

NORTH CAROLINA
MECKLENBURG COUNTY

FILED IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
16 CVS 12868

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HARUKI NAKAMURA,

MECKLENBURG CO., C.S.C.

Plaintiff,

vs.

CERTAIN UNDERWRITERS AT
LLOYD'S, LONDON,

Defendant.

COMPLAINT
[JURY TRIAL DEMANDED]

NOW COMES Plaintiff, Haruki Nakamura, by and through the undersigned counsel,
complaining of Defendant, Certain Underwriters at Lloyd's, London, and alleges as follows:

1. This is an insurance coverage action seeking damages arising from the refusal of Defendant, Certain Underwriters at Lloyd's, London ("Underwriters"), to pay benefits owed to Plaintiff, Haruki Nakamura ("Nakamura"), under a "Professional Athlete's Insurance" Policy. After pocketing hefty insurance premiums and assuring Nakamura, a professional football player, that he had procured coverage for the risk that he might suffer a career-ending injury, Underwriters repudiated the express promise of coverage under the insurance policy when that day came. Further, Underwriters' protracted, unfair and deceptive handling of Nakamura's claim violated North Carolina General Statutes §§ 58-63-15 and 75-1.1 et seq.

2. Underwriters' denial comes down to the opinion of one self-selected medical examiner whose "all clear" diagnosis conflicts with determinations – made both by Nakamura's treating physician and the "Medical Advisory Physician" designated by the NFL Retirement

Board – that Nakamura is “totally and permanently disabled” due to chronic post-concussion syndrome.

3. Nakamura is a former professional football player. During an August 29, 2013 Carolina Panthers pre-season game against the Pittsburgh Steelers, Nakamura suffered a career-ending injury, taking a hit to the side of the head while making a tackle during the first half of the game. He was removed from the game, evaluated by team doctors on the sidelines, and ultimately was taken to Carolinas Medical Center for a CT scan and diagnosed with a concussion. Nakamura was placed on the “injured reserve” list, and five days later, was released from the team through a “Settlement and Release” due to “concussion.”

4. In the weeks and months following the accident, Nakamura’s post-concussion symptoms worsened. Nakamura experienced headaches, impaired cognition, visual changes, fatigue, depression, and suicidal ideation. He visited specialist after specialist in search of diagnosis, treatment, and prognosis, and eventually was seen by Dr. Michael Collins at University of Pittsburgh Medical Center, an internationally renowned expert in sports-related concussions. Dr. Collins confirmed a diagnosis of “Post-Concussion Syndrome,” and deemed Nakamura “permanently disabled,” with “likely [] no hope of improvement sufficient to participate ever again as a professional football player.”

5. When Nakamura turned to Underwriters for benefits under the “Professional Athlete’s Insurance” policy he had purchased for this very risk, Underwriters added insult to injury by subjecting Nakamura to virtually impossible, hair-trigger notice procedures; voluminous and duplicative paperwork; no fewer than three layers of administrative bureaucracy (including, in addition to Underwriters itself, Underwriters’ insurance agent/representative and a third party claims handler); and interminable delays in its “investigation” of Nakamura’s claim.

In total, Underwriters, by and through its agents, strung Nakamura along for *more than two years*, only to deny Nakamura's claim.

6. Nakamura's evaluation with Underwriters' "selected" medical examiner, Dr. Manish Fozdar, upon which Underwriters bases its denial, was suspect from the start. On the eve of the examination, scheduled after months of unexplained unilateral delays on the part of Underwriters, both Underwriters and Dr. Fozdar threatened to cancel the appointment, with no promise of rescheduling, if Nakamura were to insist that an advocate be present during the examination. Nakamura was left with no choice but to go-it-alone. True to his fears, Dr. Fozdar's report casts aspersions, relies on speculation, and includes observations about Nakamura's demeanor and conduct *before the examination even commenced*, commenting, for example, on Nakamura's light sensitivity while he sat in the waiting room waiting for his appointment. Dr. Fozdar's report reaches the harrowing conclusion that Nakamura "is able to participate in his occupation of professional football player," but in the same breath cautions that Nakamura should take into consideration the "probable long term effects of repetitive concussions" in deciding whether to return to play.

7. Even the NFL – Nakamura's would-be employer – disagrees with Dr. Fozdar's conclusion. In late 2015, the Retirement Board of the Bert Bell/Pete Rozelle NFL Player Retirement Plan ("Plan") awarded Nakamura "total and permanent disability" ("T&P") benefits, per neurological findings that Nakamura was "totally and permanently disabled due to [] chronic post concussion syndrome," meaning, Nakamura was "substantially prevented from or substantially unable to engage *in any occupation or employment* for remuneration or profit" (emphasis added). In other words, according to the NFL's Medical Advisory Physician, Nakamura not only was incapable of returning to professional football (the threshold question for

benefits under the Professional Athlete's Policy), he could not engage in *any* gainful employment.

8. Through this Complaint, Nakamura seeks redress of the injuries caused by Underwriters' contract-repudiating, unlawful conduct.

