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GRUBSTAKE HOLDINGS, LLC d/b/a
8 GRUBSTAKE and 1337 MISSION LLC d/b/a
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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
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13 GRUBSTAKE HOLDINGS, LLC d/b/a
GRUBSTAKE and 1337 MISSION LLC
14 d/b/a 1337,

15 Plaintiffs,

16 v.

17 FIRST MERCURY INSURANCE
18 COMPANY,

19 Defendant.
20

Case No.

**COMPLAINT FOR DECLARATORY
RELIEF, BREACH OF CONTRACT,
AND BREACH OF THE IMPLIED
COVENANT OF GOOD FAITH AND
FAIR DEALING**

DEMAND FOR JURY TRIAL

1 Plaintiffs Grubstake Holdings, LLC d/b/a Grubstake (“Grubstake”) and 1337
2 Mission LLC d/b/a 1337 (“Oddjob”), bring this action against Defendant First Mercury
3 Insurance Company (“First Mercury”). Plaintiffs allege as follows upon personal
4 knowledge as to their own acts and experiences, and, as to all other matters, upon
5 information and belief, including their attorneys’ investigation.

6 **INTRODUCTION**

7 1. On March 16, 2020, the City and County of San Francisco issued a Shelter in
8 Place order requiring all residents to remain at home, with limited exceptions for essential
9 activities, outdoor activities, additional activities, or essential travel, or to perform work
10 for essential businesses, outdoor businesses, additional businesses, and government
11 agencies (the “SIP Order”). The Order, issued in response to the COVID-19 pandemic,
12 required all non-essential businesses to cease all activities at facilities located within
13 County except Minimum Basic Operations.

14 2. Under the terms of the initial SIP Order, restaurants in San Francisco were
15 only allowed to prepare and serve food for take-out or delivery. Bars that do not serve
16 food were ordered to remain closed.

17 3. In compliance with the SIP Order, both Grubstake and Oddjob have had to
18 suspend their business operations. As a result, they have suffered severe financial harm.

19 4. Grubstake and Oddjob both purchased comprehensive insurance policies
20 from First Mercury and dutifully paid thousands of dollars in premiums. In exchange,
21 First Mercury promised to provide them with protection against loss of property, and,
22 importantly, loss of business income.

23 5. After being forced to shutter their businesses, Grubstake and Oddjob both
24 filed claims with First Mercury for business interruption coverage.

25 6. However, instead of providing them with coverage, First Mercury quickly
26 denied both claims and issued almost identical denial letters after conducting little to no
27 investigation. These cursory denials appear to be based on an unreasonably narrow

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1 interpretation of the coverage provided under the policies and an overbroad application of
2 coverage exclusions.

3 7. Rather than receiving the coverage they purchased and reasonably expected
4 to receive from First Mercury, Grubstake and Oddjob now find themselves in dire financial
5 straits and they face the possibility of having to close their businesses permanently.

6 **FACTUAL BACKGROUND**

7 8. In January 2020, news outlets began reporting an outbreak of a novel strain
8 of coronavirus (COVID-19) originating in Wuhan, China.

9 9. On January 30, 2020, following the discovery that COVID-19 had spread
10 outside China, the Director-General of the World Health Organization declared that the
11 outbreak of COVID-19 constituted a Public Health Emergency of International Concern.

12 10. On March 11, 2020, the World Health Organization, citing concerns over the
13 alarming levels of spread and severity of the virus, characterized COVID-19 as a global
14 pandemic.

15 11. One of the strategies recommended by public health officials to slow the
16 spread of COVID-19 is the use of population-wide social distancing measures to restrict
17 movements of the population in order to maintain physical space between people.

18 12. On March 16, 2020, the City and County of San Francisco, in conjunction
19 with five other Bay Area counties, announced the SIP Order directing all San Francisco
20 residents to stay inside their homes and away from others as much as possible in an
21 attempt to curb the spread of COVID-19. At the time, the SIP Order was the strictest
22 measure of its kind yet in the continental United States. The SIP Order went into effect at
23 12:01 a.m. on March 17, 2020.

24 13. Businesses that did not provide services deemed “essential” under the SIP
25 Order were required to close, including all bars and nightclubs. Restaurants were
26 permitted to remain open for takeout and delivery only.

27 14. Although the mandates imposed by the SIP Order have been modified
28 several times, the SIP Order remains in place as of the filing of this complaint.

