

IN THE COURT OF COMMON PLEAS
LAKE COUNTY, OHIO

MIKMAR, INC.)	CASE NO.
5785 Heisley Rd.)	
Mentor, OH 44060)	JUDGE:
On behalf of itself and all those similarly)	
situated businesses and entities)	PLAINTIFFS' CLASS ACTION
)	COMPLAINT
And)	
)	<i>Jury Demand Endorsed Hereon</i>
MICHAEL'S INC. DBA LAMALFA)	
CENTRE AND VINE BEVERAGE)	
AND CATERERS)	
5785 Heisley Rd.)	
Mentor, OH 44060)	
On behalf of itself and all those similarly)	
situated businesses and entities)	
)	
)	
Plaintiffs)	
)	
-vs-)	
)	
WESTFIELD INSURANCE)	
COMPANY)	
One Park Circle)	
Westfield Center, OH 44251)	
)	
<u>ALSO SERVE:</u>)	
FRANK CARRINO)	
One Park Circle)	
Westfield Center, OH 44251)	
)	
)	
Defendant)	

CLASS ACTION COMPLAINT

Now come Plaintiffs, MIKMAR, Inc ("MIKMAR" or "Plaintiffs") and Michael's Inc DBA LaMalfa Centre and Vine Beverage and Caterers ("LaMalfa" or "Plaintiffs")¹, by and through its

¹ MIKMAR and LaMalfa are sometimes referred to herein as "Plaintiffs."

undersigned counsel, on behalf of the other Members of the below well-defined nationwide and Ohio Sub-Classes, bring this Class Action against Defendant Westfield Insurance Company (“Westfield” or “Defendant”), and as grounds therefore allege as follows:

THE PARTIES

1. MIKMAR is an Ohio corporation organized under Ohio law with its principal place of business located at 5785 Heisley Rd. Mentor, Ohio 44060. MIKMAR is corporation that owns and operates a hotel business known as Wingate by Windham that adjoins LaMalfa.

2. LaMalfa is an Ohio corporation organized under Ohio law with its principal place of business located at 5785 Heisley Rd. Mentor, Ohio 44060. LaMalfa is a corporation that engages in high-end banquet and catering services, such as wedding, fundraisers, and business events.²

3. Westfield is an Ohio Company organized under Ohio law, and is a property and casualty insurer, with its principal place of business in Westfield Center, Ohio, and sells insurance in Ohio and throughout the country. It is an insurance company authorized to do business in the State of Ohio and elsewhere.

JURISDICTION AND VENUE

4. This Honorable Court has jurisdiction over the parties and this dispute, including for declaratory relief, pursuant to Ohio Revised Code § 2307.382, *et seq.*, Ohio Revised Code § 2721.02, *et seq.* and Rule 57 of the Ohio Rules of Civil Procedure.

5. An actual controversy between MIKMAR and LaMalfa, and Westfield, exists within the meaning of Ohio Revised Code § 2721.02, *et seq.* regarding whether Westfield has a duty to provide MIKMAR and LaMalfa coverage and indemnity for, among other things, business

² Note, Michael’s Inc. DBA LaMalfa Centre and Vine Beverage and Caterers is the owner of all relevant property, including, without limitation, the hotel.

income loss pursuant to the terms and conditions of the Westfield Policies(s) of insurance, due to the COVID-19 pandemic, as more particularly described below.

6. The Ohio General Assembly specifically provided in Ohio Revised Code §2721.14 that “*Sections 2721.01 to 2721.15, inclusive, of the Revised Code shall be so interpreted and construed as to effectuate their general purpose to make the law of this state uniform with the law of those states which enact similar sections***.*”

7. Venue is proper in Lake County, Ohio under Ohio Rules of Civil Procedure 3(C)(3), 3(C)(6), and 3(F), and Ohio Revised Code § 2721.14 because Defendant conducted activity giving rise to Plaintiffs’ Claims for relief in Lake County, because all or part of Plaintiffs’ claims for relief arose in Lake County, and because the declaratory relief requested herein is uniform with the laws of those states that enacted similar provisions, and wherein some Class Members reside.

FACTUAL BACKGROUND

THE INSURANCE CONTRACT

8. At all relevant times, Westfield insured MIKMAR under a commercial/business owner Policies, bearing Policies, number BOP 3373761 (“MIKMAR Policies”). The certified Policies is in the possession of Westfield, and while not attached hereto because it is voluminous, it is incorporated herein by reference.

9. At all relevant times, Westfield insured LaMalfa under a commercial/business owner Policies, bearing Policies, number CWP 5019733 (“LaMalfa Policies”). The certified Policies is in the possession of Westfield, and while not attached hereto because it is voluminous, it is incorporated herein by reference.

