

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SXSW, LLC,

Plaintiff,

v.

FEDERAL INSURANCE COMPANY,

Defendant.

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Civil Action No. 1:21-CV-00900

PLAINTIFF’S ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF THIS COURT:

Plaintiff SXSW, LLC (“SXSW”), brings this action against Defendant Federal Insurance Company (“Federal”) and would respectfully show:

I. Introduction.

1. SXSW seeks a judicial declaration and judgment requiring Federal to defend and indemnify SXSW in a federal class action complaint filed against it after the City of Austin cancelled the 2020 festival due to the COVID-19 pandemic. *See* Ex. 1, attached (Original Complaint, *Bromley v. SXSW, LLC*, No. 1:20-cv-439 (W.D. Tex.) (“the *Bromley* Complaint”).

2. The *Bromley* Complaint alleges claims that trigger Federal’s duty to defend and indemnify SXSW under Directors & Officers and Entity Liability insurance coverage that Federal sold to SXSW. Federal has wrongly refused to provide coverage in response to SXSW’s tender.

3. SXSW, therefore, files this lawsuit seeking a declaration and judgment that: (1) Federal has a duty to defend Plaintiff in the *Bromley* Complaint and to indemnify SXSW against loss, including defense costs, settlement, or any judgment; (2) Federal has a duty to promptly reimburse SXSW for all defense costs incurred by SXSW in the *Bromley* Complaint in

the past, and to pay SXSW's defense costs going forward in that lawsuit; (3) Federal has breached its contract and its common law and statutory duties of good faith and fair dealing; and (4) Federal is liable to SXSW for actual and treble damages, prejudgment interest and court costs.

II. Parties.

4. Plaintiff SXSW, LLC, is a Texas limited liability company with its principal place of business at 1400 Lavaca Street, Austin Texas.

5. Federal Insurance Company is an Indiana Corporation with its principal place of business in Warren, New Jersey. It may be served by serving its registered agent for service of process, CT Corporation System, 1999 Bryan St., Ste. 900, Dallas, TX 75201-4284.

III. Jurisdiction and Venue.

6. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1391(a)(c), because there is complete diversity of citizenship between SXSW and Federal and more than \$75,000 is in controversy.

7. Defendant is subject to personal jurisdiction in Texas because the Texas long-arm statute, Texas Civil Practice and Remedies Code § 17.042, et seq., extends to the limits of the Due Process Clause of the Constitution and permits the exercise of personal jurisdiction over a nonresident defendant, such as Defendant, who has purposefully availed itself of the benefits and protections of Texas by establishing "minimum contacts" with Texas, including contracting by mail or otherwise with Plaintiff with the contract performance to be performed by either party in whole or in part within Texas, and by failing to perform its obligations that were owed in Texas, including the duty to provide a defense to Plaintiff, a Texas resident limited liability company, in a lawsuit filed in Texas, and by further committing a tort in whole or in part in Texas. Venue is proper in this district pursuant to 28 U.S.C. § 1391 because Defendant regularly transacts business

in this district and is subject to personal jurisdiction in this district, and because a substantial part of the events or omissions giving rise to the claims occurred in this District.

IV. Factual Allegations.

A. The Festival.

8. SXSW is an annual conference and festival that occurs in March in Austin, Texas, which brings together the global music, film, technology, and education industries to network and showcase new business and creative endeavors. SXSW expected thousands of people to attend SXSW 2020.

9. On March 6, 2020, however, the City of Austin, exercising its emergency powers, cancelled the entire event due to the COVID-19 pandemic. By that time, of course, SXSW had spent a tremendous amount of time and money preparing to host SXSW 2020.

10. In preparing to host SXSW 2020, the company had curated thousands of conference speakers and musical performances, and hundreds of film screenings. SXSW contracted with numerous venues and hotels, arranged for the travel of presenters and technical operations, engaged hundreds of equipment and service providers, created and printed signage, programs, merchandise, schedules, and much more.

11. Because SXSW must spend enormous sums of cash to prepare to host a festival, it has a long-standing no-refund policy for credential purchases, which is expressly stated in its Participation and Credentials Terms and Conditions (the “Terms”). After the City cancelled the 2020 event, SXSW invoked this long-standing policy when some attendees requested refunds and credit card chargebacks. Instead, SXSW offered credential purchasers the opportunity to defer their SXSW 2020 credentials to a future year and the right to purchase credentials for another year at a 50% discount. Approximately 80% of credential purchasers accepted this offer and granted

SXSW a release of claims. Nevertheless, some purchasers asserted claims against SXSW seeking refunds, despite the no-refund policy.

