No. 21-1507

**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

MASHALLAH, INC., and Illinois corporation and RANALLI'S PARK RIDGE, LLC d/b/a HOLT'S, an Illinois limited liability company,

Plaintiffs-Appellants,

v.

WEST BEND MUTUAL INSURANCE COMPANY, a Wisconsin corporation,

Defendant-Appellee.

Appeal From The United States District Court
For The Northern District of Illinois, Eastern Division
Case No. 20-cv-05472
Hon. Charles P. Kocoras

# BRIEF AND REQUIRED SHORT APPENDIX OF PLAINTIFFS-APPELLANTS MASHALLAH, INC., and RANALLI'S PARK RIDGE, LLC d/b/a HOLT'S

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**ORAL ARGUMENT REQUESTED**

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**APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

Appellate Court No: 21-1507

Short Caption: Mashallah, Inc, et al. v. West Bend Mutual Insurance Company

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Plaintiffs/ Appellants Mashallah, Inc. and Ranalli's Park Ridge, LLC d/b/a Holt's

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Fuksa Khorshid, LLC

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

None.

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

None.

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

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Attorney's Signature: /s/ William E. Meyer, Jr. Date: 04/06/2021

Attorney's Printed Name: William E. Meyer, Jr.

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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N/A

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Attorney's Signature: /s/ Vincent P. Formica Jr Date: 04/06/2021

Attorney's Printed Name: Vincent P. Formica Jr

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

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## STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

### a. District Court Jurisdiction

The United States District Court for the Northern District of Illinois (the "District Court") has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(a)(1) because there is complete diversity of citizenship between the parties and the amount in controversy exceeds $75,000, exclusive of interest and costs.

Also, minimal diversity of citizenship exists between the parties and therefore the District Court has subject matter jurisdiction pursuant to the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d)(2) over Plaintiffs' alternative class claims for premium rebate (Count IV for unjust enrichment and Count V for statutory consumer fraud). Because the District Court has original subject jurisdiction over Counts IV and V, it may also exercise supplemental jurisdiction of the related state law claims arising out of the same common nucleus of operative fact. 28 U.S.C. § 1367(a).

#### i. *Diversity Jurisdiction - Citizenship of the Parties*

Plaintiff Mashallah is a corporation organized and existing under Illinois law with its principal place of business at 1840 S. Halsted Street, Suite 1F, Chicago, Illinois 60608, located in the Northern District of Illinois, and is therefore a citizen of Illinois.

Plaintiff Ranalli is a limited liability company, organized and existing under Illinois law with its principal place of business at 43 S. Prospect Ave., Park Ridge, Illinois 60068, located in the Northern District of Illinois. Ranalli is managed by its member Matthew Ranalli, who resides in Park Ridge, Illinois with an intent to remain there, and is therefore a citizen of Illinois.

Defendant West Bend Mutual Insurance Company ("Defendant" or "West Bend") is an insurance company organized and existing under Wisconsin law with its principal place of business at 1900 S. 18th Ave, West Bend, Wisconsin 53095, and therefore is a citizen of Wisconsin. Because both Plaintiffs are Illinois citizens and Defendant is a Wisconsin citizen, there is complete diversity of citizenship.

ii. *Diversity Jurisdiction - Amount in controversy*

The amount in controversy between Mashallah and West Bend is well in excess of $75,000. As of the filing date, Mashallah had sustained approximately $68,000 in business income losses, and increasing. Additionally, Mashallah's bad faith claim under 215 ILCS 5/154.6, carries statutory penalties of at least an additional $50,000 or more as of the filing date, plus attorneys' fees accrued at the time of filing. Therefore, the amount in controversy is well in excess of $75,000 for Mashallah.

The amount in controversy between Ranalli and West Bend is also well in excess of $75,000. As of the filing date, Ranalli had sustained more than $350,000 in business income losses that continued to mount, including losses of approximately $90,000 in March, 2020, $126,000 in April, 2020, and $150,000 in May, 2020. Additionally, Ranalli's bad faith claim carries with it penalties of at least $50,000 under 215 ILCS 5/154.6, plus attorneys' fees. Therefore, the amount in controversy is well in excess of the $75,000 jurisdictional threshold for Ranalli.

iii. *Subject Matter Jurisdiction under CAFA*

The District Court also has jurisdiction pursuant to the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d)(2) because Counts IV and V allege class action

claims where "any member of a class of plaintiffs is a citizen of a state different from any defendant and the aggregated amount in controversy exceeds $5,000,000, exclusive of interest and costs." CAFA permits federal courts to preside over class actions in diversity jurisdiction where the aggregate amount in controversy exceeds $5 million; where the class comprises at least 100 plaintiffs; and where at least one plaintiff class member and at least one defendant are diverse. 28 U.S.C. § 1332(d)(2), (5). As stated in detail above, because Defendant is a citizen of Wisconsin and Plaintiffs are citizens of Illinois, there is at least minimal diversity. Additionally, the proposed class definition is such that the class would comprise well over 100 members because West Bend markets and sells policies in approximately 13 states. With respect to CAFA's amount in controversy requirement, Plaintiffs have alleged (based on information available to them at the time the Complaint was filed) that Defendant wrote over $1 billion in commercial insurance premiums for 2019, so a premium rebate of less than 1/2 of one percent would fulfill the amount in controversy. Because all CAFA requirements are met, the District Court has original subject matter jurisdiction over Plaintiffs' Class Action claims.

The District Court also properly exercises supplemental jurisdiction over Plaintiff's other state law claims (Counts I – III). Section 1367(a) provides that "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy. . . ." 28 U.S.C. § 1367(a). State and federal claims are "part

of the same case or controversy" if they "derive from a common nucleus of operative fact." *Groce v. Eli Lilly & Co.*, 193 F.3d 496, 500 (7th Cir. 1999).

Here, the District Court has original subject matter jurisdiction over Counts IV and V pursuant to CAFA. These class action claims stem from the same common nucleus, namely an insurance policy that Plaintiffs purchased from Defendant and its subsequent denial of Plaintiff's coverage claims. Therefore, the Court may also properly exercise supplemental jurisdiction over Counts I through III pursuant to 28 U.S.C. § 1367(a). *See e.g.*, *Laurens v. Volvo Cars of N. Am., LLC*, 868 F.3d 622, 626 (7th Cir. 2017) ("if the court concludes that CAFA jurisdiction is proper [. . .], then supplemental jurisdiction would likely extend to [plaintiff's] related claim.").

**b. Jurisdiction in the Court of Appeals**

This appeal is from District Judge Charles P. Kocoras' Opinion and Order entered on February 22, 2021 (ECF No. 28), granting Defendant's Fed. R. Civ. P. 12(b)(6) Motion to Dismiss, as well as the related final judgment entered on February 23, 2021 (Dkt. 29) in favor of Defendant-Appellee and against Plaintiffs-Appellants. This Court has jurisdiction to decide this case under 28 U.S.C. § 1291 and 28 U.S.C. § 1294. Plaintiffs timely filed the required Notice of Appeal with the District Court on March 23, 2021 (Dkt. 30) under Fed. R. App. P. 4 (a)(1)(A).

## STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a)(1) and Circuit Rule 34(f), Plaintiffs-Appellants submit that oral argument would significantly aid the Court because this case presents complex issues of state contract and insurance law, resolution of which have

yet to be definitively addressed by the Illinois appellate courts. Resolution of these issues could impact many pending and future cases as insurers and insureds battle over coverage and exclusions in the context of a novel pandemic.

## STATEMENT OF THE ISSUES

I. Whether the District Court erred when it disregarded the Defendant's burden to establish that the Virus Exclusions barring coverage are "clear and free from doubt," and subsequently misapplied the law in dismissing Plaintiffs' claims?

II. Whether the District Court erred when it assumed the role of the trier of fact and made premature findings that Plaintiffs' losses were caused by a virus rather than civil authority orders?

III. Whether the District Court erred when it made premature findings of fact regarding Plaintiffs' premium rebate claims?

## STATEMENT OF THE CASE

### a. Statement of Facts

Plaintiffs Mashallah, Inc. ("Mashallah") offers handcrafted jewelry at its brick-and-mortar location in Chicago. (Dkt. 1, p. 1, ¶ 1).[1] Ranalli's Park Ridge, LLC ("Ranalli") operates a successful bar and restaurant known as "Holt's" in Park Ridge, Illinois. (Dkt. 1, p. 1, ¶2). Both Plaintiffs purchased "all-risk" commercial insurance policies (the "Policies") from Defendant. Plaintiffs, like countless other businesses, have been devastated by the effects of state and local government closure orders

[1] Citations to the District Court's docket are indicated by "Dkt." Citations to page number refers to the "PageID#" in the docket entry. Pursuant to Cir. R. 30(a), the District Court's February 22, 2021 memorandum opinion, Dkt. 28, and the Judgment, Dkt. 29, have been included in the Short Appendix at the end of this brief and cited as "A." (A.1-18).

during the COVID-19 pandemic. (Dkt. 1, pp. 2-3, ¶¶ 4-6).