10. Under the Policies, Plaintiffs agreed to make premium payments to Westfield in exchange for Westfield's promise to indemnify Plaintiffs for losses including, but not limited to, business income loss at its commercial property locations ("Properties").

11. The Policies are currently in full effect, providing property, business personal property, business income and extra expense, and additional coverages for the effective period, which includes January 1, 2020 to the present.

12. Plaintiffs faithfully paid Policies premiums to Westfield, specifically to provide additional coverage for "Business Income and Extra Expense Coverage" in the event of business closures by order of Civil Authority.

13. Under the Policies, insurance is extended to apply to the actual loss of business income sustained and the actual, necessary and reasonable extra expenses incurred when access to the Properties is specifically prohibited by order of Civil Authority as the direct result of a covered loss to property in the immediate area of Plaintiffs' Properties. The covered physical loss includes, without limitation, loss of use and/or loss of utilization of the properties.

14. COVID-19's actual or suspected physical presence at or in the vicinity of Plaintiffs' Properties prevents Plaintiffs from making full use of the Property, including, without limitation, the inability to fully rent its hotel units and book catering events. Under the terms and conditions of the Policies, this kind of loss constitutes a physical loss to the Property in that there has been a loss of use and/or utilization of the Property. Moreover, the COVID-19 virus is a "physical" thing, not an abstract fear. For example, hotel and banquet facility business owners, such as Plaintiffs, forced to close and/or subject to underutilization or loss of use of their properties due to COVID-19 results in a "physical loss" of use of its Property, with resulting business interruption loss.

15. Under the terms and conditions of the subject Policies Physical loss does not mean and/or require tangible “physical damage.”

16. The Policies are “all-risk” policies, in so far as they provide that a covered cause of loss under the policies means direct physical loss of or damage to the property unless the loss is specifically excluded or limited in the Policies. Here, Plaintiffs’ operations have been suspended, suffered a loss of use and/or access to properties significantly suspended and/or outright prohibited, and no specific exclusion applies to reasonably justify the denial of Plaintiffs’ claims.

17. Based upon information and belief, Westfield has accepted the Policies premiums with no intention of providing any coverage under the Policies Business Income, Extra-Expense or Civil Authority Coverage Sections due to a loss and/or shutdown from a pandemic, i.e. the COVID-19 pandemic.

18. Defendant has, in fact, denied Plaintiffs’ claims by way of denial letters issued to Plaintiffs MIKMAR on April 13, 2020 and to LaMalfa on April 11, 2020.

THE COVID-19 PANDEMIC

19. The global COVID-19 pandemic has physically impacted both public and private property and physical spaces around the world, as well as the right of the general public to gather and utilize retail business locations. The currently raging pandemic has been exacerbated by the fact that the deadly COVID-19 physically infects and stays on surfaces of objects or materials, “fomites,” for up to twenty-eight days. The scientific community in the United States and indeed, across the world, including the World Health Organization (“WHO”), has recognized that COVID-19 is a cause of real physical loss and damage.

20. Indeed, a number of countries such as: China, Italy, France, and Spain have required the fumigation of public areas prior to allowing them to re-open. A recent scientific study printed

in the New England Journal of Medicine explains that the virus is detectable for up to three hours in aerosols, up to four hours on copper, up to 24 hours on cardboard boxes, and up to three days on plastic and stainless steel³. Notably, the most potent form of the virus is not airborne but rather present on physical surfaces.

21. While the Policies was in force, MIKMAR sustained a loss due to coronavirus, also referred to as “COVID-19”, and the Civil Authority orders issued by the Governor of Ohio that have addressed the state and nationwide spread of the coronavirus, i.e. pandemic.

22. In late 2019 and early 2020, an outbreak of respiratory illness caused by a novel COVID-19 started to infect humans across the globe. On March 11, 2020, the World Health Organization (“WHO”) declared the COVID-19 outbreak a pandemic (i.e. a global outbreak of disease).

23. On January 31, 2020, under §319 of the Public Health Service Act (42 U.S.C.247d), The Secretary of Health and Human Services (“HHS”) declared a public health emergency in response to COVID-19.

24. On March 11, 2020, the WHO announced that COVID-19 outbreak represented a pandemic.

25. On March 13, 2020 the President of the United States of America, Donald J. Trump, issued the Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (“Proclamation”), proclaiming the COVID-19 outbreak constituted a national emergency in the United States, beginning March 1, 2020.

