

I. BACKGROUND

1. On October 1, 2020, Plaintiff filed a Complaint (the “Complaint”) against Badger Mutual in the Circuit Court for the Twentieth Judicial Circuit, St. Clair County, Illinois, captioned *Smeez Inc., d/b/a Big Daddy’s Disco Diner, individually and on behalf of all others similarly situated v. Badger Mutual Insurance Company*, Case No. 20-L-758.

2. According to the Complaint, Plaintiff operates a restaurant and bar called Big Daddy’s in Belleville, Illinois that was forced to cease operations as the result of Illinois statewide executive orders (the “Closure Orders”) put in place to stop the spread of COVID-19. Compl., ¶¶ 1-2.

3. Plaintiff alleges that compliance with the Closure Orders, and the “presence of the virus in the community,” has caused direct physical loss of its property, in that the restaurant and its equipment have been made unavailable and Plaintiff’s functionality has been “severely reduced if not completely or nearly eliminated.” Compl., ¶ 22.

4. Plaintiff alleges that Badger Mutual should have provided coverage for Plaintiff’s losses under its policy of insurance (the “Policy”) that Badger Mutual issued to Plaintiff. Compl., ¶¶ 25-27, 34-26. Plaintiff alleges that, as a result of Badger Mutual’s denial of coverage and breach of the Policy, Plaintiff has suffered and will continue to suffer damages. Compl., ¶¶ 34-36.

5. Plaintiff brought this action on behalf of itself and a purported class of those allegedly similarly situated, seeking damages as a result of Badger Mutual’s alleged breach of contract (Count I), breach of the implied covenant of good faith and fair dealing (Count II), and bad faith conduct (Count III). Compl., ¶¶ 49-89. Plaintiff and the putative class also seek a declaratory judgment as to Badger Mutual’s liability and obligations under the Policy. *See* Compl., Prayer for Relief, (b) and (d).

II. THE COURT HAS SUBJECT MATTER JURISDICTION PURSUANT TO 28 U.S.C. § 1332(a)

6. Removal is proper in this case because this Court has original jurisdiction under 28 U.S.C. § 1332(a), *i.e.*, diversity jurisdiction. This Court has diversity jurisdiction, because (1) this action is between citizens of different states, and (2) there is at least \$75,000 in controversy, exclusive of interest and costs.

A. There is Complete Diversity of Citizenship Between Smeez and Badger Mutual.

7. Plaintiff alleges it is an Illinois corporation with its principal place of business in Belleville, Illinois. Compl., ¶ 11.

8. Badger Mutual was at the time this action was commenced, and still is, a citizen of Wisconsin because it is a Wisconsin mutual company with its principal place of business in Milwaukee, Wisconsin. Compl., ¶ 12. *See* 28 U.S.C. 1332(c); *see also Altom Transp., Inc. v. Westchester Fire Ins. Co.*, 823 F.3d 416, 420 (7th Cir. 2016) (“[a] corporation is a citizen of any state in which it is incorporated, and the state where it has its principal place of business.”); *Jackson v. Am. Coal Co.*, CIV05-4166-JLF, 2006 WL 181682, at *2-3 (S.D. Ill. Jan. 23, 2006) (denying remand because defendant was a citizen of the state of its incorporation and principal place of business).

9. Because Plaintiff is of different citizenship than Defendant, there is diversity of citizenship in this action proper for removal pursuant to 28 U.S.C. § 1332(a)(1) (diversity jurisdiction exists between “citizens of different States”).

B. The Amount in Controversy Exceeds the \$75,000 Jurisdictional Threshold.

10. The amount-in-controversy prong under 28 U.S.C. § 1332(a) requires the matter in controversy exceed the sum or value of \$75,000, exclusive of interest and costs.

11. A notice of removal “need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold.” *Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81, 89 (2014).

12. Though Plaintiff does not expressly quantify damages, a full and fair reading of the Complaint demonstrates the amount in controversy exceeds \$75,000, exclusive of interest and costs.

13. The Complaint seeks coverage under the Policy for Plaintiff’s losses sustained in the past and future. Compl., ¶¶ 10, 34-36. Liability limits under the Policy can exceed \$75,000.

14. Plaintiff alleges that, on March 20, 2020, Illinois Governor J.B. Pritzker issued a Stay at Home Order, in response to COVID-19, calling for the closure of all businesses. Compl. ¶ 17.