Plaintiffs' Policies are near, but not exactly identical in form. (Dkt.1, pp. 9-12, ¶¶ 29-42).[2] In the Policies, Defendant promised to pay for "actual loss of Business Income you sustain due to the necessary suspension of your 'operations'" when Plaintiffs experienced a "direct physical loss of or damage" to its business premises. (Dkt. 1, pp. 14-20, ¶¶ 51-75; Dkt. 1-1, p. 60; Dkt.1-2, pp. 226-27). Defendant further promised coverage for "actual loss of Business Income you sustain . . . caused by action of civil authority that prohibits access" to Plaintiffs' business premises, provided that Plaintiffs' premises are "not more than one mile" from other "damaged property" and the civil authority order is in response to "dangerous physical conditions." (Dkt. 1, pp. 14-20, ¶¶ 51-75; Dkt.1-1, p.65; Dkt. 1-2, p. 227). Each Policy also contains a somewhat differently-worded, purported "Virus Exclusion" which attempts to exclude from coverage all losses caused by "[a]ny virus, bacterium or other microorganism." (Dkt. 1, pp. 23-24, ¶¶ 86-91; Dkt.1-1, p. 76, Dkt. 1-2, p. 237).

On March 15, 2020 Illinois Governor J.B. Pritzker, exercising emergency powers, issued Executive Orders prohibiting public gatherings and closing or significantly restricting operations of businesses and their functions, including Plaintiffs. Chicago Mayor Lori Lightfoot issued similar civil authority orders. (Dkt. 1, pp. 16-17, ¶59). Plaintiffs contend that these governmental orders (collectively, "Closure Orders") trigger business income coverage under Plaintiffs' Policies as they have suffered a

[2] Full copies of Mashallah's and Ranalli's Policies are part of the record and are attached to Plaintiffs' Complaint as Exhibits A and B, respectively. *See* Dkt. 1-1 (Mashallah Policy) and Dkt. 1-2 (Ranalli Policy)).

direct physical loss or damage to their respective properties as the Closure Orders caused both property loss and damage by directly and physically impairing the functionality of Plaintiffs' property and dispossessing Plaintiffs of their tangible spaces. (Dkt. 1, pp. 20-21 ¶¶ 71-77). Plaintiffs further contend that the Closure Orders are "action[s] of civil authority" that prohibited Plaintiffs "access to the described premises" to use for their business purposes. (Dkt. 1, pp. 21-22 ¶¶78-85). Plaintiffs contend that they also are entitled to Civil Authority Coverage. *Id.*

Mashallah made a business income loss claim which West Bend denied on May 11, 2020 based on the Virus Exclusion, asserting that the "shut down and suspension of [Mashallah's] operations is a result of a virus." (Dkt. 1, p. 13, ¶48; Dkt.1-3). Ranalli submitted a similar claim that West Bend denied on April 23, 2020, asserting the same reason. (Dkt. 1, p. 13, ¶48, Dkt.1-4).

On September 15, 2020, Plaintiffs filed this action in the United States District Court for the Northern District of Illinois, Eastern Division. (Dkt. 1). The Complaint alleges that West Bend unjustly denied business income losses Plaintiffs incurred from mandatory Closure Orders. (Dkt. 1, pp. 1-5). Altogether, Plaintiffs plead five counts including three individual claims for declaratory judgment, breach of contract and bad faith pursuant to 215 ILCS 5/154.6. (Dkt. 1, pp. 24-30). Plaintiffs also plead two alternative class action counts that if Defendant owes no coverage, then it has been unjustly enriched (Count IV) and that Defendant's conduct violates the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA"), 815 ILCS 505/1, *et seq.* (Count V). (Dkt. 1, pp. 31-39).

### b. Procedural History

On November 16, 2020, Defendant moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). (Dkt. 12, 14, 17). The Motion was fully briefed by January 21, 2021 without oral argument. (Dkt. 26; Dkt. 27). On February 22, 2021, the District Court entered a memorandum opinion and order granting Defendant's Motion, dismissing Plaintiffs' entire Complaint with prejudice. (A. 1-16, Dkt. 28). On February 23, 2021 final judgment entered in favor of Defendant. (A. 17-18; Dkt. 29). Plaintiffs timely filed their notice of appeal within thirty (30) days of the Final Judgment, pursuant to Federal Rules of Appellate Procedure 4(a)(1)(A). (Dkt. 30).

## SUMMARY OF ARGUMENT

While the District Court correctly concluded or assumed coverage, it erred when it failed to apply the correct burden required under Illinois law to enforce a policy exclusion. Because insurance policy exclusions are in derogation of coverage, the insurer must establish that any exclusion is "clear and free from doubt." Defendant did not carry that burden and the District Court's analysis both disregarded the mandated burden under Illinois law and its analysis was fatally incomplete and rife with inferences and findings of fact erroneously applied inconsistent with Illinois law. Illinois law mandates that the subject of the exclusion must be a "dominant cause" of the loss to apply an exclusion. Absent from the District Court's decision is any just analysis that it is "clear and free from doubt" that a virus was the "dominant cause" of the loss. At the same time, the Court erred by prematurely deciding, in Defendant's

favor, an issue of fact with respect to causation that under these circumstances ought to be reserved for the jury.

To accept this decision is to rewrite well-established Illinois law and relieve insurers of their high burden to enforce exclusions, with devastating consequences for Illinois policyholders. Additionally, the District Court erred by making additional findings of fact in Defendant's favor on Plaintiff's class claims for unjust enrichment and ICFA violations. This is not Illinois law and the District Court's decision must be reversed in its entirety.

## STANDARD OF REVIEW

Because Plaintiffs appeal the District Court's decision granting Defendant's Motion to Dismiss under Fed. R. Civ. P. 12(b)(6), review is *de novo*. *Proft v. Raoul,* 944 F.3d 686, 690 (7th Cir. 2019), and this Court must "construe the complaint in the light most favorable to the plaintiff, accepting as true all well-pleaded facts alleged, and drawing all possible inferences in [the plaintiff's] favor." *Id.* (citation omitted). A Rule12(b)(6) motion to dismiss must be denied if a complaint alleges facts that "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "In resolving a motion to dismiss, we take all well pled facts as true and then determine whether those factual assertions 'plausibly give rise to an entitlement to relief.'" *Thermal Design Inc. v. Am. Soc'y of Heating*, 755 F.3d 832, 836 (7th Cir. 2014) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)).

## ARGUMENT

### I. The District Court's decision presumes that Plaintiffs are owed coverage under their respective Policies. Accordingly, the burden shifts to Defendant to establish an exclusion from coverage that is clear and free from doubt.

Although the District Court notably omits any discussion on the existence of coverage, its decision nevertheless concedes (or at the very least assumes) that Plaintiffs' losses are covered under their Policies (the proper result, of course). There can be no other inference drawn because the only way for the District Court to reach the issue of exclusion is first to establish that coverage exists under the Policies. *Country Mutual Insurance company v. Olsak*, 391 Ill. App. 3d 295, 305 (1st Dist. 2009). The District Court's silence on the threshold issue of coverage speaks volumes because with coverage established, Defendant bears the burden to affirmatively prove that the Virus Exclusion applies on this set of facts. *Addison Insurance Co. v. Fay*, 232 Ill. 2d 446, 453-54 (2009). *See also*, *Santa's Best Craft, LLC v. St. Paul Fire & Marine Insurance Co.*, 611 F.3d 339, 347 (7th Cir. 2010) (applying Illinois law). "Exclusions in an insurance policy *have relevance only when there is coverage*; an exclusion, in insurance parlance, serves purpose of taking out persons or events otherwise included within defined scope of coverage." (emphasis added). *Brady v. Highway Comm'r of Penn Twp.*, 24 Ill. App. 3d 972, 976, (3d Dist. 1975). With coverage established, the Defendant must prove it is *"clear and free from doubt"* that the Policy exclusions apply. *Olsak*, 391 Ill. App. 3d at 305.

The District Court simply jumped to an exclusion that it enforced based on a mere connection between a virus and Plaintiffs' losses – ignoring that Illinois law required

"dominant" cause. This jump at a very minimum misapprehended the weight of the "clear and free from doubt" standard and was reversible error. Had the District Court properly shifted the demanding "clear and free from doubt" burden, it would have been far from clear that Defendant was entitled to a complete win on a Rule 12(b)(6) motion. The District Court's erroneous approach ignored Plaintiffs' rights to coverage and also led to precipitous causation assumptions as set forth herein.

## II. The District erred when it failed to apply the "clear and free from doubt" standard that Defendant must meet to demonstrate the applicability of the Virus Exclusions.

The District Court also erred by failing to hold Defendant to its "clear and free from doubt" burden to enforce the Virus Exclusions. Strikingly, the standard "clear and free from doubt" as such appears nowhere in the District Court's decision. (A.5-8, Dkt. 28). The District Court's indifferent application of the insurer's highest burden ignored long-standing Illinois precedent that an exclusion must apply clearly and undoubtedly.

Instead, the District Court's conflated Defendant's burden of demonstrating the applicability of an exclusion with issues of ambiguity. ("[C]ontrary to Plaintiffs' rather broad and repeated rule statement, the Court only needs to defer to the plaintiff 'where the provision is ambiguous.'" (citation omitted) (A. 6, Dkt. 28). That is a clear error of law. The applicability of coverage exclusions does not rest on selective deference to the insured, triggered only when an exclusion is ambiguous. Illinois law requires that *all* "provisions that limit or exclude coverage are to be construed liberally in favor of the insured and against the insurer." *State Farm Mutual*

*Automobile Ins. Co. v. Villicana*, 181 Ill. 2d 436, 442 (1998). The District Court denied Plaintiffs this protection of Illinois insurance law. The District Court erred when it failed to hold Defendant to a "clear and free from doubt" burden.