B. The Claims.

12. One purchaser of SXSW 2020 credentials, Steven Leventhal, retained a lawyer who sent a demand letter dated April 11, 2020, to SXSW, threatening to file a lawsuit against SXSW in Illinois if it did not provide him a full refund (the “Leventhal Demand”).

13. Two other purchasers of SXSW 2020 credentials, Maria Bromley and Kleber Pauta, filed the *Bromley* Complaint in this Court on April 24, 2020, demanding refunds, attorney’s fees, and costs. Ex. 1. They seek to represent a class of purchasers of wristbands, passes, badges and tickets to SXSW 2020. *Id.* ¶ 48. If certified, Leventhal would be a member of the proposed class.

14. Bromley, a resident of Massachusetts, alleges that she purchased a “Platinum” badge for SXSW 2020 on February 3, 2020. Ex. 1 ¶¶ 8-9.

15. Bromley alleges that, upon learning of the cancellation of the Festival, she called SXSW and requested a cash refund, but was told that SXSW does not provide cash refunds. Ex. 1 ¶ 10-11. Bromley subsequently emailed SXSW requesting a cash refund. *Id.* ¶ 13.

16. On April 1, 2020, Bromley received an email from SXSW offering to defer her Platinum badge for use in the 2021, 2022 or 2023 SXSW festivals plus the right to purchase a second badge at 50% off one of the other years. Ex. 1 ¶ 13. Bromley does not allege she accepted the offer, which has expired.

17. Pauta, a resident of Colorado, alleges that he purchased a SXSW badge on November 25, 2019. Ex. 1 ¶¶ 14-15.

18. Pauta alleges that, after learning that SXSW 2020 had been cancelled, he emailed SXSW and requested a cash refund. Ex. 1 ¶ 17. SXSW responded on April 23, 2020, that SXSW’s

“stated registration policy has always been no refunds,” and that it therefore would not issue a refund. *Id.* ¶ 18.

19. Pauta received SXSW’s April 1, 2020, deferral offer but, like Bromley, he does not allege he accepted the offer before it expired. Ex. 1 ¶ 19.

20. The *Bromley* Complaint alleges the SXSW festival “consists of multiple ‘tracks’ of programming related to film, interactive media, music, gaming, conferences and musical performances” and that attendees are required to purchase wristbands, tickets, passes, or badges to gain access to these programming tracks, known as “Credentials.” Ex. 1 ¶¶ 27-28, 33.

21. The *Bromley* plaintiffs further allege that “SXSW offers ‘Interactive,’ ‘Film’ or ‘Music’ badges that provide ‘primary entry to programming associated with their badge type and ... secondary access to most other SXSW events[,]’ as well as communal amenities such as food courts, award shows and expositions” Ex. 1 ¶ 29.

22. The *Bromley* Complaint alleges SXSW offers “Platinum” badges, “which grant primary access to all official SXSW events,” and that attendees may also purchase Film festival, Music festival or Gaming Expo wristbands. Ex. 1 ¶¶ 30-31.

23. The *Bromley* plaintiffs further allege that, in order to purchase SXSW 2020 credentials, they were required to agree to SXSW’s Terms. Ex. 1 ¶ 34 & Ex. A. They admit that the Terms are governed by Texas law and include a Refund and Revocation Policy (“Refund Policy”) stating that SXSW “does not issue refunds under any circumstances” and that “[a]ny and all payments made to SXSW are not refundable for any reason.” *Id.* ¶ 36.

24. Referencing language in the Refund Policy that “SXSW may, in its sole discretion and at any time determined by SXSW, cancel, revoke, or refuse ... Credentials, purchases, and/or hotel reservations made through SXSW,” the *Bromley* plaintiffs allege that the Refund Policy, if

enforced, would render the contract “an unenforceable, illusory, unilateral option contract.” Ex. 1 ¶¶ 38-39.

25. The *Bromley* Complaint alleges that, despite “reports of spreading COVID-19 in early 2020, on February 28, 2020, SXSW informed the public that the SXSW 2020 event was ‘proceeding as planned’ and that despite some cancellations, the event was on par with past years,” and continued selling tickets. Ex. 1 ¶ 42.

26. The *Bromley* Complaint alleges that SXSW 2020 was scheduled to be held from March 13 to March 22, 2020, but that on March 6, 2020, just before it was scheduled to start, SXSW 2020 “was cancelled due to the COVID-19 pandemic and the City of Austin’s local state of emergency declaration.” Ex. 1 ¶¶ 3, 44. The plaintiffs allege that, by not issuing refunds, “SXSW has, in effect, shifted the burden of the COVID-19 pandemic onto festivalgoers.” *Id.* ¶¶ 44-47.