15. The Closure Orders allegedly implicated in this case cover several months (if not more).

16. Plaintiff alleges it has faced “serious financial harm,” and is in “financial straits.” Compl., ¶¶ 5, 7. Plaintiff further seeks all statutory remedies afforded by the Illinois Insurance Code.¹ Attorneys’ fees and statutory penalties are properly considered in determining the amount in controversy. *See Brandy v. Brotherhood’s Relief and Comp. Fund*, No. 07-C-2204, 2007 WL 9815742, at *2 (N.D. Ill. July 24, 2007) (“if a plaintiff seeks statutory penalties or attorneys fees, those amounts will count towards the amount in controversy ‘exclusive of interests and costs.’”).

17. Plaintiff’s allegations of “serious financial harm,” its request for statutory penalties, and attorneys’ fees, the fact that the coverage Plaintiff seeks can have liability limits over \$75,000, and the months-long duration of the potentially implicated Closure Orders, taken together, support

¹ Under Illinois law, attorney fees and statutory penalties may be awarded for violations of the Illinois Insurance Code. *See* 215 ILCS 5/155(a); 215 ILCS 5/1020(A).

the conclusion that the amount in controversy plausibly exceeds \$75,000. *See Dart Cherokee Basin Operating Co.*, 574 U.S. at 89.

18. In referring to Plaintiff's allegations as to damages and the potentially implicated Closure Orders, Badger Mutual does not admit or concede that Plaintiff is entitled to any relief.

III. THE COURT ALSO HAS SUBJECT MATTER JURISDICTION PURSUANT TO 28 U.S.C. § 1332(d)

19. Pursuant to 28 U.S.C. §1332(d), removal is proper under CAFA, because United States District Courts have original jurisdiction over any class action: (i) involving a plaintiff class of 100 or more members; (ii) where at least one member of the plaintiff class is a citizen of a state different from any defendant; and (iii) in which the matter in controversy exceeds the sum or value of \$5 million, inclusive of interest and costs. *See* 28 U.S.C. §1332(d). Here, all three of the CAFA prerequisites are satisfied.

A. The Putative Class Exceeds 100 Members.

20. This class action involves a proposed class of more than 100 members.

21. Plaintiff has brought this action, "on behalf of itself and the following proposed Class . . . [a]ll restaurants in Illinois that purchased comprehensive commercial insurance coverage from Defendant Badger Mutual . . ." Compl., ¶ 37. Plaintiff alleges there are "tens of thousands of restaurants in Illinois which are governed by the Closure Orders and attendant statewide dine-in restrictions, and public reporting reveals that many have filed claims with Badger Mutual." Compl., ¶ 41.

22. Therefore, the proposed class is comprised of at least 100 members as required under CAFA. *See* 28 U.S.C. § 1332(d)(5)(B).

B. Minimal Diversity Exists.

23. As discussed, Smeez is a citizen of Illinois. Compl., ¶ 11.

24. Badger Mutual, was at the time this action was commenced, and still is, a citizen of Wisconsin because it is a Wisconsin mutual company with its principal place of business in Milwaukee, Wisconsin. Compl., ¶ 12.

25. Because Smeez and Badger Mutual are citizens of different states, there is at least minimal diversity among the parties to this case as required under CAFA for original jurisdiction in this Court. *See* 28 U.S.C. § 1332(d)(2)(A).

C. The Amount in Controversy Exceeds the Jurisdictional Threshold.

26. The amount in controversy in this case exceeds \$5 million, inclusive of interests and costs. *See* 28 U.S.C. § 1332(d)(2); *Appert v. Morgan Stanley Dean Whitter, Inc.*, 673 F.3d 609, 617 (7th Cir. 2012).

27. In removing a case under CAFA, the removing party need only supply a “good-faith estimate” of the amount in controversy that is “plausible and adequately supported by the evidence ...” *Blomberg v. Serv. Corp. Int’l*, 639 F.3d 761, 763-64 (7th Cir. 2011). The removing party meets this burden by proving the jurisdictional aspects by a preponderance of the evidence. *Id.* at 763.

28. Though Plaintiff does not expressly quantify damages, the Complaint seeks declaratory relief for Plaintiff and the putative class members to determine coverage under the Policy for their loss(es) sustained, and damages for Badger Mutual’s alleged breach and bad faith conduct related to the insurance policies. *See generally*, Prayer for Relief, (b)-(i). Liability limits under each putative class member’s policy can exceed \$75,000. Moreover, Plaintiff alleges that there are “tens of thousands” of restaurants in Illinois, “many” of which have filed claims against Badger Mutual. Compl., ¶ 41.

29. Further, Plaintiff and the putative class members seek attorney's fees and statutory penalties afforded by the Illinois Insurance Code, which are considered in determining the amount in controversy. *See Brandy*, 2007 WL 9815742, at *2.