Compounding the error, the District Court saw decisions elsewhere in which a virus exclusion existed and therefore automatically assumed that because Virus Exclusions also exist here, the outcome should be the same. The fact that Virus Exclusions exist in Plaintiffs' Policies cannot lead to a *per se* finding that coverage is therefore barred. Such a predetermined conclusion erroneously relieves the insurer's burden in contravention to Illinois law.

**III. The District Court erred when basing dismissal on the Virus Exclusions; Plaintiffs' losses are covered under the Policies.**

The allegations in Plaintiffs' Complaint, which if accepted as true and viewed in a light most favorable to them, establish that they are entitled to coverage for direct physical damage or losses to their properties resulting from the Closure Orders.

The burden then shifts to Defendant who has not demonstrated that the exclusion is *"clear and free from doubt*" – an analysis conspicuously omitted from the District Court's decision. Nor do cases such as *Riverwalk Seafood Grill Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 20-cv-3768, 2021 WL 81659 (N.D. Ill. Jan. 7, 2021) or *Dental Experts LLC v. Mass. Bay Ins. Co.*, 20 C 5887 2021 WL 1722781 (N.D. Ill. May 1, 2021) acknowledge and apply this high standard, a reversible error. To dismiss or ignore burden, as Defendant, the District Court, *Riverside*, and *Dental Experts* all do, miscarries justice. Illinois law requires this high burden to take away coverage and it is not appropriate for a federal court, siting in diversity jurisdiction, to rewrite

Illinois insurance law.

**A. Plaintiffs suffered a direct physical loss of or damage to their properties.**

The District Court, relying solely on the Virus Exclusion, essentially conceded that Plaintiffs are owed business income coverage and civil authority coverage, but for the exclusion. Plaintiffs obviously agree with that concession. However, because this court reviews *de novo*, it is appropriate to address why Plaintiffs suffered a covered physical loss of or damage to their properties in the first place.

Plaintiffs' claims center on the construction of the parties' contract and principles of insurance law. In order to determine whether Plaintiffs can state a claim for coverage, the construction and intent of the Policies must be examined. In construing the language of an insurance policy, a court must ascertain and give effect to the intention of the parties as expressed in their agreement. *American States Ins. Co. v. Koloms*, 177 Ill. 2d 473, 479 (1997). To that end, terms utilized in the policy are accorded their plain and ordinary meaning. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 108 (1992). In addition, a court must read the policy as a whole and consider the type of insurance purchased, the nature of the risks involved, and the overall purpose of the contract. *Koloms*, 177 Ill. 2d at 479. Provisions that limit or exclude coverage are to be construed liberally in favor of the insured and against the insurer. *State Farm Mutual Automobile Ins. Co. v. Villicana*, 181 Ill. 2d 436, 442 (1998).

Plaintiffs' Policies covered "actual loss of Business Income" caused by either a "direct physical loss of" *or* "damage" to their premises. (Dkt. 1, pp. 14-20; Dkt. 1-1, 62-

63; Dkt.1-2, 226). The phrase "direct physical loss of or damage to" property is broad and includes detrimental physical effects which alter and impair the function of the tangible, material aspects of property—especially where, as here, property is rendered nonfunctional for its intended purpose due to altered appearance, shape, and other material aspects. Notably, neither "direct physical loss" or "damage" are defined terms and therefore must be given their plain and ordinary meanings, consistent with expectations of the insured. *See Outboard Marine Corp.,* 154 Ill. 2d at 108.

When interpreting "direct physical loss of or damage," loss and damage are two distinct concepts. If loss could be equated with damage, then one of the conditions is superfluous. Defendant specifically chose to provide coverage for losses stemming from physical loss, damage, or both. With respect to "loss," this can include Plaintiffs being deprived of their properties' function. If given its ordinary meaning, it logically includes "the act of losing possession" and "deprivation." [3] In comparison, "damage" may refer to impairment of their properties or a reduction in their functionality.

Here, the Closure Orders caused both property loss and damage by impairing the function of Plaintiffs' property and dispossessing them of their tangible spaces. As Plaintiffs and other businesses were required to implement occupancy limits and social distancing measures, they were left with little choice but to close portions of their premises, erect plexiglass barriers, move furniture and fixtures and otherwise alter their premises. (Dkt. 1, p. 15). Each of these measures results in some

[3] *See* https://www.merriam-webster.com/dictionary/loss (last visited April 30, 2021).

measurable and direct physical loss and damage. The Closure Orders have greatly reduced and in many instances completely shut down Plaintiffs' operations. (Dkt. 1, pp. 15-16). When Plaintiffs are deprived of access to their properties or they must acquiesce to major functional impairments, their reasonable expectation is that business income coverage will be triggered to make up for the resulting income losses.

Plaintiffs' position that physical loss includes loss of use or access to a property as well as loss of the property's essential function, is an accepted and valid interpretation of "physical loss." For example, the decision in *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co.,* No. 2:12-cv-04418 (WHW)(CLW), 2014 WL 6675934, at *5 (D.N.J. Nov. 25, 2014) found that an ammonia gas release constituted a "physical loss or damage." The court concluded that "[P]roperty can be physically damaged, without undergoing structural alteration, when it *loses its essential functionality*." (emphasis added). *See also*, *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 702 (E.D. Va. 2010) (rejecting insurer's argument that policy required "physical alteration or injury to the property's structure" and finding coverage because the building "had been rendered unusable by physical forces"); *Universal Sav. Bank v. Bankers Standard Ins. Co.,* No. B159239, 2004 WL 515952, at *6 (Cal. Ct. App. Mar. 17, 2004) ("The plain meaning of 'direct physical loss' encompasses physical displacement or loss of physical possession. That the loss must be 'physical' distinguishes the loss from some other, incorporeal loss."), *vacated on other grounds*, No. B159239, 2004 WL 3016644 (Cal. Ct. App. Dec. 30, 2004); *see also Murray v. State Farm Fire & Cas. Co.,* 509 S.E.2d 1, 17 (W.Va. 1998) (losses that rendered insured property "unusable or

uninhabitable, may exist in the absence of structural damage"); *Dundee Mut. Ins. Co. v. Marifjeren,* 587 N.W.2d 191, 194 (N.D. 1998) (coverage applied even absent physical alteration because properties "no longer performed the function for which they were designed"); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968) (gasoline saturation around church rendering occupancy unsafe constituted a "direct physical loss within the meaning of that phrase").

The District Court's order presumed coverage – otherwise the Virus Exclusions need not be considered. Although the District Court offered no analysis, it is clear that deprivation of the use and functionality of Plaintiffs' properties is covered under the Policies.

**B. Closure Orders, Not Virus, Caused Plaintiffs' Losses.**

As pled throughout the Complaint, Plaintiffs sustained their losses as a result of the governmental Closure Orders. (Dkt. 1, pp. 19-22). Plaintiffs have pled that their operations were shut down because of the Closure Orders, not because any of their customers or employees on their property had a virus. (Dkt. 1, pp. 14-16). The Virus Exclusions are dead on arrival because these Plaintiffs sustained business income loss when Closure Orders, not a virus, shut them down. *Id.* That is enough to reject the Virus Exclusions.

Regardless of whether the virus was actually present at Plaintiffs' premises, it was the Closure Orders that caused Plaintiffs' losses. Plaintiffs would have otherwise continued fully to operate their businesses but for a government order constraining operations. The Closure Orders were also predicated on a myriad of considerations,

not just the existence of the virus or that the virus existed at the insured premises.

This is especially true because what ultimately determined whether a business was shut down was not the existence of a virus on the insured premises but rather the nature of the business itself. The Closure Orders trigger the loss based on the nature of the business and its operations – including "essential" or "non-essential." Ill. Executive Order 2020-10 (Mar. 20, 2020), https://www2.illinois.gov/pages/executive-orders/executiveorder2020-10.aspx ("All businesses and operations in the State, except Essential Businesses and Operations as defined below, are required to cease all activities within the State except Minimum Basic Operations . . ."). In other words, the existence of the virus did not, in and of itself, become the "but-for" cause, much less the dominant cause leading to Plaintiffs' business income losses. Plaintiffs were subject to the mandatory closures because they were certain types of businesses doing certain activities – not because the government closed them down due to a viral outbreak on their premises.

### C. The District Court erred in determining that the Virus Exclusions are unambiguous.

Both the Mashallah and Ranalli Policies are also facially ambiguous as to whether the Virus Exclusion is triggered by the existence of virus anywhere or whether the virus must have been present at the insured premises. (Dkt. 1, pp. 23-24, ¶¶ 86-91; Dkt.1-1, p. 76, Dkt. 1-2, p. 237). But the District Court wrote this off, ignoring language elsewhere in the Policies.

In situations where policy language is ambiguous or uncertain, then that language must be construed in favor of the insured and against the insurer who wrote the

policy. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.,* 154 Ill. 2d 90, 108-09 (1992); *United Servs. Auto. Ass'n v. Dare*, 357 Ill. App. 3d 955, 964 (1st Dist. 2005). Here, the ambiguity is whether a virus must be present on the insured premises for the Virus Exclusions to deny coverage.

