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**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

THE GARDENER,

Plaintiff,

v.

OHIO SECURITY INSURANCE
COMPANY,

Defendant.

Case No. _____

CLASS ACTION COMPLAINT

DEMAND FOR JURY TRIAL

1 Plaintiff The Gardener, individually and on behalf of all others similarly
2 situated, files suit against Ohio Security Insurance Company and alleges as follows:

3 INTRODUCTION

4 1. Since March 19, 2020, California's "Stay at Home" order has instructed
5 all 40 million California residents to remain at home, with certain exceptions. Though
6 lifesaving, this mandate, which remains in place, ends in-house service at California
7 retailers. This is not merely causing severe financial distress for retailers and their
8 employees; such closures threaten the viability of California's retail industry.

9 2. Plaintiff The Gardener offers a diverse mix of home and garden goods at
10 retail stores in Berkeley, San Francisco, and Healdsburg, California. The Gardener is
11 among the thousands of retailers that have been forced by State orders to cease
12 operations as part of the Stay at Home order. The Gardener and many California
13 retailers – none of whom bear fault for statewide closures – were responsible business
14 stewards, thus paying for business interruption insurance to protect against a
15 situation like this.

16 3. But insurance companies operating in California are categorically
17 denying claims from retailers arising from California's mandated interruption of
18 business services. Those denials are often made with little or no investigation and
19 without due regard for the interests of insureds.

20 4. Indeed, form letters denying coverage for such losses appear to rest on
21 crabbed readings of coverage language and overbroad readings of exclusions. That
22 gets insurance law exactly backwards – and raises the specter of bad-faith denials.

23 5. The Gardener's experience is no different. It has dutifully followed
24 California's mandates. Facing serious financial harm, it has filed a claim with
25 Defendant for business interruption coverage.

26 6. Defendant swiftly denied the claim. Though its reasons are cursory, the
27 denial appears to be based on an unreasonable reading of its policy, which tracks
28 form policies issued throughout California on a take-it-or-leave-it basis.

1 15. Venue is appropriate in this Court pursuant to 28 U.S.C. § 1391(b) as a
2 substantial part of the events or omissions giving rise to the instant action occurred in
3 Berkeley, California.

4 **INTRADISTRICT ASSIGNMENT**

5 16. Assignment to the Oakland or San Francisco Division would be proper
6 because Defendant has conducted business there and a substantial part of the events
7 or omissions which give rise to the claims alleged herein occurred in Alameda
8 County.

9 **FACTUAL BACKGROUND**

10 17. In January 2020 early media reports documented an outbreak of a novel
11 strain of coronavirus – COVID-19 – in Wuhan, China. By late January, it was
12 generally understood in the scientific and public health communities that COVID-19
13 was spreading through human-to-human transmission and could be transmitted by
14 asymptomatic carriers.

15 18. On January 30, 2020, reports of the spread of COVID-19 outside China
16 prompted the World Health Organization to declare the COVID-19 outbreak a
17 “Public Health Emergency of International Concern.”

18 19. On March 11, the World Health Organization declared COVID-19 a
19 global health pandemic based on existing and projected infection and death rates and
20 concerns about the speed of transmission and ultimate reach of this virus.

21 20. Public health officials have recognized for decades that non-
22 pharmaceutical interventions (NPIs) can slow and stop the transmission of certain
23 diseases. Among these are screening and testing of potentially infected persons;
24 contact tracing and quarantining infected persons; personal protection and
25 prevention; and social distancing. Social distancing is the maintenance of physical
26 space between people. Social distancing can be limited – *e.g.*, reducing certain types
27 of conduct or activities like hand-shaking – or large-scale – *e.g.*, restricting the
28 movements of the total population.

1 21. A lack of central planning, shortages of key medical supplies and
2 equipment, and the unfortunate spread of misinformation and disinformation about
3 the risks of COVID-19 has led to widespread confusion, unrest, and uncertainty
4 regarding the likely trajectory of this pandemic and the appropriate counter-measures
5 necessary to mitigate the damage it could potentially cause.