³ See Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1, New England Journal of Medicine (March 17, 2020), available at <https://www.nejm.org/doi/pdf/10.1056/NEJMc2004973?articleTools=true>.

26. Various states, including the State of Ohio have issued and implemented mandatory Stay-At-Home Orders,⁴ Requiring businesses, such as Plaintiffs, to shut down and/or significantly suspend business operations, thus causing Plaintiffs a loss of use of its Properties, and resulting in substantial loss of business income.

27. On March 29, 2020 President Donald J. Trump announced the extension of his Administration's social distancing guidelines until April 30, 2020.

28. Effective March 23rd, 2020, Ohio Civil Authority ordered Ohio residents to stay at home and ordered all non-essential businesses in Ohio to cease all activities. This order was extended to May 29, 2020.

29. Coronavirus and the pandemic cause direct physical loss and property damages. COVID-19 and the Pandemic are physically impacting public and private property in Ohio and throughout the country. The executive orders issued by the Governor of Ohio, and the majority of other State Governors, in response to the pandemic have caused direct physical loss of Plaintiffs' and Class Members' properties.

30. COVID-19 has devastated the hotel industry.

31. Hotel occupancy in the United states is expected to drop by at least 59%.⁵

32. The hotel industry is expected to experience a 50% decline in revenue, with an 2020 occupancy rate forecasted to be worse than in 1933, during the Great Depression.⁶

33. For example:

⁴ Upon information and belief, most states, including Ohio, are still currently under some form of mandatory stay-at-home orders.

⁵ <https://www.statista.com/statistics/1109521/hotel-occupancy-coronavirus/>

⁶ <https://www.hotelmanagement.net/own/studies-break-down-covid-19-s-impact-hotels-travel-plans>



COVID-19 DEVASTATING HOTEL INDUSTRY

Low to zero hotel revenue driving unprecedented job loss

HISTORIC LOW OCCUPANCY

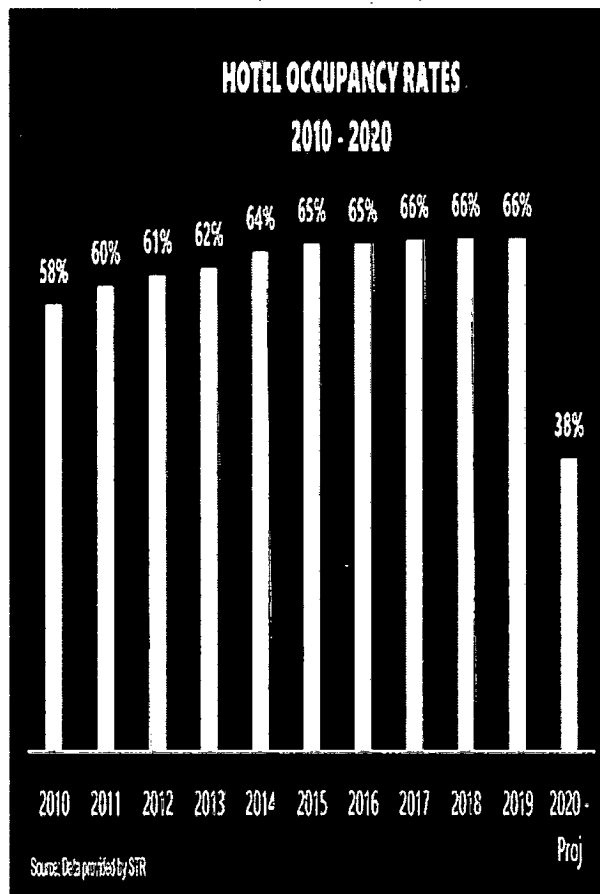
Impact to travel industry **9x worse** than 9/11.
(Tourism Economics)

Nearly **50% revenue decline** in 2020, **\$124B**
lost off \$270B total (Oxford Economics)

Eight in 10 hotel rooms are empty. (STR)

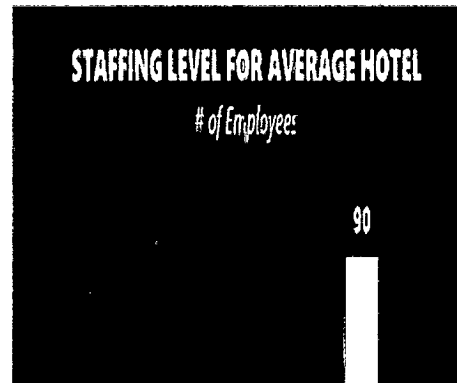
2020 is projected to be the **worst year on**
record for hotel occupancy. (CBRE)

Forecasted occupancy rate for 2020 **worse than**
1933 during Great Depression. (CBRE)



STAGGERING JOB LOSS

70% of hotel employees have been laid off or furloughed. (Oxford
Economics and Hotel Effectiveness)



34. After MIKMAR lost several hotel guest reservations due to order of the State of Ohio and Lake County (and other counties), MIKMAR made a claim with Westfield under the Policy commercial/business income coverage. Westfield acknowledged the claim and assigned it claim number 0002132245, and then denied MIKMAR's claim on April 13, 2020.

