

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

KARA MCCULLOCH DMD MSD PLLC,
individually and on behalf of all others similarly
situated,

Plaintiff,

v.

VALLEY FORGE INSURANCE COMPANY,
Defendant.

No.

COMPLAINT—CLASS ACTION

JURY DEMAND

I. INTRODUCTION

Plaintiff, Kara McCulloch DMD MSD PLLC (“McCulloch” or “Plaintiff”), individually and on behalf of all other similarly situated members of the defined national class and Washington State sub-classes (collectively, the “Class Members”), by and through the undersigned attorneys, brings this class action against Defendant Valley Forge Insurance Company (“Valley Forge” or “Defendant”) and alleges as follows based on personal knowledge and information and belief:

II. JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction pursuant to the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d), because at least one Class member is of diverse citizenship

COMPLAINT—CLASS ACTION - 1

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1 7. Defendant is authorized to write, sell, and issue business insurance policies in the
2 District of Columbia and forty-nine (49) states, including the state of Washington. Defendant
3 conducted business in the state of Washington by selling and issuing business insurance policies
4 to policyholders including Plaintiff.

5
6 **IV. NATURE OF THE CASE**

7 8. Due to COVID-19 and a state-ordered mandated closure, Plaintiff's orthodontics
8 business has been interrupted, curtailed, and suspended. Plaintiff intended to rely on its business
9 insurance to maintain business income in case of an insured loss. This lawsuit is filed to ensure
10 that Plaintiff and other similarly-situated policyholders receive the insurance benefits to which
11 they are entitled and for which they paid.

12 9. Defendant issued one or more insurance policies to Plaintiff, a businessowners
13 policy and related endorsements ("the Policy"), insuring Plaintiff's property and business
14 practice and other coverages, with effective dates of August 12, 2019, to August 12, 2020.

15
16 10. Plaintiff's business property includes property owned and/or leased by Plaintiff
17 and used for general business purposes for the specific purpose of orthodontics and related
18 business activities.

19 11. Defendant insurance policy issued to Plaintiff promises to pay Plaintiff for "direct
20 physical loss of or physical damage to" to covered property.

21
22 12. The Policy includes coverage for risks of both damage to and loss of covered
23 property.

24 13. Defendant's insurance policy issued to Plaintiff includes Business Income
25 Coverage, Extra Expense Coverage, Extended Business Income Coverage and Civil Authority
26 Coverage.

1 14. Plaintiff paid all premiums for the coverage when due.

2 15. On or about January 2020, the United States of America saw its first cases of
3 persons infected by COVID-19, which has been designated a worldwide pandemic.

4 16. In light of this pandemic, Washington Governor Jay Inslee issued certain
5 proclamations and orders affecting many persons and businesses in Washington, whether
6 infected with COVID-19 or not, requiring certain public health precautions. Among other things,
7 Governor Inslee's "Stay Home, Stay Healthy" orders required the closure of all non-essential
8 businesses, including Plaintiff's business.
9

10 17. Governor Inslee's "PROCLAMATION BY THE GOVERNOR AMENDING
11 PROCLAMATION 20-05: 20-24 Restrictions on Non-Urgent Medical Procedures," dated March
12 19, 2020, also provides, in part:
13

14 WHEREAS, the health care person protective equipment supply chain in
15 Washington State has been severely disrupted by the significant increased use of
16 such equipment worldwide, such that there are now critical shortages of this
17 equipment for health care workers. To curtail the spread of the COVID-19
18 pandemic in Washington State and to protect our health care workers as they
19 provide health care services, it is necessary to immediately prohibit all hospitals,
ambulatory surgery centers, and dental, orthodontic, and endodontic offices in
Washington State from providing health care services, procedures and surgeries
that require personal protective equipment, which if delayed, are not anticipated
to cause harm to the patient within the next three months.

20 18. By order of Governor Inslee, orthodontists including Plaintiff were prohibited
21 from providing services but for urgent and emergency procedures.

22 19. No COVID-19 virus has been detected on Plaintiff's business premises.