27. Based on these facts, the *Bromley* Complaint alleges three causes of action. First, the plaintiffs allege breach of contract, claiming that SXSW failed to provide them refunds after the City of Austin cancelled SXSW 2020, contending that SXSW’s no-refund policy is “unlawful and unenforceable.” *Id.* ¶¶ 54-63. Second, the plaintiffs allege unjust enrichment, claiming that SXSW, by not issuing refunds after SXSW 2020 was cancelled, retained “benefits conferred on it by Plaintiffs and the Class” in a manner that “is unjust and inequitable under the circumstances.” *Id.* ¶¶ 64-68. Third, the *Bromley* plaintiffs allege conversion, claiming that SXSW, by not providing refunds, “has, unlawfully and without authorization, assumed and exercised dominion and control over that property to the exclusion of, or inconsistent with, the rights of Plaintiffs and the class.” *Id.* ¶¶ 69-73.

C. The Policy.

28. SXSW purchased from Federal a ForeFront Portfolio 3.0SM insurance policy (“the Policy”). Ex. 2, attached. The Policy has three coverage parts: (1) Directors & Officers and Entity Liability Coverage; (2) Employment Practices Liability Coverage; and (3) CyberSecurity Coverage. *Id.* At issue in this lawsuit is the Policy’s first coverage part, which covers claims made against SXSW, LLC, as an entity, as well as claims made against SXSW’s individual directors and officers. *Id.* at 26-47.

29. The Policy’s Directors & Officers and Entity Liability Coverage Part (“Entity Coverage”) provides SXSW, the entity, with the following coverage relevant to this lawsuit, subject to the Policy’s General Terms and Conditions:

Insuring Clause (C): Entity Liability Coverage

(C) The Company shall pay, on behalf of an **Organization**, **Loss** on account of a **Claim** first made against the **Organization** during the **Policy Period**, or the extended Reporting Period if applicable.

Ex. 2 at 27 (emphasis in original).

30. The Policy defines the bolded terms above in pertinent part as follows:

Organization means the Parent **Organization** and any **Subsidiary**. **Organization** shall also mean any such entity as a debtor in possession under United States bankruptcy law or the equivalent of a debtor in possession under the law of any other country.

Claim means:

...

(C) when used in reference to the coverage provided by Insuring Clause (C), Entity Liability Coverage, any:

(1) written demand first received by an **Insured** for monetary damages or non-monetary relief, including injunctive relief;

(2) civil proceeding commenced by the service of a complaint or similar pleading;

...

against an **Organization** for a **Wrongful Act**, including any appeal therefrom;

Wrongful Act means any actual or alleged error, misstatement, misleading statement, act, omission, neglect, or breach of duty committed, attempted, or allegedly committed or attempted by:

...

(B) for purposes of coverage under Insuring Clause (C), Entity Liability Coverage, any **Organization**.

Loss means the amount which an **Insured** becomes legally obligated to pay as a result of any **Claim**, including:

(A) compensatory damages;

...

(D) judgments, including pre-judgment and post-judgment interest;

(E) settlements; and

(F) **Defense Costs**,

Ex. 2 at 14, 28-31 (emphasis in original).

31. With respect to Entity Coverage, the Policy contains an exclusion, referred to herein as the “Contract Exclusion,” stating:

The Company shall not be liable for **Loss** on account of any **Claim** against an **Organization**:

(1) Contract

based upon, arising from or in consequence of any liability in connection with any oral or written contract or agreement to which an **Organization** is a party ...

Ex. 2 at 33 (emphasis in original). The Contract Exclusion is itself subject to an exception, referred to herein as the Contract Exclusion Exception, which provides that “this Exclusion ... shall not apply to the extent that such **Organization** would have been liable in the absence of such contract or agreement.” *Id.*

32. Endorsement/Rider No. 5, which adds a Services Industry Endorsement, replaces Exclusion (B)(6)(c) of the Entity Coverage with an exclusion, referred to herein as the “Professional Services Exclusion,” stating:

(1) The Company shall not be liable under this Coverage Part for **Loss** on account of any **Claim** based upon, arising from, or in consequence of the rendering of, or failure to render, any **Professional Services** by an **Insured**

Ex. 2 at 43.

33. Elsewhere, the Policy defines “Professional Services” as follows:

Professional Services means services which are performed for others for a fee.

Ex. 2 at 31.