30. Although Badger Mutual does not concede Plaintiff or any putative class member is entitled to damages or attorney's fees, the claimed damages and attorney's fees exceed the \$5 million threshold for CAFA jurisdiction. *See* 28 U.S.C. § 1332(d)(2).

IV. ALL PROCEDURAL REQUIREMENTS ARE MET

31. The United States District Court for the Southern District of Illinois, East St. Louis Division, is the appropriate venue for removal of Plaintiff's state court action pursuant to 28 U.S.C. § 1441, which permits any civil action brought in any state court in which the district courts of the United States have original jurisdiction to be removed to the district court of the United States for the district and division embracing the place where the state court action is pending. This action was originally filed in the Twentieth Judicial Circuit of St. Clair County, Illinois, making venue in this federal judicial district and division proper. 28 U.S.C. § 102(a)(1); 28 U.S.C. § 1441(a).

32. Pursuant to 28 U.S.C. § 1446(a), Badger Mutual attaches to this notice the Complaint and other filings in the Circuit Court that constitute all "process, pleadings, and orders" served to date on Badger Mutual. *See* Ex. A hereto.

33. This Notice of Removal is timely under 28 U.S.C. § 1446(b), because it is filed within 30 days of the filing of Plaintiff's Complaint, and within one year of the commencement of the Action.

34. Pursuant to 28 U.S.C. § 1446(d), prompt written notice of this Notice of Removal is being sent to Plaintiff through its counsel, and to the Clerk of Court of St. Clair County, Illinois.

35. Badger Mutual submits this Notice of Removal without waiving any defenses to the claims asserted by Plaintiff, without conceding that Plaintiff has pled claims upon which relief can be granted, and without admitting that Plaintiff is entitled to any monetary relief whatsoever (or that the damages it seeks may be properly sought).

WHEREFORE, Badger Mutual Insurance respectfully removes this action now pending in the Circuit Court of St. Clair County, Illinois, to the United States District Court for the Southern District of Illinois.

Date: October 27, 2020

Respectfully submitted,

/s/ Scott J. Helfand

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CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2020, the foregoing was served via e-mail upon the following counsel of record:

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IN THE TWENTIETH JUDICIAL CIRCUIT
 ST. CLAIR COUNTY, ILLINOIS

SMEEZ INC., d/b/a BIG DADDY'S
 DISCO DINER, individually and on behalf
 of all others similarly situated,

Plaintiffs,

v.

BADGER MUTUAL INSURANCE
 COMPANY,

Defendant.

JURY DEMAND

Case No. 20L0758

CLASS ACTION COMPLAINT

Plaintiff Smeez Inc., d/b/a Big Daddy's Disco Diner ("Smeez"), individually and on behalf of all others similarly situated, files suit against Badger Mutual Insurance Company ("Badger Mutual") and alleges as follows.

INTRODUCTION

1. Beginning March 16, 2020, Illinois Governor J.B. Pritzker issued a series of Executive Orders ("Closure Orders") instructing all 12.7 million Illinois residents to remain at home, with certain exceptions. Though lifesaving, these mandates, which remain partially in place, prohibited dine-in service at Illinois restaurants. This prohibition is not merely causing severe financial distress for restaurateurs and their employees; such closures threaten the viability of Illinois's restaurant industry.

2. Plaintiff's restaurant Smeez in Belleville, Illinois is among the thousands of restaurants that have been forced by the presence of coronavirus in the community and State orders to cease operations as part of the Closure Orders. Smeez and many Illinois restaurants—none of which bear fault for statewide closures—were responsible business stewards, thus paying for business interruption insurance to protect against a situation like this.

3. But insurance companies operating in Illinois—despite collecting premiums for such risks—are categorically denying claims from restaurants arising from the presence of the virus or Illinois’s mandated interruption of business services. Those denials are often made with little or no investigation and without due regard for the interests of insureds.

4. Indeed, form letters denying coverage for such losses appear to rest on crabbed readings of coverage language. That gets insurance law exactly backwards—and raises the specter of bad-faith denials.

5. Smeez’s experience is no different. Smeez has dutifully followed Illinois’s mandates, issued to stem the spread of coronavirus in the community. Facing serious financial harm, it has filed a claim with Badger Mutual for business interruption coverage.

6. Badger Mutual swiftly denied the claim. Though its reasons are cursory, the denial appears to be based on an unreasonable reading of its policy, which tracks form policies issued throughout Illinois on a take-it-or-leave-it basis.