23 20. Plaintiff's property sustained direct physical loss and/or damage related to
24 COVID-19 and/or the proclamations and orders.
25
26

21. Plaintiff's property will continue to sustain direct physical loss or damage covered by the Valley Forge policy or policies, including but not limited to business interruption, extra expense, interruption by civil authority, and other expenses.

22. Plaintiff's property could not be used for its intended purposes.

23. As a result of the above, Plaintiff has experienced and will experience loss covered by the Valley Forge policy or policies.

24. After its business was shut down in March 2020, Plaintiff filed a claim for its loss of income. After an investigation, Defendant denied coverage on May 15, 2020.

25. In a letter to Plaintiff dated May 15, 2020, Defendant acknowledged that:

The [March 19, 2020] Order [20-24] reflects that, as of March 19, 2020 . . . dental, orthodontic and endodontic offices are prohibited from providing health care services, procedures, and surgeries that, if delayed, are not anticipated to cause harm to patient within the next three months.

Yet Defendant denied coverage because there was "no indication that [Plaintiff's] operations were suspended as a result of direct physical loss or damage[.]"

26. Upon information and belief, Valley Forge has denied or will deny all similar claims for coverage.

V. CLASS ACTION ALLEGATIONS

27. This matter is brought by Plaintiff on behalf of itself and those similarly situated, under Federal Rules of Civil Procedure 23(b)(1), 23(b)(2), and 23(b)(3).

28. The Classes that Plaintiff seeks to represent are defined at this time as:

A. ***Business Income Breach of Contract Class:*** All persons and entities in the United States insured under a Valley Forge policy with Business Income Coverage who suffered a suspension of their practice at the covered premises related to COVID-19

1 and/or orders issued by Governor Inslee, other Governors, and/or other civil authorities
2 and whose Business Income claim has been denied by Valley Forge.

3 B. ***Business Income Breach of Contract Washington Subclass:*** All persons
4 and entities in the State of Washington insured under a Valley Forge policy with Business
5 Income Coverage who suffered a suspension of their business at the covered premises
6 related to COVID-19 and/or orders issued by Governor Inslee, and/or other civil
7 authorities and whose Business Income claim has been denied by Valley Forge.
8

9 C. ***Business Income Declaratory Relief Class:*** All persons and entities in the
10 United States insured under a Valley Forge policy with Business Income Coverage who
11 suffered a suspension of their practice at the covered premises related to COVID-19
12 and/or orders issued by Governor Inslee, other Governors, and/or other civil authorities.
13

14 D. ***Business Income Declaratory Relief Washington Subclass:*** All persons
15 and entities in the State of Washington insured under a Valley Forge policy with Business
16 Income Coverage who suffered a suspension of their business at the covered premises
17 related to COVID-19 and/or orders issued by Governor Inslee, and/or other civil
18 authorities.
19

20 E. ***Extended Business Income Breach of Contract Class:*** All persons and
21 entities in the United States insured under a Valley Forge policy with Extended Business
22 Income Coverage who suffered a suspension of their business at the covered premises
23 related to COVID-19 and/or orders issued by Governor Inslee, other Governors, and/or
24 other civil authorities and whose Extended Business Income claim has been denied by
25 Valley Forge.
26

1 F. ***Extended Business Income Breach of Contract Washington Subclass:***

2 All persons and entities in the State of Washington insured under a Valley Forge policy
3 with Extended Business Income Coverage who suffered a suspension of their business at
4 the covered premises related to COVID-19 and/or orders issued by Governor Inslee,
5 and/or other civil authorities and whose Extended Business Income claim has been
6 denied by Valley Forge.
7

8 G. ***Extended Business Income Declaratory Relief Class:*** All persons and

9 entities in the United States insured under a Valley Forge policy with Extended Business
10 Income Coverage who suffered a suspension of their business at the covered premises
11 related to COVID-19 and/or orders issued by Governor Inslee, other Governors, and/or
12 other civil authorities.
13