34. The Policy’s “Defense and Settlement” Section VIII states, in pertinent part:

VIII. DEFENSE AND SETTLEMENT

(A) The Company shall have the right and duty to defend any **Claim** covered by this Coverage Part. Coverage shall apply even if any of the allegations are groundless, false or fraudulent. The Company’s duty to defend any **Claim** shall cease upon exhaustion of the applicable Limit of Liability.

Ex. 2 at 35.

35. Paragraph (1) of Endorsement/Rider No. 6 to the Policy’s Directors & Officers and Entity Liability Coverage Part provides, in pertinent part, that the Policy’s Defense and Settlement Section VIII is deleted and replaced by language set forth in the Endorsement, “[u]nless the **Insured** has tendered the defense of a **Claim** to the Company pursuant to paragraph (3) of this Endorsement....” Ex. 2 at 45. Paragraph (3) of that endorsement states:

Notwithstanding paragraph (1) of this Endorsement, the **Insureds** shall have the option to tender the defense of any **Claim** to the Company by notifying the Company within a reasonable time after such **Claim** is first received by the **Insured**, but in no event later than thirty (30) days after the date such **Claim** is first received by the **Insured**.

Ex. 2 at 46.

36. The Policy’s standard Defense and Settlement Section VIII, set forth in Paragraph 34 above, applies in this case because SXSX timely tendered the defense of the Claims to Federal pursuant to the provisions of paragraph (3) of Endorsement/Rider No. 6 to the Policy’s Directors & Officers and Entity Liability Coverage Part.

37. In addition, the Policy’s standard IX Allocation Section applies because SXSX tendered the defense of the Claims to Federal pursuant to the provisions of paragraph (3) of Endorsement/Rider No. 6 to the Policy’s Directors & Officers and Entity Liability Coverage Part.

Ex. 2 at 46.

38. Subject to the Policy's \$25,000 retention, the Policy's IX Allocation Section, paragraph (A), provides that Federal is responsible for one hundred percent (100%) of SXSWS Defense Costs for a Claim under the Policy's Directors & Officers and Entity Liability Coverage Part, even if SXSWS incurs an amount consisting of both Loss that is covered by the Coverage Part and also Loss that is not covered by the Coverage Part. Ex. 2 at 26, 36.

D. The Denial of Coverage.

39. After the City of Austin cancelled SXSWS 2020, SXSWS put Federal on notice of the potential for a claim even before any actual claim was made.

40. SXSWS received the Leventhal Demand on April 15, 2020 and tendered it to Federal on April 16, 2020.

41. The *Bromley* Complaint was filed on April 24, 2020, and SXSWS tendered the defense of the *Bromley* Complaint to Federal on April 27, 2020.

42. Federal denied coverage in a letter to SXSWS on May 18, 2020. Ex. 3, attached.

43. Federal asserted two reasons for denying coverage. First, Federal claimed that the Contract Exclusion excludes coverage for the entire *Bromley* Complaint because "the claimants' allegations are based upon, arise from and are in consequence of liability in connection with a contract to which SXSWS is a party." Ex. 3 at 2. Federal claimed, without explanation, that the Contract Exclusion Exception "does not apply." *Id.*

44. Second, Federal claimed that the Professional Services Exclusion excludes coverage because SXSWS "provided a service – scheduling, overseeing, organizing and managing South by Southwest – for which it collected a fee thus precluding coverage." Ex. 3 at 2. Federal directed SXSWS to put its E&O carrier on notice of the Claim. *Id.*

45. Counsel for SXSWS's insurance agent responded to Federal on July 8, 2020,

explaining that the Contract Exclusion does not preclude coverage for the *Bromley* Complaint because the unjust enrichment and conversion claims seek to impose liability against SXSW in the absence of a contract. Ex. 4 at 8-10, attached.¹ Thus, under the Contract Exclusion Exception, the Contract Exclusion does not apply. SXSW's agent further explained that the Contract Exclusion does not even apply to the *Bromley* Complaint breach of contract claim, because that claim is not based on liability arising under any oral or written contract. While the *Bromley* plaintiffs allege that there is a contract (SXSW's Terms), and that the Terms' no-refund policy is unenforceable, they do not allege that SXSW *is contractually liable to pay refunds under Terms when a festival is cancelled by a government agency. Id.* at 10.