1 Restaurants in San Francisco are still limited to takeout and delivery, and bars and
2 nightclubs must remain closed.

3 **GRUBSTAKE’S INSURANCE CLAIM**

4 15. Plaintiff Grubstake Holdings, LLC operates the Grubstake diner located in
5 the Polk Gulch neighborhood of San Francisco. Grubstake has been in operation since the
6 late 1960s.

7 16. Grubstake purchased a comprehensive business insurance policy issued by
8 First Mercury (Policy No. FMEV111848) that covered the period from June 1, 2019 to June
9 1, 2020. The policy includes business income and extra expense coverage with a total limit
10 of \$420,000, as well as additional “civil authority” coverage.

11 17. On March 17, 2020, in compliance with the SIP Order, Grubstake suspended
12 operations and closed its restaurant. Because much of Grubstake’s business comes from
13 late-night diners leaving bars and nightclubs located in and around Polk Gulch, all of
14 which were also required to close, Grubstake’s owners concluded at the time of the closure
15 that offering takeout and delivery would not generate sufficient revenue to offset the
16 expense of remaining open.

17 18. Although Grubstake has now since started offering takeout and delivery, the
18 restaurant’s dining room remains closed. Thus, compliance with the SIP Order has caused
19 and continues to cause direct physical loss of Grubstake’s insured property in that much of
20 it has been rendered useless or uninhabitable, and its functionality has been severely
21 reduced or eliminated.

22 19. Furthermore, even when Grubstake is allowed to reopen its dining room to
23 guests, it will likely be required to comply with social distancing protocols, which will
24 greatly reduce the number of guests that can be served at any one time.

25 20. On March 25, 2020, Grubstake tendered a claim to First Mercury for lost
26 business income.

27 21. On April 3, 2020, First Mercury informed Grubstake via email of its intent to
28 deny Grubstake’s claim for coverage.

1 22. On May 7, 2020, First Mercury denied Grubstake’s claim. In what appears
2 to be a form denial letter, First Mercury concluded that Grubstake’s claim “for business
3 income loss resulting from the closure of the Premises related to COVID-19 is not caused
4 by direct physical loss or damage to property at the Premises due to a Covered Cause of
5 Loss. To that end, the information and documentation submitted fails to support that
6 property at the Premises was physically damaged in any way.”

7 23. As for civil authority coverage, First Mercury stated that Grubstake’s claim
8 “for business income loss resulting from the closure of the Premises related to COVID-19
9 is not caused by action of civil authority which prevents access to the Premises due to
10 nearby property damage.”

11 24. The denial letter from First Mercury also stated that “[t]he Policy contains
12 the Exclusion of Loss Due to Virus or Bacteria endorsement which excludes coverage for
13 any business income loss, extra expense, or action of civil authority claim ‘caused by or
14 resulting from any virus . . . that induces or is capable of inducing physical distress, illness
15 or disease.’ Your claim for business income loss resulting from the closure of the Premises
16 related to COVID-19 is caused by and the result of such a virus.”

17 **ODDJOB’S INSURANCE CLAIM**

18 25. Plaintiff 1337 Mission LLC operates Oddjob, a high-end cocktail lounge
19 located in the SoMa neighborhood of San Francisco. Oddjob has been in operation since
20 2013.

21 26. Oddjob purchased a comprehensive business insurance policy issued by First
22 Mercury (Policy No. FMEV112250) that covered the period from August 8, 2019 to August
23 8, 2020. The policy includes business income and extra expense coverage with a total
24 limit of \$300,000, as well as additional “civil authority” coverage.

25 27. On March 17, 2020, in compliance with the SIP Order, Oddjob suspended
26 operations and closed its doors to all customers. Thus, compliance with the Order has
27 caused and continues to cause direct physical loss of Oddjob’s insured property in that
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1 much of it has been rendered useless or uninhabitable, and its functionality has been
2 severely reduced or eliminated.

3 28. If and when Oddjob is allowed to reopen, it will likely be required to comply
4 with social distancing protocols, which will greatly reduce the number of guests that can
5 be served at any one time.

6 29. On March 26, 2020, Oddjob tendered a claim to First Mercury for lost
7 business income.

8 30. On April 28, 2020, First Mercury denied Oddjob's claim. In what appears to
9 be a form denial letter, First Mercury concluded that Oddjob's claim "for business income
10 loss and/or extra expense resulting from the closure of the Premises related to COVID-19
11 is not caused by direct physical loss or damage to property at the Premises due to a
12 Covered Cause of Loss. To that end, the information and documentation submitted fails to
13 support that property at the Premises was physically damaged in any way."

14 31. As for civil authority coverage, First Mercury stated that Oddjob's claim "for
15 business income loss and/or extra expense resulting from the closure of the Premises
16 related to COVID-19 is not caused by action of civil authority which prevents access to the
17 Premises due to nearby property damage."

18 32. The denial letter from First Mercury also stated that "[t]he Policy contains
19 the Exclusion of Loss Due to Virus or Bacteria endorsement which excludes coverage for
20 any business income loss, extra expense, or action of civil authority claim 'caused by or
21 resulting from any virus . . . that induces or is capable of inducing physical distress, illness
22 or disease.' Your claim for business income loss resulting from the closure of the Premises
23 related to COVID-19 is caused by and the result of such a virus."

24 **PARTIES**

25 33. Plaintiff Grubstake Holdings, LLC d/b/a Grubstake is a limited liability
26 company formed under the laws of California with its principal place of business in San
27 Francisco, California.

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1 34. Plaintiff 1337 Mission LLC d/b/a 1337 is a limited liability company formed
2 under the laws of California with its principal place of business in San Francisco,
3 California.

4 35. Defendant First Mercury Insurance Company is a corporation organized
5 under laws of Delaware with its principal place of business in Southfield, Michigan. At all
6 relevant times, First Mercury operated in California, including in San Francisco,
7 California.

8 **JURISDICTION AND VENUE**

9 36. This court has original jurisdiction under 28 USC § 1332, in that it is a civil
10 action between citizens of different states in which the matter in controversy exceeds,
11 exclusive of costs and interest, seventy-five thousand dollars

12 37. This Court has personal jurisdiction over First Mercury because First
13 Mercury conducts business in San Francisco, California.

14 38. Venue is proper in the Northern District of California under 28 U.S.C. §
15 1391(b), as a substantial part of the events giving rise to Plaintiffs' claims occurred in the
16 district.

17 **INTRADISTRICT ASSIGNMENT**

18 39. Assignment to the San Francisco or Oakland Divisions would be proper
19 because Defendant has conducted business in San Francisco and a substantial part of the
20 events or omissions which give rise to the claims alleged herein occurred in San Francisco.

21 **CAUSES OF ACTION**

22 **First Cause of Action**

23 **(Declaratory Judgment)**

24 40. Plaintiffs reallege the paragraphs above as if fully set forth herein.

25 41. Plaintiffs purchased comprehensive business insurance policies from First
26 Mercury that insured against all risks of physical damage or loss (unless excluded) to their
27 property. The policies also insured against loss of business income and covered extra
28

1 expenses sustained during a suspension of business operations resulting from covered loss
2 or damage.

3 42. On March 16, 2020, the City and County of San Francisco issued the SIP
4 Order which required restaurants to close, except for takeout and delivery, and required
5 bars that did not serve food to close completely.

6 43. As a direct result of the SIP Order, Plaintiffs' covered property has been
7 rendered useless or uninhabitable, and its functionality has been severely reduced or
8 eliminated.

9 44. However, First Republic has taken the position that it owes Plaintiffs no duty
10 to provide coverage under their comprehensive business insurance policies for the
11 business income they have lost and extra expenses they have incurred as a result of the SIP
12 Order.

13 45. A dispute has arisen as to the rights and responsibilities of the parties under
14 the policies issued by First Mercury and such dispute is ripe for adjudication.

15 46. Therefore, Plaintiffs request a declaration that the insurance policies issued
16 by First Mercury provide coverage for Plaintiffs' business income losses and that such
17 coverage is not precluded by any exclusions or limitations contained in those policies.

18 **Second Cause of Action**

19 **(Breach of Contract)**

20 47. Plaintiffs reallege the paragraphs above as if fully set forth herein.

21 48. Plaintiffs purchased comprehensive business insurance policies from First
22 Mercury that insured against all risks of physical damage or loss (unless excluded) to their
23 property. The policies also insured against loss of business income and covered extra
24 expenses sustained during the suspension of business operations resulting from covered
25 loss or damage.

26 49. Plaintiffs have duly performed all terms, conditions, covenants and promises
27 they were required performed under the terms and conditions of their policies, except for
28 those terms, conditions, covenants and/or promises which were excused, waived, or

1 prevented from being performed, or otherwise discharged. This includes paying all
2 premiums required to maintain coverage under their policies.