6 22. Beginning in late February, public health officials began advising
7 various governments around the world that one of the most disruptive NPIs –
8 population-wide social distancing – was needed to stop the transmission of COVID-
9 19. Suddenly schools, offices, public transit, restaurants, bars, music venues, and
10 shops -- densely occupied spaces, heavily traveled spaces, and frequently visited
11 spaces – were likely to become hot-spots for local transmission of COVID-19.

12 23. By mid-March, that advice was being implemented by state and local
13 governments across the United States. In many respects, California led the way,
14 becoming one of the first states to order widespread closures.

15 24. California's Governor Gavin Newsom, on March 12, 2020, issued a
16 statewide directive known as the Safer at Home order: "All residents are to heed any
17 orders and guidance of state and local public health officials, including but not
18 limited to the imposition of social distancing measures, to control the spread of
19 COVID-19."

20 25. Following closely on the heels of local closure orders, including in San
21 Francisco, on March 19, 2020, the Governor issued another series of mandates (the
22 Stay at Home Order) – which remain in effect to date – requiring retailers to cease in-
23 person services, though curbside sales or by delivery are now permitted.

24 **PLAINTIFF'S EXPERIENCE**

25 26. Plaintiff operates a retail store called The Gardener, with locations in
26 Berkeley, San Francisco, and Healdsburg. The Gardener sells unique home and
27 garden goods, with a focus on seasonal items and sustainability.

28 27. The Gardener has complied with all applicable orders of California state

1 and local authorities. Compliance with those orders has caused direct physical loss of
2 The Gardener's insured property in that its business locations and its equipment,
3 furnishings, and other business personal property, have been made unavailable,
4 inoperable, useless and/or uninhabitable; and its functionality has been severely
5 reduced if not completely or nearly eliminated.

6 28. The impact of these orders is felt not simply in their direct application to
7 The Gardener's operations, but also in the damage caused to neighboring businesses
8 and properties.

9 29. Even when California relaxes or revokes its mandates, The Gardener
10 will encounter continued loss of business income due to those orders because, in
11 issuing those orders, government officials have stated that densely occupied public
12 spaces are dangerously unsafe, and continuing to operate the shop in the same
13 manner as before could expose The Gardener to the risk of contaminated premises as
14 well as exposing customers and workers to transmission and infection risks.

15 30. Plaintiff purchased comprehensive commercial liability and property
16 insurance from Defendant to insure against risks the business might face. Such
17 coverage includes business income coverage for the loss, as well as additional "civil
18 authority" coverage. The coverage excludes "loss or damage caused directly or
19 indirectly by" "[a]ny virus." Once triggered, the policy pays actual losses sustained
20 for the business income or civil authority coverage.

21 31. To date, Plaintiff has paid all of the premiums required by Defendant to
22 keep its policy in full force. These premiums have totaled many thousands to date.

23 32. On or about April 27, 2020, Plaintiff reported a loss of business income
24 as of March 16, 2020, under Policy BZS564923944.

25 33. On or about May 8, 2020, Defendant denied Plaintiff's claim for
26 coverage. In a cursory denial letter, Defendant took the position that "The closure of
27 your business, resulting in a loss of income is not related to any direct physical
28 damage to the business personal property or the building. The closing was due to the

1 Coronavirus (COVID-19)." Further, Defendant stated that civil authority coverage
2 was inapplicable because "[t]he issuing of a State of Emergency was not due to
3 physical loss or damage nor did it prohibit access to the described premises." Lastly,
4 Defendant stated that "[t]he policy specifically excludes losses caused by or resulting
5 from a virus."

6 34. Defendant's denial letter, on information and belief, appears to be a
7 form letter sent in response to business interruption claims arising from California's
8 Stay at Home orders.

9 35. Defendant's denial is contrary to the terms and conditions of the policy
10 and applicable law, which gives effect to plain language, construes coverage
11 agreements broadly, narrowly construes exclusions and construes ambiguity in favor
12 of coverage. Insurers have the burden of proving the applicability of exclusions.

13 36. Defendant's denial of coverage breached its obligation and
14 responsibility to provide coverage available through the policy to Plaintiff due to its
15 covered loss of business income.

16 37. As a result, Defendant's denial of coverage and breach of the insurance
17 policy it issued, Plaintiff has suffered and will continue to suffer damages.