14 H. ***Extended Business Income Declaratory Relief Washington Subclass:*** All

15 persons and entities in the State of Washington insured under a Valley Forge policy with
16 Extended Business Income coverage who suffered a suspension of their business at the
17 covered premises related to COVID-19 and/or orders issued by Governor Inslee, and/or
18 other civil authorities.
19

20 I. ***Extra Expense Breach of Contract Class:*** All persons and entities in the

21 United States insured under a Valley Forge policy with Extra Expense Coverage who
22 sought to minimize losses from the suspension of their business at the covered premises
23 in connection with COVID-19 and/or orders issued by Governor Inslee, other Governors,
24 and/or other civil authorities and whose Extra Expense claim has been denied by Valley
25 Forge.
26

1 J. ***Extra Expense Breach of Contract Washington Subclass:*** All persons
 2 and entities in the State of Washington insured under a Valley Forge policy with Extra
 3 Expense Coverage who sought to minimize losses from the suspension of their business
 4 at the covered premises in connection with COVID-19 and/or orders issued by Governor
 5 Inslee, and/or other civil authorities and whose Extra Expense claim has been denied by
 6 Valley Forge.
 7

8 K. ***Extra Expense Declaratory Relief Class:*** All persons and entities in the
 9 United States insured under a Valley Forge policy with Extra Expense Coverage who
 10 sought to minimize losses from the suspension of their business at the covered premises
 11 in connection with COVID-19 and/or orders issued by Governor Inslee, other Governors,
 12 and/or other civil authorities.
 13

14 L. ***Extra Expense Declaratory Relief Washington Subclass:*** All persons and
 15 entities in the State of Washington insured under a Valley Forge policy with Extra
 16 Expense Coverage who sought to minimize losses from the suspension of their business
 17 at the covered premises in connection with COVID-19 and/or orders issued by Governor
 18 Inslee, and/or other civil authorities.
 19

20 M. ***Civil Authority Breach of Contract Class:*** All persons and entities in the
 21 United States insured under a Valley Forge policy with Civil Authority Coverage who
 22 suffered a suspension of their practice and/or extra expense at the covered premises
 23 related to COVID-19 and/or orders issued by Governor Inslee, other Governors, and/or
 24 other civil authorities and whose Civil Authority claim has been denied by Valley Forge.
 25

26 N. ***Civil Authority Breach of Contract Washington Subclass:*** All persons
 and entities in the State of Washington insured under a Valley Forge policy with Civil

1 Authority coverage who suffered a suspension of their business and/or extra expense at
 2 the covered premises related to COVID-19 and/or orders issued by Governor Inslee,
 3 and/or other civil authorities and whose Civil Authority claim has been denied by Valley
 4 Forge.

5 O. ***Civil Authority Declaratory Relief Class:*** All persons and entities in the
 6 United States insured under a Valley Forge policy with Civil Authority Coverage who
 7 suffered a suspension of their practice at the covered premises related to COVID-19
 8 and/or orders issued by Governor Inslee, other Governors, and/or other civil authorities.

9 P. ***Civil Authority Declaratory Relief Washington Subclass:*** All persons and
 10 entities in the State of Washington insured under a Valley Forge policy with Civil
 11 Authority Coverage who suffered a suspension of their business at the covered premises
 12 related to COVID-19 and/or orders issued by Governor Inslee, and/or other civil
 13 authorities.
 14
 15

16 29. Excluded from the Classes are Defendant's officers, directors, and employees; the
 17 judicial officers and associated court staff assigned to this case; and the immediate family
 18 members of such officers and staff. Plaintiff reserves the right to amend the Class definitions
 19 based on information obtained in discovery.

20 30. This action may properly be maintained on behalf of each proposed Class under
 21 the criteria of Rule 23 of the Federal Rules of Civil Procedure.