7. That leaves Smeez in financial straits—precisely the situation it sought to avoid when it obtained coverage for business interruptions.

8. Smeez and other restaurants bought full-spectrum, comprehensive insurance for their *businesses* – not just for tangible damage to their premises and equipment. And for good reason. Business interruptions are a particular concern of the restaurant industry. Insurance coverage is important, if not vital, because profit margins in the restaurant industry are slim and reserve funds tend to be low.

9. Smeez and other Illinois restaurants reasonably believed they had comprehensive coverage that would apply to business interruptions under circumstances like these, where they have done everything right to protect their businesses and the public. But insurance companies

like Badger Mutual are cutting those lifelines – despite having pocketed significant premiums for their policies.

10. Plaintiff thus brings this action, on behalf of itself and other Illinois restaurants similarly situated, seeking declaratory relief, insurance coverage owed under Badger Mutual's comprehensive commercial owners' policies, and damages.

PARTIES

11. Plaintiff Smeez Indy LLC, d/b/a Smeez Restaurant is a corporation formed under the laws of Illinois. Its principal place of business is in Belleville, Illinois.

12. Defendant Badger Mutual, A Mutual Company is a corporation organized under laws of Wisconsin with its principal place of business in Milwaukee, Wisconsin. At all relevant times, Badger Mutual operated in Illinois.

JURISDICTION AND VENUE

13. Venue lies in St. Clair County pursuant to 735 ILCS 5/2-101 because Plaintiff resides in St. Clair County and the events or omissions giving rise to the claims asserted herein occurred in St. Clair County.

FACTUAL BACKGROUND

14. On March 9, 2020, Illinois Governor Pritzker issued a Gubernatorial Disaster Proclamation, declaring a public health emergency in the state of Illinois.

15. On March 13, 2020, Governor Pritzker issued Executive Order 2020-04, the first of many statewide Closure Orders, mandating that "all public and private gatherings of 1,000 or more people [were] cancelled for the duration of the Gubernatorial Disaster Proclamation."

16. On March 16, 2020, Governor Pritzker issued Executive Order 2020-07, mandating that "all businesses in the State of Illinois that offer food or beverages for on-premises

consumption—including restaurants, bars, grocery stores, and food halls—must suspend service for any may not permit on-premises consumption.” Businesses were “permitted and encouraged” to serve food through delivery, drive-through, and take-out services.

17. On March 20, 2020, Governor Pritzker issued Executive Order 2020-10, mandating all individuals living in Illinois to “stay at home or their place of residence.” The order further directed all non-essential businesses and operations to cease, and prohibited all public and private gatherings of any number of people occurring outside a single household or living unit[.]” These mandates were extended throughout all of April and May. (Executive Orders 2020-18 and 2020-32).

18. On May 29, 2020, Governor Pritzker issued Executive Order 2020-38, setting forth a plan known as “Restore Illinois.” However, under the first phase of Restore Illinois, known as “Phase 3,” restaurants and bars were still only permitted to open for delivery, pickup, and drive through.

19. On June 8, 2020, the Illinois Department of Insurance issued Company Bulletin 2020-15, “Coverage Related to Business and Property Damage Losses, Including but not Limited to Those Arising Out of Vandalism and Looting.” In pertinent part, the Department of Insurance advised, “[t]o the extent business interruption provisions are included and operative under a policy, insurers should base payouts on business activity levels that eliminate the impact of COVID-19.”

20. On June 26, 2020, Illinois moved to “Phase 4,” of Restore Illinois, under which it is currently operating. Under “Phase 4,” restaurants and other establishments to are permitted to open for in-person dining, but with limited capacity as set forth by the Illinois Department of Public Health.

PLAINTIFF'S EXPERIENCE

21. Plaintiff operates a restaurant and bar called Big Daddy's in Belleville, Illinois, just outside of St. Louis. Big Daddy's began in the Historic Soulard neighborhood in downtown St. Louis in 1999, and has grown to four more locations in the Greater St. Louis area, including the Belleville location.

22. Smeez has complied with all applicable Closure Orders of Illinois state and local authorities. Compliance with those Closure Orders, and the presence of the virus in the community, has caused direct physical loss of Smeez's insured property in that the restaurant and its equipment, furnishings and other business personal property, has been made unavailable, inoperable, useless and/or uninhabitable; and its functionality has been severely reduced if not completely or nearly eliminated.

23. The impact of these Closure Orders and the presence of the virus is felt not simply in their direct application to Smeez's operations, but also in the damage caused to neighboring businesses and properties.