PARTIES AND JURISDICTION

9. Plaintiff Haruki Nakamura is an individual who resides in Mooresville, North Carolina.

10. Upon information and belief, Underwriters is affiliated with the same insurance syndicate commonly known as "Lloyd's of London" referenced in N.C.G.S. § 58-17-1.

11. Upon information and belief, Underwriters is engaged in the insurance business by and through its affiliates, brokers and agents in this State and is therefore an "Eligible Surplus Lines Insurer" as defined in N.C.G.S. § 58-21-10(3). Underwriters therefore is subject to the jurisdiction of this Court pursuant to N.C.G.S. § 58-21-100 et seq.; by virtue of its business activities in North Carolina; and by virtue of the Policy's "Service of Suit Clause," which provides that "[i]t is agreed that in the event of the failure of the Underwriters hereon to pay any amount claimed to be due hereunder, the Underwriters hereon, at the request of the Insured . . . will submit to the jurisdiction of a Court of competent jurisdiction within the United States."

12. This Court has jurisdiction over the subject matter of this action, *see* N.C.G.S. § 1-75.4, and venue is proper in this Court pursuant to N.C.G.S. § 1-82.

FACTUAL BACKGROUND

A. The Insurance Policy

13. Nakamura purchased a "Professional Athlete's Insurance" policy from Underwriters, bearing Certificate Number RCA06813341, for the policy period July 11, 2013 to July 11, 2014 (the "Policy"), naming Nakamura as the "Named Insured." Policy, Schedule. The

Policy has a \$1,000,000 Limit of Liability. A true and correct copy of the Policy is attached hereto as Exhibit A.

14. Underwriters promised to pay "benefits" to Nakamura for "Bodily Injury" sustained during the Policy Period:

In the event that the Insured sustains Bodily Injury caused in and of itself by an Accident occurring during the Certificate period and which, solely and independently of any other cause, results in the Total Disablement directly culminating in the Permanent Total Disablement of the Insured and providing the Total Disablement commenced within six (6) months of the date of such Accident, then the Insurers agree to pay the benefits stated in the Schedule to the Insured.

Id. at Part 1, Insuring Agreement.

15. "Accident" is defined as "a single sudden and unexpected event, which occurs at an identifiable time and place and which causes unexpected Bodily Injury at the time it occurs."

Id. at Part 2(1).

16. The Policy defines "Bodily Injury" to mean, *inter alia*:

a specific physical injury caused by an Accident. An injury is a Bodily Injury only if it is the direct consequence of an Accident and is not the accumulation of a series of accidents or traumas and if it is not directly or indirectly caused by, contributed to, by and/or aggravated by any physical impairment, defect, degenerative process or infirmity existing prior to the inception of Policy. A physical impairment, defect, degenerative process or infirmity exists prior to the inception of this policy if it has been diagnosed by a health care practitioner the Insured could reasonably have been expected to be aware of its existence on the date of inception of this Policy.

Id. at Part 2(2).

17. The Policy defines "Total Disablement" to mean "the Insured's complete and total physical inability to Participate in his occupation" of "Football Player." *Id.* at Part 2(4) & Schedule. It defines "Permanent Total Disablement" to mean "that the Insured has suffered continuous Total Disablement for the Waiting Period stated in the Schedule [12 Months], and that as a result of the Accidental Bodily Injury . . . giving rise to the Total Disablement, the

Insured has no likely hope of improvement, sufficient to Participate ever again in his occupation” of “Football Player.” *Id.* at Part 2(5) and Schedule.

18. The Policy provides “Additional Benefits,” including “Injury Assistance and Family Inconvenience Benefit”: “We will reimburse an Insured Person for non medical expenses incurred directly relating to the Bodily Injury. Non medical expenses includes items such as transportation and accommodation costs not to exceed \$10,000.” *Id.* at Part 4(1).

19. “Hanleigh Management, Inc.” is designated as “Insurers’ Representatives” for purposes of providing notice. Specifically, “[n]otice of Accidental Bodily Injury . . . , Proof of Total Disablement and Proof of Permanent Total Disablement to be given to: Hanleigh Management, Inc.” *Id.*, “Insurers’ Representatives” at p. 8 of 8.

20. Nakamura signed an “Authorization to Release Personal Health Information” as part of his application for coverage (dated July 11, 2012). *Id.*, Sports Insurance Proposal Form at 9 of 9. By letter dated July 17, 2012, Hanleigh’s “Senior Underwriter,” Diane Koval, provided that signed authorization to the Carolina Panthers Head Athletic Trainer, and advised, “One of your players, Haruki Nakamura, has applied for disability insurance with Lloyd’s of London through our company. In order to underwrite his application, we require a copy of his most recent complete team physical covering all body parts” A true and correct copy of the July 17, 2012 Letter from D. Koval, enclosing Authorization to Release, is attached hereto as Exhibit B. Included in Nakamura’s Carolina Panthers medical file is a document entitled “Medical Record Documentation,” indicating that Nakamura’s “Panther Medical File” was shipped to Hanleigh on July 23, 2012. *Id.* The medical file contains a “Physical Exam” “Final Report” by the Carolina Panthers’ physician, Dr. Robert Heyer, M.D., dated March 15, 2012. The cover page of the Report includes Nakamura’s “Past Medical History,” which states in part

that Nakamura “had one concussion when he was a sophomore in college. He spent the night in the hospital, but played the next weekend. No other issues” *See* March 15, 2012 Final Report, a true and correct copy of which is attached hereto as Exhibit C. Upon information and belief, this March 15, 2012 “Final Report” was provided to Underwriters during the underwriting of the Policy.