22 31. **Numerosity:** The members of the Class are so numerous that joinder of all
 23 members would be impractical. Plaintiff is informed and believes that the proposed Class
 24 contains hundreds of members. The precise number of class members can be ascertained through
 25 discovery, which will include Defendant's records of policyholders.
 26

1 32. **Commonality and Predominance:** Common questions of law and fact
2 predominate over any questions affecting only individual members of the Class. Common
3 questions include, but are not limited to, the following:

4 A. Whether the class members suffered covered losses based on common
5 policies issued to members of the Class;

6 B. Whether Valley Forge acted in a manner common to the class and
7 wrongfully denied claims for coverage relating to COVID-19 and/or orders issued by
8 Governor Inslee, other Governors, and/or other civil authorities;

9 C. Whether Business Income Coverage in Valley Forge's policies of
10 insurance applies to a suspension of practice relating to COVID-19 and/or orders issued
11 by Governor Inslee, other Governors, and/or other civil authorities;

12 D. Whether Extended Business Income Coverage in Valley Forge's policies
13 of insurance applies to a suspension of practice relating to COVID-19 and/or orders
14 issued by Governor Inslee, other Governors, and/or other civil authorities;

15 E. Whether Extra Expense Coverage in Valley Forge's policies of insurance
16 applies to efforts to minimize a loss at the covered premises relating to COVID-19 and/or
17 orders issued by Governor Inslee, other Governors, and/or other civil authorities;

18 F. Whether Civil Authority Coverage in Valley Forge's policies of insurance
19 applies to a suspension of practice relating to COVID-19 and/or orders issued by
20 Governor Inslee, other Governors, and/or civil authorities;

21 G. Whether Valley Forge has breached its contracts of insurance through a
22 blanket denial of all claims based on business interruption, income loss or closures
23
24
25
26

1 related to COVID-19 and/or orders issued by Governor Inslee, other Governors, and/or
2 other civil authorities;

3 H. Whether, because of Defendant's conduct, Plaintiff and the class members
4 have suffered damages; and if so, the appropriate amount thereof; and
5

6 I. Whether, because of Defendant's conduct, Plaintiff and the class members
7 are entitled to equitable and declaratory relief, and if so, the nature of such relief.

8 33. **Typicality:** Plaintiff's claims are typical of the claims of the members of the
9 classes. Plaintiff and all the members of the classes have been injured by the same wrongful
10 practices of Defendant. Plaintiff's claims arise from the same practices and course of conduct
11 that give rise to the claims of the members of the Class and are based on the same legal theories.

12 34. **Adequacy:** Plaintiff will fully and adequately assert and protect the interests of
13 the classes and has retained class counsel who are experienced and qualified in prosecuting class
14 actions. Neither Plaintiff nor its attorneys have any interests contrary to or in conflict with the
15 Class.
16

17 35. **Federal Rule of Civil Procedure 23(b)(1), the Risk of Inconsistent or Varying**
18 **Adjudications and Impairment to Other Class Members' Interests:** Plaintiff seeks
19 adjudication as to the interpretation, and resultant scope, of Defendant's policies, which are
20 common to all members of the class. The prosecution of separate actions by individual members
21 of the classes would risk inconsistent or varying interpretations of those policy terms and create
22 inconsistent standards of conduct for Defendant. The policy interpretations sought by Plaintiff
23 could also impair the ability of absent class members to protect their interests.
24

25 36. **Federal Rule of Civil Procedure 23(b)(2), Declaratory and Injunctive Relief:**
26 Defendant acted or refused to act on grounds generally applicable to Plaintiff and other members

1 of the proposed classes making injunctive relief and declaratory relief appropriate on a classwide
2 basis.

3 37. **Federal Rule of Civil Procedure 23(b)(3), Superiority:** A class action is
4 superior to all other available methods of the fair and efficient adjudication of this lawsuit. While
5 the aggregate damages sustained by the classes are likely to be in the millions of dollars, the
6 individual damages incurred by each class member may be too small to warrant the expense of
7 individual suits. Individual litigation creates a risk of inconsistent and/or contradictory decisions
8 and the court system would be unduly burdened by individual litigation of such cases. A class
9 action would result in a unified adjudication, with the benefits of economies of scale and
10 supervision by a single court.
11

12 VI. CAUSES OF ACTION

13 Count One—Declaratory Judgment

14
15 *(Brought on behalf of the Business Income Declaratory Relief Class, Business Income*
16 *Declaratory Relief Washington Subclass, Extended Business Income Declaratory Relief Class,*
17 *Extended Business Income Declaratory Relief Washington Subclass, Extra Expense*
18 *Declaratory Relief Class, Extra Expense Declaratory Relief Washington Subclass, Civil*
Authority Declaratory Relief Class, and Civil Authority Declaratory Relief Washington
Subclass)

19 38. Previous paragraphs alleged are incorporated herein.