24. Even though Illinois has begun to relax its mandates, Smeez will encounter continued loss of business income due to the presence of the virus and the Closure Orders because, in issuing those orders, government officials have stated that densely occupied public spaces are dangerously unsafe, and continuing to operate the restaurant might expose Smeez to the risk of contaminated premises as well as exposing customers and workers to heightened transmission and infection risks.

25. Plaintiff purchased comprehensive commercial liability and property insurance from Badger Mutual for the policy period of March 15, 2020 to March 15, 2021 to insure against risks the business might face. Such coverage includes business income with extra expense

coverage for the loss. Once triggered, the policy pays actual losses sustained for the business income and extra expense coverage.

26. Plaintiff's policy contains an exclusion for Civil Authority. The Civil Authority exclusion is not applicable to Plaintiff's claims because Plaintiff's property was not seized, confiscated, destructed, or quarantined.

27. Plaintiff's policy also contains a Virus or Bacteria Exclusion endorsement, Form CL 0700 10 06. The exclusion in the Virus and Bacteria endorsement is not applicable because Plaintiff's and other class members' losses were not caused by a "virus, bacterium or other microorganism that causes disease, illness, or physical distress." Plaintiff's and other class members' losses were caused by measures taken by the State of Illinois government, to prevent the spread of COVID-19. The losses were not caused by or related to coronavirus having been detected in or on Plaintiff's insured property.

28. To date, Plaintiff has paid all of the premiums required by Badger Mutual to keep its policy in full force.

29. On or about March 16, 2020 Plaintiff reported a loss of business income under its policy.

30. On or about May 13, 2020, Badger Mutual denied Plaintiff's claim for coverage. In a cursory denial letter, Badger Mutual cited policy language stating it "do[es] not pay for loss . . . caused by order of any civil authority, including seizure, confiscation, destruction, or quarantine of property[.]" or "loss, cost, or expense . . . caused by, resulting from, or relating to any virus, bacterium, or other microorganism[.]" Badger Mutual offered no written explanation of the factual or legal basis for its decision to deny coverage.

31. Badger Mutual's denial letter, on information and belief, appears to be a form letter

sent in response to any restaurant with comprehensive commercial insurance that files a claim arising from Illinois's Closure Orders, and was issued without any investigation by Badger Mutual within one day of the filing of Plaintiff's claim.

32. Commercial insurance policies purchased by small businesses like restaurants are not individually negotiated. At most, the prospective policyholder may elect to add specialized coverage options to a basic commercial insurance policy form. But the substantive terms are set unilaterally by the insurer.

33. Plaintiff's policy includes common terms and phrases widely used by the insurance industry. The insurance industry typically hews closely to standardized insurance policy forms in addressing property and liability risks, and Badger Mutual did so here.

34. Badger Mutual's denial is contrary to the terms and conditions of the policy and applicable law, which gives effect to plain language, construes coverage agreements broadly, narrowly construes exclusions, and construes ambiguity in favor of coverage.

35. Badger Mutual's denial of coverage breached its obligation and responsibility to provide coverage available through the policy to Plaintiff due to its covered loss of business income because it has suffered direct physical loss of its insured real and business personal property.

36. As a result of Badger Mutual's denial of coverage and breach of the insurance policy it issued, Plaintiff has suffered and will continue to suffer damages due to Badger Mutual's wrongful denial of vital property and business income coverage, which Plaintiff acquired to ensure the survival of its business in these circumstances.

CLASS ALLEGATIONS

37. Plaintiff brings this action on behalf of itself and the following proposed Class (the

“Class”):

All restaurants in Illinois that purchased comprehensive commercial insurance coverage from Defendant Badger Mutual which includes coverage for business interruption, filed a claim for lost business income following Illinois’s Closure Orders, and were denied coverage by Badger Mutual.

38. Excluded from the Class are Defendant, any entity in which Defendant has a controlling interest, and Defendant’s officers, directors, legal representatives, successors, subsidiaries, and assigns. Also excluded from the Class are any judge, justice, or judicial officer presiding over this matter and the members of their immediate families and judicial staff.

39. Plaintiff reserves the right to amend the Class definition if discovery and further investigation reveal that the Class should be expanded, divided into subclasses, or modified in any other way.

40. This action has been brought and may properly be maintained as a class action as it satisfies the numerosity, commonality, typicality, adequacy, predominance, and superiority requirements.