46. SXSW's agent further explained that the Professional Services Exclusion did not preclude coverage because, under Texas law, "professional services" exclusions only exclude damages that directly stem from the performance of services for others that involve a specialized skill, vocation or training. Ex. 4 at 10-11. Texas cases have made clear that "professional services" are not defined by the title or person performing the service, but by the act itself, so that ordinary or administrative acts performed by professionals are not "professional services." Thus, "professional services" exclusions do not apply to billing, ticket sales, and refund activities which are merely administrative tasks inherent in all businesses. SXSW organized the festival, determined who should present at the festival, made the travel arrangements for presenters, and made arrangements for the presentations. These are not professional services, but even if they were, the *Bromley* plaintiffs did not sue SXSW for damages arising from such services. Rather,

¹ Under Texas law, an unjust enrichment claim may only be asserted when there is no governing contract. *See Bado Equip. Co., Inc. v. Bethlehem Steel Corp.*, 814 S.W.2d 464, 473 (Tex. App. – Houston [14th Dist.] 1991, no writ) (existence of contract precludes recovery for unjust enrichment). Likewise, a claim for conversion is a tort claim not founded upon contract. *Lawyers Title Co. v J.G. Cooper Dev., Inc.*, 424 S.W.3d 713, 718 (Tex. App. – Dallas 2014, pet. denied) (conversion requires no proof of contract).

they complain that SXS_W wrongfully refused to refund their payments. Ticket sales and refunds are non-professional billing services. *Id.* SXS_W's agent also noted that Federal's denial letter, after denying coverage, had directed SXS_W to file a claim against its E&O carrier, which is also Federal. *Id.* at 3-4. But Federal had also denied coverage under its E&O policy based on an exclusion for Professional Services performed *for* an Insured. *Id.* In that denial, Federal denied coverage by asserting that the *Bromley* plaintiffs' claims were based on SXS_W's performance of "Professional Services" – which it described as scheduling, overseeing, organizing, and managing the Festival – *on its own behalf*. Ex. 7 at 5. Federal cannot have it both ways, denying Entity Coverage by claiming the *Bromley* Complaint is based on SXS_W's failure to render Professional Services *for others* while denying Professional Services coverage by claiming the *Bromley* Complaint is based on SXS_W's failure to render Professional Services *to itself*.

47. Outside counsel for Federal responded on August 13, 2020, repeating its claim that the Contract Exclusion and the Professional Services Exclusions excuse Federal from providing any defense or indemnification. Ex. 5, attached. Counsel for Federal also claimed that SXS_W had failed to timely tender the defense to Federal, *id.* at 6, but this claim is refuted by Federal's initial denial letter, which acknowledged that SXS_W had tendered the Leventhal Demand and the *Bromley* Complaint on April 16 and April 27, 2020, respectively, well within the 30-day deadline Federal's counsel cites. *See* Ex. 3 at 1. In that letter, Federal expressly denied it had a duty to defend, thereby acknowledging that SXS_W had tendered the defense to it. *Id.* at 3.

48. Federal's refusal to defend and indemnify SXS_W is wrongful under Texas law and a breach of its duties under the Policy.

49. Federal's denial based on the "Professional Services Exclusion" is wrongful for other reasons as well. First, as noted in Federal's denial letter, the Policy purports to define

“Professional Services” as “services which are performed for others for a fee.” That definition, if construed as Federal alleges, would render the term “Professional” superfluous. Indeed, the word “professional” is ordinarily and commonly understood as referring to someone with specialized knowledge, education and training like a doctor or engineer. As a matter of law, insurance policies should not be interpreted in such a manner that renders terms superfluous.

50. Second, Federal’s interpretation of “Professional Services” as encompassing “any services” not only makes the word “Professional” superfluous, it also renders the Policy’s entity coverage for SXSU illusory. By interpreting the “Professional Services” exclusion to apply to “any” services and further interpreting “Services” to apply to ordinary billing activities and ticket refund policies, Federal would effectively eliminate *any* entity coverage for SXSU, because all of its activities and alleged omissions could then be characterized as “Professional Services” subject to the exclusion, no matter how mundane or ordinary.

51. Federal’s purported definition is no definition at all. Given the lack of a meaningful definition of “Professional Services” in the policy, the Court should look to Texas law, which defines “Professional Services” as a service peculiar to an individual’s specialized vocation and performed by that professional using specialized knowledge or training inherent to their profession. The *Bromley* Complaint is not based on SXSU’s provision, or failure to provide, the plaintiffs such specialized services.