3 50. On March 16, 2020, the City and County of San Francisco issued the SIP
4 Order which required restaurants to close, except for takeout and delivery, and required
5 bars that did not serve food to close completely.

6 51. Beginning on March 17, 2020, and continuing through the date of this
7 complaint, Plaintiffs suffered a direct physical loss of property and have lost business
8 income as a direct result of the SIP Order.

9 52. Plaintiffs' losses are covered under the comprehensive business insurance
10 policies they purchased from First Mercury and there are no exclusions or limitations in
11 Plaintiffs' policies that would preclude coverage for their losses.

12 53. First Mercury has breached its contractual obligations to Plaintiffs under
13 their respective insurance policies by denying their insurance claims.

14 54. As a result of First Mercury's breach of its obligations, Plaintiffs have
15 sustained damages including but not limited to, loss of policy benefits, in an amount to be
16 proven at trial.

17 **Third Cause of Action**

18 **(Breach of the Implied Covenant of Good Faith and Fair Dealing)**

19 55. Plaintiffs reallege the paragraphs above as if fully set forth herein.

20 56. The insurance policies issued by First Mercury were subject to an implied
21 covenant of good faith and fair dealing that all parties would act in good faith and with
22 reasonable efforts to perform their contractual duties and not impair the rights of other
23 parties to receive the benefits under the contracts.

24 57. First Mercury breached the implied covenant of good faith and fair dealing
25 by:

- 26 a. By unreasonably failing and refusing to conduct a fair and thorough
27 investigation into the facts which gave rise to Plaintiffs' insurance
28 claims;

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- b. By unreasonably and narrowly interpreting the insurance policies in a manner calculated to deny benefits due to Plaintiffs;
- c. By unreasonably failing to acknowledge that Plaintiffs’ business income and extra expense losses were caused by direct physical loss of their insured property;
- d. By unreasonably denying Plaintiffs’ claim for loss of property, loss of business income, and extra expense;
- e. By misrepresenting the scope of coverage under the insurance policies;
- f. By misrepresenting the scope and applicability of the exclusions contained in the insurance policy, including the Exclusion of Loss Due to Virus or Bacteria;
- g. By compelling Plaintiffs to commence litigation to recover benefits due to them under the policies.

58. First Mercury acted with fraud, malice, oppression and with reckless disregard for Plaintiffs’ rights by

- a. By misrepresenting the scope of the business income, extra expense, and civil authority coverage under the insurance policies;
- b. By misrepresenting the scope and applicability of the exclusions contained in the insurance policies, including the Exclusion of Loss Due to Virus or Bacteria;
- c. By systematically denying claims for business income, extra expense, and civil authority coverage arising out of the SIP Order, and similar orders issued by state, county, and municipal authorities in response to the COVID-19 pandemic.

59. As a result of First Mercury’s breach of the covenant of good faith and fair dealing, Plaintiffs lost the contract benefits due under the insurance policies, sustained consequential damages, and incurred attorneys’ fees and costs in order to enforce their contractual rights.

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60. As a result of First Mercury’s breach of the covenant of good faith and fair dealing, and because First Mercury acted with fraud, malice, oppression and with reckless disregard for Plaintiffs’ rights, Plaintiffs are entitled to punitive damages in an amount that is in accordance with the evidence to be introduced at trial.

PRAYER

Plaintiffs pray for the following relief:

- a. A declaration that Plaintiffs’ losses are covered under the comprehensive business insurance policies issued to them by Defendant;
- b. Damages, attorneys’ fees and costs, and any other 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;
- c. Punitive damages;
- d. Any other relief that this Court finds just and proper.
- e.

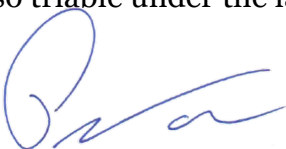
Dated: June 17, 2020

By: 
 Peter Roldan
 EMERGENT LLP
 Attorneys for Plaintiffs
 GRUBSTAKE HOLDINGS, LLC d/b/a
 GRUBSTAKE and 1337 MISSION LLC d/b/a 1337

JURY DEMAND

Plaintiffs demand a jury trial for all issues so triable under the law.

Dated: June 17, 2020

By: 
 Peter Roldan
 EMERGENT LLP
 Attorneys for Plaintiffs
 GRUBSTAKE HOLDINGS, LLC d/b/a
 GRUBSTAKE and 1337 MISSION LLC d/b/a 1337