18 38. A declaratory judgment determining that the coverage provided under
19 the policy and an order that such coverage is owed will prevent Plaintiff and Class
20 members from being wrongfully left without vital coverage acquired to ensure the
21 survival of its businesses in these circumstances. As a result of the Stay at Home
22 orders, Plaintiff has incurred and continues to incur a substantial loss of business
23 income and additional expenses covered under the policy.

24 **CLASS ALLEGATIONS**

25 39. Plaintiff re-alleges and incorporates by reference herein all of the
26 allegations contained above.

27 40. Business insurance policies purchased by small businesses like Plaintiff
28 are not individually negotiated. At most, the prospective policyholder may elect to

1 add specialized coverage options to a basic business insurance policy. But the
2 substantive terms are set unilaterally by the insurer.

3 41. Plaintiff's policy includes common terms and phrases widely used by
4 the insurance industry. The insurance industry typically hews closely to
5 standardized insurance policy forms in addressing property and liability risks, and
6 Defendant did so here.

7 42. As the impact of the COVID-19 pandemic is emerging, leading
8 insurance industry associations have publicly stated that such standard business
9 insurance policies do not provide any coverage for the business losses related to
10 public health orders like the Stay at Home orders imposed by California. The denial
11 letter received by Plaintiff – issued without any investigation at Plaintiff's premises
12 and shortly after a claim was filed – appears to be a form letter that, on information
13 and belief, is sent automatically to any such business with comprehensive business
14 insurance that files a claim at this time.

15 43. Pursuant to Fed. R. Civ. P. 23(b)(2), 23(b)(3), and 23(c)(4), Plaintiff brings
16 this action on behalf of itself and the following Class (the "Class"): All retailers in
17 California that purchased comprehensive business insurance coverage from
18 Defendant which includes coverage for business interruption, filed a claim for lost
19 business income following California's Stay at Home order, and were denied
20 coverage by Defendant.

21 44. Excluded from the Class are Defendant, any entity in which Defendant
22 has a controlling interest, and Defendant's officers, directors, legal representatives,
23 successors, subsidiaries, and assigns. Also excluded from the Class are any judge,
24 justice, or judicial officer presiding over this matter and the members of their
25 immediate families and judicial staff.

26 45. This action has been brought and may properly be maintained as a class
27 action as it satisfies the numerosity, commonality, typicality, adequacy,
28 predominance, and superiority requirements.

1 46. Plaintiff reserves the right to amend the Class definition if discovery and
2 further investigation reveal that the Class should be expanded, divided into
3 subclasses, or modified in any other way.

4 47. Although the precise number of members of the Class is unknown and
5 can only be determined through appropriate discovery, Plaintiff believes, and on that
6 basis alleges, that the members of the proposed Class are so numerous that joinder of
7 all members would be impracticable. There are tens of thousands of retailers in
8 California which are governed by the Stay at Home order and attendant statewide
9 restrictions, and public reporting reveals that many have filed for coverage but have
10 been denied.

11 48. Questions of law and fact common to the Class exist that predominate
12 over questions affecting only individual members, including *inter alia*:

- 13 a. Whether Defendant's comprehensive business insurance policies
14 cover claims for lost business income under the circumstances
15 present here;
- 16 b. Whether the terms, definitions, and exclusions that Defendant
17 has relied on to deny coverage reasonably can be construed in the
18 manner that Defendant claims, or are otherwise unenforceable as
19 a basis for Defendant's denials or, instead, must be construed to
20 provide coverage under California law;
- 21 c. Whether the virus exclusion endorsement excludes coverage for
22 the Stay at Home order;
- 23 d. Whether Defendant breached the implied covenant of good faith
24 and fair dealing in its handling of the claim;
- 25 e. Whether Defendant acted in bad faith in denying claims for lost
26 business income without investigation or due consideration of
27 those claims; and
- 28 f. Whether the declaratory judgment sought is appropriate.

1 49. Plaintiff is a member of the putative Class. The claims asserted by the
2 Plaintiff in this action are typical of the claims of the members of the putative Class as
3 the claims arise from the same course of conduct by Defendant and the relief sought is
4 common.