When considered in context with the Policies as a whole, the Virus Exclusions contemplate a physical manifestation of a virus or bacteria ***at*** the insured locations – not a generalized response to a pandemic in the United States. The primary purpose of the coverage is to cover direct physical loss or damage to Covered Property *at the premises* described in the Declarations. (Dkt. 1-1, pp. 57-58; Dkt. 1-2, pp. 210-11). The Policies go to great lengths to define which portions of the premises (and the property therein) are covered and under what conditions. *Id.* Both Business Income Coverage and Civil Authority Coverage also prescribe specific geographic limitations on the extent that coverage will apply, each relating back to Plaintiffs' insured premises. (Dkt.1-1, pp. 62, 65; Dkt. 1-2, pp. 226-27). Further, the Exclusions all relate to conditions or perils that occur at the Plaintiffs' properties and impact them. This includes earthquakes, nuclear hazards, failure of utility services, war, flooding, and others. (Dkt. 1-1, pp. 73-76; Dkt. 1-2, pp. 240-43). Given that these other exclusions all relate back to conditions or events occurring at or directly affecting the premises, it is reasonable for Plaintiffs to interpret the Virus Exclusions to also cover instances of virus *being present on their premises.*

Yet Defendant argues a broader interpretation, one where the Virus Exclusions will defeat coverage even when a virus exists anywhere else but the insured's

property. This interpretation is inconsistent with the rest of the exclusions which contemplate acts or events occurring at the insured premises. In fact, the Policies clearly recognized the distinction of whether the excluded peril originates at or away from the premises, yet failed to make such a distinction in the Virus Exclusions themselves. (Dkt. 1-1 p. 74; Dkt. 1-2, p. 241) (distinguishing failure of utility services originating away from the described premises versus originating at the described premises). Lack of clarity on whether or not the Virus Exclusions require the existence of a virus at the premises demonstrate that the language is susceptible to more than one reasonable interpretation. The Virus Exclusions thus are ambiguous, invite conflicting readings on critical coverage issues, and must be construed against West Bend. The District Court erred in concluding that the Exclusions were clear and free from doubt.

### D. The District Court erred by making a determination of causation at the pleading stage and by determining that a virus was the dominant cause of Plaintiffs' losses thereby triggering the Virus Exclusions.

The District Court also erred when it prematurely determined issues of causation in connection with the Virus Exclusions. "Causation . . . is preeminently an issue of fact . . . 'In cases where reasonable men might differ – which will include all but a few of the cases in which the issue is in dispute at all--the question is one for the jury.'" (citations omitted) *Renslow v. Mennonite Hosp.*, 67 Ill. 2d 348, 369 (1977). Even in this specific context of insurance coverage, "[d]etermining what perils were working and whether they were working together independently or in succession (and if so how), as well as identifying the type of damage following the operation of each peril,

all fall to the fact finder." 5 New Appleman on Insurance Law § 44.06[1], at 44-45 (Jeffrey E. Thomas & Susan Randall eds., Library ed. 2014). *See also*, *Park Ridge Presbyterian Church v. Am. States Ins. Co.*, Case No. 11 C 5321, 2014 WL 4637433, at *8 (N.D. Ill. Sept. 17, 2014) (finding an issue of fact for the jury because the "record does not adequately deal with evidence of relative causation other than the parties arguing that the cause of damage they are asserting was the predominant one.").

Here, the District Court was too quick in deciding that because the coronavirus fell *somewhere* in the causal chain that it was sufficient to trigger the Virus Exclusions. While construction of a contract may be the province of the court, the factual issues of breach and causation should be left to the jury lest there be no jury trial right at all in a contract action. The District Court erred in taking over the role as trier of fact, thereby denying Plaintiffs their right to have this important causation issue decided by a jury.

The Closure Orders, and the multitude of reasons why they were issued, were a separate, non-excluded cause of loss apart from a virus. The scope and applicability of the Closure Orders are controlled almost entirely by a governmental determination of the nature of each business, including which businesses and functions are "essential" and which are not. Altogether, these considerations present complex issues of causation that should not have been decided on the pleadings, but rather reserved for a jury after discovery.

Even assuming that it was appropriate for the District Court to make causation determinations at the pleading stage, it nevertheless erred in concluding that the

coronavirus was the "dominant" or "proximate" cause of Plaintiffs' losses. Illinois law imposes a narrow reading of any exclusion when a question arises as to whether more than one cause contributed to a loss. *Bozek v. Erie Insurance Group*, 2015 IL App (2d) 150155, ¶¶ 19-22. As the District Court recognized, "Illinois favors the efficient-or-dominant-or-proximate-cause rule." *Id.* at ¶ 22. It cannot be "clear and free from doubt" that the "efficient-or-dominant-or-proximate cause" of Plaintiffs' losses was a virus versus government Closure Orders. Whether or not a virus was present, Plaintiffs were bound by the Closure Orders. Ignoring this critical point is another source of error in the District Court's decision.

Taking Defendant's interpretation of the Virus Exclusions to its (il)logical conclusion, the Virus Exclusions are triggered when a virus exists *anywhere*, including away from the insured premises, so long as it can be loosely identified in the chain of causation. If, for example, an outbreak of another novel coronavirus occurs in Carbondale, Illinois and the State's response is another statewide lockdown to prevent the spread, Defendant's interpretation would bar coverage for business income losses felt 350 miles away in Chicago. But this cannot be reconciled with the Plaintiffs' reasonable expectations of coverage under the Policy, if events occurring at the opposite end of the State were somehow deemed to deprive them of coverage. The District Court's erroneous and premature conclusion about causation also renders the geographic limitations in the Policies meaningless because perils occurring anywhere away from the insureds' properties would exclude Plaintiffs' losses simply because they can be traced to a virus. *See e.g.*, *Allstate Ins. Co. v. Gutenkauf*, 103 Ill. App. 3d

889, 893 (1st Dist. 1981) ("[i]f defendants' interpretation of the coverage clause were adopted, the 'insured premises' definition would be rendered meaningless for there would be no geographical limit to coverage and liability for conduct." (citations omitted)). In the process, it impermissibly expands the application of an exclusion, which by law, are required to be "construed liberally in favor of the insured and against the insurer," and must "be read narrowly and will be applied only where its terms are clear, definite, and specific." (citations omitted). *Berg v. N.Y. Life Ins. Co.*, 831 F.3d 426, 429 (7th Cir. 2016) (applying Illinois law).

Timing and proximity is instructive as well on these complex causation issues. "[A]s far as any sort of order, sequence, or timing is concerned, we look to the point in time that the cause contributed to the loss, not the point in time that the cause came into existence." *Bozek*, 2015 IL App (2d) 150155, ¶ 26. *Bozek* recognized that loss "occurs at that point in time when the insured suffers deprivation of, physical damage to, or destruction of the property insured." *Id.* (citing *Corban v. United Servs. Auto. Ass'n,* 20 So. 3d 601, 613 (Miss. 2009)). Under this analysis, Plaintiffs' losses occurred when the Closure Orders (and their rules about "essential" and "non-essential" businesses and functions) came into play. Plaintiffs' business income losses were "proximate" to the Closure Orders – not the virus – as these Plaintiffs did not sustain their losses due to an employee or customer having the virus. Under Illinois law, the Closure Orders (and rules thereunder) were the proximate cause of the Plaintiffs' losses, and the virus exclusion therefore cannot apply to defeat coverage.

Other courts have declined to allow a similarly almost limitless application of a

virus exclusion, instead finding that "there must be a direct connection between the exclusion and the claimed loss and not, as defendants argue, a tenuous connection anywhere in the chain of causation." *Elegant Massage, LLC v. State Farm Mutual Automobile Insurance Company*, 2:20-cv-00265-RAJ-LRL, 2020 WL 7249624, at *15 (E.D. Va. Dec. 9. 2020). In *Elegant Massage* the court reviewed a near identical virus exclusion and concluded that it applies where "a virus has spread throughout the property." *Id.* Since neither that plaintiff nor these Plaintiffs make such an allegation, the fact that the Closure Orders have some connection to the coronavirus generally does not trigger the Virus Exclusion. *Id.*

Further, the Governor and other authorities put Closure Orders in place due to a variety of factors, including preservation of hospital and other resources, and public safety to name a few. This situation is distinct from one in which a virus is found at the specific premises and owners are denied access to and use of their property because of a specific outbreak or contamination. Given those circumstances, this exclusion is far from "clear and free from doubt" and the District Court erred in assuming that Defendant had carried its high burden on Virus Exclusions.

**E. Illinois Law and Public Policy Defeat Defendant's Arguments.**

The Virus Exclusion language differed between the Ranalli Policy and Mashallah Policy. Ranalli's Virus Exclusions states that Defendant "will not pay for loss or damage caused by or resulting from any virus . . ." (Dkt. 1-2, p. 237). This "caused by / resulting from" language is often considered to be an application of the "efficient" or "dominant" proximate cause standard. *Valley Lodge Corp. v. Society Ins.*, No. 2964,

2021 WL 679109, at *8 (N.D. Ill. Feb. 22, 2021). Similar language like "caused by" has been found to be "both broad and vague," and it should therefore be liberally construed in favor of the insured. *Old Republic Ins. Co. v. Kenny Constr. Co.*, No. 15-CV-03524, 2017 WL 4921970, *10 (N.D. Ill. Oct. 31, 2017). The District erred in making any causation determination, much less determining that a virus was the proximate cause of Ranalli's losses, under this specific Virus Exclusion.