52. Alternatively, it would be proper for the Court to construe the Policy using the “Professional Services” definition provided in the Professional Portfolio policy concurrently issued by Federal to SXSU, which defines “Professional Services” as “event planning, promotional activities, branding, travel agency services, and related services.” Ex. 6 at 23. It is appropriate to read the Professional Liability policy’s definition into the Entity Liability Policy,

not only to gain an understanding of the objectively reasonable interpretation of the parties under the circumstances, but also because the Policy's "Service Industry" Endorsement/Rider No. 5 states that "[s]ubject to the provisions of this endorsement, no coverage shall be available for any **Loss** until after any and all coverage available under any policy providing professional liability or errors and omissions coverage has been exhausted." Ex. 2 at 43. That is, the "Professional Services" *excluded* from coverage in the D&O and Entity Coverage would fall *within* the coverage provided in the Professional Liability Policy, thus providing coverage as objectively intended by the parties, while avoiding double coverage. Further, by not applying the exclusion to SXSU's ordinary activities like billing, or refunds – activities are performed by all businesses regardless of any specialized training or education – SXSU's reasonable interpretation prevents the Entity Liability coverage from being illusory.

53. At a minimum, SXSU proffers reasonable interpretations of the scope of the Professional Services Exclusion that differ from Federal's interpretation. When a policy term is susceptible to more than one reasonable interpretation, the court must resolve the ambiguity in favor of the insured. This rule applies even when the insurer's interpretation may seem more reasonable, so long as the insured's interpretation is not unreasonable. Here, SXSU's interpretation is not unreasonable and is consistent with Texas law.

54. Third, even if "professional services" means *all* services, the Professional Services Exclusion does not bar coverage because it is expressly limited to Loss on account of a Claim based upon or arising out of "the rendering of, or failure to render, any **Professional Services** by an Insured." Ex. 2 at 43 (underling added). The exclusion does not bar coverage to the extent the *Bromley* Complaint includes claims arising from the plaintiffs being deprived of services that were

to have been provided by others, such as “programming relating to film, interactive media, music, gaming, conferences and musical performances.” Ex. 1 ¶ 27.

55. The *Bromley* Complaint’s unjust enrichment claims is based upon the plaintiffs’ paying for, but not being able to attend, including musical performances, film screenings and conference presentations, which were to be rendered by musicians, filmmakers, and others, not by SXSW. The *Bromley* plaintiffs complain it is “unjust and inequitable under the circumstances” for SXSW to retain the money they paid. Ex. 1 ¶ 67. It can be inferred from the *Bromley* Complaint that the plaintiffs are claiming that, despite the work and expenses SXSW incurred preparing for SXSW 2020, it would be unjust for SXSW to retain plaintiffs’ payments because the performers and presenters, through no fault of their own, were unable to perform due to the City of Austin cancelling the festival.

56. In short, the *Bromley* plaintiffs claim it would be unjust for SXSW to retain the Credential payments, not because SXSW did not provide them “Professional Services” of “event planning, promotional activities, branding, travel agency services, and related services,” but because SXSW retained their payments despite the plaintiffs being unable to enjoy services that would have been provided *by others* at SXSW 2020. Therefore, the Professional Services Exclusion does not apply.

57. The *Bromley* Complaint cites a page on SXSW’s website, <https://www.sxsw.com/attend/#chart> to support the allegation that “SXSW offers ‘Interactive,’ ‘Film’ or ‘Music’ badges that provide ‘primary entry to programming associated with their badge type and ... secondary access to most other SXSW events[,]’ as well as communal amenities such as food courts, award shows and expositions . . .” Ex. 1 ¶ 29. Although it is clear from the *Bromley* Complaint that SXSW 2020 would consist of performances and presentations to be provided by

others, this is further confirmed by the webpage cited by the *Bromley* plaintiffs, which references programming such as “performances from new, developing, and established artists” and provides tabs to click for SXSW 2020 News and to “Explore Announced Programming.” Those links provided a list of the announced presenters, speakers and performers, and news about internationally acclaimed speakers, musical performers, comedians, and filmmakers who would have presented the programming at the Festival and who are obviously not SXSW. *Id.*

58. The *Bromley* plaintiffs’ unjust enrichment claim is further based on their denial of access to the many non-SXSW services and amenities that would have been part of the experience of attending SXSW 2020. The *Bromley* Complaint alleges that “[a]fter accounting for travel and room and board, participants who plan to attend the festival in its entirety can expect to spend thousands of dollars.” Ex. 1 ¶ 32. This reflects the plaintiffs’ awareness that food and hospitality services *provided by others* was part of the experience they were unable to enjoy as a result of the City’s cancellation of SXSW 2020, making the Professional Services Exclusion inapplicable.

59. At the time the City of Austin cancelled SXSW 2020, SXSW had already performed much of its services, such as event planning, curating films, music showcases and conference panels, arranging for performers and production equipment, and renting the Austin Convention Center and other area venues. The *Bromley* plaintiffs are not complaining about SXSW failing to properly perform these services. Rather, they are complaining that because of the City of Austin’s emergency declaration shutting down SXSW 2020, they were deprived of services *from others* that they had expected to enjoy. For that reason, they want a refund. Thus, even if the expansive and overly broad definition of “Professional Services” [“services which are performed for others for a fee”] is applied, the Professional Services Exclusion does not bar coverage because the unjust enrichment and conversion causes of action are not grounded upon

SXSW's failure to render Professional Services, but instead from the inability of *others* to render services, professional or otherwise.

V. Claims.

COUNT I. Declaratory Judgment: Duty to Defend and Indemnify.

60. SXSW incorporates the allegations in the above paragraphs of this Complaint as though fully alleged herein.

61. An actual bona fide controversy exists between SXSW, on the one hand, and Federal, on the other hand, that requires judicial declaration by this Court of the parties' rights and duties regarding insurance coverage under the Policy.

62. A valid contract exists between SXSW, LLC, and Federal, namely the Policy.

63. SXSW fully performed all obligations and conditions under the Policy or is excused from performing the same as a result of Federal's wrongful denial of coverage.

64. All premiums owed under the Policy have been paid.

65. The Contract Exclusion does not apply to all claims in the *Bromley* Complaint, and to the extent it does, the Contract Exclusion Exception applies to the unjust enrichment and conversion claims, thus placing SXSW within coverage and requiring Federal to defend and indemnify, if a settlement is reached or a judgment is entered on those claims. The Professional Services Exclusion does not apply. Federal therefore owes SXSW a duty to defend the *Bromley* Complaint, and it owes a duty to indemnify SXSW if a settlement is reached or a judgment is rendered under any claim covered by the Policy's Entity Coverage. Federal has wrongfully denied that it owes any duty to defend the *Bromley* Complaint or indemnify SXSW. SXSW seeks a declaration to this effect.

COUNT II. Breach of Contract

66. SXSU incorporates the allegations in the above paragraphs of this Complaint as though fully alleged herein.

67. A valid contract exists between the parties, namely the Policy.

68. Federal has breached that contract by failing to provide SXSU a defense in the *Bromley* Complaint, and has anticipatorily breached that contract by claiming it has no duty to indemnify any claim made in the *Bromley* Complaint.

69. SXSU fully performed all the obligations and conditions required to be performed under the Policy, or has been excused from performing them as a result of Federal's breach of its duty to defend.

70. Federal's breach of contract has proximately caused SXSU damages including, but not limited to, the attorneys' fees, costs, and expenses incurred in the defense of the *Bromley* Complaint.

COUNT III. Breach of Implied Covenant of Good Faith and Fair Dealing.

71. SXSU incorporates the allegations in the above paragraphs of this Complaint as though fully alleged herein.

72. Federal at all material times had the duty to act fairly and in good faith to Plaintiff in carrying out their responsibilities under the Policy.

73. Pursuant to the Policy, Federal has a legal obligation to act fairly and in good faith to SXSU to promptly and reasonably investigate claims against SXSU, and to make reasonable coverage decisions. As an insurer, Federal owes SXSU an implied covenant of good faith and fair dealing. Federal has breached that implied covenant of good faith and fair dealing by refusing to defend SXSU in the *Bromley* Complaint and to provide necessary coverage(s) owed under the

Policy when tendered, and at all material times thereafter, notwithstanding repeated requests to do so.

74. Federal breached its duty of good faith and fair dealing owed to SXSU by committing, among other things, the following acts and omissions:

a. Unreasonably refusing to immediately defend SXSU in the *Bromley* Complaint after receipt of tender thereof and repeated communications from SXSU to Federal in violation of the Prompt Payment of Claims Act; and failing to follow the statutory time guidelines for accepting or denying coverage within fifteen business days, which constitutes a violation of Section 542.051 *et. seq.* of the Texas Insurance Code;

b. Failing to conduct a reasonable investigation and unreasonably withholding monetary payment of the defense;

c. Failing to give a reasonable interpretation to the provisions of the policies, failing to reasonably apply provisions of the policies to the claims, and unreasonably refusing to acknowledge that the claims asserted against SXSU in the *Bromley* Complaint were and are potentially covered, and failing to timely, promptly and without delay, pay for the reasonable and necessary defense incurred after the tender;

d. Failing to provide SXSU with any reasonable or justifiable basis for the decision to deny and/or delay the actual participation of the defense of the *Bromley* Complaint; and

e. Interpreting the provisions of the policies and the factual circumstances so as to resolve ambiguities and uncertainties against SXSU and to favor its own economic interests.