5 50. Plaintiff will fairly and adequately represent and protect the interests of
6 the members of the putative Class, as its interests coincide with, and are not
7 antagonistic to, the other members of the Class. Plaintiff has retained counsel
8 competent and experienced in both consumer protection, insurance coverage, and
9 class-action litigation.

10 51. Certification of the Class is appropriate pursuant to Fed. R. Civ. P. 23
11 (b)(3) because:

- 12 a. Questions of law or fact common to the respective members of
13 the Class predominate over questions of law or fact affecting only
14 individual members. This predominance makes class litigation
15 superior to any other method available for the fair and efficient
16 adjudication of these claims including consistency of
17 adjudications. Absent a class action it would be highly unlikely
18 that the members of the Class would be able to protect their own
19 interests because the cost of litigation through individual
20 lawsuits might exceed the expected recovery.
- 21 b. A class action is a superior method for the adjudication of the
22 controversy in that it will permit a large number of claims to be
23 resolved in a single forum simultaneously, efficiently, and
24 without the unnecessary hardship that would result from the
25 prosecution of numerous individual actions and the duplication
26 of discovery, effort, expense, and the burden of the courts that
27 individual actions would create.
- 28 c. The benefits of proceeding as a class action, including providing

a method for obtaining redress for claims that would not be practical to pursue individually, outweigh any difficulties that might be argued with regard to the management of the class action.

52. The Class should also be certified pursuant to Fed. R. Civ. P. 23(b)(2) because:

- a. The prosecution of separate actions by the individual members of the proposed class would create a risk of inconsistent adjudications, which could establish incompatible standards of conduct for Defendant.
- b. The prosecution of individual actions could result in adjudications, which as a practical matter, would be dispositive of the interests of non-party class members or which would substantially impair their ability to protect their interests.
- c. Defendant has acted or refused to act on grounds generally applicable to the proposed Class, thereby making appropriate final and injunctive relief with respect to the members of the proposed Class as a whole.

53. Likewise, particular issues are appropriate for certification under Fed. R. Civ. P. 23(c)(4) because such claims present only particular, common issues, the resolution of which would advance the disposition of this matter and the parties' interests therein. Such particular issues include, but are not limited to:

- a. Whether the comprehensive business insurance policies issued by Defendant covers class members' direct physical loss of property and lost business income following California's Stay at Home order;
- b. Whether the coverages for direct physical loss of property and lost business income provided by the comprehensive business

insurance policies are precluded by exclusions or other limitations in those policies;

c. Whether Defendant breached contracts by denying comprehensive business insurance coverage to Plaintiff and Class members;

d. Whether summary denial of claims for direct physical loss of property and lost business income, including by invoking an exclusion for viruses, without any investigation or inquiry constitutes bad faith and therefore a breach of the implied covenant of good faith and fair dealing to act in good faith and with reasonable efforts to perform their contractual duties and not to impair the rights of other parties to receive the rights, benefits, and reasonable expectations under the contracts;

e. Whether the handling of the claim with the knowledge that Defendant would not provide coverage for business interruptions associated with public health measures such as California's Stay at Home order constitutes a breach of the implied covenant of good faith and fair dealing.

f. Whether Plaintiff and Class members are entitled to actual damages and/or injunctive relief as a result of Defendant's wrongful conduct.

FIRST CAUSE OF ACTION

Declaratory Judgment

54. Plaintiff re-alleges the paragraphs above as if fully set forth herein.

55. Plaintiff purchased a comprehensive business insurance policy from Defendant.

56. Plaintiff paid all premiums required to maintain its comprehensive business insurance policy in full force.

1 57. The comprehensive business insurance policy includes provisions that
2 provide coverage for the direct physical loss of or damage to the premises as well as
3 actual loss of business income and extra expenses sustained during the suspension of
4 operations as a result of such loss or damage.

5 58. On or about March 19, California issued the Stay at Home order,
6 mandating that all Californians remain at home, with certain exceptions. This
7 mandate required retailers to cease all non-essential services. This mandate also
8 applied to neighboring businesses, thus causing widespread closures surrounding
9 Plaintiff's business premises.