As for the Mashallah Virus Exclusion, it contains what is referred to as "anti-concurrent causation language" which aims to exclude certain losses or damages which are caused "directly or indirectly" by certain perils and further states that "[s]uch loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." (Dkt. 1-1, pp. 73, 76). The District Court, recognizing that anti-concurrent causation clauses have been upheld in some other jurisdictions, simply endorsed that broad assumption without any meaningful analysis as to whether a jury could have decided that the Closure Orders were the *exclusive* cause of the loss or whether anti-concurrent causation language under these facts violates Illinois law. Significantly, *Bozek* does not stand for the proposition that anti-concurrent causation clauses are enforceable in every instance or that they never violate public policy. The *Bozek* court was clear that its decision was intended to be applied narrowly, and recognized that other jurisdictions have found these types of clauses unenforceable against public policy. *Bozek v. Erie Insurance Group*, 2015 IL App (2d) 150155, ¶¶ 37-38.

No Illinois appellate court has since squarely addressed this issue, and this Court

should not just endorse these clauses to expand the scope of an exclusion without limits. Whether or not the Policies contained an anti-concurrent causation clause, there remain ample causation issues for the jury to decide and it was error for the District Court to conclude that an anti-concurrent causation clause is always enforceable because the parties contracted for it. In reality, these are contracts of adhesion – a "take it or leave it" transaction in which a small business must succumb to the disproportionate power dynamic imposed by a multi-billion dollar insurance company in order to purchase coverage. It is disingenuous to assume that any insured would have any bargaining power over such language or that the insured would appreciate the immensely broad impact these clauses carry. Tying the Closure Orders to a virus based on a limitless interpretation of the words "indirect" or "concurrent" defeats Mashallah's reasonable expectations of coverage. The District Court's reasoning wipes away all coverage so long as any non-covered cause of loss (*i.e.*, the virus) contributed to the otherwise covered loss in any indirect, conceivable way. This is not the law in Illinois.

Given that Illinois follows the efficient or dominant proximate causation rule, there are also strong public policy reasons to hold these Virus Exclusions invalid. Under Illinois law, the insurer must provide coverage "if a risk of loss that is specifically insured against in the insurance policy sets in motion, in an unbroken causal sequence, the events that cause the ultimate loss, even though the immediate cause in the chain of causation is an excluded cause." Peter Nash Swisher, *Causation Requirements in Tort and Insurance Law Practice: Demystifying Some Legal*

*Causation "Riddles,"* 43 Tort Trial & Ins. Prac. L.J. 1, 26 (2007). In this case, the dominant cause is the Closure Orders. The risk of loss began with the Closure Orders, and set in motion an unbroken chain of events that led to Plaintiffs' harm. Virus on the property did not come into play. Coverage must not be taken away simply because the Closure Orders can be linked to COVID-19 in some way.

Finally, the District Court erred because its overly broad application of the Virus Exclusion rendered coverage illusory. If, as Defendant argues, the Virus Exclusions are so broad and effective, then during this time of virus-related closure and slowdown, business income losses should all be excluded because practically any business income losses suffered today has some arguable link to COVID-19. If that is true, then the coverage has no value because it included a virus exclusion that can be applied without limitation. The District Court thus erred by adopting an interpretation that would lead to illusory coverage under the Policy. *See State Farm Fire & Casualty Co. v. Trousdale*, 285 Ill. App. 3d 566, 673 (1st Dist. 1996); *Ill. Farmers Ins. Co. v. Keyser*, 2011 IL App (3d) 090484, ¶ 15.

## IV. The District Court's decision dismissing Plaintiffs' bad-faith denial of coverage claim under Section 154.6 of the Illinois Insurance Code must also be reversed.

Because the District Court found that the Virus Exclusions denied Plaintiffs' claims for coverage, it then dismissed Plaintiffs' bad faith Count III pursuant to 215 ILCS 5/154.6. However, if the District Court's decision as to Count I or II is ultimately reversed, so to must the dismissal of Count III.

## V. The District Court erred when it made premature findings of fact with respect to Plaintiffs' class claim under ICFA.

The District Court also committed reversible error when it continued to summarily decide fact issues related to Plaintiffs' alternative class action counts for premium rebate. Like issues of causation, fact issues stemming from Plaintiffs' unjust enrichment and consumer fraud claims should have been left to a jury. With respect to Plaintiffs' class claims under the ICFA, 815 ILCS 505/1, *et seq.* the District Court made sweeping generalizations that Plaintiffs were "not deceived" because they renewed their Policies in 2020 supposedly after knowing of COVID-19 and Defendant's position that the Policies did not allegedly cover losses related to COVID-19. (A.12, Dkt. 28). The District Court overemphasized the need for "actual deception" and ignored the fact that the ICFA broadly encompasses unfair business practices beyond just deception. (A.12-13, Dkt. 28). Moreover, unlike common law fraud, "[p]laintiff's reliance is not an element of statutory consumer fraud . . . but a valid claim must show that the consumer fraud proximately caused plaintiff's injury." *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 501 (1996). Not only did the District Court unnecessarily shrink the scope of misconduct contemplated by the ICFA, it also made findings of fact that Plaintiffs were not deceived or that Defendant had not engaged in unfair business practices within the meaning of ICFA. (A.12-14, Dkt. 28). The District Court went so far as to state that it "struggles to see how West Bend did anything wrong," in blatant disregard of the "unfairness" factors which viewed in a light most favorable to Plaintiffs, set forth a plausible claim under ICFA. (A.13, Dkt. 28). All of these issues belong to the jury.

The District Court's flawed analysis of the ICFA claim is further underscored by perfunctory dismissal of Plaintiffs' rights as members of a mutual company. The ICFA claim does not hinge on it nor were these issues raised in connection the ICFA claim. Instead, the District Court was flatly dismissive of the significance of this unique status that policyholders have as owners of West Bend and completely avoided any discussion related to the fiduciary relationship that existed between Plaintiffs and Defendant. (A.14-15, Dkt. 28).

## VI. The District Court erred when it made premature findings of fact with respect to Plaintiffs' class claim for unjust enrichment.

The District Court again erred when it failed to consider the extra-contractual, tort basis for sustaining Plaintiffs' class claim for unjust enrichment. The District Court relied on an erroneous generalization that because a contract exists between Plaintiffs and Defendant, that automatically forecloses Plaintiffs from seeking an unjust enrichment remedy. (A.15-16, Dkt. 28). This misapplies Illinois law. "Unjust enrichment may be predicated on either quasi-contract ***or tort*** . . . [and if] plaintiff's unjust enrichment claim is based on tort, instead of quasi-contract, ***the existence of a specific contract does not defeat his cause of action."*** (emphasis added). *Peddinghaus v. Peddinghaus*, 295 Ill. App. 3d 943, 949 (1st Dist. 1998). Plaintiffs identified and the District Court completely disregarded "an independent basis that establishes a duty on the part of the defendant to act and the defendant must have failed to abide by that duty." *Martis v. Grinnell Mut. Reinsurance Co.*, 388 Ill. App. 3d 1017, 1025 (3d Dist. 2009).

Here, under Wisconsin law (which determines the internal affairs of a Wisconsin

entity such as West Bend) West Bend owes a fiduciary duty to its mutual company insureds. *Noonan v. Nw. Mut. Life Ins. Co.*, 276 Wis. 2d 33, 45, 687 N.W.2d 254, 260 (2004) ("The officers and directors of a mutual insurance company stand in a fiduciary relation to the company and its members, and occupy a position of trust."). The District Court completely ignored the fiduciary basis for supporting an unjust enrichment claim. The distinction matters because "[i]n a mutual company, whatever the field of its operation, the premium exacted is necessarily greater than the expected cost of the insurance . . . . It is of the essence of mutual insurance that the excess in the premium over the actual cost as later ascertained shall be returned to the policy holder." (emphasis added) *Kimberly-Clark Corp. v. Factory Mut. Ins. Co.*, 566 F.3d 541, 548 (5th Cir. 2009). *See also, Ormond v. Anthem, Inc.*, 799 F. Supp. 2d 910 (S.D. Ind. 2011) (when dealing with whether to retain excess profits, courts generally treat policyholders as being entitled to the same fiduciary duty as owed to stockholders).

The District Court simply disregarded the significance of the fiduciary relationship that supports Plaintiffs' claims for unjust enrichment and in the process conflated a misinterpreted claim for contractual distributions with an equitable attempt to recover overcharged premiums stemming from Defendants' bad faith conduct and dereliction of its fiduciary duties owed to Plaintiffs. Plaintiffs may sustain an unjust enrichment claim on tort theories separate from the contract and it was error for the District Court to conclude that there were no set of facts upon which Plaintiffs could state a claim for unjust enrichment. The lower court's dismissal

of this count (and all others) must be reversed.

## CONCLUSION

For the foregoing reasons, the District Court's decision should be reversed in its entirety and the cause remanded for proceedings consistent with this Court's decision.

Respectfully Submitted,
FUKSA KHORSHID, LLC

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## CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATION

The undersigned, counsel of record for the Plaintiffs-Appellants, furnishes the following in compliance with Fed. R. App. P. 32(a)(7): I hereby certify that this brief conforms to the rules contained in Fed. R. App. P. 32(a)(7) for a brief produced with proportionally spaced font. The length of this brief is 9,827 words.

*/s/ William E. Meyer, Jr.*
William E. Meyer, Jr.
*Attorney for Plaintiffs-Appellants*

## CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2021, I electronically filed the above Brief and Required Short Appendix of Plaintiffs-Appellants Mashallah, Inc. and Ranalli's Park Ridge, LLC, with the Clerk of the United States Court of Appeals for the Seventh Circuit, using the CM/ECF system, which sent notification of such filing via the EM/ECF system on all counsel of record, including those for Defendant- Appellee West Bend Mutual Insurance Company.

*/s/ William E. Meyer, Jr.*
William E. Meyer, Jr.
*Attorney for Plaintiffs-Appellants*

## STATEMENT PURSUANT TO CIRCUIT RULE 30(d)

The undersigned counsel for Plaintiffs-Appellants Mashallah, Inc. and Ranalli's Park Ridge, LLC d/b/a Holt's (collectively "Appellants") certifies that the Required Short Appendix contains and includes all materials required by Circuit Rule 30(a) and (b) of the United States Court of Appeals for the Seventh Circuit.

*/s/ William E. Meyer, Jr.*
William E. Meyer, Jr.
*Attorney for Plaintiffs-Appellants*

No. 21-1507

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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MASHALLAH, INC., and Illinois corporation and RANALLI'S PARK RIDGE, LLC d/b/a HOLT'S, an Illinois limited liability company,

Plaintiffs-Appellants,

v.

WEST BEND MUTUAL INSURANCE COMPANY, a Wisconsin corporation,

Defendant-Appellee.

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Appeal From The United States District Court
For The Northern District of Illinois, Eastern Division
Case No. 20-cv-05472
Hon. Charles P. Kocoras

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# REQUIRED SHORT APPENDIX OF PLAINTIFFS-APPELLANTS MASHALLAH, INC., and RANALLI'S PARK RIDGE, LLC d/b/a HOLT'S

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ORAL ARGUMENT REQUESTED

# APPENDIX

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**Required Short Appendix**

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF ILLINOIS**
**EASTERN DIVISION**

| | | |
|---|---|---|
| MASHALLAH, INC., an Illinois Corporation and RANALLI'S PARK RIDGE, LLC d/b/a HOLTS, | ) | |
| Plaintiffs, | ) | |
| v. | ) | 20 C 5472 |
| WEST BEND MUTUAL INSURANCE COMPANY, a Wisconsin Corporation, | ) | |
| Defendant. | ) | |

## MEMORANDUM OPINION

**CHARLES P. KOCORAS, District Judge**:

Before the Court is West Bend Mutual Insurance Company's ("West Bend") Motion to Dismiss Plaintiffs' Mashallah Inc. ("Mashallah") and Ranalli's Park Ridge ("Ranalli's") (collectively, "Plaintiffs") Complaint under Federal Rule of Civil Procedure 12(b)(6). For the following reasons, the Court grants West Bend's motion.

## BACKGROUND

The Court "accept[s] as true all factual allegations in the complaint and draw[s] all permissible inferences in plaintiffs' favor." *Boucher v. Fin. Sys. of Green Bay, Inc.*, 880 F.3d 362, 365 (7th Cir. 2018).

Plaintiff Mashallah is a small Chicago-based jewelry business. Plaintiff Ranalli is a small Chicago-area restaurant. Plaintiffs' businesses were interrupted and are

suffering due to COVID-19. Accordingly, Plaintiffs now seek coverage under "all-risk" commercial property insurance policies (the "Policies") issued and sold to them by Defendant West Bend—a mutual insurance company.

The Policies provide several types of coverage.[1]

First, Plaintiffs seek coverage under the Policies' Business Income provisions, which provide that West Bend will pay for "actual loss of Business Income" sustained because of a "direct physical loss of" Plaintiffs' business premises. Dkt. #1-1 at 23; Dkt #1-2 at 43.

Second, Plaintiffs seek coverage under the Policies' Extra Expense provisions, which provide coverage for "extra expenses" that would not have been "incurred if there had been no direct physical loss." Dkt. #1-1 at 25; Dkt #1-2 at 43.

And third, Plaintiffs seek coverage under the Policies' Civil Authority provisions, which provide coverage for lost business income sustained because of a civil authority that "prohibits access to" the premises. Dkt. #1-1 at 26; Dkt. #1-2 at 44.

Aside from these provisions, each Policy has a slightly different Virus Exclusion. The Mashallah Virus Exclusion provides that West Bend will not cover "loss or damage caused directly or indirectly by . . . any virus . . . that induces or is capable of inducing physical distress, illness or disease. . ." Dkt. #1-1 at 34, 37. The Mashallah Virus

[1] The Policies are central to and attached to the Complaint and are therefore a part of the pleading for the purposes of this Motion. Fed. R. Civ. P. 10(c); *Foshee v. Daoust Const. Co. et al.,* 185 F.2d 23, 25 (7th Cir. 1950).

Exclusion provides that such "loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." *Id.* at 34. The Ranalli's Virus Exclusion provides that West Bend will not pay for "loss or damage caused by or resulting from any virus . . . that induces or is capable of inducing physical distress, illness or disease." Dkt. #1-2 at 54.

Against this backdrop, Plaintiffs seek coverage under the terms of the Policies. In Count I, Plaintiffs seek a declaratory judgment that West Bend is obligated to cover Plaintiffs' claims. In Count II, Plaintiffs allege that West Bend breached the terms of the Policies. In Count III, Plaintiffs allege a bad-faith denial of insurance coverage in violation of Illinois law, 215 ILCS 5/155. In the alternative, Plaintiffs seek a rebate of their insurance premiums. Specifically, in Count IV, Plaintiffs allege that West Bend has been unjustly enriched by collecting premiums while not covering Plaintiffs. And in Count V Plaintiffs allege that West Bend violated the Illinois Consumer Fraud and Deceptive Business Practices Act ("ICFA") for similar reasons.

## LEGAL STANDARD

In this motion, West Bend moves to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6). A motion to dismiss based on Federal Rule of Civil Procedure challenges the sufficiency of the facts alleged in the complaint and not the merits of the case. Fed. R. Civ. P. 12(b)(6); *McReynolds v. Merrill Lynch & Co.*, 694 F.3d 873, 878 (7th Cir. 2012). The Court accepts as true all well pled facts in the complaint and draws all reasonable inferences in favor of the plaintiff. *AnchorBank,*

*FSB v. Hofer*, 649 F.3d 610, 614 (7th Cir. 2011). The factual allegations in the complaint must state a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

The complaint does not require detailed factual allegations but must provide sufficient factual support to "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint must provide a defendant with fair notice of the claim's basis and also must be facially plausible. *Id.*; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim is facially plausible if the complaint contains sufficient alleged facts that permit the Court "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Mere conclusory statements or a "formulaic recitation of the elements of a cause of action" are insufficient pleadings to overcome a Rule 12(b)(6) motion to dismiss. *Id.* at 678-79.

The parties do not dispute that Illinois law applies. In Illinois, "the construction of an insurance policy is a question of law. An insurance policy is to be construed as a whole, giving effect to every provision, if possible, because it must be assumed that every provision was intended to serve a purpose. If the words used in the policy are clear and unambiguous, they must be given their plain, ordinary, and popular meaning. However, a policy provision is not rendered ambiguous simply because the parties disagree as to its meaning." *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, 2020 WL 5630465, at *2 (N.D. Ill. 2020) (cleaned up).

## DISCUSSION

### 1. The Virus Exclusions Preclude All Coverage

The Court recently decided a very similar case in *Riverwalk Seafood Grill Inc. v. Travelers Cas. Ins. Co. of America*., 2021 WL 81659 (N.D. Ill. 2021). There, we held that the "plain language of the Virus Exclusion is dispositive" and that it is therefore unsurprising that federal courts have "nearly unanimously" held that exclusions like those here bar coverage. *Id.* at *3. Since our decision in *Riverwalk*, other courts nationwide are in accord. *See, e.g., Mena Catering, Inc. v. Scottsdale Ins. Co.,* 2021 WL 86777, at *9 (S.D. Fla. 2021) (collecting cases); *Palmdale Estates, Inc. v. Blackboard Ins. Co.*, 2021 WL 25048, at *3 (N.D. Cal. 2021) (concluding that the "weight of authority" supports the application of the virus exclusion).

The Virus Exclusions here are no different.

The Mashallah Virus Exclusion provides that West Bend will not cover "loss or damage caused directly ***or indirectly*** by . . . ***any*** virus . . . that induces or is capable of inducing physical distress, illness or disease. . ." Dkt. #1-1 at 34, 37. COVID-19 is clearly *any virus* that *directly or indirectly* caused damage to Mashallah's business. The Mashallah Policy also provides that such "loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." *Id.* at 34.

The Ranalli's Virus Exclusion is a bit different, but the conclusion is still the same. That Policy provides that West Bend will not pay for "loss or damage caused by

***or resulting from any virus*** . . . that induces or is capable of inducing physical distress, illness or disease." Dkt. #1-2 at 54 (emphasis added). Here, Ranalli's business losses no doubt "result from" COVID-19, which is a virus.

Given the clear language in both Policies, it is peculiar that Plaintiffs open their response brief by referring to these exclusions as "purported" virus exclusions. To the contrary, the Virus Exclusions are far from imaginary. They are indeed clear and free from any ambiguity. In *Riverwalk*, we held that language like that here is "clear, sweeping, and all-encompassing." *Riverwalk Seafood Grill Inc.*, 2021 WL 81659, at *3. We reaffirm that holding here.

Plaintiffs also respond by arguing that West Bend must affirmatively establish that the exclusions apply. True. But that is exactly what West Bend has done here. And, contrary to Plaintiffs' rather broad and repeated rule statement, the Court only needs to defer to the plaintiff "where the provision is ambiguous." *Founders Ins. Co. v. Munoz*, 237 Ill. 2d 424, 433 (2010). Ambiguous means that the plain text of the exclusion is "susceptible to more than one *reasonable* interpretation." *Id.* (emphasis added). Here, there is *no reasonable interpretation* that would allow coverage. Both policies preclude coverage for "any virus" and no one can credibly argue that COVID-19 is not "any virus." Thus, the Court need "not strain to find an ambiguity where none exists." *Id.* The policy provisions are also not ambiguous simply because the parties disagree about the meaning. *Id.*

To get around the virus exclusion, Plaintiffs argue that COVID-19 itself is not the "dominant" or "efficient" cause of Plaintiffs' damages because Governor Pritzker's COVID-19 orders are an independent intervening cause. The "efficient" or "dominant" cause rule is the default causation rule in Illinois. *Bozek v. Erie Ins. Grp.*, 2015 IL App (2d) 150155, ¶ 22. Generally, causation can be analyzed under one of four approaches, with the "dominant" cause rule being the second most relaxed. The *Bozek* court explains:

> Many coverage cases have sought to determine, in the absence of specific policy language, exactly how substantial or sufficient a given causal nexus needs to be in order to provide coverage. There are four basic stops on the causal spectrum of insurance coverage: (1) most broadly, but-for or minimally sufficient causation, providing coverage if a covered cause contributes to the loss, regardless of its dominance or order in a chain of events; (2) in the middle, efficient or dominant proximate causation, providing coverage if a risk of loss that is specifically insured against in the insurance policy sets in motion, in an unbroken causal sequence, the events that cause the ultimate loss, even though the immediate cause in the chain of causation is an excluded cause, or if it is simply the dominant cause; (3) more narrowly, immediate causation, providing coverage only where the covered cause is the last, immediate cause in the chain of causation; and (4) most narrowly, regardless of order, if any excluded cause contributes to the loss, there is no coverage.

*Id.* at ¶ 21 (cleaned up). The Illinois default rule can be further relaxed via an "anticoncurrent-causation clause," under which "there is no coverage if even one contributing cause is an excluded event." *Id.* at ¶ 23. Thus, the question that matters when analyzing an anti-concurrent causation clause is whether an excluded cause "was one contributing cause of the loss at issue." *Temperature Serv. Co., Inc. v. Acuity*, 2018 WL 1378345, at *7 (N.D. Ill. 2018).

Despite the minor differences in both Virus Exclusions, both Plaintiffs lose even under the "efficient" or "dominant" causation approach. In applying this approach, we must ask: was COVID-19 "simply the dominant cause" that set the other causes in motion in an "unbroken causal sequence?" *See Bozek*, 2015 IL App (2d) 150155, ¶ 21.

Obviously. "Here, there is no genuine dispute that the activity of a virus, namely COVID-19, set government restrictions in motion, and is therefore the efficient proximate cause of Plaintiffs' claimed losses." *Ba Lax, LLC v. Hartford Fire Ins. Co.*, 2021 WL 144248, at *4 (C.D. Cal. 2021); *accord Boxed Foods Co., LLC v. California Capital Ins. Co.*, 2020 WL 6271021, at *4 (N.D. Cal. 2020). This is because the "causal links represented by the virus and the Order are interlocking – even intertwined." *LJ New Haven LLC v. AmGUARD Ins. Co.*, 2020 WL 7495622, at *5 (D. Conn. 2020). Indeed, the closure orders "would not exist absent the presence of COVID-19." *Boxed Foods Co.*, 2020 WL 6271021, at *4. After all, the closure orders "*only came about sequentially as a result of* the COVID-19 virus spreading rapidly throughout the community." *Diesel Barbershop, LLC v. State Farm Lloyds*, 2020 WL 4724305, (W.D. Tex. 2020) (emphasis added). Thus, COVID-19 was the "primary root cause of Plaintiffs' businesses temporarily closing." *Id.*; *see also Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.*, 2020 WL 5642483, at *2 (N.D. Cal. 2020) (citing *Diesel Barbershop* approvingly and adding that closure orders "were issued as the direct result of COVID-19—a cause of loss that falls squarely within the Virus Exclusion.").

Our conclusion as to this argument is in line with other courts nationwide. *See Raymond H Nahmad DDS PA v. Hartford Cas. Ins. Co.*, 2020 WL 6392841, at *9 (S.D. Fla. 2020) (collecting cases).

Mashallah's claims fail for an additional and independent reason. The Mashallah Policy, but not the Ranalli's Policy, has an anti-concurrent causation clause. *See* Dkt. #1-1 at 34 ("loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss."). "This language demonstrates the parties' intent to contract around the efficient proximate cause doctrine, language which courts have held is enforceable." *N&S Rest. LLC v. Cumberland Mut. Fire Ins. Co.*, 2020 WL 6501722, at *4 (D.N.J. 2020). Thus, applying the clear language of this provision, Mashallah cannot recover even if the Governor's COVID-19 orders contributed concurrently to the loss. *See Temperature Serv. Co., Inc.,* 2018 WL 1378345, at *6.

Plaintiffs' other arguments do not complicate the otherwise clear Virus Exclusions. First, the argument that COVID-19 must be physically present at Plaintiffs' premises to trigger coverage is flatly contrary to the plain text of the Virus Exclusions, which contain no such requirement. *See LJ New Haven LLC*, 2020 WL 7495622, at *6; *N&S Rest. LLC*, 2020 WL 6501722, at *3. And second, the argument that business income coverage is now illusory because of COVID-19 also fails because a "policy need not provide coverage against all possible liabilities; if it provides coverage against

some, the policy is not illusory." *Nicor, Inc. v. Associated Elec. & Gas Ins. Servs. Ltd.*, 362 Ill. App. 3d 745, 754 (2005), *aff'd*, 223 Ill. 2d 407 (2006).

For the foregoing reasons, Plaintiffs claims based on the Policies are barred. Counts I and II are therefore dismissed. Because there is no coverage, Plaintiffs' bad-faith denial of coverage claim under Section 155 of the Illinois Insurance Code also fails. *See Martin v. Illinois Farmers Ins.*, 318 Ill. App. 3d 751, 764 (1st Dist. 2000) ("a defendant cannot be liable for section 155 relief where no benefits are owed."). Count III is therefore dismissed accordingly.

**2. Plaintiffs Are Also Not Entitled To A Premium Rebate**

Plaintiffs, in the alternative, argue that they are entitled to a rebate of the insurance premiums they paid under either the ICFA or a common law theory of unjust enrichment. At a high level, Plaintiffs' claims fail because there is nothing unfair or unscrupulous about holding Plaintiffs to the terms of the Policies they bought, which do not include coverage for "any virus" like COVID-19. The Court's conclusion here is buttressed by the general rule of insurance law that:

> an insured may not have any part of his or her premium returned once the risk attaches, even if it eventually turns out that the premium was in part unearned. This rule is based upon just and equitable principles, for the insurer has, by taking upon itself the peril, became entitled to the premium.

5 Couch on Ins., § 79:7 (3d Ed. 2014); *accord Euclid Nat. Bank v. Fed. Home Loan Bank Bd.*, 396 F.2d 950, 951 (6th Cir. 1968); *Fleetwood Acres v. Fed. Hous. Admin.*,

171 F.2d 440, 442 (2d Cir. 1948); 44 Am. Jur. 2d Insurance § 909. And, for the reasons discussed below, no argument made by Plaintiffs upsets this general rule.

Plaintiffs seemingly recognize this reality and argue upfront that the "unique circumstances" of COVID-19, a "world-altering event," "demand that the law respond with flexibility to do justice" Dkt. #26 at 31. But no matter how sympathetic the Court is to the plight of small businesses during this once-in-a-century pandemic, the Court cannot create law where none exists. To do so would impermissibly "place the whole rights and property of the community under the arbitrary will of the Judge . . ." *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 332 (1999) (quoting Story, J., 1 Commentaries on Equity Jurisprudence § 19, at 21). Nor is the Court empowered to "improvise" because of COVID-19. *Democratic Nat'l Comm. v. Wisconsin State Legislature*, 141 S. Ct. 28, 30 (2020) (Gorsuch, J., concurring); *cf. Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 70 (2020) (Gorsuch, J., concurring) (observing that while the Constitution has "taken a holiday during this pandemic" "it cannot become a sabbatical.").

Against this backdrop, the Court will address Plaintiffs' ICFA claim and unjust enrichment claim in turn.

**A. ICFA Claim**

To state a claim under ICFA, plaintiffs must allege "(1) a deceptive act or practice by the defendant, (2) the defendant's intent that the plaintiff rely on the deception, (3) the occurrence of the deception in the course of conduct involving trade

or commerce, and (4) actual damage to the plaintiff (5) proximately caused by the deception." *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100, 190 (2005) (cleaned up).