20 39. This is a cause of action for declaratory judgment pursuant to the Declaratory
21 Judgment Act, codified at 28 U.S.C. § 2201.

22 40. Plaintiff brings this cause of action on behalf of the Business Income Declaratory
23 Relief Class, Business Income Declaratory Relief Washington Subclass, Extended Business
24 Income Declaratory Relief Class, Extended Business Income Declaratory Relief Washington
25 Subclass, Extra Expense Declaratory Relief Class, Extra Expense Declaratory Relief Washington
26

Subclass, Civil Authority Declaratory Relief Class, and Civil Authority Declaratory Relief Washington Subclass.

41. Plaintiff seeks a declaratory judgment declaring that Plaintiff and Class Members' losses and expenses resulting from the interruption of their business are covered by the Policy. Plaintiff seeks a declaratory judgment declaring that Valley Forge is responsible for timely and fully paying all such claims.

Count Two—Breach of Contract

(Brought on behalf of the Business Income Breach of Contract Class, Business Income Breach of Contract Washington Subclass, Extended Business Income Breach of Contract Class, Extended Business Income Breach of Contract Washington Subclass, Extra Expense Breach of Contract Class, Extra Expense Breach of Contract Washington Subclass, Civil Authority Breach of Contract Class, and Civil Authority Breach of Contract Washington Subclass)

42. Previous paragraphs alleged are incorporated herein.

43. Plaintiff brings this cause of action on behalf of the Business Income Breach of Contract Class, Business Income Breach of Contract Washington Subclass, Extended Business Income Breach of Contract Class, Extended Business Income Breach of Contract Washington Subclass, Extra Expense Breach of Contract Class, Extra Expense Breach of Contract Washington Subclass, Civil Authority Breach of Contract Class and Civil Authority Breach of Contract Washington Subclass.

44. The Policy is a contract under which Plaintiff and the class paid premiums to Valley Forge in exchange for Valley Forge's promise to pay plaintiff and the class for all claims covered by the Policy.

45. Plaintiff has paid its insurance premiums.

1 46. Plaintiff submitted a claim to Valley Forge for its covered loss, and Valley Forge
2 denied coverage.

3 47. On information and belief, Valley Forge has denied coverage for other similarly
4 situated policyholders.

5 48. Denying coverage for the claim is a breach of the insurance contract.

6 49. Plaintiff is harmed by the breach of the insurance contract by Valley Forge.
7

8 **VII. PRAYER FOR RELIEF**

9 1. A declaratory judgment that the policy or policies cover Plaintiff's losses and
10 expenses resulting from the interruption of the Plaintiff's business related to COVID-19 and/or
11 orders issued by Governor Inslee, other Governors, and/or other authorities.

12 2. A declaratory judgment that the defendant is responsible for timely and fully
13 paying all such losses.

14 3. Damages.

15 4. Pre- and post-judgment interest at the highest allowable rate.

16 5. Reasonable attorney fees and costs.

17 6. Such further and other relief as the Court shall deem appropriate.
18

19 **VIII. JURY TRIAL DEMANDED**

20 Plaintiff demands a jury trial on all claims so triable.
21

22
23
24 //

25 //

26 //

DATED this 29th day of May, 2020.

KELLER ROHRBACK L.L.P.

By: s/ Amy Williams-Derry
By: s/ Lynn L. Sarko
By: s/ Ian S. Birk
By: s/ Gretchen Freeman Cappio
By: s/ Irene M. Hecht
By: s/ Maureen Falecki
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