10 59. As a direct result of this mandate, Plaintiff has suffered direct physical
11 loss of its covered property because it lost some or all of its functionality and/or
12 became inaccessible, inoperable, useless and/or uninhabitable, resulting in
13 substantial loss of business income.

14 60. These losses are insured losses under several provisions of Plaintiff's
15 comprehensive business insurance policy including business income and extra
16 expense coverage, and coverage for civil authority orders.

17 61. Defendant cannot meet its burden of proving that there are applicable,
18 enforceable exclusions or limitations of coverage in the insurance policies that
19 preclude coverage for these losses.

20 62. WHEREFORE, Plaintiff seeks a declaration for itself and similarly
21 situated retailers that its business income losses are covered and not precluded by
22 exclusions or other limitations in its comprehensive business insurance policy.

23 **SECOND CAUSE OF ACTION**

24 **Breach of Contract**

25 63. Plaintiff re-alleges the paragraphs above as if fully set forth herein.

26 64. Plaintiff purchased a comprehensive business insurance policy from
27 Defendant to insure against all risks (unless specifically excluded) a business might
28 face. This policy was a binding contract that afforded Plaintiff comprehensive

business insurance under the terms and conditions of the policy.

65. Plaintiff met all or substantially all of its contractual obligations, including paying all the premiums required by Defendant.

66. On or about March 19, California issued the Stay at Home order, mandating that all Californians remain at home, with certain exceptions. This mandate required retailers, including that owned by Plaintiff, to cease all in-person services. This mandate also applied to neighboring businesses, thus causing widespread closures surrounding Plaintiff's business premises.

67. Beginning on March 16, 2020, and continuing through the date of the filing of this Complaint, Plaintiff suffered the direct physical loss of property and lost business income alleged above—losses which were covered under the comprehensive business insurance policy purchased from Defendant.

68. Defendant cannot meet its burden of proving that there are applicable, enforceable exclusions or limitations of coverage in Plaintiff's comprehensive business insurance policy that precludes coverage.

69. Defendant breached its contracts by denying comprehensive business insurance coverage to Plaintiff and Class members.

70. As a direct and proximate result of Defendant's denial of comprehensive business insurance coverage to Plaintiff and Class members, Plaintiff and members of the Class have suffered damages.

71. WHEREFORE, Plaintiff seeks: (a) a judgment for itself and similarly situated retailers that Defendant breached its contracts with Plaintiff and Class members; and (b) corresponding damages for that breach.

THIRD CAUSE OF ACTION

Breach of Implied Covenant of Good Faith and Fair Dealing

72. Plaintiff re-alleges the paragraphs above as if fully set forth herein.

73. Plaintiff and Class members contracted with Defendant to provide it with comprehensive business insurance to insure against all risks (unless specifically

1 excluded) a business might face.

2 74. This contract was subject to an implied covenant of good faith and fair
3 dealing that all parties would act in good faith and with reasonable efforts to perform
4 their contractual duties – both explicit and fairly implied – and not to impair the
5 rights of other parties to receive the rights, benefits, and reasonable expectations
6 under the contracts. These included the covenant that Defendant would act fairly and
7 in good faith in carrying out its contractual obligations to provide Plaintiff and Class
8 members with comprehensive business insurance.

9 75. Defendant breached the implied covenant of good faith and fair dealing
10 by:

- 11 a. Selling policies that appear to provide liberal coverage for loss of
12 property and lost business income with the intent of interpreting
13 undefined or poorly defined terms, undefined terms, and
14 ambiguously written exclusions to deny coverage under
15 circumstances foreseen by Defendant;
- 16 b. Denying coverage for loss of property and lost business income
17 unreasonably, and without proper cause, by applying undefined,
18 ambiguous, and contradictory terms contrary to applicable rules
19 of policy construction and the plain terms and purpose of the
20 policy;
- 21 c. Denying Plaintiff's claim for loss of property and loss of business
22 income without conducting a fair, unbiased and thorough
23 investigation or inquiry;
- 24 d. Misrepresenting policy terms;
- 25 e. Failing to provide a written explanation of the legal and factual
26 basis for its denials; and
- 27 f. Compelling policyholders, including Plaintiff, to initiate litigation
28 to recover policy benefits to which they are entitled.

Dated: June 9, 2020

Respectfully submitted,

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