35. After LaMalfa lost several catering and banquet events due to order of the State of Ohio and Lake County (and other counties), LaMalfa made a claim with Westfield under the Policy commercial/business income coverage. Westfield acknowledged the claim and assigned it claim number 0002132242, and then denied MIKMAR's claim on April 11, 2020.

36. Upon information and belief, Westfield has denied similar claims regarding the COVID-19 Pandemic and will continue to do so unless enjoined by this Honorable Court.

37. Based on the prevalence of the virus in Lake County and throughout Ohio, it is probable that MIKMAR and LaMalfa sustained direct physical loss of or damage to its properties due to the presence of coronavirus, and has unquestionably sustained direct physical loss as the result of the pandemic and/or civil authority orders issued by the Governor of Ohio.

38. Any effort by Westfield to deny the reality that the Coronavirus causes physical loss of or damage to property would constitute a false and potentially fraudulent misrepresentation that could endanger Policy holders, such as Plaintiffs, and the public.

39. Insurers, including Westfield, also had actual and express knowledge of specific coverage forms that specifically exclude losses related to pandemics and/or SARS, but Westfield failed to use those coverage forms, and Plaintiffs did not contract for those coverage forms, regarding coverage under the subject Policies.

40. In this case, under the coverage forms at issue, Westfield based its denial on exclusions that are not applicable to a pandemic, which is a covered loss under the subject Policies.

41. Had Westfield intended to exclude claims for the COVID-19 pandemic made under the subject Policies(s), it would have, and could have, included the express exclusionary language used in the past to deny claims, which specifically included the term “pandemic” and “SARS,” but Westfield failed to do so related to the Plaintiffs herein and Class Members.

42. Westfield knowingly, purposely, and intentionally used inapplicable exclusions to deny claims for Business Interruption, Extra Expense and Civil Authority claims related to the COVID-19 pandemic.

43. Westfield had at its disposal contractual language that specifically excluded pandemics and SARS but did not include those Policies exclusions in the subject Policies(s), yet wrongfully denied claims for those very reasons. Moreover, the exclusions relied upon by Westfield in its denial letter are inapplicable to claims for Business Income Loss, Extra Expense and/or Civil Authority coverage.

44. Westfield has actual knowledge of the different meanings between pandemic, SARS, Virus, Bacteria and Contamination, by way of the insurance industry using those terms in previous cases and policies utilizing those different terms, and wrongfully and intentionally used the terms “virus” and “bacteria,” among others, to exclude Plaintiffs’ and Class Members’ claims when, in fact, Plaintiffs and Class Members’ claims are, as admitted by Westfield, related to a pandemic – which is not expressly excluded in the subject Policies(s).

45. Alternatively, the terms and conditions of coverage and exclusionary language relied upon by Westfield to deny Plaintiffs and Class Members coverage under the Policies(s) related to the COVID-19 pandemic are ambiguous and, therefore, must be construed strictly against Westfield and in favor of Plaintiffs and the Class Members.

CLASS ACTION ALLEGATIONS

46. Plaintiffs hereby restate the allegations and averments contained in the preceding paragraphs of this Complaint, as if fully rewritten herein, and further states as follows:

47. **Class Definition(s)**: In accordance with Ohio Civ. R. Proc. 23, Plaintiffs bring this action individually and on behalf of similarly situated persons and entities. In this action Plaintiffs seek certification of (1) a nationwide Declaratory Relief Class pursuant to Ohio Civ. R. Proc. 23(b)(2), (2) a nationwide Restitution/Monetary Relief Sub-Class pursuant to Ohio Civ. R. Proc. 23(b)(3), and (3) an Ohio State Sub-Class for Insurance Bad Faith pursuant to Ohio Civ. R. Proc. 23(b)(3) and 23(c)(5). This Class and these Sub-Classes are defined as follows⁷:

