Policy have been carried out and accomplished by Plaintiff. Seneca's conduct constitutes a breach of the insurance contracts between it and Plaintiff.

B. NONCOMPLIANCE WITH TEXAS INSURANCE CODE

1. UNFAIR SETTLEMENT PRACTICES

27. Plaintiff re-alleges the foregoing paragraphs. Texas law is clear that insurance companies and anyone engaged in the business of insurance by investigating and adjusting a claim must conduct a reasonable, full and fair claim investigation. Seneca violated Chapter 541 of the Texas Insurance Code, in one or more of the following particulars:

§ 541.061. Misrepresentation of Insurance Policy.

- Making an untrue statement of material fact;

- Failing to state a material fact necessary to make other statements made not misleading;
- Making a misleading statement; and
- Failing to disclose a material matter of law.

§ 541.060 by, among other things:

- misrepresenting one or more material facts and/or policy provisions relating to coverage and requirements;
- failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim with respect to which their liability has become reasonably clear;
- failing to promptly provide a reasonable explanation of the basis in law or fact for the denial of the insured's claims;
- refusing to pay the claim without conducting a reasonable investigation; and/or
- refusing to conduct a reasonable investigation.

As alleged above, Seneca wholly failed to conduct any investigation of the claim, and then misrepresented to Plaintiff that the Policy required actual physical, tangible damage to its Property in order for it to have coverage for Business Income.

2. THE PROMPT PAYMENT OF CLAIMS

28. Plaintiff re-alleges the foregoing paragraphs. Seneca's conduct constitutes and will continue to constitute multiple violations of the Texas Insurance Code, Prompt Payment of Claims. All violations made under this article are made actionable by TEX. INS. CODE §542.060.

29. Seneca failed to meet its obligations under the Texas Insurance Code regarding timely beginning an investigation of Plaintiff's claim, and requesting all information reasonably necessary to investigate Plaintiff's claim within the statutorily mandated time of receiving notice of Plaintiff's claim. Its conduct constitutes a violation of the Texas Insurance Code, Prompt Payment of Claims. TEX. INS. CODE §542.055.

30. Further, Seneca failed to accept Plaintiff's full and entire claim within the statutorily-mandated time of receiving all necessary information. Its conduct constitutes a violation

of the Texas Insurance Code, Prompt Payment of Claims. TEX. INS. CODE §542.056.

31. Seneca failed and will fail to timely pay Plaintiff's claim, and for all of the covered losses due to its wrongful denial of the policy benefits. TEX. INS. CODE §542.057.

32. Seneca failed and will fail to meet its obligations under the Texas Insurance Code regarding payment of claim without delay due to its wrongful denial. Its conduct constitutes a violation of the Texas Insurance Code, Prompt Payment of Claims. TEX. INS. CODE §542.058.

33. Because of Seneca's wrongful acts and omissions, Plaintiff was forced to retain the professional services of the attorney and law firm who is representing it with respect to these causes of action.

C. BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING

34. Plaintiff re-alleges the foregoing paragraphs. Seneca's conduct constitutes a breach of the common law duty of good faith and fair dealing owed to the insureds pursuant to insurance contracts.

35. From and after the time Plaintiff's loss was presented to Seneca, its liability to pay the full claim in accordance with the terms of the Policy was reasonably clear. However, it has refused to pay Plaintiff in full and wrongfully denied the claim, despite there being no basis upon which a reasonable insurance company would have relied to deny the full payment. Seneca's conduct constitutes a breach of the common law duty of good faith and fair dealing.

36. Further, Seneca's failure, as described above, to adequately and reasonably investigate and evaluate Plaintiff's claim, although, at that time, it knew or should have known by the exercise of reasonable diligence that its liability was reasonably clear, constitutes a breach of the duty of good faith and fair dealing.

VI.
KNOWLEDGE

37. Each of the acts described above, together and singularly, was done "knowingly" by Defendant as that term is used in the Texas Insurance Code and was a producing cause of Plaintiff's damages described herein.

VII.
DAMAGES

38. Plaintiff would show that all of the aforementioned acts, taken together or singularly, constitute the proximate and producing causes of the damages sustained by Plaintiff.

39. For breach of contract, Plaintiff is entitled to regain the benefit of the bargain, which is the amount of the claim, together with attorney's fees.

40. For noncompliance with the Texas Insurance Code, Unfair Settlement Practices, Plaintiff is entitled to actual damages, which include the loss of the benefits that should have been paid pursuant to the Policy but for the wrongful denial, court costs, consequential damages not covered by Plaintiff's Policy and attorney's fees. For knowing conduct of the acts described above, Plaintiff asks for three times the actual damages. TEX. INS. CODE §541.152.

41. For noncompliance with the Texas Insurance Code, Prompt Payment of Claims, Plaintiff is entitled to the amount of the claim, as well as eighteen (18) percent interest per annum on the amount of such claim as damages, together with attorney's fees. TEX. INS. CODE §542.060.

42. For breach of the common law duty of good faith and fair dealing, Plaintiff is entitled to compensatory damages, including all forms of loss resulting from the insurer's breach of duty, such as additional costs, economic hardship, losses due to nonpayment of the amount the insurer owed, and exemplary damages.

43. For the prosecution and collection of this claim, Plaintiff has been compelled to engage the services of the attorney whose name is subscribed to this pleading. Therefore, Plaintiff is entitled to recover a sum for the reasonable and necessary services of Plaintiff's attorney in the preparation and trial of this action, including any appeals to the Court of Appeals and/or the Supreme Court of Texas.

VIII.

44. In addition, as to any exclusion, condition, or defense pled by Defendant, Plaintiff would show that:

45. The clear and unambiguous language of the policy provides coverage for business interruption and other losses to the Property caused by losses made the basis of Plaintiff's claims;

46. In the alternative, any other construction of the language of the policy is void as against public policy;

47. Any other construction and its use by the Defendant violate the Texas Insurance Code section 541 et. seq. and is void as against public policy;

48. Any other construction is otherwise void as against public policy, illegal, and violates state law and administrative rule and regulation.

49. In the alternative, should the Court find any ambiguity in the policy, the rules of construction of such policies mandate the construction and interpretation urged by Plaintiff;

50. In the alternative, Defendant is judicially, administratively, or equitably estopped from denying Plaintiff's construction of the policy coverage at issue;

51. In the alternative, to the extent that the wording of such policy does not reflect the true intent of all parties thereto, Plaintiff pleads the doctrine of mutual mistake requiring reformation.

**IX.
REQUEST FOR DISCLOSURES**

52. Pursuant to the Texas Rules of Civil Procedure 194, Plaintiff requests that Defendant provide the information required in a Request for Disclosure.

**X.
FIRST REQUEST FOR PRODUCTION TO SENECA**

53. Pursuant to the Texas Rules of Civil Procedure 196, Plaintiff requests that Defendant Seneca provide the information required:

- 1) Produce the non-privileged portion of Seneca's complete claim file for Plaintiff's Property relating to or arising out of Plaintiff's losses for which Seneca opened a claim under the Policy.
- 2) Produce all emails and other forms of communication between Seneca, its agents, adjusters, employees, or representatives and the agent and adjuster, and/or their agents, adjusters, representatives or employees relating to, mentioning, concerning or evidencing the Plaintiff's Policy and/or Property which are the subject of this suit.
- 3) Underwriting documents and communications, including but not limited to, any and all materials, documents, notations, files, reports, correspondence and/or other communications related to Plaintiff's application/s for coverage, binders, proposals, and the issuance of the policy, including renewals thereof. This request also includes materials, determination and/or method for determining the forms and endorsements to be used in creating the policy. This request also includes information regarding the basis for rating and premium classifications used for Plaintiff. Finally, this request includes any internal communications or guidelines regarding the handling and/or coverage positions of Defendant regarding business interruption and other claims related to the 2019 Novel Coronavirus and/or COVID-19.
- 4) Any and all documents and/or communications from Seneca or any parent, subsidiary or affiliated entities to any third-party, including but not limited to insurance agents and brokers, marketing and/or public relations firms, at any time after December 15, 2019, and relating in any way to coverage or exclusions or denials of coverage for civil authority or for business interruption or business income loss and/ or commercial property coverage mentioning or referencing the 2019 Novel Coronavirus, the pandemic, and/or COVID-19.

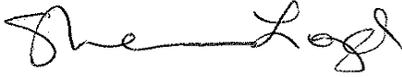
XI.

54. WHEREFORE, PREMISES CONSIDERED, Plaintiff requests that Defendant be cited to appear and answer herein; that, on final hearing, Plaintiff has judgment against Defendant for an amount, deemed to be just and fair by the jury, which will be a sum within the jurisdictional

limits of this Court. Plaintiff pleads that the damages will be more than \$1,000,000. Plaintiff further pleads for costs of suit; for interest on the judgment; for pre-judgment interest; and, for such other and further relief, in law or in equity, either general or special, including the non-monetary relief of declaratory judgment against Defendant, to which Plaintiff may be justly entitled.

Respectfully submitted,

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