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

20 RAVEN AND THE BOW, LLC d/b/a
 21 IVY ROOM,

22 Plaintiff,

23 v.

24 FIRST MERCURY INSURANCE
 25 COMPANY,

26 Defendant.
 27

28 Case No. 3:20-cv-3264

CLASS ACTION COMPLAINT

DEMAND FOR JURY TRIAL

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1 Plaintiff Raven and the Bow LLC d/b/a Ivy Room, individually and on behalf
2 of all others similarly situated, files suit against First Mercury Insurance Company
3 and alleges as follows:

4 **INTRODUCTION**

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

10 2. Plaintiff’s bar Ivy Room in Albany, California is among the thousands of
11 music venues that have been forced by State orders to cease operations as part of the
12 Stay at Home order. Ivy Room and many California venues – none of whom bear
13 fault for statewide closures – were responsible business stewards, thus paying for
14 business interruption insurance to protect against a situation like this.

15 3. But insurance companies operating in California – despite collecting
16 premiums for such risks – are categorically denying claims from venues arising from
17 California’s mandated interruption of business services. Those denials are often made
18 with little or no investigation and without due regard for the interests of insureds.

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

22 5. Ivy Room’s experience is no different. It has dutifully followed
23 California’s mandates. Facing serious financial harm, it has filed a claim with First
24 Mercury for business interruption coverage.

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

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1 7. That leaves the Ivy Room in financial straits – precisely the situation it
2 sought to avoid when it obtained coverage for business interruptions.

3 8. Ivy Room and other music venues bought full-spectrum, comprehensive
4 insurance for their *businesses* – not just for damage to their physical premises and
5 equipment. And for good reason. Insurance coverage is important, if not vital for
6 small businesses.

7 9. Ivy Room and other California music venues reasonably believed they
8 had comprehensive coverage that would apply to business interruptions under
9 circumstances like these, where they have done everything right to protect their
10 businesses and the public. But insurance companies like First Mercury are cutting
11 those lifelines – despite having pocketed significant premiums for such relief.

12 10. Plaintiff thus brings this action, on behalf of itself and other California
13 music venues, seeking declaratory relief, insurance coverage owed under First
14 Mercury’s policy, and damages.

15 **PARTIES**

16 11. Plaintiff Raven and the Bow, LLC d/b/a Ivy Room is a limited liability
17 company formed under the laws of California. Its principal place of business is San
18 Francisco, California.

19 12. Defendant First Mercury Insurance Company is a corporation organized
20 under laws of Delaware with its principal place of business in Southfield, Michigan.
21 At all relevant times, First Mercury operated in California, including in Alameda
22 County.

23 **JURISDICTION AND VENUE**

24 13. This Court has subject matter jurisdiction over this action under 28
25 U.S.C. § 1332(d)(2) because this is a class action wherein the amount in controversy
26 exceeds the sum or value of \$5,000,000, exclusive of interest and costs, there are more
27

1 than 100 members in the proposed class, and at least one member of the class is a
2 citizen of a state different from Defendant.

3 14. This Court has personal jurisdiction over Defendant, because Defendant
4 conducts business in San Francisco, CA.

5 15. Venue is appropriate in this Court pursuant to 28 U.S.C. § 1391(b) as a
6 substantial part of the events or omissions giving rise to the instant action occurred in
7 San Francisco, CA.

8 **INTRADISTRICT ASSIGNMENT**

9 16. Assignment to the San Francisco or Oakland Divisions would be proper
10 because Defendant has conducted business in Alameda County and a substantial part
11 of the events or omissions which give rise to the claims alleged herein occurred in
12 Alameda County.

13 **FACTUAL BACKGROUND**

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

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

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

25 20. Public health officials have recognized for decades that non-
26 pharmaceutical interventions (NPIs) can slow and stop the transmission of certain
27 diseases. Among these are screening and testing of potentially infected persons;

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1 contact tracing and quarantining infected persons; personal protection and
2 prevention; and social distancing. Social distancing is the maintenance of physical
3 space between people. Social distancing can be limited – *e.g.*, reducing certain types
4 of conduct or activities like hand-shaking – or large-scale – *e.g.*, restricting the
5 movements of the total population.