- a. ***Declaratory Relief Class (Count I)***: All commercial entities engaged in hospitality services including, without limitation, hotel operations and management, and banquet/catering event facility operations and management throughout the United States who, from January 1, 2020 to the present have been insured by Commercial and/or Business Owner Policies issued by Westfield and denied Business Income loss, Extra Expense and/or Civil Authority coverage due to COVID-19; and
- b. ***Restitution/Monetary Relief Sub-Class (Counts I, II)***: All commercial entities engaged in hospitality services including, without limitation, hotel operations and management, and banquet/catering event facility operations and management throughout the United States who from January 1, 2020 to the present have been insured by Commercial and/or Business Owner Policies

⁷ Alternatively, Plaintiffs seeks class certification pursuant to Ohio Civ. R. Proc. 23(c)(4) for each Class.

issued by Westfield and denied Business Income, Extra Expense and/or Civil Authority coverage due to COVID-19; and;

- c. ***Ohio State Bad Faith Sub-Class (Counts I, II and III)***: All commercial entities engaged in hospitality services including, without limitation, hotel operations and management, and banquet/catering event facility operations and management throughout the State of Ohio who from January 1, 2020 to the present have been insured by Commercial and/or Business Owner Policies issued by Westfield and denied, in bad faith, Business Income, Extra Expense and/or Civil Authority coverage due to COVID-19.

48. Excluded from the Class are Westfield's employees, officers, directors, legal representatives, successors, and assigns; any entity in which Westfield has a controlling interest; any Judge to whom the litigation is assigned; all members of the Judge's family; and all persons who timely and validly request exclusion from the Class. Plaintiffs reserves the right to modify the Class Definition(s) throughout the course of this litigation to conform with the evidence and facts as they develop.

49. This action has been brought as a class action, and may properly be maintained, pursuant to Ohio Civ. R. Proc. 23(b)(1), (2) and (3) of the Ohio Rules of Civil Procedure and case law thereunder and, alternatively, pursuant to Ohio Civ. R. Proc. 23(c)(4).

50. **Numerosity**: Plaintiffs do not know the exact number of the Members of the Class(es) because such information is in the exclusive control of Defendant. Due to the nature of the trade and commerce involved, however, Plaintiffs believe that Class Members number at least in the many thousands and possibly millions and are sufficiently numerous and geographically dispersed throughout the United States of America, and State of Ohio, so that joinder of all Class

Members is impracticable.

51. **Typicality**: The Plaintiffs' claims are typical of the Class Members' claims. Like other Class Members, Plaintiffs are insureds of Westfield who purchased Policies of Insurance and sought coverage and indemnification thereunder for Business Income loss, Extra Expense and Civil Authority coverage due to the COVID-19 pandemic, and were summarily denied the requested coverage by Westfield under the same, or substantially same, coverage forms.

52. **Adequacy**: Plaintiffs will fairly and adequately protect the interests of the Class Members. Plaintiffs' interests are aligned with the Class Members that Plaintiffs seeks to represent, and Plaintiffs have retained counsel experienced in complex class action litigation and insurance law, and who has previously been appointed lead and/or co-lead class action counsel in several previous class action matters. Plaintiffs do not have any conflicts of interest with any Class Members that would impair or impede its ability to represent such Class Members fully and adequately.

53. **Commonality**: Common questions of law and fact exist as to all Class Members and predominate over any questions solely affecting individual Class Members, including but not limited to:

- a. Whether Westfield has systematically and systemically refused and/or failed to find coverage and indemnify for Business Income loss, Extra Expense, and Civil Authority due to the COVID-19 pandemic;
- b. Whether Westfield has systematically and systemically denied coverage and indemnity for Business Income loss, Extra Expense, and Civil Authority due to the COVID-19 pandemic;
- c. Whether Westfield used inapplicable exclusions to deny coverage;

- d. Whether the pandemic resulted in a physical loss under the Westfield Policies;
- e. Whether the COVID-19 pandemic is a covered cause of loss under the subject Policies;
- f. Whether loss of use and/or utilization of Plaintiffs' and Class Members' businesses is a direct physical loss under the Westfield Policies;
- g. Whether the relevant terms and conditions of the Westfield Policies are ambiguous;
- h. Whether Class Members are entitled to declaratory and/or injunctive relief requiring Westfield to honor claims for Business Income loss, Extra Expense, and Civil Authority due to the COVID-19 pandemic in an amount determined by the Policies limits of liability for future claims;
- i. Whether Westfield breached its contract with Plaintiffs and the Class Members;
- j. Whether Westfield breached the implied duty of good faith and fair dealing, thus damaging Plaintiffs and Class Members;
- k. Whether, and to what extent, the conduct of Westfield caused injury to Plaintiffs and Members of the Class, and, if so, the appropriate measure of damages.
- l. Whether Plaintiffs and Class Members are entitled to injunctive and/or equitable relief as a result of Defendants' wrongful conduct;
- m. The proper form of equitable and injunctive relief;
- n. Whether Westfield acted in bad faith as to the Ohio Sub-Class Members.