41. Numerosity: Although the precise number of members of the Class is unknown and can only be determined through appropriate discovery, on information and belief, the members of the proposed Class are so numerous that joinder of all members would be impracticable. There are tens of thousands of restaurants in Illinois which are governed by the Closure Orders and attendant statewide dine-in restrictions, and public reporting reveals that many have filed claims with Badger Mutual but have been denied coverage.

42. Common Questions of Law and Fact Predominate: The questions of law and fact common to the Class predominate over any questions affecting only individual Class members, particularly because the focus of the litigation will be on Badger Mutual’s conduct. The

predominant questions of law and fact in this litigation include, but are not limited to:

- a. Whether Defendant's comprehensive commercial insurance policies cover claims for lost business income under the circumstances present here;
- b. Whether Defendant violates the terms of its standard commercial insurance policies by denying claims for lost business income as described herein;
- c. Whether Defendant breached the implied covenant of good faith and fair dealing in its handling of its insureds' claims for lost business income;
- d. Whether Defendant acted in bad faith in denying claims for lost business income without investigation or due consideration of those claims;
- e. Whether the declaratory judgment sought is appropriate; and
- f. The proper measure of damages.

43. These questions predominate over any questions affecting only individual Class members. This is particularly true because, on information and belief, the terms of the Badger Mutual's commercial insurance policies are identical or substantively identical and Badger Mutual has acted uniformly with respect to such policies.

44. Typicality: The claims asserted by the Plaintiff in this action are typical of the claims of the members of the putative Class as the claims arise under Badger Mutual's standard commercial insurance policies, challenge Badger Mutual's standard course of conduct under those policies, and seek common relief therefor.

45. Adequacy of Representation: Plaintiff will fairly and adequately represent and protect the interests of the members of the putative Class, as its interests coincide with, and are not antagonistic to, the other members of the Class. Plaintiff has retained counsel competent and experienced in consumer protection, insurance coverage, and class-action litigation.

46. Superiority of Class Action: A class action is superior to any other method available for the fair and efficient adjudication of these claims including consistency of adjudications. Absent a class action it would be highly unlikely that the members of the Class would be able to protect their own interests because the cost of litigation through individual lawsuits might exceed the expected recovery. Moreover, a class action is a superior method for the adjudication of the controversy in that it will permit a large number of claims to be resolved in a single forum simultaneously, efficiently, and without the unnecessary hardship that would result from the prosecution of numerous individual actions and the duplication of discovery, effort, expense, and the burden of the courts that individual actions would create.

47. Action Generally Applicable to Class as a Whole: Defendant has acted or refused to act on grounds generally applicable to the proposed Class, thereby making appropriate final and injunctive relief with respect to the members of the proposed Class as a whole.

48. Likewise, particular issues are appropriate for certification under 735 Ill. Stat. Ann. 5/2-801 because such claims present only particular, common issues, the resolution of which would advance the disposition of this matter and the parties' interests therein. Such particular issues include, but are not limited to:

- a. Whether the comprehensive commercial insurance policies issued by Defendant cover Class members' direct physical loss of property and lost business income following the presence of coronavirus and Illinois's Closure Orders;
- b. Whether the coverages for direct physical loss of property and lost business income provided by the comprehensive commercial insurance policies are precluded by exclusions or other limitations in those policies;

- c. Whether Defendant breached contracts by denying comprehensive commercial insurance coverage to Plaintiff and Class members;
- d. Whether Defendant's summary denial of claims for direct physical loss of property and lost business income, without any investigation or inquiry, constitutes bad faith and therefore a breach of the implied covenant of good faith and fair dealing to act in good faith and with reasonable efforts to perform its contractual duties and not to impair the rights of other parties to receive the rights, benefits, and reasonable expectations under the contracts;
- e. Whether Badger Mutual's handling of claims for direct physical loss of property and lost business income associated with the presence of coronavirus and public health measures such as Illinois's Closure Orders constitutes a breach of the implied covenant of good faith and fair dealing; and
- f. Whether Plaintiff and Class members are entitled to actual damages and/or injunctive relief as a result of Defendant's wrongful conduct.

FIRST CAUSE OF ACTION
Breach of Contract

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

50. Plaintiff and Class members purchased comprehensive commercial insurance policies from Defendant to ensure against all risks (unless specifically excluded) a business might face. These policies were binding contracts that afforded Plaintiff and Class members comprehensive commercial insurance under the terms and conditions of the policies.

51. Plaintiff and Class members met all or substantially all of their contractual obligations, including paying all the premiums required by Defendant.

52. On or about March 16, 2020, Illinois Governor Pritzker issued Executive Order

2020-07, mandating restaurants, including those owned by Plaintiffs and Class members, to cease all dine-in services. This mandate also applied to neighboring businesses, thus causing widespread closures surrounding Plaintiff's business premises and those of the Class.