75. As a result of the bad faith conduct of Federal in this matter, SXSU has incurred substantial attorneys' fees, costs and expenses in defense, repair, loss adjustment, mitigation and

investigation and other costs and expenses in response to the *Bromley* Complaint and has been required to bring this Complaint to enforce its rights under the Policy.

76. SXSU is entitled to recover as damages against Federal, all the aforementioned fees, costs and expenses which it has incurred as a result of the *Bromley* Complaint and the instant action, together with interest thereon, including attorney's fees as set forth in Section 542.060 of the Texas Insurance Code and pursuant to Section 38.001 of the Texas Civil Practice and Remedies Code.

77. SXSU is further entitled to recover as damages against Federal all fees, expenses and costs incurred in this action to enforce its rights under the Policy, plus interest thereon, according to proof and is entitled to 18% interest and attorney's fees as set forth in Section 542.060 of the Texas Insurance Code.

COUNT IV. Violations of the Texas Insurance Code

78. SXSU incorporates the allegations in the above paragraphs of this Complaint as though fully alleged herein.

79. Pursuant to Texas law, Federal owes duties under Sections 541.060 and 541.061 of the Texas Insurance Code to refrain from engaging in any unfair or deceptive acts or practices in the business of insurance and to refrain from misrepresenting its insurance policies.

80. Federal engaged in unfair or deceptive practices in violation of Section 541.060 of the Texas Insurance Code by, among other things:

- a. misrepresenting to SXSU one or more material facts and/or policy provisions relating to coverage;
- b. failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim with respect to which their liability has become clear;

c. failing to promptly provide a reasonable explanation of the basis in law or in fact for the denial of SXSU's claim;

d. refusing to pay SXSU's claim without conducting a reasonable investigation with respect to those claims and/or

e. refusing to conduct a reasonable investigation.

81. Federal misrepresented its insurance policy in violation of Section 541.061 of the Texas Insurance Code by, among other things:

a. making an untrue statement of material fact;

b. failing to state a material fact necessary to make other statements made not misleading;

c. making a misleading statement; and/or

d. failing to disclose a material matter of law.

82. Federal has failed to accept SXSU's full and entire claim within the statutorily mandated time of receiving all necessary information, in violation of Section 542.056 of the Texas Insurance Code requiring the prompt payment of claims.

83. Federal failed to timely pay SXSU's claim for covered losses due to its wrongful denial of the policy benefits in violation of Section 542.057 of the Texas Insurance Code.

84. Federal failed to meet its obligations to pay claims without undue delay, due to its wrongful denial, in violation of Section 542.058 of the Texas Insurance Code.

85. SXSU is entitled to recover its actual damages attorneys' fees, costs and expenses in defense, repair, loss adjustment, mitigation and investigation and other costs and expenses in response to the *Bromley* Complaint pursuant to Sections 541.152(a) and 542.060 of the Texas Insurance Code proximately caused by Federal's unfair or deceptive insurance practices.

86. Because Federal committed the forgoing acts knowingly, SXSU is entitled to an award of three times the amount of its actual damages pursuant to Section 541.152(b) of the Texas Insurance Code.

VI. Prayer for Relief.

WHEREFORE, PREMISES CONSIDERED, Plaintiff SXSU, LLC, seeks judgment against Defendant Federal Insurance Company as follow:

1. Declaring that Defendant had and has a duty to defend and indemnify SXSU in the *Bromley* Complaint under the Policy;
2. Declaring that Defendant has breached its contractual duties to SXSU under the Policy;
3. A determination and award of damages consisting of all reasonable defense expenses incurred by SXSU in the *Bromley* Complaint, including any consequential damages;
4. Awarding prejudgment interest incurring from the date of each defense invoice at the statutory rate of interest, per annum;
5. Ordering Defendant to pay ongoing reasonable defense expenses within the date of invoice submitted to Defendant;
6. Declaring that Defendant breached its covenant of good faith and fair dealing;
7. Awarding damages against Defendant for its breach of its covenant of good faith and fair dealing;
8. Declaring that Defendant committed unfair or deceptive practices in the insurance business;
9. Awarding SXSU treble damages pursuant to Section 541.152(b), Tex. Ins. Code, upon a finding by the trier of fact that Defendant knowingly committed unfair or deceptive practices;
10. Awarding SXSU's reasonable attorneys' fees incurred in this lawsuit in accord with applicable Texas law;
11. Awarding costs of court herein; and
12. Such other and further relief deemed just and proper.

Respectfully submitted,

/s/ Peter D. Kennedy

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