B. The Accident, And Underwriters’ Forms Morass

21. On August 29, 2013, during a Carolina Panthers pre-season game against the Pittsburgh Steelers, Nakamura took a hit to the side of his head. He was seen by the team doctors that same day, and was sent to Carolinas Medical Center for a CT Scan. Nakamura was evaluated two days post-injury, at which time he had deficits in verbal memory and was mildly symptomatic. Nakamura continued to report concussion symptoms, was placed on the “injured reserve” list on September 2, 2013, and two days later, was released from his Carolina Panthers contract due to “concussion.” A true and correct copy of the Settlement and Release (eff. as of Sept. 3, 2013) is attached hereto as Exhibit D.

22. On or about November 8, 2013, Nakamura’s advisor, Brad Schwartz, informed Christopher Larcheveque, Senior Vice President at Hanleigh Management Company (“Hanleigh”), of Nakamura’s “lingering health issues due to the injury” on August 29, 2013. Schwartz spoke with Larcheveque several more times as well. Larcheveque advised that Nakamura be seen by doctors, and requested that he be kept apprised of Nakamura’s diagnosis and prognosis once known.

23. A month later, Schwartz advised Larcheveque that Nakamura had been seen by several doctors, and was still awaiting word regarding his diagnosis and prognosis. Schwartz advised, “We will provide you with an update regarding his medical status as soon as possible. At this time, it appears unlikely that Nakamura will be able to play professional football again.”

See Dec. 17, 2013 Letter from B. Schwartz to C. Larcheveque, a true and correct copy of which is attached hereto as Exhibit E.

24. In response to this letter, Schwartz received an email from Graham Southall, Vice President – Chief Underwriter of Hanleigh, advising that Larcheveque was no longer with Hanleigh. Graham attached a form entitled “Proof of Loss,” a form “used by us as an Incident Report form,” and asked that the form be completed. See Dec. 18-19, 2013 Email chain between G. Southall and B. Schwartz, a true and correct copy of which is attached hereto as Exhibit F.

25. On January 31, 2014, Nakamura submitted the “Proof of Loss” form to Underwriters, in which he stated that he was “[s]uffering from post-concussive symptoms, including headaches, nausea, dizziness, imbalance, visual changes, fatigue, mental ‘fogginess,’ slow mentation, vestibular/inner ear dysfunction.” See Jan. 31, 2015 Email from K. Barrett to G. Southall, *et al.*, attaching “Proof of Loss,” a true and correct copy of which is attached hereto as Exhibit G; *see also* Jan. 31, 2014 Email from G. Southall to K. Barrett, a true and correct copy of which is attached hereto as Exhibit H (confirming receipt that same day, and advising that Nakamura’s “completed Proof of Loss Form” had been “communicated to underwriters.”).

26. On or about April 11, 2014, Nakamura received a letter from Mary Ann Camp with Midlands Claim Administrators, Inc., advising that Midlands “has been authorized” by Underwriters “to assist in the investigation and handling” of Nakamura’s claim for Permanent Total Disability benefits. Underwriters requested that Nakamura “provide the following, which are required under your Policy”: (1) an “Incident Report form”; (2) signed authorization to allow Underwriters to obtain copies of Nakamura’s medical records; and (3) an “Attending Physicians Statement.” A true and correct copy of the April 11, 2014 Letter from M. Camp to H. Nakamura is attached hereto as Exhibit I. These requests were bewildering on several fronts: First, as

explained in ¶ 25 above, Hanleigh provided, and Nakamura submitted, a “Proof of Loss” form that, according to Hanleigh (Underwriters’ representative), was the equivalent to the so-called “Incident Report” form. Underwriters’ April 11, 2014 letter was the first time the “Incident Report Form” even was provided to Nakamura. Second, as part of his January 31, 2014 “Proof of Loss” submission, Nakamura signed an “Authorization to Disclose Health Information,” allowing Underwriters to obtain copies of his medical records. Indeed, as the letter admits, Midlands *already had requested* medical records from Nakamura’s physicians. Third, the Hanleigh-provided “Proof of Loss” form included a two-page “Attending Physician’s Statement” (which Nakamura was in the process of having completed). Once again, Underwriters’ April 11, 2014 letter was the first time this new seven-page “Attending Physicians Statement” was being provided.

27. Further, Underwriters threatened that coverage “appears questionable . . . because of your failure to submit notice of your injury, your incident report and proof of loss in a timely manner,” thus “fall[ing] outside of the policy requirements under paragraphs 2, 3 and 4[.]” Underwriters’ threatened bases for denial misrepresent pertinent facts and insurance policy provisions relating to coverage:

- (a) First, Underwriters has its dates wrong. Nakamura first provided notice on or about November 8, 2013 (*see* ¶ 22 above), not “on or about January 31, 2014,” as Underwriters claimed.
- (b) Second, Underwriters has its forms confused. At no time did anyone at Hanleigh advise that Nakamura needed to submit the “Incident Report” form. Rather, Hanleigh provided a “Proof of Loss” form, and advised it was equivalent to the “Incident Report” form. Now, *months* after Nakamura already had submitted the

Hanleigh-provided equivalent, Underwriters was invoking “paragraph 3” (requiring submission of an Incident Report Form within ninety days after the commencement of Total Disablement), as grounds for denying coverage. *See* Policy, § V(3).

- (c) Third, Underwriters’ invocation of “paragraph 4” (requiring submission of a Proof of Permanent Total Disablement Form “[w]ithin twenty (20) days after the commencement of Permanent Total Disablement”) as grounds to deny coverage was particularly puzzling, given that the time to perform that condition was, at the earliest, four months in the future. Nevertheless, Underwriters already was citing to Nakamura’s alleged failure to timely submit that form as grounds for denying coverage. *Id.*, § V(4).

28. On April 17, 2014, Nakamura submitted an “Attending Physician’s Statement” from Nakamura’s treating physician, Dr. Michael Collins, Ph.D. *See* April 17, 2014 Email from K. Barrett to G. Southall, attaching Attending Physicians Statement, a true and correct copy of which is attached hereto as Exhibit J; *see also* April 17, 2014 Email from G. Southall to K. Barrett, a true and correct copy of which is attached hereto as Exhibit K (acknowledging receipt and confirming that “[t]he information has been passed to underwriters.”).

29. Dr. Collins is a clinical neuropsychologist at the University of Pittsburgh Medical Center’s Sports Medicine Concussion Program. He is an internationally renowned expert in sports-related concussion. The UPMC Sports Medicine Concussion Program, established in 2000, is the first and largest research and clinical program focused on the diagnosis, evaluation and management of sports-related mild traumatic brain injury in athletes of all levels. In addition to extensive clinical experience, Dr. Collins has been a lead author on several major

groundbreaking studies of high school and college athletes published in JAMA, Neurosurgery, American Journal of Sports Medicine, and Pediatrics, and an author on more than 70 peer-reviewed research articles for other prestigious medical journals. He was the co-lead author of the Centers for Disease Control and Prevention's "Concussion Tool Kit for Physicians," which has been disseminated nationwide to several physician subspecialties as an education standard regarding concussion management. He is an advisor to numerous athletic organizations, including USA Rugby, and US Lacrosse, as well as a concussion consultant for several other national and international sports organizations and teams.

30. In his "Attending Physician's Statement," Dr. Collins describes Nakamura's "diagnosis and current condition" as "post-concussion syndrome, post-traumatic vestibular and ocular motor deficits, major depressive disorder, moderate." In response to the question, "How long was or will patient be continuously totally disabled? (Unable to work?)," Dr. Collins indicated "8/29/2013 [date of injury] Thru: current." Dr. Collins further opined that "Haruki's prognosis is poor for returning to his position as a professional football player, with a reasonable degree of medical certainty, I believe he is permanently disabled."

31. Nakamura submitted an "Incident Report" on May 5, 2014. See May 5, 2014 Letter from J. Hammerman to M. Camp, with attachment, a true and correct copy of which is attached hereto as Exhibit L.

32. The forms morass *coup de grace* came on August 26, 2014, when Underwriters' claims handler, Camp, advised that she "just noticed we haven't received Part II of Hanleigh's claim form, which is completed by the attending physician . . . I did check with Hanleigh, and they have advised that they did not receive it." Nakamura, however, had submitted that form to Hanleigh four months earlier. Nakamura's counsel then had to email Southall to confirm the

transmission date, and Southall immediately located the “missing” form that same day. A true and correct copy of the June 12 – Aug. 26, 2014 Email chain between M. Camp, J. Hammerman, *et al.* is attached hereto as Exhibit M.

C. Never-Ending Requests for Medical Files and Other Investigation Delays

33. The initial forms having now been completed, Underwriters began a seemingly endless series of requests for medical files. In contrast to the saga described below, Nakamura requested and received the very same medical records within a month.

34. As of June 12, 2014, more than five months after receiving Nakamura’s authorization to obtain medical records, Camp advised that Midlands “still await[s] receipt of records from several other physicians involved in Nakamura’s care, and we are calling them today to expedite receipt of their records.” *Id.*

35. Again on June 30, 2014, Camp advised that Midlands had not received records from several doctors, but “will call their office this week in an effort to expedite our requests.” *Id.*

36. After several follow-up requests from Nakamura’s counsel regarding the status of the records requests in late July and early August, Camp advised by email dated August 7, 2014 that Midlands had received additional records, which had been “forwarded” to Underwriters, and Camp would “check with them for their comments.” In response to whether that “complete[d] Midland’s medical file for this claim,” and emblematic of the layered bureaucracy of Underwriters’ claims process, Camp responded, “We won’t know if Underwriters need something additional until after they have reviewed what they now have. I will keep you posted.” A true and correct copy of the June 12 – Aug. 7, 2014 Email chain between M. Camp and J. Hammerman is attached hereto as Exhibit N.

37. As yet another example of the Underwriters' runaround, on October 3, 2014, Camp advised that "Underwriters are now reviewing all of the claim documents," and "*request additional information from Dr. Collins*, in order to assist with their determination." (emphasis added). Camp allegedly had sent a letter on September 4, and – one month later – said she would "follow up with him so that we get his response." A true and correct copy of the Oct. 3, 2014 Email from M. Camp to J. Hammerman is attached hereto as Exhibit O.

38. On October 28, 2014, Nakamura submitted a "Proof of Total Disablement Form" to Underwriters, attaching Dr. Collins' October 23, 2014 Report regarding Nakamura's condition and prognosis. A true and correct copy of the Proof of Permanent Total Disablement Form, attaching the Oct. 23, 2014 Letter from M. Collins is attached hereto as Exhibit P. Dr. Collins reached the following conclusions: Nakamura "has been unable to participate as a professional athlete as a result of" the August 28, 2013 head injury, "since the time of the injury through the present day." Nakamura's "presentation," more than a year after the injury occurred, "is consistent with post-concussion syndrome." Dr. Collins concluded "to a reasonable degree of medical certainty" that, due to "the persistence and severity of post-concussion syndrome and depression, as well as poor adherence and response to treatment, Nakamura is permanently disabled and likely has no hope of improvement sufficient to participate ever again as a professional football player." Nakamura's "risk level for further injury and poor long-term outcomes is elevated to the degree that return to football would not be recommended." Dr. Collins further concluded that there was no evidence that prior head injuries had contributed to Nakamura's permanent total disablement."

39. By email dated October 30, 2014, Camp advised that she was "moving to Empirical Loss Management, LLC ("Empirical") as of October 31, 2014. On and after that date

Empirical will represent Certain Underwriters at Lloyd's, London ('Underwriters') with regard to this claim and I will continue to adjust the claim on behalf of Underwriters." See Oct. 30, 2014 Email from M. Camp to J. Hammerman, a true and correct copy of which is attached hereto as Exhibit Y.

40. By letter dated December 4, 2014, Camp wrote "to request assistance in obtaining additional information related to the claim investigation." Empirical, now "represent[ing] Certain Underwriters at Lloyd's, London ('Underwriters') with regard to Mr. Nakamura's claim[.]" claimed not to have received medical records from several medical providers that Nakamura had first identified in his "Proof of Loss" in January 2014, and contemporaneously had authorized Underwriters to obtain. Virtually *all* of the information requested in Underwriters' December 4, 2014 letter was contained in the medical records to which Underwriters had been authorized access *for nearly a year*. A true and correct copy of the December 4, 2014 Letter from M. Camp to J. Hammerman is attached hereto as Exhibit Q.

D. Underwriters' Closed-Door Medical Examination and Denial of Coverage

41. In mid-January 2015, Underwriters invoked its "Right to Medical Examination" under the Policy – nearly a year after receiving Nakamura's "Proof of Loss." Underwriters "selected" Dr. Manish Fozdar and his colleague, Dr. Thomas Bundick, Ph.D., with Triangle Forensic Neuropsychiatry, PLLC, in Raleigh, North Carolina. Drs. Fozdar and Bundick apparently had no availability until mid-March 2015, notwithstanding Nakamura's availability and eagerness to be seen. (Underwriters even acknowledged the significant time lapse in its eventual denial letter, noting that Dr. Fozdar's examination occurred "approximately 6 months after" Nakamura was last seen by his treating physician, Dr. Collins, *i.e.*, seven months after the Policy's prescribed twelve-month "Waiting Period.")

42. On the eve of the March 18, 2015 appointment, Underwriters advised that Dr. Fozdar “has a strict policy of not allowing any attorneys or representatives to be present during his examinations and related neuropsychiatric testing.” If Nakamura refused to attend the examination alone, Underwriters “may not be able to reschedule the examination. The examination is a condition precedent to coverage.” A true and correct copy of the March 17, 2015 Email chain between M. Camp and J. Hammerman is attached as Exhibit R. Faced with that Hobson’s choice, Nakamura opted to go-it-alone.

43. Dr. Fozdar took more than a month to write his report (dated April 26, 2015), and Underwriters, for reasons unknown, stalled on providing Nakamura with a copy of the report (which references and incorporates Dr. Bundick’s report) until Underwriters was ready with its denial. It is fair to assume that Underwriters received its copy of Dr. Fozdar’s report at or soon after April 26, 2015. In response to Nakamura’s counsel’s request for a copy of the report on May 20, 2015, Underwriters simply did not respond. When asked again on May 28, 2015, Underwriters responded, with questionable truthfulness, that it was “confirming with Dr. Fozdar that we have his report and the attachments cited in the report.” A true and correct copy of the April 10 – June 12, 2015 Email chain between J. Hammerman and M. Camp is attached hereto as Exhibit S.

44. Finally, on June 12, 2015 – nearly two years after Nakamura sustained his injury, nearly a year-and-a-half after submitting his Proof of Loss, more than four months after submitting his “Proof of Permanent Total Disablement,” and three months after submitting to a medical examination by Underwriters’ chosen medical examiner – *Underwriters denied Nakamura’s claim*. Nakamura’s claim was denied on grounds that he does not satisfy “the Policy’s requirement of sustaining a Bodily Injury caused in and of itself by an Accident

occurring during the Certificate period and which, solely and independently of any other cause, results in Total Disablement directly culminating in Permanent Total Disability.” Underwriters’ denial called into question (1) whether Nakamura even was suffering from post-concussive syndrome, (2) but if so, whether his condition was solely attributable to the August 29, 2013 injury, as opposed to prior documented (and speculated) concussions; and (3) whether, notwithstanding Nakamura’s post-concussive syndrome, Nakamura could return to the NFL. A true and correct copy of the June 12, 2015 Denial of Coverage, enclosing medical examiner reports, is attached hereto as Exhibit T.

45. Dr. Fozdar’s report, quoted at length in Underwriters’ denial, makes all too clear that Dr. Fozdar (and Underwriters) took full advantage of the fact that Nakamura was forced to submit to their medical examination without an advocate. The report includes the irrelevant note, among others, that Nakamura “requested to turn the lights off” during the examination,” but “[w]hen he was noted to be sitting in the waiting room, he did not request to turn the lights off and was not noted to be in any distress due to lights.” The report does not indicate who (receptionist? trained professional?) was “observing” Nakamura in the waiting room before the appointment began, nor does the report elucidate the differences, if any, between *waiting* room versus *examination* room lighting. Regardless, Underwriters made sure to repeat this observation in its denial. *See* Denial Letter at 12-13 (Exhibit S) (“Nakamura complained of eye distress due to lights, but Dr. Fozdar notes that he did not manifest similar distress *while he was sitting in the waiting room prior to his examination.*”) (emphasis added). This observation, and its repetition by Underwriters, verges on the malicious in terms of its irrelevance and inappropriateness.

46. In conclusion, Underwriters' denial block-quotes from Dr. Fozdar's "Russian Roulette" final word of advice, i.e., that Nakamura *could* play professional football, though he would be well-advised *not to*: "It is my medical opinion with a reasonable degree of medical certainty that Nakamura is able to participate in his occupation of professional football player. Whether to return to previous career is a deliberate decision he would have to take based on several considerations *including probable long term effects of repetitive concussions*, both past and future." (emphasis added).

47. Dr. Fozdar's report, and Underwriters' denial relying on same, utterly miscomprehended the findings in Dr. Collins' report, and made numerous erroneous assumptions about Dr. Collins' analysis. Dr. Collins therefore supplemented his report both to clarify and confirm his opinion that Nakamura is "permanently disabled and likely has no hope of improvement sufficient to participate ever again as a professional football player."

- (a) First, Nakamura's major depressive disorder may well be caused, in and of itself, by the August 29, 2013 head injury. Dr. Collins agreed with Dr. Bundick's opinion (Dr. Fozdar's colleague) that Nakamura's "predisposition to major depressive episodes may adversely affect his ability to play should they recur," but reached a different conclusion therefrom: "Mr. Nakamura is unable to play professional football based on current cognitive impairments and potential future risk of reinjury and worse outcomes." Further, "[m]ajor depressive disorder negatively influences several cognitive functions included in the skillset of a professional athlete, including motor speed, working memory, decision making, problem solving, and processing speed," and Dr. Bundick observed that Nakamura exhibited mild to moderate impairments across many of these domains.

Nakamura's "depressive presentation" may be the "direct result" of neurochemical imbalance arising from the August 2013 head injury, "rather than a byproduct or psychological response to the injury." Dr. Collins therefore concludes that Nakamura's emotional changes are "directly related to the concussion he sustained 8/29/2013."

