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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF KING

ES RESTAURANT GROUP, INC., a Delaware
corporation,

Plaintiff,

vs.

FIREMAN’S FUND INSURANCE
COMPANY, a California corporation,

Defendant.

Case No.

COMPLAINT

I. INTRODUCTION

Plaintiff ES Restaurant Group, Inc. (“ESR”) owns and operates many of Seattle’s best known and most highly acclaimed restaurants. After suffering direct physical loss of or damage to covered property due to the COVID-19 pandemic, ESR turned to its commercial property insurer, Fireman’s Fund Insurance Company, for payment of policy benefits, including but not limited to, business income loss. In response, Fireman’s Fund failed to reasonably investigate ESR’s claim and then denied ESR through a template denial letter which misstates the policy’s coverage, misstates facts that were both publicly available and specifically relayed to Fireman’s Fund, and which even misstates its own insured’s name.

ESR provided Fireman’s Fund statutory notice pursuant to RCW 48.30.015 of its intent to bring this lawsuit unless the basis for ESR’s claim was resolved within 20 days. No response to

1 that notice has been provided by Fireman’s Fund. Having no other option to recover the policy
2 benefits owed to it, ESR brings its Complaint against Fireman’s Fund Insurance Company, and
3 alleges as follows:

4 **II. PARTIES**

5 1. ESR is a Delaware corporation with its principal place of business in Seattle,
6 Washington.

7 2. Defendant Fireman’s Fund Insurance Company (“Fireman’s Fund”) is a California
8 corporation with its principal place of business in Illinois. Fireman’s Fund conducts business and
9 sells insurance policies in King County, Washington.

10 **III. JURISDICTION AND VENUE**

11 3. ESR’s properties are located in King County, Washington and ESR purchased an
12 insurance policy from Fireman’s Fund in King County. The Court has original jurisdiction over
13 the subject matter of this action under RCW 2.08.010. Venue is proper in King County,
14 Washington, pursuant to RCW 4.12.025.

15 **IV. FACTUAL BACKGROUND**

16 **A. ESR and the Fireman’s Fund Policy**

17 4. Ethan Stowell, a self-trained chef and longtime resident of Seattle, opened his first
18 restaurant, Union, in 2013. Mr. Stowell has since earned consistent and broad acclaim for both his
19 culinary skills and community involvement. Mr. Stowell and others formed ESR, which owns and
20 operates 13 restaurants in the Seattle area. ESR’s 13 restaurants (the “Properties”) provide a variety
21 of dining experiences and cuisines.

22 5. From its principal place of business in the Seattle area, ESR paid premiums in
23 exchange for a property insurance policy from Fireman’s Fund, numbered MZX 80997150 with a
24 policy period of May 24, 2019 through May 24, 2020 (the “Policy”).

25 6. The Policy is an “all-risk” policy. All-risk policies “provide coverage for all risks
26 unless the specific risk is excluded” and “shift the risk of loss away from [the insured] and place

1 it upon an insurer.” *Vision One, LLC v. Philadelphia Indem. Ins. Co.*, 174 Wn.2d 501, 514, 276
2 P.3d 300, 306 (2012) (internal citations omitted).

3 7. The Policy contains a “Property Gard” form, numbered 14200 12 88, which covers
4 ESR for “direct physical loss of or damage to Covered Property. . . caused by or resulting from
5 any Covered Cause of Loss.”

6 8. The Policy includes “Business Income” coverage in Form CP 00 30 10 91. The form
7 provides: “We will pay for the actual loss of Business Income you sustain due to the necessary
8 suspension of your operations during the period of restoration. The suspension must be caused by
9 direct physical loss of or damage to property” at a covered location or to personal property within
10 1,000 feet of a covered location.

11 9. The Policy provides “Extended Business Income” that “begins on the date that . . .
12 operations are resumed; and ends on the earlier of the date [the insured] could restore [its] property
13 with reasonable speed, to the condition that would have existed if no direct physical loss or damage
14 occurred” or 180 consecutive days after operations are resumed.

15 10. The Policy provides coverage for “Extra Expense,” which means necessary
16 expenses [incurred] during the period of restoration” that the insured “would not have incurred if
17 there had been no direct physical loss or damage to property caused by or resulting from a Covered
18 Cause of Loss.” This coverage is paid to “avoid or minimize the suspension of business and to
19 continue operations . . .”