Plaintiffs argue that West Bend violated the ICFA by misrepresenting and omitting facts regarding the scope of coverage. This contention fails for two reasons.

First, Plaintiffs have not alleged that West Bend undertook "a deceptive act or practice." *Avery,* 216 Ill. 2d at 190–91. In short, Plaintiffs' story simply does not add up because they purchased their Policies in 2019—well before the COVID-19 pandemic was a ubiquitous feature of daily life. *See* Dkt. #1 at ¶ 58 ("[r]eports of a novel Coronavirus ("COVID-19") pandemic emerged out of Wuhan, China in early 2020."). Thus, West Bend could not have made affirmative representations or omissions about something it did not yet know exists.

Plaintiffs are correct that they renewed their Policies in 2020 after everyone knew about the pandemic. But Plaintiffs renewed their Policies *after* they had already been denied coverage for their COVID-19 claims. Any damage is therefore not "proximately caused by the deception" because Plaintiffs were not "actually deceived." *Avery,* 216 Ill. 2d at 190, 199; *accord Villasenor v. Am. Signature, Inc.*, 2007 WL 2025739, at *5 (N.D. Ill. 2007). After all, Plaintiffs already knew West Bend's position that the Policies did not cover COVID-19. They presumably knew that too because of the clear terms of the Policies, which preclude coverage for "any virus" like COVID-19.

West Bend is also correct that Plaintiffs' claims are mere "breach-of-contract allegations dressed up in the language of fraud" and "cannot support statutory or common-law fraud claims" as a result. *Greenberger v. GEICO Gen. Ins. Co.*, 631 F.3d 392, 395 (7th Cir. 2011). Indeed, under ICFA, when "allegations of consumer fraud arise in a contractual setting, the plaintiff must prove that the defendant engaged in deceptive acts or practices distinct from any underlying breach of contract." *Id.* at 399. Plaintiffs do not even attempt to do so here. The Court acknowledges that small businesses are suffering, but the right solution is not to use equity to rewrite an otherwise clear contract. At bottom, Plaintiffs contracted for Policies with clear Virus Exclusions and must be bound by the terms they agreed to.

In response, Plaintiffs urge the Court to conclude that West Bend's practices "offend public policy" or that they are "immoral, unethical, oppressive, or unscrupulous." The Court struggles to see how West Bend did anything wrong. Both sides entered in an arms-length insurance contract that expressly excludes coverage for "any virus" like COVID-19. All West Bend is trying to do now is enforce this contract. That is not immoral or unscrupulous for the simple reason that it is not unfair to hold a party to the terms of the contract they signed.

Plaintiffs respond that this makes coverage illusory because West Bend could use COVID-19 as an excuse to limit business income coverage in the event of a covered loss like a fire or vandalism. Admittedly, because Plaintiffs' businesses are suffering, the recoverable amount of lost business income might be lower. But that does not mean

the Policies are truly "empty" or "optional." *States Self-Insurers Risk Retention Grp., Inc. v. City of Waukegan*, 2018 WL 1378346, at *7 (N.D. Ill. 2018). The Policies would still cover losses "in at least some circumstances" and are therefore "not illusory." *Id.* at *9 (citing *W.E. Erickson Constr., Inc. v. Chi. Title Ins. Co.*, 641 N.E.2d 861, 864 (Ill. App. 1994)). Of course, Plaintiffs would like more coverage, but a contract is not rendered illusory simply because Plaintiffs would like more coverage. *See id.*; *accord Charles Hester Enterprises, Inc. v. Illinois Founders Ins. Co.*, 137 Ill. App. 3d 84, 98 (1985) ("coverage was not false or 'phantom' merely because there was no present exposure."), *aff'd*, 114 Ill. 2d 278 (1986).

Plaintiffs make three other arguments, all of which fail.

First, Plaintiffs point out that some auto insurers like AARP have chosen to rebate premiums because of COVID-19. But Plaintiffs cite no authority that requires the Court to make AARP's act of corporate grace a legal mandate.

Second, Plaintiffs argue that they were forced to buy insurance like any prudent business would. But Plaintiffs fail to allege that West Bend somehow forced them to obtain this insurance or, for that matter, any insurance at all. Presumably, Plaintiffs could have shopped around for a policy without a virus exclusion.

And third, Plaintiffs argue that because West Bend is a mutual insurance company, they should be able to compel West Bend to rebate premiums. Yet, the rights of a member of a mutual company are "delineated by the terms of the contract, and come from it alone." *Andrews v. Equitable Life Assur. Soc. of U.S.*, 124 F.2d 788, 789

(7th Cir. 1941). Here, the terms of the Policies state that distributions are available to "the extent and upon the conditions fixed and determined by the Board of Directors." Dkt. # 1-1 at 5. Plaintiffs thus cannot unilaterally compel a distribution according to the clear terms of the contract. *See Andrews*, 124 F.2d at 789; *Babbitt Municipalities, Inc. v. Health Care Serv. Corp.*, 2016 IL App (1st) 152662, ¶ 35 (observing that "such matters are typically left to the discretion of the company's board of directors"). Plaintiffs' authorities, *e.g., Kimberly-Clark Corp. v. Factory Mut. Ins. Co.*, 566 F.3d 541, 542 (5th Cir. 2009), do not change the game because in those cases the company had *already elected* to make distributions. Plaintiffs provide the Court with no authority that supersedes the clear terms of the contract, which govern here. *Andrews*, 124 F.2d at 789.

For the foregoing reasons, Plaintiffs cannot maintain an ICFA claim. This claim is therefore dismissed.

**B. Unjust Enrichment Claim**

Plaintiffs' unjust enrichment claim also fails. At the outset, because Plaintiff cannot prevail on their ICFA claim, they also cannot prevail on the unjust enrichment claim. *See Toulon v. Cont'l Cas. Co.*, 877 F.3d 725, 742 (7th Cir. 2017).

Plaintiffs claim is also foreclosed because there is an *actual contract* that governs the relationship between the parties. *Id.* "Where there is a specific contract that governs the relationship of the parties" the unjust enrichment doctrine has no application. *Id.* And, here, as in *Toulon*, there is "no question that a contract for insurance" governs the

relationship between Plaintiffs and West Bend. *Id.* Likewise, Plaintiffs "refer to the Policy throughout the Complaint" and "attached it as an exhibit to the Complaint." *See id.* Dismissal is therefore warranted as it was in *Toulon*.[2] *See id.*

One last point: alternative pleading cannot remedy Plaintiffs' unjust enrichment claim because this type of pleading is limited. *Cohen v. Am. Sec. Ins. Co.*, 735 F.3d 601, 615 (7th Cir. 2013). "A plaintiff may plead as follows: (1) there is an express contract, and the defendant is liable for breach of it; and (2) if there is *not* an express contract, then the defendant is liable for unjustly enriching himself at my expense." *Id.* But it is impermissible to plead that West Bend "is liable for breaching this express contract but that if it did not breach the contract, then it owes damages for unjust enriching itself." *Id.* That is exactly what Plaintiffs are trying here. That effort, while adroit, is impermissible.

## CONCLUSION

For the foregoing reasons, the Court grants West Bend's Motion to Dismiss. Because the Virus Exclusion bars all coverage, any further amendment would be futile. Accordingly, this case is dismissed with prejudice. Civil case terminated. It is so ordered.

Dated: 2/22/2021

Charles P. Kocoras
United States District Judge

[2] Plaintiffs' class claims also cannot proceed because when "the plaintiff's own claim is dismissed, he can no longer be the class representative." *Collins v. Vill. of Palatine, Ill.*, 875 F.3d 839, 846 (7th Cir. 2017) (quoting *Hardy v. City Optical Inc.*, 39 F.3d 765, 770 (7th Cir. 1994)).

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE**
**NORTHERN DISTRICT OF ILLINOIS**

MASHALLAH, INC., an Illinois Corporation and RANALLI'S PARK RIDGE, LLC d/b/a HOLTS.,

Plaintiff(s),

v.

WEST BEND MUTUAL INSURANCE COMPANY, a Wisconsin Corporation,

Defendant(s).

Case No. 20 C 5472
Judge Charles P. Kocoras

# JUDGMENT IN A CIVIL CASE

Judgment is hereby entered (check appropriate box):

☐ in favor of plaintiff(s)
and against defendant(s)
in the amount of $ ,

which ☐ includes pre–judgment interest.
☐ does not include pre–judgment interest.

Post-judgment interest accrues on that amount at the rate provided by law from the date of this judgment.

Plaintiff(s) shall recover costs from defendant(s).

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☐ in favor of defendant(s)
and against plaintiff(s)

.

Defendant(s) shall recover costs from plaintiff(s).

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☒ other: Judgment entered in favor of defendant West Bend Mutual Insurance Company and against plaintiffs Mashallah Inc. and Ranalli's Park Ridge.

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This action was *(check one)*:

☐ tried by a jury with Judge presiding, and the jury has rendered a verdict.
☐ tried by Judge without a jury and the above decision was reached.
☒ decided by Judge Charles P. Kocoras on a motion to dismiss.

Date: 2/23/2021 Thomas G. Bruton, Clerk of Court

Vettina Franklin, Deputy Clerk