- (b) Second, regarding Nakamura's concussion history, Dr. Collins found no evidence that Nakamura had sustained any concussion-related impairment prior to the August 29, 2013 accident. Any potential lingering vestibular, ocular, or cognitive impairments, if they existed, would have compromised Nakamura's performance on the field "to a degree that it would have been apparent to his coaches, family members, and physicians." Dr. Collins' impression is that Nakamura's prior concussion "caused no permanent impairment, and did not lead to a cumulative effect of injuries."
- (c) Third, regarding alleged "malingering," Dr. Collins notes that Nakamura "did display adequate effort on some free standing measures of performance validity during Dr. Bundick's evaluation, and there were several scores within normal limits." Dr. Collins opines that emotional distress, which may be caused by the injury, may play a role in inadequate effort and symptom exaggeration, but "exaggeration of current symptoms and impairments *does not assume absence of injury, but rather makes it difficult to comment on the extent of injury and corresponding impairments, particularly from a cognitive standpoint.*" (emphasis added). Dr. Collins points to the objective evidence of vestibular and oculomotor impairments that previously had been documented and were fully consistent with

his injury. Dr. Collins thus concludes: “my impression is that Nakamura had exhibited (and may continue to exhibit) legitimate vestibular/ocular impairments and some degree of neurocognitive deficits secondary to the concussion he sustained 8/29/2013.”

A true and correct copy of the September 3, 2015 Letter from J. Schryber to M. Camp, enclosing Dr. Collins’ August 5, 2015 Rebuttal Report, is attached hereto as Exhibit U.

48. Dr. Collins’ supplemental report was provided to Underwriters on September 3, 2015. Underwriters took another *seven-and-a-half months* to respond, again with a *denial*. Underwriters asked Dr. Fozdar to review Dr. Collins’ report and provide a supplemental report of his own. A true and correct copy of Underwriters’ April 22, 2016 Denial Letter, enclosing Dr. Fozdar’s Jan. 30, 2016 supplemental report, is attached hereto as Exhibit V. In his January 30, 2016 supplemental report, Dr. Fozdar cites to the lack of “a detailed neuropsychological testing or a thorough neurological examination documenting his neurological and neurocognitive status before 08/29/2013 concussion,” and then speculates, “[w]e do know Nakamura sustained at least 2-3 concussions before his 08/29/2013 concussion. *He probably sustained more concussions that he did not reveal to others.*” (emphasis added). Here again, it must be said: Underwriters *could and did* evaluate Nakamura before issuing the Professional Athlete’s Policy, and, on information and belief, was provided with documentation of the prior concussions upon which Underwriters and Dr. Fozdar rely.

49. Further, Dr. Fozdar opines that “[i]t is highly unlikely” (though not impossible) that Nakamura’s August 29, 2013 concussion “alone would make him unable to play professional football again.” Dr. Fozdar also claimed it to be “sound medical advice” to suggest that Nakamura “may want to *weigh the decision* about his return to professional football

carefully, considering his history of multiple concussions and exposure to future risk,” but that this risk “is not synonymous with his *inability* to participate in his occupation as a professional football player.” (emphasis added). Dr. Fozdar paradoxically concludes, “a physician or a qualified medical provider may advise him as such, but that advice does not indicate that Nakamura is unable to participate in his occupation.” Regarding Nakamura’s prior concussions, Dr. Fozdar admits that “it is prudent and intellectually honest” to list among the possibilities that “Nakamura may not have had any significant residual impairment as a result of previous concussions,” or “[h]e may have had some impairments that may not have reached the threshold to impair his occupational performance. Subtle neurological and cognitive impairments are hard to be noticed by lay observers.” Dr. Fozdar also agreed with Dr. Collins that “exaggeration of symptoms and impairment does not assume the absence of injury.” In sum, Dr. Fozdar’s report opines that Nakamura has failed to prove the negative, an impossible standard – medical or legal – and one not imposed by the Policy.

E. NFL Awards “Total and Permanent” Disability Benefits

50. The Retirement Board of the Bert Bell/Pete Rozelle NFL Player Retirement Plan (“Plan”), meanwhile, has awarded Nakamura total and permanent disability (“T&P”) benefits. A player is eligible for T&P benefits if he “is determined by the Retirement Board or the Disability Initial Claims Committee to be totally and permanently disabled in accordance with Section 5.2.” A Player “will be deemed to be totally and permanently disabled if the Retirement Board or the Disability Initial Claims Committee finds (1) that he has become totally disabled to the extent that he is substantially prevented from or substantially unable to engage in any occupation or employment for remuneration or profit . . . and (2) that such condition is permanent” Plan § 5.1. A disability is deemed “permanent” “if it has persisted or is expected to persist for at least twelve months from the date of its occurrence[.]” *Id.*

51. The Retirement Board relied on the assessment of neurologist Dr. Barry Jordan, M.D. Dr. Jordan is a board certified neurologist with specialized interests in sports neurology, Alzheimer's disease, and traumatic brain injury. Dr. Jordan is currently the Chief Medical Officer of the New York State Athletic Commission and a team physician for U.S.A. Boxing. He is also an Associate Professor of Clinical Neurology at Weill Medical College of Cornell University. Dr. Jordan graduated from the University of Pennsylvania with a B.A. in neurophysiology and obtained his medical degree from Harvard Medical School. He completed a Masters of Public Health at Columbia University.

52. Dr. Jordan determined Nakamura to be "totally and permanently disabled due to [Nakamura's] chronic post concussion syndrome." The Retirement Board reviewed Dr. Jordan's findings, "and concluded that you are totally and permanently disabled—and therefore entitled to T&P benefits—based upon Dr. Jordan's final and binding disability determination." A true and correct copy of the January 5, 2016 Memorandum from E. Richard to J. Lorentz, enclosing Dr. Barry Jordan's evaluation, is attached hereto as Exhibit W. A true and correct copy of the December 2, 2015 Letter from M. Miller (Plan Director) to H. Nakamura is attached hereto as Exhibit X.

53. Dr. Jordan's report concludes, "[T]he constellation of symptoms, including cognitive impairment, debilitating headaches, dizziness/vertigo, and behavioral changes characterized by irritability, depression, anxiety and outbursts, is consistent with a chronic postconcussion syndrome. Accordingly, he fulfils criteria for total and permanent disability considering that his concussion occurred two years ago and has not resolved."

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF - BREACH OF CONTRACT

54. Plaintiff incorporates the facts set forth in all preceding paragraphs.

55. The insurance policy is a contract that requires Underwriters to pay benefits in the event the insured, Nakamura, “sustains Bodily Injury caused in and of itself by an Accident occurring during the Certificate period and which, solely and independently of any other cause, results in the Total Disablement directly culminating in the Permanent Total Disablement of the Insured.”

56. Underwriters wrongfully denied coverage to Nakamura because Nakamura sustained a Bodily Injury as defined in the insurance policy, and no condition or exclusion of the insurance policy bars coverage.

57. By wrongfully denying coverage to Nakamura, Underwriters breached the insurance policy.

58. As a result of Underwriters’ breach, Nakamura has incurred reasonable costs, charges, fees (including but not limited to attorneys’ fees and experts’ fees) and expenses to secure the benefits promised under the Policy.

59. Nakamura is entitled to recover, as damages for Underwriters’ breach of contract, the benefits promised under the Policy, and all reasonable legal fees and expenses incurred.

60. The total amount of damages for which Underwriters is liable upon this claim is an amount in excess of \$10,000, plus interest.

SECOND CLAIM FOR RELIEF – UNFAIR AND DECEPTIVE TRADE PRACTICES
(N.C.G.S. § 75-1 et seq.)

61. Plaintiff incorporates the facts set forth in all preceding paragraphs.

62. Defendant’s actions and practices in regard to Plaintiff’s Claim were in or affecting commerce.

63. Defendant’s actions and practices in regard to Plaintiff’s Claim were unfair, deceptive, unethical, unscrupulous, improper and unlawful, including but not limited to:

- a. Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;
- b. Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
- c. Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;
- d. Refusing to pay claims without conducting a reasonable investigation based upon all available information;
- e. Failing to affirm or deny coverage of claims within a reasonable time after proof-of-loss statements have been completed;

....

- f. Delaying the investigation or payment of claims by requiring an insured claimant, or the physician, of [or] either, to submit a preliminary claim report and then requiring the subsequent submission of formal proof-of loss forms, both of which submissions contain substantially the same information;

N.C.G.S. § 58-63-15(11) (alteration in original).

64. Underwriters, acting through its representatives or agents Hanleigh Management, Inc.; Midlands Claim Administrators, Inc.; and/or Empirical Loss Management, LLC, is liable for violation of Nakamura's rights under N.C.G.S. § 75-1.1 because at all times relevant hereto, these agents were acting with the consent of, under the control and supervision of, and within their authority as representatives or agents of Underwriters.

65. Plaintiff has sustained actual damages as a direct and proximate result of Defendant's unfair or deceptive misconduct, as described herein.

66. As a result of Defendant's unfair or deceptive trade practices, Plaintiff has sustained damages in excess of Ten Thousand Dollars (\$10,000.00), and further is entitled to recover treble damages pursuant to N.C.G.S. § 75-16.

WHEREFORE, Plaintiff, having complained of Defendant, and having raised the claims set forth herein, now hereby prays that this Honorable Court afford him the following relief:

- A. That Plaintiff have and recover of Defendant for all of his actual, consequential, compensatory, general, special, and other like damages, to the greatest extent permitted by law, in an amount in excess of Ten Thousand Dollars (\$10,000.00);
- B. That Plaintiff have and recover of Defendant punitive damages, treble damages, or other like exemplary damages, at Plaintiff's election, to the greatest extent permitted by law;
- C. That Plaintiff have and recover of Defendant all costs, interest, and attorneys' fees, to the greatest extent permitted by law;
- D. That Plaintiff have and recover of Defendant pre- and post-judgment interest; and
- E. That Plaintiff have all other and further relief as may be just and proper, in the discretion of this Honorable Court.

DEMAND FOR JURY TRIAL

Plaintiff requests a trial by jury on all issues so triable.

Dated: July 18, 2016

Respectfully submitted,

By: /s/ John W. Schryber

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