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

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

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

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

25 25. Following closely on the heels of local closure orders, including in San
26 Francisco, on March 19, 2020, the Governor issued another series of mandates (the
27

1 Stay at Home Order) – which remain in effect to date – require music venues to cease
2 in-person services, though the sale of alcohol curbside or by delivery is permitted.

3 PLAINTIFF’S EXPERIENCE

4 26. Plaintiff operates a music venue called Ivy Room in Albany, California.
5 Ivy Room plays host to national and local acts in an intimate setting.

6 27. Ivy Room has complied with all applicable orders of California state and
7 local authorities. Compliance with those orders has caused direct physical loss of Ivy
8 Room’s insured property in that the property has been made useless and/or
9 uninhabitable; and its functionality has been severely reduced if not completely or
10 nearly eliminated.

11 28. The impact of these orders is felt not simply in their direct application to
12 Ivy Room’s operations, but also in their application to neighboring businesses and
13 properties, whose property has suffered similar direct physical loss as a result.

14 29. Even when California relaxes or revokes its mandates, Ivy Room will
15 encounter continued loss of business income due to those orders because, in issuing
16 those orders, government officials have stated that densely occupied public spaces are
17 dangerously unsafe, and continuing to operate the venue in the same manner as
18 before could expose Ivy Room to the risk of contaminated premises as well as
19 exposing customers and workers to transmission and infection risks.

20 30. Plaintiff purchased comprehensive commercial liability and property
21 insurance from First Mercury Insurance to insure against risks the business might
22 face. Such coverage includes business income with extra expense coverage for the
23 loss, as well as additional “civil authority” coverage. The coverage excludes loss
24 “caused by or resulting from” virus or bacteria. Once triggered, the policy pays actual
25 losses sustained for the business income and extra expense coverage.

26 31. To date, Plaintiff has paid all of the premiums required by First Mercury
27 to keep its policy in full force. These premiums have totaled many thousands to date.

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1 32. On or about March 18, 2020, Plaintiff reported a loss of business income
2 as of March 16, 2020, under Policy FMEV112910.

3 33. On or about March 25, First Mercury denied Plaintiff's claim for
4 coverage. In a cursory denial letter, First Mercury took the position that Plaintiff's
5 claim "for business income loss [and/or extra] expense resulting from the closure of
6 the Premises relating to COVID-19 does not arise out of direct physical loss or
7 damage to the covered premises due to a Covered Cause of Loss. To that end, the
8 claim does not indicate that the Premises was physically damaged in any way." With
9 respect to civil authority coverage, First Mercury stated that the "claim for business
10 income loss [and/or] extra expense resulting from the closure of the Premises relating
11 to COVID-19 does not arise out of action of civil authority which prevents access to
12 the Premises due to nearby property damage." First Mercury further stated: "The
13 Policy contains the Exclusion of Loss Due to Virus or Bacteria endorsement, which
14 excludes coverage from any business income loss, extra expense, or action of civil
15 authority claim 'caused by or resulting from any virus . . . that induces or is capable of
16 inducing physical distress illness or disease.' Your claim for business income loss
17 [and/or] extra expense coverage resulting from the closure of the Premises related to
18 COVID-19 entirely arises out of such a virus."

19 34. First Mercury's denial letter, on information and belief, appears to be a
20 form letter sent in response to business interruption claims arising from California's
21 Stay at Home orders.

22 35. First Mercury's denial is contrary to the terms and conditions of the
23 policy and applicable law, which gives effect to plain language, construes ambiguity
24 in favor of coverage, and narrowly construes exclusions, the applicability of which
25 insurers have the burden of proving.

26 36. First Mercury's denial of coverage breached its obligation and
27 responsibility to provide coverage available through the policy to Plaintiff due to its

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1 covered loss of business income because its premises are unusable and uninhabitable
2 and have lost all function.

3 37. As a result of First Mercury’s denial of coverage and breach of the
4 insurance policy it issued, Plaintiff has suffered and will continue to suffer damages.

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

11 CLASS ALLEGATIONS

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

14 40. Business insurance policies purchased by small businesses like music
15 venues are not individually negotiated. At most, the prospective policyholder may
16 elect to add specialized coverage options to a basic business insurance policy. But the
17 substantive terms are set unilaterally by the insurer.

18 41. Plaintiff’s policy includes common terms and phrases widely used by
19 the insurance industry. The insurance industry typically hews closely to
20 standardized insurance policy forms in addressing property and liability risks, and
21 Defendant did so here.

22 42. As the impact of the COVID-19 pandemic is emerging, leading
23 insurance industry associations have publicly stated that such standard business
24 insurance policies do not provide any coverage for the business losses related to
25 public health orders like the Stay at Home orders imposed by California. The denial
26 letter received by Plaintiff – issued without any investigation at the music venue
27 shortly after a claim was filed – appears to be a form letter that, on information and

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1 belief, is sent automatically to any such business with comprehensive business
2 insurance that files a claim at this time.

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

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

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

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

20 47. Although the precise number of members of the Class is unknown and
21 can only be determined through appropriate discovery, Plaintiff believes, and on that
22 basis alleges, that the members of the proposed Class are so numerous that joinder of
23 all members would be impracticable. There are thousands of music venues in
24 California which are governed by the Stay at Home order and attendant statewide
25 restrictions, and public reporting reveals that many have filed for coverage but have
26 been denied.

27 48. Questions of law and fact common to the Class exist that predominate

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1 over questions affecting only individual members, including *inter alia*:

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

18 49. Plaintiff is a member of the putative Class. The claims asserted by the
19 Plaintiff in this action are typical of the claims of the members of the putative Class as
20 the claims arise from the same course of conduct by Defendant and the relief sought is
21 common.

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

27 51. Certification of the Class is appropriate pursuant to Fed. R. Civ. P. 23

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1 (b)(3) because:

- 2 a) Questions of law or fact common to the respective members of
3 the Class predominate over questions of law or fact affecting only
4 individual members. This predominance makes class litigation
5 superior to any other method available for the fair and efficient
6 adjudication of these claims including consistency of
7 adjudications. Absent a class action it would be highly unlikely
8 that the members of the Class would be able to protect their own
9 interests because the cost of litigation through individual
10 lawsuits might exceed the expected recovery;
- 11 b) A class action is a superior method for the adjudication of the
12 controversy in that it will permit a large number of claims to be
13 resolved in a single forum simultaneously, efficiently, and
14 without the unnecessary hardship that would result from the
15 prosecution of numerous individual actions and the duplication
16 of discovery, effort, expense, and the burden of the courts that
17 individual actions would create; and
- 18 c) The benefits of proceeding as a class action, including providing
19 a method for obtaining redress for claims that would not be
20 practical to pursue individually, outweigh any difficulties that
21 might be argued with regard to the management of the class
22 action.

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

- 25 a) The prosecution of separate actions by the individual members of
26 the proposed class would create a risk of inconsistent
27 adjudications, which could establish incompatible standards of

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1 conduct for Defendant;

2 b) The prosecution of individual actions could result in
3 adjudications, which as a practical matter, would be dispositive
4 of the interests of non-party class members or which would
5 substantially impair their ability to protect their interests; and

6 c) Defendant has acted or refused to act on grounds generally
7 applicable to the proposed Class, thereby making appropriate
8 final and injunctive relief with respect to the members of the
9 proposed Class as a whole.

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

14 a) Whether the comprehensive business insurance policies issued by
15 Defendant cover class members' direct physical loss of property
16 and lost business income following California's Stay at Home order;

17 b) Whether the coverages for direct physical loss of property and lost
18 business income provided by the comprehensive business
19 insurance policies are precluded by exclusions or other limitations
20 in those policies;

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

23 d) Whether summary denial of claims for direct physical loss of
24 property and lost business income, including by invoking an
25 exclusion for viruses, without any investigation or inquiry
26 constitutes bad faith and therefore a breach of the implied covenant
27 of good faith and fair dealing to act in good faith and with

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1 reasonable efforts to perform their contractual duties and not to
2 impair the rights of other parties to receive the rights, benefits, and
3 reasonable expectations under the contracts;

4 e) Whether the handling of the claim with the knowledge that
5 Defendant would not provide coverage for business interruptions
6 associated with public health measures such as California's Safer at
7 Home order constitutes a breach of the implied covenant of good
8 faith and fair dealing; and

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

12 **FIRST CAUSE OF ACTION**

13 **Declaratory Judgment**

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

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

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

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

23 58. On or about March 19, California issued the Stay at Home order,
24 mandating that all Californians remain at home, with certain exceptions. This
25 mandate required music venues to cease all non-essential services. This mandate also
26 applied to neighboring businesses, thus causing widespread closures surrounding
27 Plaintiff's business premises.

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1 business income following California’s Stay at Home order – losses which were
2 covered under the comprehensive business insurance policy purchased from
3 Defendant.

4 68. There are no applicable, enforceable exclusions in Plaintiff’s
5 comprehensive business insurance policy that precludes coverage.

6 69. Defendant breached its contract by denying comprehensive business
7 insurance coverage to Plaintiff.

8 70. As a direct and proximate result of Defendant’s denial of comprehensive
9 business insurance coverage to Plaintiff, Plaintiff suffered damages.

10 71. WHEREFORE, Plaintiff seeks: (a) a judgment for itself and similarly
11 situated music venues that Defendant breached its contracts with Plaintiff; and (b)
12 corresponding damages for that breach.

13 **THIRD CAUSE OF ACTION**

14 **Breach of Implied Covenant of Good Faith and Fair Dealing**

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

16 73. Plaintiff contracted with Defendant to provide it with comprehensive
17 business insurance to ensure against all risks (unless specifically excluded) a business
18 might face.

19 74. This contract was subject to an implied covenant of good faith and fair
20 dealing that all parties would act in good faith and with reasonable efforts to perform
21 their contractual duties – both explicit and fairly implied – and not to impair the
22 rights of other parties to receive the rights, benefits, and reasonable expectations
23 under the contracts. These included the covenant that Defendant would act fairly and
24 in good faith in carrying out its contractual obligations to provide Plaintiff with
25 comprehensive business insurance.

26 75. Defendant breached the implied covenant of good faith and fair dealing
27 by:

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- 1 a. Selling policies that appear to provide liberal coverage for loss of
2 property and lost business income with the intent of interpreting
3 undefined or poorly defined terms, undefined terms, and
4 ambiguously written exclusions to deny coverage under
5 circumstances foreseen by Defendant;
- 6 b. Denying coverage for loss of property and lost business income
7 unreasonably, and without proper cause, by applying undefined,
8 ambiguous, and contradictory terms contrary to applicable rules of
9 policy construction and the plain terms and purpose of the policy;
- 10 c. Denying Plaintiff's claim for loss of property and loss of business
11 income without conducting a fair, unbiased and thorough
12 investigation or inquiry, arbitrarily and capriciously, and/or with
13 knowledge that the denial was unreasonable under the policy;
- 14 d. Misrepresenting policy terms; and
- 15 e. Compelling policyholders, including Ivy Room, to initiate litigation
16 to recover policy benefits to which they are entitled.

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

19 77. Defendant's failure to act in good faith in providing comprehensive
20 business insurance coverage to Plaintiff denied Plaintiff the full benefit of its bargain.

21 78. Accordingly, Plaintiff has been injured as a result of Defendant's breach
22 of the covenant of good faith and fair dealing and is entitled to damages in an amount
23 to be proven at trial.

24 79. WHEREFORE, Plaintiff seeks: (a) a judgment for itself and similarly
25 situated music venues that Defendant has breached the covenant of good faith and
26 fair dealing implied in its contract with Plaintiff; and (b) corresponding damages for
27 that breach.

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PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests, on behalf of itself and the Class, that the Court enter a judgment awarding the following relief:

- a. An order certifying this action as a class action under Fed. R. Civ. P. 23, defining the Class as requested herein, appointing Gibbs Law Group LLP and Cohen Milstein Sellers & Toll PLLC, as Class Counsel, and finding that Plaintiff is a proper representative of the Class requested herein.
- b. A declaration that Plaintiff's and Class members' losses are covered under Defendant's comprehensive business insurance policy;
- c. Plaintiff also requests damages, attorney's fees and costs, and such other and further relief as is just and proper as compensation for Defendant's breach of contract and breach of the implied covenant of good faith and fair dealing.

JURY DEMAND

Plaintiff demands a trial by jury for all issues so triable under the law.

Dated: May 13, 2020

Respectfully submitted,

GIBBS LAW GROUP LLP

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