53. Beginning on March 16, 2020 and continuing through the date of the filing of this Complaint, Plaintiff and Class members suffered the direct physical loss of property and lost business income as the direct result of Illinois's Closure Orders and the presence of coronavirus in the community—losses which are covered under the comprehensive commercial insurance policies purchased from Defendant.

54. There are no applicable, enforceable exclusions in Plaintiff's and Class members' comprehensive commercial insurance policies that preclude coverage.

55. Defendant breached its contracts by denying comprehensive commercial insurance coverage to Plaintiff and Class members as described herein.

56. At all relevant times, the grounds that Defendant used to deny the claim were unreasonable, unjustified, and not well grounded.

57. In its denial letter, Defendant gave a bare notice of a reservation of rights, so as to ineffectively claim a reservation of rights.

58. In its denial letter, Defendant did not make specific reference to any other policy defense which would be ultimately asserted, and therefore, did not properly reserve any further rights to a defense.

59. Defendant is estopped from asserting any other grounds as a basis for its denial that is not contained in the denial letter.

60. By their continued refusal and improper notification to Plaintiff of its denial, Defendant has waived any policy defenses under the policy.

61. Defendant has breached the terms of the policy by continually refusing to tender the insurance policy benefits to Plaintiff.

62. As a direct and proximate result of Defendant's denial of comprehensive commercial insurance coverage to Plaintiff and Class members, Plaintiff and Class members suffered damages.

SECOND CAUSE OF ACTION

Breach of Implied Covenant of Good Faith and Fair Dealing

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

64. Plaintiff and Class members contracted with Defendant to provide them with comprehensive commercial insurance to ensure against all risks (unless specifically excluded) a business might face.

65. Under the laws of the states where Badger Mutual does business, including Illinois, good faith is an element of every contract between insurance companies and their insureds.

66. Badger Mutual's contracts are subject to implied covenants of good faith and fair dealing that all parties would act in good faith and with reasonable efforts to perform their contractual duties—both explicit and fairly implied—and not to impair the rights of other parties to receive the rights, benefits, and reasonable expectations under the contracts. These contracts thus include the covenants that Defendant would act fairly and in good faith in carrying out their contractual obligations to provide Plaintiff and Class members with comprehensive commercial insurance.

67. Plaintiff and covered Class members reported a loss of business income under their respective commercial insurance policies.

68. Defendant denied Plaintiff's and covered Class members' claims for insurance coverage.

69. Defendant did not have a reasonable basis for denying Plaintiff's and the covered Class members' claims for coverage.

70. Defendant did not properly investigate plaintiff's or the covered Class members' claims, nor were the results of Defendant's investigation subject to a reasonable evaluation and review.

71. Defendant was aware that there was no reasonable basis for denying plaintiff's or the covered Class members' claims for coverage.

72. Defendant displayed a reckless indifference to the facts or proofs submitted by plaintiff and the covered Class members' claim for coverage.

73. Defendant breached the implied covenant of good faith and fair dealing by:

- a. Selling policies that appear to provide liberal coverage for loss of property and lost business income with the intent of interpreting undefined or poorly defined terms, undefined terms, and ambiguously written exclusions to deny coverage under circumstances foreseen by Defendant;
- b. Denying coverage for loss of property and lost business income unreasonably, and without a rational basis in their policy and applicable law by applying undefined, ambiguous, and contradictory terms contrary to applicable rules of policy construction and the plain terms and purpose of the policy;
- c. Denying Plaintiff and Class members' claims for loss of property and loss of business income without conducting a fair, unbiased, and thorough investigation or inquiry; and
- d. Compelling Plaintiff and Class members to initiate this litigation to secure the policy benefits to which they are entitled.

74. Plaintiff and Class members met all or substantially all of their contractual obligations, including by paying all the premiums required by Defendant.

75. Defendant's failure to act in good faith in providing comprehensive commercial insurance coverage and exercising its discretion under its commercial insurance policies to Plaintiff and Class members denied Plaintiff and Class members the full benefit of their bargain.

76. Accordingly, Plaintiff and Class members have been injured as a result of Defendant's breach of the covenant of good faith and fair dealing and are entitled to damages in an amount to be proven at trial.

THIRD CAUSE OF ACTION
Bad Faith

77. Defendant failed to properly investigate the Plaintiff's claim. Defendant denied this claim within one day of its submission.