54. **Risk of Inconsistent or Varying Adjudications.**

Certification pursuant to Ohio Civ. R. Proc. 23(b)(2), (b)(3), and/or 23(c)(4) is proper for the Classes defined above because the maintenance of separate actions by individual members of the

Classes would create a risk of inconsistent or varying adjudications with respect to interpretations of uniform Policies terms and obligations that would establish incompatible standards of conduct for the Defendant as the party opposing the class. Furthermore, certification under Ohio Civ. R. Proc. 23(b)(2), (b)(3) and/or 23(c)(4) is proper because adjudications with respect to individual Class Members would, as a practical matter, be dispositive of the interests of other Class Members not a party to the adjudication or would substantially impair or impede their abilities to protect their interests. In addition, the Defendant, as the party opposing the Classes, has acted, or refused to act on grounds generally applicable to the Classes, thereby making relief appropriate with respect to the Class as a whole.

55. *Superiority and Predominance For The Restitution/Monetary Relief Sub-Class.*

While Plaintiffs specifically states that certification pursuant to Ohio Civ. R. Proc. 23(b)(2) is proper by itself for this entire action because monetary damages in the form of restitution is merely incidental to the declaratory and injunctive relief sought, Plaintiffs alternatively alleges that certification of the Restitution/Monetary Relief Sub-Class and the Ohio State Sub-Class defined above is likewise proper under Ohio R Civ P. 23(b)(3). Specifically, common issues of fact and law as set forth above predominate over any individual issues that may exist. Furthermore, a Class Action is superior to other available methods for a fair and efficient adjudication of this controversy because joinder of all members of the class is impractical, and adjudication of this action as a Class is properly manageable, The interests of judicial economy favor adjudication of the claims alleged herein on a Class basis rather than an individual basis, especially where, as here, the amount of damages for each claim are small compared to the burden and expense that would be incurred if each claim was litigated individually.

56. Further, and in the alternative, Ohio. R. Civ. Proc. 23(c)(4) permits an action to

be maintained as a class action with respect to only particular issues, and the common questions of law and fact set forth above raise issues which are appropriate for class treatment pursuant to Ohio. R. Civ. Proc. 23(c)(4).

COUNT ONE

DECLARATORY JUDGMENT

57. Plaintiffs hereby restate the allegations and averments contained in the preceding paragraphs of this Complaint, as if fully rewritten herein, and further states as follows:

58. There is a genuine dispute and actual controversy, over which this Honorable Court has jurisdiction, between MIKMAR, LaMalfa, the Class Members, and Westfield concerning their respective rights, duties and obligations for which Plaintiffs and the Class Members desire a declaration of rights and obligations under Westfield's Policies. Pursuant to Ohio's Declaratory Judgment statute and all other uniform state declaratory judgment statutes and laws in which Plaintiffs and Class Members reside, this Honorable Court may declare the rights, obligations and legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

59. Since there is a dispute about whether or not MIKMAR, LaMalfa and the Class Members have coverage under Westfield's Policies for the loss sustained and to be incurred in the future, MIKMAR, LaMalfa and the Class Members are entitled to declaratory relief from this Honorable Court pursuant to Ohio Civil Rule 57 and R.C. §2721.01 to 2721.15, and the uniform state declaratory judgment statutes and laws in which the Class Members reside.

60. MIKMAR, LaMalfa and the Class Members are entitled to a declaration including, but not limited to, that:

- a. MIKMAR, LaMalfa and the Class Members sustained direct physical loss of or damage as a result of the coronavirus pandemic;
- b. Physical loss under the Policies does not require tangible physical damage;
- c. Loss of use and/or utilization of Plaintiffs' and Class Members' properties constitutes a direct physical loss under the Westfield Policies;
- d. COVID-19 is a covered cause of loss under the Policies;
- e. The losses incurred by MIKMAR, LaMalfa and the Class Members as a result of the executive orders issued by the Governor of Ohio and the Governors of the States wherein the Class Members reside are covered losses under the Policies;
- f. The prohibition (and/or significant limitation) of access to Property as Ordered by the Civil Authority Orders, constitutes a prohibition to the insureds' Property(s);
- g. The Civil Authority Orders triggers coverage because the Policies does not include an exclusion for a viral pandemic;
- h. The Policies provides coverage to Plaintiffs and Class Members for any current and future civil authority closures of commercial buildings due to physical loss of or damage to property from COVID-19 under the Civil Authority coverage parameters and the Policies(s) provides business income coverage in the event COVID-19 has caused a loss or damage at the insureds' Property(s) or immediate area of the insureds' Property(s);
- i. The Civil Authority Orders constitute a prohibition of access to the insureds' Property(s) by a Civil Authority as defined in the Policies(s);

- j. Westfield Mutual has not and cannot prove the application of any exclusion or limitation;
- k. MIKMAR, LaMalfa and the Class Members are entitled to coverage for their Business Income loss and Extra Expense resulting from coronavirus;
- l. MIKMAR, LaMalfa and the Class Members are entitled to coverage for loss due to the actions of Ohio's civil authorities, and the civil authorities wherein the Class Members reside;
- m. MIKMAR, LaMalfa and the Class Members have coverage for any substantially similar civil authority order in the future that limits or restricts the public's access to MIKMAR's, LaMalfa's and Class Members' business establishments and
- n. Any other issue that may arise during the course of litigation that is a proper issue on which to grant declaratory relief.

61. Plaintiffs pray for any further relief the Court deems proper, including attorney fees, interest and costs as allowed by law or in the exercise of the Court's equitable jurisdiction.

COUNT II

BREACH OF CONTRACT

62. Plaintiffs hereby restate the allegations and averments contained in the preceding paragraphs of this Complaint, as if fully rewritten herein, and further states as follows:

63. Plaintiffs and Class Members, and Westfield, entered into a valid and enforceable insurance contract.

64. Plaintiffs and Class Members gave valuable consideration in the form of premium payments in exchange for the promise of insurance coverage in the event of, among other things, loss of business income.

65. Westfield had an affirmative duty to comply with terms and conditions of the Policies and find coverage wherever possible under the Policies and indemnify Plaintiffs and the Class Members for their losses sustained and recoverable under the terms and conditions of the Policies.

66. Plaintiffs and Class Members made a claim for loss of Business Income, Extra-Expense and Civil Authority arising from the pandemic, interruption by civil authority and prohibited ingress and loss of use and/or utilization of Plaintiffs' and Class Members' properties.

67. Westfield breached the insurance contract by denying coverage for Plaintiffs' and Class Members' loss, which was due to a covered and foreseeable peril not subject to any exclusion.

68. Plaintiffs and Class Members complied with all of their obligations under the insurance contracts.

69. Westfield has also affirmatively waived any of its defenses to coverage sought by Plaintiffs and Class Members by failing to issue and/or assert in a timely matter, or at all, any reservation of rights.

70. Plaintiffs and Class Members have been injured and suffered financial harm as a result of Westfield's breach of the insurance contract.

71. In addition, in breaching the contract, Westfield has violated its implied duty to act in good faith and fair dealing with Plaintiffs and the Class Members.

72. As a direct and proximate result of Westfield's breach of contract, Plaintiffs and the Class Members have incurred substantial and ongoing monetary damages in excess of \$25,000.00.

COUNT III

BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING
(BAD FAITH)

73. Plaintiffs hereby restate the allegations and averments contained in the preceding paragraphs of this Complaint, as if fully rewritten herein, and further state as follows:

74. Ohio law recognizes the independent tort of bad faith in the context of the insured/insurer relationship.

75. Westfield's conduct has breached the implied covenant of good faith and fair dealing implicit to the Policies of insurance.

76. Ohio law provides that an insurer's lack of good faith is equivalent to bad faith.

77. Plaintiffs and the Ohio Bad Faith Sub-Class Members are all insureds of Westfield in the State of Ohio.

78. Westfield failed and refused to make an adequate investigation or any investigation regarding Plaintiffs' and Sub-Class Members' claims which, among other things, has caused a severe delay in full indemnification of Plaintiffs' and Sub-Class Members' claims, and providing all benefits that Plaintiffs and Sub-Class Members are entitled to under the Policies(s), which has severely prejudiced and damaged the Plaintiffs and Sub-Class Members, and has further resulted in Westfield withholding all recoverable benefits due under the Policies(s).

79. Westfield has also affirmatively waived any of its defenses to coverage sought by Plaintiffs and Class Members by failing to issue and/or assert in a timely manner, or at all, any reservation of rights.

80. Despite failing to preserve any defenses to coverage via a timely reservation of rights, Westfield has failed to accept coverage and indemnify Plaintiffs and Class Members as required under the subject Policies.

81. Westfield refused and continues to refuse to give any reasonable interpretation to the provisions in the Policies(s) or any reasonable application of such provisions to Plaintiffs' and Sub-Class Members' claims and has acted to protect its own financial interests therein at the expense of and detriment to Plaintiffs' and Sub-Class Members' rights.

82. Westfield fails to provide Plaintiffs and Sub-Class Members any reasonable or justifiable basis for denying Plaintiffs' and Sub-Class Members' claims.

83. Westfield misrepresented the Policies(s) terms and conditions to Plaintiffs and the Sub-Class Members including, and without limitation, attempting to use an inapplicable exclusion, i.e. the virus/bacteria exclusion in a knowingly and malicious attempt to avoid paying Plaintiffs and the Sub-Class Members all benefits they are entitled to under the Policies(s).

84. Westfield, knowing that Plaintiffs and Sub-Class Members were incompetent, inexperienced and unable to act to protect their interests, that such benefits were justly due, and that such benefits were necessary to pay Plaintiffs and Sub-Class Members necessities of their use of the Premises, nevertheless have deprived Plaintiffs and Sub-Class Members of such benefits.

85. Westfield's refusal to properly investigate, adjust, handle, process and/or pay benefits due Plaintiffs and Sub-Class Members compelled Plaintiffs and Sub-Class Members to, among other things, engage counsel and to initiate litigation to recover such benefits.

86. Plaintiffs and Sub-Class Members are informed and believe and thereon allege that Westfield intends to and will continue to delay, deny, and withhold, in bad faith, benefits due

Plaintiffs and Sub-Class Members unless and until compelled to pay such benefits by final judgment of this Honorable Court.

87. As a direct and proximate result of Westfield's conduct, Plaintiffs and Sub-Class Members have sustained substantial compensable losses, including benefits withheld, and economic losses, such as attorney's fees, out of pocket expenses, loss of business income, personal property loss, out-of-pocket costs and expenses, diminution in value of the insurance Policies, and have suffered embarrassment and humiliation and severe mental and emotional distress and discomfort, all to Plaintiffs' and Sub-Class Members' detriment and damage in amounts not fully ascertained, but in excess of \$25,000, and within the jurisdiction of this Honorable Court.

88. Further, at all material times and in doing things alleged herein, Westfield acted oppressively, maliciously and with a conscious disregard of Plaintiffs' and Sub-Class Members' rights, with the intention of benefitting Westfield financially and with the intention of causing or recklessly disregarding the probability of causing, injury and emotional distress to Plaintiffs and Sub-Class Members, Westfield has refused and continues to refuse to pay all benefits due Plaintiffs and Sub-Class Members and, further, has unjustifiably and/or intentionally failed to properly investigate, adjust, process, handle and pay Plaintiffs' and Sub-Class Members' claims resulting in a significant and unjustifiable delay in resolving Plaintiffs' and Sub-Class Members' claims under the terms and conditions of the Policies(s). In so doing, Westfield did vex, annoy, injure, and harass Plaintiffs and Sub-Class Members so as to justify the assessment of punitive and exemplary damages against Westfield.

WHEREFORE, Plaintiffs respectfully requests of this Honorable Court the following relief, on behalf of themselves and all others similarly situated:

a. An Order certifying the proposed Declaratory Relief Class herein pursuant to Ohio Civ. R. Proc. 23(B)(2), and appointing Plaintiffs and its counsel of record to represent the

Declaratory Relief Class;

b. That the court certify the Declaratory Relief Class as a class action pursuant to Ohio Civ. R. 23(B)(2) as defined above, and, at such time thereafter as the Court deems proper, then certify the Restitution/Monetary Relief Sub-Class and the Ohio State Bad Faith Sub-Class as a class action pursuant to Ohio Civ. R. 23(B)(3) and/or 23(C)(4) as defined above; award the Class Members monetary recovery in excess of \$25,000; and appoint Plaintiffs and its counsel of record to represent the 23(B)(3) and 23(C)(4) Class(es);

c. In the alternative, an Order certifying the proposed Classes pursuant to Ohio Civ. R. Proc. 23(C)(4); award the Class Members monetary recovery in excess of \$25,000, and appoint Plaintiffs and its counsel of record to represent the 23(C)(4)Class;

d. Pre-judgment and post-judgment interest;

e. Punitive damages, costs, and attorney fees where applicable and in the event the Ohio State Bad Faith Sub-Class is certified as a Class Action;

f. Plaintiffs' costs of suit, including, without limitation, its attorney's fees, expert fees, and actual incurred and costs; and

g. Such other further relief, at law or in MIKMAR and LaMalfa, as the Court deems just and proper.

JURY DEMAND

Pursuant to Ohio Civil Rule 38, Plaintiffs requests a jury trial of all issues alleged herein.

Respectfully submitted,

/s/ Thomas J. Connick
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