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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.

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 in 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