20 11. The Policy includes “Civil Authority” coverage for the “actual loss of Business
21 Income” sustained and “necessary Extra Expense caused by action of a civil authority that
22 prohibits access to the described premises due to direct physical loss of or damage to property,
23 other than at the described premises, caused by or resulting from any Covered Cause of Loss.”

24 12. The Policy also contains a “Crisis Management Coverage Extension Endorsement,”
25 Form 143623 06 05, which covers “the actual loss of crisis event business income [the insured]
26 sustains due to the necessary suspension of [its] operations during the crisis event period of

1 restoration,” which “must be caused by or result from a covered crisis event at [the insured’s]
2 covered premises.”

3 13. “Suspension” is defined in the Policy as “the slowdown or cessation of your
4 business activities or that a part or all of the covered premises is rendered untenable.”

5 14. A covered crisis event includes “Premises Contamination,” which is defined as the
6 “necessary closure of [the insured’s] covered premises due to any sudden, accidental and
7 unintentional contamination or impairment of the covered premises or other property on the
8 covered premises which results in clear, identifiable, internal or external visible symptoms of
9 bodily injury, illness, or death of any person(s).” “Covered premises” means “that part of the
10 location [the insured occupies] which is covered by this policy including the area within 100 feet
11 thereof.”

12 15. Premises Contamination includes contamination by “Communicable Disease,”
13 which is defined as “any disease or any related or resulting diseases, viruses, complexes,
14 symptoms, manifestations, effects, conditions, or illnesses.”

15 16. The Policy contains a “Causes of Loss Form” numbered 141035 12 18. The Causes
16 of Loss form contains two sub-forms: the “Basic Causes of Losses” form and the “Special Causes
17 of Loss” form (the “Special Causes Form”). The Special Causes Form provides “When Special is
18 shown in the Declarations, covered causes of loss means the Basic Causes of Loss and Risks of
19 Direct Physical Loss not covered by the Basic Causes of Loss unless the loss is excluded or limited
20 as stated in Sections B and C that follow.” The Policy declarations show that ESR’s Policy includes
21 the Special Causes Form.

22 17. Section B.2 of the Special Causes Form, titled “Exclusions,” provides that
23 Fireman’s Fund “will not pay for loss or damage caused by or resulting from” among other
24 exclusions, “2.d.(3). Disease.” However, this disease exclusion was intentionally removed by
25 Fireman’s Fund through an endorsement. The “Washington Changes” endorsement, numbered
26 CP 01 60 12 98 (the “Endorsement”) amends the Special Causes Form by removing the “disease”

1 exclusion as follows: “Exclusion 2.d. of the Causes of Loss – Special Form is replaced by the
2 following . . .” The Endorsement then provides a replacement exclusion list that does not contain
3 a Disease exclusion.

4 **B. COVID-19 and Resulting Government Orders**

5 18. In or around December of 2019, a novel coronavirus began to spread in China.
6 The World Health Organization later named it “COVID-19.”

7 19. In January 2020, health officials reported that a Washington State resident living
8 about 30 miles north of Seattle tested positive for COVID-19; he was the first known U.S. resident
9 that the virus had infected. The first reported COVID-19 death in the United States occurred in
10 King County, Washington, on or around February 28, 2020.

11 20. On February 29, 2020, Washington State Governor Jay Inslee issued Proclamation
12 20-05, proclaiming, that a State of Emergency existed in all Washington counties due to the rapid
13 transmission of COVID-19 between Washington residents.

14 21. On March 1, 2020, King County, Washington Executive Dow Constantine
15 proclaimed a state of emergency in King County, Washington due to COVID-19.

16 22. On March 3, 2020, City of Seattle Mayor Jenny A. Durkan issued a “Mayoral
17 Proclamation of Civil Emergency” due to COVID-19.

18 23. On March 11, 2020, the Director of the WHO determined that the rapidly spreading
19 COVID-19 disease constituted a worldwide pandemic.

20 24. On March 11, 2020, Governor Inslee issued Proclamation 20-07, which among
21 other things, amended Proclamation 20-05, and established “community mitigation strategies” due
22 to COVID-19, including prohibiting gatherings of 250 people or more for specified activities,
23 including “recreational activities.”

24 25. On March 16, 2020, Governor Inslee issued Proclamation 20-13, which prohibited
25 in-person dining in restaurants and stated that COVID-19 “remains a public disaster affecting life,
26 health, [and] property.”

1 26. On March 23, 2020, Governor Inslee issued Proclamation 20-25, known as the
2 “Stay Home – Stay Healthy Order,” prohibiting Washington residents from leaving their homes
3 except for essential functions such as getting groceries and seeking medical care. Governor
4 Inslee’s Proclamation 20-25 also ordered that all non-essential businesses in Washington State
5 cease performing all but basic minimum operations due to COVID-19.

6 27. On April 2, 2020, Governor Inslee issued Proclamation 20-25.1, which, among
7 other things, extended Proclamation 20-25’s restrictions to at least May 4, 2020. On May 4, 2020,
8 Governor Inslee extended Proclamations 20-25 and 20-25.1 through May 31, 2020.

9 28. The WHO has explained that COVID-19 primarily spreads through respiratory
10 droplets expelled when an infected person talks, sneezes, and coughs, and by “fomites,” objects
11 and surfaces contaminated by the respiratory droplets.

12 29. Emerging research on the virus and reports indicate that the COVID-19 strains
13 physically infect and can stay alive on surfaces for at least 17 days, a characteristic that renders
14 property exposed to the contagion potentially unsafe and dangerous. Other research indicates that
15 the virus may linger on surfaces for up to four weeks in lower temperatures.

16 30. COVID-19 reportedly has an incubation period of 2–12 days, during which time
17 any person can spread the disease even before symptoms develop.

18 **C. Damage to ESR’s Properties and the Resulting Losses**

19 31. On or about March 16, 2020, ESR closed its restaurants to customers and suspended
20 its operations. About 16,000 customers per week visited ESR’s Properties prior the suspension of
21 ESR’s activities. People with confirmed cases of COVID-19 visited locations near ESR’s
22 Properties beginning as early as February 2020 and continuing for several weeks. Since then ESR
23 has had at least three confirmed cases of COVID-19 on its Properties.

24 32. ESR has suffered direct physical loss of or damage to its Properties, which entitles
25 it to Business Income coverage, as a result of the COVID-19 pandemic.
26

1 33. Diseases such as COVID-19 constitute a Covered Cause of Loss under ESR’s all-
2 risk policy because Fireman’s Fund intentionally deleted the Disease exclusion from the Policy
3 pursuant to the Endorsement.

4 34. Accordingly, Fireman’s Fund owes Business Income coverage to ESR because the
5 circumstances required by the Policy to trigger such coverage have occurred.

6 35. ESR has a duty under the Policy to “[t]ake all reasonable steps to protect the
7 Covered Property from further damage by a Covered Cause of Loss.”

8 36. In addition, various orders of civil authority prohibited ESR’s customers from
9 accessing to the Properties, including orders from the King County Executive, the City of Seattle
10 Mayor, and Governor Jay Inslee.

11 37. These prohibitions were in response to physical loss of or damage (the presence of
12 COVID-19) to property “other than” ESR’s Properties, which was it turn caused by a covered
13 cause of loss (a disease).

14 38. Accordingly, Fireman’s Fund owes Civil Authority coverage to ESR because the
15 circumstances required by the Policy to trigger such coverage have occurred.

16 39. The Crisis Management Extension Endorsement also provides coverage. ESR
17 closed its restaurants because of fortuitous premises contamination and impairment to its
18 Properties. COVID-19 was present at the Properties and, as is common knowledge, causes
19 identifiable internal or external symptoms of illness or death.

20 40. As a result, Fireman’s Fund owes Crisis Management coverage because the
21 circumstances required by the Policy to trigger such coverage have occurred.

22 41. Additionally and in the alternative, Fireman’s Fund owes ESR coverage under the
23 Policy because it provides business income coverage due to a “suspension caused by direct
24 physical loss of” property at the premises. ESR was forced to suspend its operations because of
25 the loss of its Properties as businesses to serve in-person meals. The Policy provides coverage for
26 such losses.

1 42. In an effort to reduce its business income loss, ESR resumed its operations in part
2 by offering small take-out menus from selected locations during shortened hours. The revenue
3 generated from take-out sales is approximately 20% of ESR’s former revenue.

4 43. Before its closures, ESR averaged monthly revenues of approximately \$2.2mm.

5 44. The losses suffered by ESR for which the Policy provides coverage increase every
6 day. At the date of filing, ESR estimates that its losses exceed \$1,500,000. ESR’s losses are
7 catastrophic to its business.

8 **D. Fireman’s Fund’s Denial of Policy Benefits**

9 45. On or about March 11, 2020, ESR notified Fireman’s Fund of its claim under the
10 Policy for business income coverage.

11 46. Fireman’s Fund assigned Conrad Knoten to adjust ESR’s claim.

12 47. On March 24, 2020, Steve Hooper, ESR’s president, participated in a call with
13 Mr. Knoten regarding ESR’s claims. Mr. Hooper answered Mr. Knoten’s questions, which focused
14 on Washington State government orders and whether people with COVID-19 had been in or
15 around ESR’s covered locations.

16 48. Mr. Hooper explained to Mr. Knoten that people who were present at or around
17 ESR’s locations had confirmed positive COVID-19 tests.

18 49. On May 11, 2020, Mr. Knoten notified ESR that Fireman’s Fund had wholly denied
19 ESR’s claim.

20 50. In its denial letter, Fireman’s Fund mischaracterized the facts of ESR’s operations
21 and losses. Contrary to Mr. Hooper’s explanation of ESR’s closures and publicly available
22 information, Fireman’s Fund’s denial stated, “[A]ll of ES Restaurant Group, Inc.’s locations have
23 remained open and provide take-out offerings.”

24 51. Fireman’s Fund’s denial also incorrectly referred to ESR by other restaurants’
25 names that are not in any way related to ESR—and repeated such misstatements throughout its
26 denial.

1 52. On information and belief, Fireman’s Fund has treated other Seattle restaurants
2 similarly—confusing their names, misstating policy language, and unreasonably investigating and
3 denying coverage. On information and belief, Fireman’s Fund’s “investigations” comprise cutting
4 and pasting insured’s names into template denial letters.

5 53. Additionally, the denial letter grossly mischaracterized what coverage Fireman’s
6 Fund owes ESR under the Policy.

7 54. The denial misstated the distance around ESR’s locations for which coverage is
8 provided to personal property (the Policy’s Restaurant Extension makes it 1,000, not 100 feet).

9 55. Most egregiously, Fireman’s Fund represented in its denial that the Policy contains
10 a Disease exclusion, which it does not. The opposite is true: the Washington Changes endorsement
11 removes the disease exclusion, as stated above.

12 56. Additionally, Fireman’s Fund incorrectly quoted the language of the “Acts or
13 Decisions” exclusion, which an endorsement substantially modifies. The Acts or Decision
14 exclusion that actually applies to ESR’s Policy excludes coverage for loss or damage caused by
15 “Acts or decisions, including the failure to act or decide, of any person, group, or organization or
16 governmental body. But if loss or damage by a Covered Cause of Loss results, we will pay for that
17 resulting loss or damage.”

18 57. In bringing this lawsuit, ESR has relied on the bases for denial stated in Fireman’s
19 Fund denial letter.

20 **V. FIRST CLAIM FOR RELIEF: BREACH OF CONTRACT**

21 58. ESR realleges and incorporates by reference each and every preceding paragraph.

22 59. ESR, the named insured on the Policy, paid valuable premiums in consideration for
23 the Policy.

24 60. ESR complied with all conditions precedent to coverage under the Policy, except
25 any obligations that were waived or excused.
26

1 61. Fireman’s Fund breached its express and implied duties under the Policy by, among
2 other things, denying coverage that ESR is owed in consideration of its premium payments to
3 Fireman’s Fund.

4 62. By breaching the terms of the Policy, Fireman’s Fund has caused ESR damages in
5 an amount to be proven at trial, but not less than \$1,500,000.

6 **VI. SECOND CLAIM FOR RELIEF: COMMON LAW BAD FAITH**

7 63. ESR realleges and incorporates by reference each and every preceding paragraph.

8 64. Fireman’s Fund owes ESR a duty of good faith and fair dealing. Under Washington
9 law, this duty prohibits Fireman’s Fund from putting its own economic interests above ESR’s
10 when adjusting ESR’s claim.

11 65. Fireman’s Fund committed bad faith through multiple acts and omissions,
12 including but not limited to: failing to conduct a reasonable investigation; failing to connect the
13 language of the policy to its insured’s losses; and failing to put ESR’s economic interests on par
14 with its own. Additionally, Fireman’s Fund failed to pay coverage that it owes ESR under the
15 Policy and unreasonably denied its claim, which constitute breaches of its duties to ESR and
16 amount to the tort of bad faith under Washington law.

17 66. Fireman’s Fund’s bad faith conduct directly and proximately damaged ESR. These
18 damages include, but are not limited to, the deprivation of benefits owed to ESR under the Policy
19 and the costs associated with bringing this action for coverage, including court costs and attorney
20 fees. ESR is entitled to recover these costs, which were caused by Fireman’s Fund’s bad faith.

21 **VII. THIRD CLAIM FOR RELIEF: CONSUMER PROTECTION ACT**

22 67. ESR realleges and incorporates by reference each and every preceding paragraph.

23 68. Fireman’s Fund unfairly denied ESR’s claim for insurance benefits owed under the
24 Policy and substantially misrepresented ESR’s coverage in the denial letter.

25 69. On information and belief, Fireman’s Fund has employed similar unfair and
26 deceptive acts for other similar claims, including sending nearly identical denial letters that contain

1 inaccurate policy information, misstate the facts of its insureds' claims, and unreasonably deny
2 policy benefits.

3 70. Fireman's Fund's use of unfair and deceptive practices in the insurance industry
4 against Washington policyholders impacts the public interest.

5 71. Fireman's Fund's unfair and deceptive practices injured ESR by depriving it of
6 coverage owed under the Policy and by requiring it to incur costs and attorney fees to bring this
7 action.

8 72. Fireman's Fund's unfair and deceptive acts directly and proximately caused ESR's
9 damages.

10 **VIII. FOURTH CLAIM FOR RELIEF: DECLARATORY RELIEF**

11 73. ESR realleges and incorporates by reference each and every preceding paragraph.

12 74. A clear and present dispute exists between ESR and Fireman's Fund concerning
13 their respective rights and obligations as to coverage under the Policy. Accordingly, ESR seeks
14 declaratory judgment that:

- 15 a. Fireman's Fund's investigation was unreasonable;
- 16 b. Fireman's Fund unreasonably denied coverage;
- 17 c. Fireman's Fund is limited to asserting the bases for denial that it set forth in its
18 May 11, 2020 letter;
- 19 d. Fireman's Fund breached the Washington Consumer Protection Act by its
20 conduct set forth in this Complaint;
- 21 e. Fireman's Fund breached the Insurance Fair Conduct Act by its conduct handling
22 ESR's claim as set forth in this Complaint; and
- 23 f. Any other declaratory relief as the court may deem appropriate.

24 **IX. FIFTH CLAIM FOR RELIEF: INSURANCE FAIR CONDUCT ACT**

25 75. ESR realleges and incorporates by reference each and every preceding paragraph.
26

1 76. Pursuant to RCW 48.30.015(8), ESR sent notice to Fireman’s Fund of ESR’s intent
2 to assert a cause of action against Fireman’s Fund under the Insurance Fair Conduct Act (“IFCA”)
3 on June 9, 2020 (the “IFCA Notice”).

4 77. Fireman’s Fund failed to resolve ESR’s claim within the 20-day statutory period.

5 78. As such, ESR has met its statutory obligations under IFCA.

6 79. Fireman’s Fund is liable under IFCA for, among other things, failing to conduct a
7 reasonable investigation into ESR’s claim, compelling ESR to initiate litigation to recover amounts
8 due to it under the Policy, failing to reasonably connect the Policy language on which it relies for
9 denial to the facts of ESR’s claim, and for unreasonably denying ESR coverage owed under the
10 Policy.

11 80. ESR is entitled to recovery for its actual damages, attorney fees, litigation costs,
12 and expert witness fees pursuant to RCW 48.30.015(3).

13 81. The Court may award up to three times ESR’s actual damages pursuant to
14 RCW 48.30.015(3).

15 **X. PRAYER FOR RELIEF**

16 WHEREFORE, ESR prays for judgment in its favor against Fireman’s Fund as follows:

- 17 1. For damages in an amount to be proven at trial but not less than \$1,500,000;
- 18 2. For declaratory relief;
- 19 3. For an award of attorney fees, expert costs, and other costs incurred in bringing
20 this action;
- 21 4. For prejudgment interest accruing until the date judgment is entered; plus post-
22 judgment interest at the statutory rate;
- 23 5. For treble damages under the Consumer Protection Act up to the statutory
24 maximum; and
- 25 6. For treble damages under IFCA; and

26 ///

1 7. For such other and further relief as the Court deems just and equitable.

2 DATED this 2nd day of July, 2020.

3
4 *s/ Tristan N. Swanson*

Tristan N. Swanson, WSBA No. 41934

s/ Carolyn A. Mount

Carolyn A. Mount, WSBA No. 55527

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