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

17 THE GARDENER,

18  
19 Plaintiff,

20 v.

21  
22 OHIO SECURITY INSURANCE  
23 COMPANY,

24  
25 Defendant.  
26

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 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

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

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

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

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

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

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

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

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

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

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

22 **FIRST CAUSE OF ACTION**

23 **Declaratory Judgment**

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

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

27 56. Plaintiff paid all premiums required to maintain its comprehensive  
28 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

1 business insurance under the terms and conditions of the policy.

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

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

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

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

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

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

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

24 **THIRD CAUSE OF ACTION**

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

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

27 73. Plaintiff and Class members contracted with Defendant to provide it  
28 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.





1 Dated: June 9, 2020

Respectfully submitted,

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