78. In denying plaintiff's claim, and all other class members claims, defendant has engaged in such activity with such frequency so as to indicate a persistent tendency to engage in the type of conduct described herein.

79. Defendant has refused to pay this claim without conducting a reasonable investigation based on all available information. Defendant is doing no investigation, but is rather flat out denying all claims for business interruption coverage.

80. Defendant has knowingly misrepresented to Plaintiffs relevant policy provisions relating to coverage by knowingly misconstruing the applicability of the Virus Exclusion to the facts of these circumstances.

81. Defendant has never assisted, or even tried to assist to help Plaintiff during the claims handling process. Rather, Defendant chose to stick its head in the sand and issue a blanket denial.

82. Defendant has not attempted in good faith to effectuate prompt, fair, and equitable settlement of claims submitted.

83. The Defendant's sole intention during the entire claim process was to find a way to deny this claim, versus conducting an unbiased, informative, and collaborative investigation.

84. Rather, Defendant chose to knowingly and completely disregard evidence and misconstrue policy exclusions in the hopes of avoiding coverage at all costs.

85. Defendant repeatedly investigated this matter without Plaintiff's interest in mind. Rather, Defendant chose to disregard evidence, and investigated this matter in a biased way so as to only try to find ways to avoid coverage and deter Plaintiff from seeking coverage for their rightful claim.

86. Defendant has never uncovered any substantive ground to justify the denial in this matter. Rather, Defendant has tried to throw every possible issue at the wall in the hopes that something would stick to justify its wrongful denial. This is clearly not how insurance claims are supposed to be handled in this State.

87. Defendant has now forced its own policyholder, Plaintiff, to initiate a lawsuit recover what is rightfully owed, and hire a lawyer, when there are no reasonable grounds to deny the claim.

88. Defendant's actions are done for no other purpose than to force Plaintiff into filing suit and incurring as much expense and delay as possible.

89. Defendant's conduct is clearly done in bad faith, is unreasonable and vexatious.

PRAYER FOR RELIEF

Plaintiff, on behalf of itself and the Class, requests the following relief:

- a. An order certifying this action as a class action under 735 Ill. Stat. Ann. 5/2-801,

appointing Plaintiff as Class Representative, and appointing Plaintiff's counsel as Class Counsel.

- b. A declaration that Plaintiff's and Class members' losses are covered under Defendant's comprehensive commercial insurance policies;
- c. Actual damages in an amount according to proof;
- d. Injunctive or declaratory relief;
- e. Pre- and post-judgment interest at the maximum rate permitted by applicable law;
- f. Costs and disbursements assessed by Plaintiff in connection with this action, including reasonable attorneys' fees pursuant to applicable law;
- g. Attorneys' fees for Badger Mutual's bad faith, under the common fund doctrine, and all other applicable law; and
- h. Such other relief as this Court deems just and proper; and
- i. All penalties applicable pursuant to 215 ILCS 5/155, *et seq.*, including but not limited to, 60% of what should have been paid, attorneys fees, costs and interest.

JURY DEMAND

Plaintiff, by counsel, demands trial by jury.

Dated: October 1, 2020

Respectfully Submitted,

By: /s/ David Cates

DAVID CATES #6289198

CATES MAHONEY, LLC

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& JENNINGS, PLLC**
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**To be admitted pro hac vice*

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

SMEEZ, INC. d/b/a BIG DADDY'S
DISCO DINER, individually and on behalf of others similarly situated

(b) County of Residence of First Listed Plaintiff St. Clair, IL
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

David Cates, Cates Mahoney, LLC 216 West Pointe Drive, Suite A,
Swansea, Illinois 62226, 618-277-3644

DEFENDANTS

Badger Mutual Insurance Company

County of Residence of First Listed Defendant Milwaukee, WI
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF
THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

Scott J. Helfand, Husch Blackwell LLP, 120 S. Riverside
Plaza, Suite 2200, Chicago, IL 60606, (312) 655-1500

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☐ 2 U.S. Government Defendant
- ☐ 3 Federal Question
(U.S. Government Not a Party)
- ☒ 4 Diversity
(Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|---------------------------------------|----------------------------|---|----------------------------|---------------------------------------|
| Citizen of This State | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input checked="" type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☐ 1 Original Proceeding ☒ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District (specify) ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
§§ 1332, 1441, and 1446

Brief description of cause:
Breach of contract

VII. REQUESTED IN COMPLAINT:

☒ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$
5,000,001.00

CHECK YES only if demanded in complaint:
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

10/27/2020

SIGNATURE OF ATTORNEY OF RECORD

/s/ Scott J. Helfand

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE