

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF KANSAS,

3 PAUL GUSTAFSON, et al.,

Docket No. 20-2272-KHV

4 Plaintiffs,

Kansas City, Kansas

Date: 5/12/2021

5 v.

6 TRAVEL GUARD GROUP, INC, et al.,

7 Defendants.
8

9 TRANSCRIPT OF
10 STATUS HEARING
BEFORE THE HONORABLE KATHRYN H VRATIL,
11 UNITED STATES SENIOR JUDGE.

12 APPEARANCES:

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1 THE COURT: Good afternoon. The court calls
2 Gustafson, et al., versus Travel Guard Group, Incorporated, et
3 al., Case Number 20-2272. Could you please state your
4 appearances please?

5 MR. RICHARDS: Yes, Your Honor, Kip Richards and David
6 Skeens for the plaintiffs, Paul and Debra Gustafson.

7 THE COURT: Thank you.

8 MS. HARRISON: Good afternoon, Your Honor, Ashley
9 Harrison and Bill Burck on behalf of defendants.

10 THE COURT: Thank you. I want to talk about
11 plaintiff's motion to file a second amended complaint.
12 Frankly, I was disappointed and pretty surprised when I read
13 what you're proposing to adopt as an amended pleading. I
14 thought I had been very clear, and maybe in fact, too clear
15 about what I thought were the deficiencies in the first amended
16 complaint. It's extremely rare when I am evaluating a motion
17 to dismiss that I actually stop the proceedings, tell the
18 plaintiffs what I think the problems are, give 'em a chance to
19 cure the problems to avoid a dismissal with prejudice, and have
20 them ignore everything I say. It's been a while since I was in
21 private practice, but I -- one thing I would not have done is
22 what you guys did, and my sense of the proposed amendment is
23 that it's futile, and either we go back and enter judgment on
24 the first amended complaint or figure out some other path
25 forward. It looks to me like what you've done is doubled down

1 on all the problems that I thought I had signaled were at issue
2 in the first complaint. This is one of the most ill-conceived
3 class actions I have ever seen, and I've given you a chance to
4 try to rectify that and come up with a manageable class with a
5 legitimate path forward, and you don't seem to be interested in
6 doing that. So first of all, Mr. Richards, you're the one that
7 tends to sign all the pleadings, so I expect you're the one who
8 is mostly involved here for purposes of Rule 11. Who -- who is
9 the one that is calling the shots here? Is it you or the
10 client or Mr. Skeens?

11 MR. RICHARDS: Your Honor, would you like me to come
12 to the lectern or --

13 THE COURT: Yes.

14 MR. RICHARDS: This is not a money grab, and frankly,
15 I understand that you've never issued an order like this, and
16 you wouldn't have expected to issue an order like this, and you
17 don't like issuing orders like that. Believe you, I don't --
18 I've never gotten an order like this. I never expected to get
19 an order like this, and I'm -- I'm actually very concerned that
20 the legal work that I think I've done and I think I was doing
21 for a lot of other people has been viewed this way, and it's my
22 goal and my effort here today to try to convince you of what
23 and how we view this case. This is not a situation where I'm
24 controlling Mr. and Mrs. Gustafson. Their motives and
25 motivations for filing the suit are exactly the same as mine,

1 and I'll tell you how this case came about. My wife and I were
2 booked on the same trip as the Gustafson's, the same cruise,
3 and in April of 2020, we had the same travel agent that was
4 selling the travel policies through Travel Guard. We got word
5 that the trip, not the policy, but that the trip was cancelled,
6 and in that e-mail, I assumed pursuant to an agreement with
7 Travel Guard, the travel agent said the insurance premiums are
8 not refundable, they are going to instead issue a
9 time-restricted voucher for two years, and that you have the
10 opportunity -- this is March 2020, you have the opportunity to
11 use that voucher within two years. Well, I can tell you one,
12 this was the first trip I'd ever booked. I don't think I can
13 fit in a boat, and I wasn't going anywhere in two years after
14 this, and so I said to the travel agent, and this was my
15 personal communications, I said they have to refund the
16 premium. They can't keep this. It's like the risk for the
17 post-departure coverage never attached. So they -- the law is,
18 you can't keep that premium, and the travel agent said, well, I
19 don't know about that, but let me run it up the chain and I'll
20 get back with you, and I got a response back that said, nope,
21 you have a voucher, they're not going to refund the premium,
22 and you don't -- essentially, they said, you don't understand
23 insurance. So I looked into the issue to confirm what I knew,
24 and what I continue to this day to believe, and that is, an
25 insurance company cannot keep a premium that is pre-paid for

1 insurance when the risk to be insured does not attach, and that
2 is exactly the situation, what we have here. All of these
3 policies -- in every jurisdiction in which Travel Guard does
4 business now -- they say they do in all 50 states and the
5 District of Columbia, we haven't figured that out yet, but all
6 of these policies have two coverages within them, pre and
7 post-departure coverages.

8 THE COURT: I understand all this. Go ahead.

9 MR. RICHARDS: Okay. Well, all I'm saying, Judge, is
10 when the trip, not the policy, but when the trip cancels before
11 post-departure coverage is ever to become effective, not even
12 effective, and when the risk to be insured will never attach,
13 it's the law in quasi contract, not contract, but in quasi
14 contract, as far as I know in Kansas and every other
15 jurisdiction, that the insurance company has an immediate
16 obligation to refund the unearned premium. So we filed this
17 case because we believe our interpretation of the law, and it
18 goes back to England, it goes back to a 1700's decision where
19 whoever ruled that an insurance company can't keep an unearned
20 premium when a risk doesn't attach. This is not a situation
21 where the term of the policy's still going and the risk has
22 attached, and then, say, the house burns down; the insurance
23 company gets to keep the whole premium then, and that's the
24 pre-departure coverage. This is what happens on the other side
25 before the post-departure coverage ever becomes effective.

1 THE COURT: I understand all this.

2 MR. RICHARDS: And I'm sorry, but I wanted to make
3 sure, because we cited the law that directly supports that
4 proposition. We located a case in Nebraska that is against
5 another travel insurance company where the judge denied the
6 motion to dismiss, namely the Anderson case which we cited, and
7 during a conversation subsequent to all of this, I didn't go to
8 Mr. Gustafson and say, hey, let's do this. He said, what's
9 going on, and I said, well, they're offering us -- offering us
10 a voucher, and I said, you know what a voucher is, don't you?
11 We've been in several class actions. We get criticized for
12 coupon claims all the time, although we've never done one of
13 those. And if you would look us up, you'd see most of our
14 recoveries are in the tens of thousands of dollars that we get
15 for our class members, and not coupons, and said, a voucher is
16 not cash, they cannot do that, they can't offer non-cash for
17 money they have to refund. This isn't right. He said
18 something to the extent, and I'll paraphrase, that's not right.
19 That's not what he said, but he said, that's not right, what
20 can we do about it? And his incentive is exactly the same as
21 mine. This lawsuit was filed because we perceive based upon
22 the situation and circumstances as we assert it, the defendants
23 haven't breached a contract, they've breached the quasi
24 contractual obligation existing in every state that says an
25 insurance company can't keep an unearned premium. It's that

1 simple.

2 THE COURT: Okay. It's this simple from my
3 standpoint. Under the contract, you had a right to cancel.
4 You had a right to get your money back. You have the exact
5 same rights that you had under your quote, unquote money had
6 and received theory; they tender the money, you turn it down.
7 I mean, what are you doing? How is that not a violation of
8 Rule 11?

9 MR. RICHARDS: It isn't, Your Honor. They have
10 treated --

11 THE COURT: Well, no, first of all, tell me -- tell
12 me, what are you doing? So the contract gives you the exact
13 same rights that you've asserted in Count 1, there is no
14 difference.

15 MR. RICHARDS: No, it does not. It does not.

16 THE COURT: Okay. What's the difference?

17 MR. RICHARDS: The difference is what they have done
18 and how they have convinced you -- my hat's off to these guys.
19 They've done a marvelous job because they can tell you that
20 they can treat the cancellation of a trip with no action
21 required on the part of the insured as a cancellation of a
22 contract of insurance.

23 THE COURT: Okay. Tell me this. So you deny that you
24 cancelled the insurance on the trip?

25 MR. RICHARDS: How could we, Judge, when the trip

1 cancelled, the consideration failed, and there's no contract to
2 cancel.

3 THE COURT: Okay. So why do they owe you any money?

4 MR. RICHARDS: Because under the law in every
5 jurisdiction as brought over from England, an insurer cannot
6 keep an unearned premium, and we've quoted the cases that are
7 directly on point and say that, so I don't know -- I understand
8 your concern about this, 'cause you're sitting here thinking,
9 hmm, as a practical matter, you got what you wanted, even
10 though -- and the other thing, Judge --

11 THE COURT: There's no difference in what you're
12 asking for. You're asking for the pro rata share of the money
13 back that was on account of the unearned premium plus interest
14 for the delay in payment.

15 MR. RICHARDS: Judge, they only offered it on
16 December 17th, months after.

17 THE COURT: That's why you have prejudgment interest.
18 So you're -- you are asking in Count 1 for exactly what you're
19 entitled to under the contract and under Kansas law, so you
20 come into court, and you say, yeah, we have these rights; we
21 don't want to exercise those rights, we want to sue the
22 defendants for money had and received. What are you doing?

23 MR. RICHARDS: We couldn't exercise those rights, Your
24 Honor, and this is --

25 THE COURT: Wait, why couldn't you exercise those

1 rights?

2 MR. RICHARDS: Because when the trip cancels, there's
3 nothing to insure, and the policy coverages never became
4 effective.

5 THE COURT: The policy coverage did become effective
6 because it had pre-trip provisions as part of the same policy.

7 MR. RICHARDS: Yes, it did.

8 THE COURT: And you had a right to cancel.

9 MR. RICHARDS: At that point, Judge, when the trip is
10 cancelled, if you don't -- if you don't submit by giving --
11 delivering -- receiving a written policy cancellation before
12 cancellation, there's nothing to cancel, because the
13 consideration -- whatever -- whatever was left was the
14 remaining consideration, and that consideration failed, and the
15 contract by law became void, and what I was going to say is,
16 you're viewing that, as you should here, Judge, practical
17 argument, but if you're going to resolve the practical analysis
18 of this, that practicality should be resolved in favor of the
19 insureds, not the insurer.

20 THE COURT: There's nothing to resolve. There's no
21 ambiguity. There's no difference in the relief that you're
22 seeking. I mean, how is that not a violation of Rule 11 B 1,
23 presenting a claim for an improper purpose such as to harass,
24 cause unnecessary delay, or needlessly impede dispositive
25 litigation?

1 MR. RICHARDS: I'm not doing that, and I would not
2 have doubled down, as you say, if I thought that. We had --
3 this is the law. And there is other -- there is another case
4 that would support the argument in Nebraska, there is --

5 THE COURT: I don't care about Nebraska, and I don't
6 care about corpus juris secundum, which I haven't looked to
7 since I was in law school. So Kansas has statutes on this, the
8 contract that is squarely on point. Why are you seeking a
9 remedy other than what you're entitled to under the contract?

10 MR. RICHARDS: Because in May of 2020, the web site
11 from Travel Guard posted and available nationwide said no
12 refunds, you get a voucher.

13 THE COURT: Uh-huh.

14 MR. RICHARDS: And our complaint was filed based upon
15 that, and when we filed our complaint in May 2020, we hadn't --
16 we hadn't even gotten a voucher nor did we have a refund. The
17 law obligated them, in our opinion, to do that. We then
18 delayed things, and I understand you're upset with how that
19 happens -- sorry, how that happened, but then we filed again in
20 November with the court's permission, November of 2020. At
21 that time, we hadn't got a refund. You know what we had? We
22 had an offered voucher, and then there was this discussion that
23 had come up about, well, Kansas has a different provision, and
24 that provision applies. And if you look at the e-mails, both
25 sides were trying to figure out where the other one was going,

1 and it wasn't until they filed their motions to dismiss and
2 motion to strike that they tendered the refund to Mr.
3 Gustafson, and they did so in conflict of their own arguments
4 that they had sent. They said, you never cancelled the
5 contract -- that's their words, Judge -- you never cancelled
6 the contract, so you don't have standing. The next thing we
7 get is, you requested a refund, so we're going to refund it.

8 THE COURT: Well, none of that --

9 MR. RICHARDS: That's just spin, Judge. That's spin.
10 They're trying to avoid the argument.

11 THE COURT: None of this is in your complaint, and I'm
12 not going to consider it. So what I'm trying to figure out,
13 what -- what I was trying to have you figure out is whether
14 there -- you had a viable claim going forward, and whether you
15 could file new pleadings which would salvage your ability to go
16 forward on a class action basis or individually. And I mean,
17 last I heard as to Count 1, a claim for money had and received,
18 a tender of payment would be a full defense. I mean, even if
19 you have standing, I don't know -- I mean, you find a lot of
20 fault with this voucher program, but apparently, the voucher
21 was for the full value of the premium, and what you are
22 entitled to under the contract was only a pro rata share. So
23 what -- what, in your opinion -- there's nothing in the
24 complaint, so we don't know from the allegations why -- why is
25 a voucher for the full value an unfair -- why is it unfair to

1 offer a voucher for the full value of the premium?

2 MR. RICHARDS: Well, number one, I believe as a matter
3 of law, our time restricted voucher is not deemed a refund of
4 cash. The two are not the same.

5 THE COURT: I didn't say they were. I'm asking you
6 why you think it's -- well, in your words, it's illegal; it's
7 unfair and deceptive business practice, and it's illegal,
8 etcetera. Why is that?

9 MR. RICHARDS: Well, Judge, there's a reason why
10 vouchers were issued and not money was tendered, and the reason
11 why is it's just like a class action when there's a claims made
12 process, the people at the insurance company knew that the take
13 rate on these vouchers is not going to be 100 percent, and that
14 instead of refunding all of the money and the premiums as they
15 should have, they'll send out these time restricted vouchers.
16 In March of 2021, I wonder how many of those people that got
17 those vouchers have booked another cruise. We don't know
18 because we can't get any information, but the two are not the
19 same, and it's not fair. Who was entitled to the cash?

20 THE COURT: I'm not saying they're the same. Which
21 has greater value?

22 MR. RICHARDS: Cash.

23 THE COURT: Okay. Half a pro rata share of the
24 premium, for you and your friend. Is this your friend over
25 here?

1 MR. RICHARDS: No, it is not my friend. That is my
2 co-lawyer.

3 MR. VAUGHN: It's Mike Vaughn. I've been in front of
4 you.

5 THE COURT: I didn't recognize you with your mask. So
6 I mean, there's a way to mathematically figure out, you know,
7 the value of the voucher for the full premium good for two
8 years as opposed to a reimbursement of a pro rata share.
9 That's a knowable number.

10 MR. RICHARDS: Well, I don't know that you could put a
11 value on a voucher that -- with any predictability that would
12 be admissible. I wouldn't want to ever come in and offer
13 evidence of damages based upon what -- some guy telling me what
14 a voucher's worth. The value is the cash, the cash that the
15 law required these folks to refund when the trip cancelled.
16 Not one of these policy holders as far as we know, and
17 certainly not the Gustafson's, and by their own admission, they
18 admit this fact, none of us cancelled the policy. None of us
19 can. Because none of us could, and I know you don't
20 appreciate --

21 THE COURT: What are you talking about? I don't
22 understand that.

23 MR. RICHARDS: Because there is a policy with two
24 coverages, and this is discussed in detail with the Anderson
25 case, and if you look at the policy, each has its own effective

1 date, and each has its own termination date, and so you've got
2 the pre-cancellation coverage that becomes effective when the
3 trip cancels, it gets cut off before all of that premium is
4 earned. But guess what? The risk is attached, so Travel Guard
5 gets to keep the whole portion of that premium or the whole
6 premium for that coverage.

7 THE COURT: Which is exactly what the -- what the
8 policy says.

9 MR. RICHARDS: Yes, but they don't get to keep the
10 coverage that never became -- the premium charged for the
11 coverage that never became effective and for which no risk ever
12 attached. And you may disagree with that, and that's fine.

13 THE COURT: That's exactly what the policy says.
14 That's my whole point.

15 MR. RICHARDS: I don't think it says that. I don't
16 read it that way at all, and in fact, the contract doesn't talk
17 about refunding unearned premiums at all. It says you can
18 cancel by giving written notice that's either mailed or
19 delivered to the insured; in fact, it says Travel Guard or
20 National Union.

21 THE COURT: Okay.

22 MR. RICHARDS: With the -- well, there's two
23 provisions, the Free Look provision which is in every policy,
24 and then in Kansas, the second one says before departure.

25 THE COURT: Right.

1 MR. RICHARDS: But we never did that, so how are we
2 entitled under the contract to get an unearned premium back?
3 We can't because when the trip cancelled -- not the policy --
4 when the trip cancelled, considerations failed, the policy's
5 done, and that's why money had and received and quasi contract
6 comes into play, and that's why the defendants have done
7 everything they can to try to convince you -- and they've done
8 it -- that this is really a contract remedy and not a quasi
9 contract remedy, and if you disagree with that, you can
10 disagree with that, and I think you can, as you said, rule --
11 rule the motion to amend as futile, and we'll go from there.

12 THE COURT: I mean, the contract says the insured may
13 cancel this policy at any time prior to the start of the trip.
14 So you could still cancel it. Your trip hasn't started. You
15 can cancel the policy. All you need to do is give written
16 notice.

17 MR. RICHARDS: And we would say no written notice was
18 given, and even if it was, they said, here's a voucher, and
19 they said here's a voucher until they figured out what they
20 wanted to do in Kansas, because they had notice of our claim,
21 they had notice it was a class action. What they want to do is
22 convince you this is a contract action, not a quasi contract
23 action, because if they do that, they're going to contain this
24 problem in Kansas and this case, and that will be the end of
25 it. And rather than us going out and hiring companies to

1 elicit people, which we don't make a practice of doing, we
2 tried to get this one dispute before you, because if it is a
3 quasi contract matter, and it is, in our opinion, Judge -- I
4 understand, I respectfully understand that you disagree with
5 that, but in our opinion, it's a quasi contract theory for
6 money had and received, and if you believe that, you can clear
7 this whole thing up nationwide, and this is not to mention that
8 our -- the basis of our action -- and remember, when we filed
9 this claim, and when we amended the complaint, they hadn't
10 refunded anything. We have a declaratory judgment action that
11 would say okay, even if you find that the Gustafson's took the
12 money and they're refunded, there's still a problem of them
13 doing this again. But if you think they can do this, that's
14 your legal call. But we have a good faith basis to argue to
15 the contrary, and it's not a Rule 11 sanction.

16 THE COURT: Well, it's not a question of them
17 convincing me this is a contract. I'm looking at the contract,
18 and it says in several places, this is a legal contract, it's
19 binding on both sides, and that at any time, the insured can
20 cancel, and receive a prompt return of the unearned portion of
21 any premium paid. So if you haven't cancelled, then why should
22 they have promptly returned the unearned portion of the premium
23 paid?

24 MR. RICHARDS: Well, the first thing I'll ask you is
25 why didn't they? They didn't.

1 THE COURT: Why didn't they what?

2 MR. RICHARDS: Why didn't they return the unearned
3 premium at the beginning? Why did they tell everybody
4 nationwide, you don't get it, you get a voucher?

5 THE COURT: Because you hadn't cancelled.

6 MR. RICHARDS: When did anybody cancel? When we filed
7 the lawsuit?

8 THE COURT: We're talking about plaintiff.

9 MR. RICHARDS: I understand. We never cancelled.
10 They say that.

11 THE COURT: So this -- we're just coming full circle
12 to where we started. You had a right under the contract to
13 receive exactly the relief that you're seeking on Count 1.

14 MR. RICHARDS: Before the trip cancelled, yes. Before
15 the trip, not the policy, before the trip cancelled, yes, I
16 agree.

17 THE COURT: And after the trip cancelled, you had the
18 same right.

19 MR. RICHARDS: That's where we're disagreeing, and I
20 don't believe that's a Rule 11 sanction. I -- respectfully, I
21 don't, and we've got law to support that.

22 THE COURT: So tell me the law again that supports
23 that.

24 MR. RICHARDS: Well, there's the Anderson case for
25 one. There's also -- I know you didn't appreciate the CJS cite

1 apparently, but we took that from one of Judge Lungstrum's
2 cases that talked about money had and received where he cited
3 CJS, and in our opinion is the Tourney case -- I believe there
4 were two of 'em, and in our opinion, that supports exactly what
5 we're saying, and that is, there's two issues to a claim for
6 money received, and even though it's based in equity, it's an
7 action implied in law, and under -- and based on authority of
8 CJS, an insurance company has to refund unearned premiums. Not
9 only is that the law, Judge, it's just, just, it's fair. You
10 can't keep what you don't earn.

11 THE COURT: It's what the policy says. I mean, you're
12 talking like what the policy is doing is illegal. You're not
13 just talking; that's your theory of the whole case.

14 MR. RICHARDS: Okay, but they didn't -- even -- even
15 if you accept that, and we don't, but even if you accept that
16 position, they didn't do it, Judge. Their response to this was
17 to say, no premiums are coming back, you get a voucher. And
18 that's what we have corrected in an attempt to clarify -- we're
19 not being cute, Judge. This isn't a money grab. We're doing
20 this -- we filed this lawsuit for one reason. We think under
21 the law that what they are doing is wrong. We think that the
22 accountants came in, and they valued how much money they were
23 going to have to return in unearned premiums versus sending out
24 vouchers, and they made the second decision so that they kept
25 the money during COVID, not the people that paid that. We

1 don't think that's right and neither does Mr. Gustafson,
2 independent of my opinion, and he'll tell you that. His words
3 were much stronger than that's not right. So the case is in
4 earnest, and we brought it to this court, and truly, I was
5 pleased when I heard you were on -- that we've been appointed
6 with you, because I said, here's somebody -- boy, was I wrong,
7 but I said --

8 THE COURT: Be careful what you wish for, right?

9 MR. RICHARDS: I thought, here, if we can convince --
10 if we can show that what we have here is a quasi contract claim
11 that applies in England, and it was brought over to the United
12 States, and it's been employed since the country was formed,
13 even before. We've even cited an old case to show you that an
14 insurance company anywhere can't keep a premium that it doesn't
15 earn, because the risk never attaches, and that is exactly what
16 we have here, and they knew it was a problem. And so now,
17 they've done whatever they could to convince you that, well,
18 the Kansas Insurance Department is looking at this. Why do
19 they do that? Because they want to convince you this is a
20 contract claim, and they've done it. We disagree with that
21 respectfully, but we believe our analysis of the law is
22 absolutely 100 percent sound. And if you disagree with that,
23 you disagree with that. You rule as such, and we'll see what
24 happens. I don't know.

25 THE COURT: Well, I mean, isn't this exactly why,

1 though, we have the rule that if you have a contract remedy,
2 that's what you're obligated to pursue instead of a claim for
3 equitable relief?

4 MR. RICHARDS: Yes.

5 THE COURT: Because otherwise, it would be shambles in
6 the business world, because people would enter into contracts,
7 and then at the end of the day say, well, we're not seeking
8 relief under the contract, we're going to ignore the contract
9 and go on some equitable theory. So there wouldn't be any
10 certainty in contract negotiations or provisions for remedies
11 in the event of a breach or anything like that.

12 MR. RICHARDS: And they are jumping all over that, and
13 if you look at their reply and in the arguments they raise,
14 that is exactly where they directed you, and that is exactly
15 where you've gone. But we don't view this as a contract
16 remedy, and there are cases and authority out there that says
17 it isn't.

18 THE COURT: Okay. And --

19 MR. RICHARDS: If you disagree, then disagree. That's
20 fine.

21 THE COURT: All right. Then let's stop talking about
22 it. I disagree.

23 MR. RICHARDS: Okay.

24 THE COURT: And I think for that reason, that your
25 proposed amendment to Count 1 is futile. And let's talk about

1 Count 3. Umm, so --

2 MR. RICHARDS: Okay.

3 THE COURT: So Count 2 is basically -- there's no
4 independent cause of action there that I see. I think it's
5 just --

6 MR. RICHARDS: It's based upon --

7 THE COURT: -- asking for injunctive and declaratory
8 relief if we find a violation under Count 1 or 3.

9 MR. RICHARDS: Exactly. So that would be futile as
10 well.

11 THE COURT: Okay. Well, I --

12 MR. RICHARDS: And then there's Count 3. You know,
13 there's a recent opinion from the Commonwealth of Pennsylvania,
14 the highest court there, that says you don't have to be a
15 Pennsylvania resident to assert a claim under that, and if
16 defendants' practice of telling everybody nationwide, and
17 they're a Pennsylvania insurance company, if their practice of
18 telling people nationwide that there's no obligation to refund
19 a premium, that all you get is a voucher, is deceptive, and if
20 they don't tell people when they buy these policies that even
21 though there's a different effective termination date for
22 post-departure coverage, and that's illusory coverage, we think
23 we have a claim there. But again, if you don't agree with
24 that, then that claim is futile as well.

25 THE COURT: I mean, it seems to me that -- so as to

1 plaintiffs in particular, it's not clear to me how defendants
2 would have engaged in any unfair or deceptive acts or practices
3 in the sale, issuance or administration of these policies, and
4 to be honest, in the proposed amended complaint, I don't
5 completely understand what it is that you are saying was false
6 or deceptive. So in Page 35, Paragraph A, it looks like you're
7 saying --

8 MR. RICHARDS: That -- Your Honor, if you think is
9 confined to Kansas, and if you construe Kansas law as you have,
10 then that would be futile, but offering insurance without
11 telling people that if the risk never attaches and the coverage
12 never becomes effective -- and by the way, we're going to keep
13 the money, or at the very least, we're going to give you a time
14 restricted voucher, we think that's illusory coverage. We
15 think that's deceptive. There are cases that say that -- you
16 may not agree, but that's the claim.

17 THE COURT: So --

18 MR. RICHARDS: And that's true of all these.

19 THE COURT: So -- so you're -- you agree that given my
20 view of the contract and your rights under the contract and
21 Kansas law, that all of these would be futile?

22 MR. RICHARDS: I believe -- I believe that's the case,
23 to the extent you're saying that -- that your analysis is based
24 upon that Kansas contract. If you're saying that we're stuck
25 with the Kansas contract and can't go beyond that because it

1 has this additional clause, then yeah, I don't know how we
2 could -- that would be hard to show that we have a claim when
3 somebody else -- other people certainly have claims, but you're
4 saying we don't by your analysis. So yeah, there's no sense in
5 spending time on that, if that's what you concluded, and that's
6 fair. But again Your Honor, that's not a Rule 11 sanction.

7 THE COURT: So, if -- if the proposed amendments to
8 Counts 1 and 3 are both futile, then what do you think we do
9 now?

10 MR. RICHARDS: 1, 2 and 3, if those are all futile,
11 you deny motion for leave to amend, we've got --

12 THE COURT: Right.

13 MR. RICHARDS: You know, we've got what's hanging out
14 there. And I might say this, Judge, just because I really was
15 hurt by -- I mean, I don't want to say I was emotionally --
16 well, I was emotionally hurt. I've never had anything like
17 that said about my ability, and I like to think I try to do a
18 good job, but the -- the -- and I just lost my train of thought
19 on that. If the court believes that we don't have a claim
20 under Kansas law that we can assert, then we're left with what
21 we had, and that's where I was going to say. And I might say,
22 Judge, your metaphors were -- were appropriate, I think, the
23 moorings. But I want to point out that it was the defendant
24 through the affidavits they admitted in support of their
25 motion, which they did not file until December 17, that

1 uninged this case from the moorings, if you will. They're the
2 ones that put in all the extraneous evidence, and they did so
3 under 12 B 1, not 12 B 6. And so as a consequence of that,
4 saying we've tendered a refund in conjunction with filing our
5 motions -- you know, I got a letter from -- or an e-mail from
6 Mr. Burck saying he was going to send the refund to
7 Mr. Gustafson. Well, the refund had all ready been or was soon
8 to be processed as an issue to his -- as a credit to his credit
9 card, so he couldn't reject it, where other people got checks.
10 And how do I know that? Well, here's mine, which I haven't
11 cashed because I've excluded myself from this class. That's
12 where this mess -- that's where the case got off the tracks.
13 I'm using too many metaphors now. That's where we got off the
14 tracks, because it was at that point that they interject all
15 these facts that they didn't need to, because everything we
16 filed before that was absolutely accurate and true, no Rule 11
17 violation whatsoever, and they took us off the track, because
18 they tried, in our opinion, to implement -- impermissibly moot
19 our case and the entire Kansas class. We still haven't figured
20 out really what's going on, although Mr. Burck just brought a
21 letter, an update that he's provided just for this hearing,
22 which I don't quite understand 'cause I haven't had a chance to
23 read it. But that's how this thing got -- that's how this
24 thing spiraled out of control. And no one can deny that.
25 They're the people that put in all this intervening stuff, and

1 none of that happened until after we filed our case originally,
2 after we amended our complaint, and only in conjunction with
3 their motions to dismiss, which Judge, were based on a
4 conflicting view of what happened to the Gustafson's, you
5 didn't cancel the policy, so you don't have standing. You
6 asked for a refund, so you've been made whole. How can we win?
7 And with your view that this is a contract action and solely a
8 contract action governed by the Kansas contract, I don't know
9 how we can. So I mean, we came here today in earnest, with a
10 sincere attempt to try to convince you that we're not -- this
11 isn't a money grab. We're trying to do the right thing, and
12 that's exactly why I said, yeah, let's proceed with this case,
13 after consultation with my law partners, and that's why Mr.
14 Gustafson is doing it. He's not a potted plant, as they say.
15 He's not. And he'll get in here and tell you that he doesn't
16 agree with any of this, and not to mention that, he said, I
17 never got my voucher, so --

18 THE COURT: He didn't ask for one.

19 MR. RICHARDS: He was told he was getting one.

20 THE COURT: Well, I mean, again, you keep trying to --
21 we requested a refund, we didn't request a refund, we are --
22 we have no voucher.

23 MR. RICHARDS: We don't have to request a voucher or
24 request a refund under our legal theory. No request is
25 required. They have to kick it back. They have to give it

1 back.

2 THE COURT: If nothing else, filing a lawsuit and
3 asking for the money would constitute a request. I think
4 you've acknowledged as much.

5 MR. RICHARDS: Yes, we did, and even then, they didn't
6 refund it, even then, they told us we only got a voucher, and
7 when we amended, we didn't get a refund, and even then, they
8 told us we only get a voucher. None of this happened, Judge,
9 until they -- in anticipation, they filed their motion to
10 dismiss on December 17th. They had issued the credit on
11 December 15th without telling us, and I believe it was
12 December 16th that Mr. Burck called me and said he needs more
13 time to file his motions. I said, no, we're done with
14 extensions. And I now know that he wanted me to give him more
15 time so that that letter that he sent and which was delivered
16 on December 18, two-day UPS, so they had to hold it for a day,
17 told us that this credit had been issued. So it was an
18 orchestrated attempt to gut this case, and they've convinced
19 you of what they wanted to convince you of, and if that's your
20 holding, then that's your holding. But our argument to the
21 contrary is not baseless. It's not only supported by the law,
22 in our opinion. It certainly should be, if it isn't.

23 THE COURT: Well, first of all, let me say, I didn't
24 mean to hurt your feelings, and -- and I -- that order that I
25 wrote, you know, I was direct. I was trying to be clear, and

1 maybe I was trying to be too clear, but I don't lightly put my
2 name on something like that.

3 MR. RICHARDS: I understand that.

4 THE COURT: I also -- you know, I think most people
5 who are familiar with my track record in terms of
6 multi-district litigation, or complex litigation, or class
7 actions would say that I am on the generous side of the
8 spectrum in terms of giving plaintiffs a chance to develop
9 their theories, and to get them into a class action where
10 that's appropriate, which is what I was trying to do, instead
11 of resolve on the record before me at the time that the case
12 would either be dismissed with prejudice or without prejudice.

13 MR. RICHARDS: Uh-huh.

14 THE COURT: I felt like it was important for me to
15 know what your back-up theory would be if this one didn't fly,
16 and like -- like I said, when I -- I -- when it became clear
17 that you were doubling down on the theory that I had problems
18 with, I mean, I think we're sort of at the end of the road of
19 what we can do with this, and --

20 MR. RICHARDS: I agree.

21 THE COURT: -- maybe -- maybe it's time for you to get
22 on the road to the Court of Appeals or do whatever comes next,
23 but --

24 MR. RICHARDS: And Judge, please, I didn't mean to
25 interrupt, but let me say in that regard, we discussed, well,

1 do we change it? Do we drop claims? Do we do -- no, that
2 would be the worst thing, and I truly do appreciate your --
3 your effort to say, look, you can try this again; back up and
4 try this again and see if it works. That would have been
5 orchestrated, that would have been forced, that would have
6 been, well, how do we keep the pressure on these guys? How do
7 we, you know, try to get to the point where we can really
8 squeeze 'em? That's not our goal. We're just trying to
9 correct a wrong as we see it, and had we done anything else, in
10 my opinion, that's what we talked about, and I said, no, we're
11 not going to. This is a claim, and this is a legitimate claim,
12 and let's proceed, and I convinced everybody that that's the
13 case, and we've got a lot of insurance years on our side. We
14 were all with Lindy Thompson. And you and I had the last case
15 scheduled for trial in the old courthouse. I don't know if you
16 remember that. It was against Tri-State. So I'm not -- I'm
17 not -- we're not here playing games, Judge. One, that's not
18 us; two, it's not me; and three, it's not my client's.

19 THE COURT: So assuming that -- so what do you think
20 we should do now to -- I mean, if you want to just get on the
21 road to the Court of Appeals, should we sustain defendants'
22 motion to dismiss in terms of the 12 B 6 claims, and enter
23 judgment on -- final judgment for defendants, and overrule the
24 rest of the motions as moot, or what's your thought?

25 MR. RICHARDS: You could do that, but I mean, I think

1 to get the cleanest record, and I haven't -- I mean, I'm not
2 going to test your brain with constitutional law. I believe to
3 get the cleanest record for the Court of Appeals, you -- I
4 think you would sustain it on the ground that it was moot under
5 12 B 1, and that we had also failed to state a claim. I think
6 -- and that all the other claims, because they're dependent
7 upon your construction of the Kansas contract and how you view
8 the claim in Count 1, those claims necessarily fall as a
9 result, because we can't assert a claim on behalf of anybody
10 else with that -- with that legal conclusion.

11 THE COURT: All right. Let me hear from defendants.
12 Thank you.

13 MR. RICHARDS: Thank you, Your Honor.

14 MR. BURCK: Good afternoon, Your Honor. William Burck
15 from Quinn Emmanuel Unguhart & Sullivan. Nice to meet you,
16 Your Honor. Your Honor, just one thing I'd like to point out
17 before I -- we agree 100 percent with the court's order, and
18 also the conclusion that we hear is likely today, that the
19 amended the second amended complaint is also futile. But one
20 thing I wanted to point out, Your Honor, is that we did -- or
21 our clients refunded the Gustafson's the \$417 in December after
22 several months of discussions between the lawyers about the
23 fact that we understood, and we were seeing that they had not
24 cancelled the trip, or cancelled the insurance, but we
25 understood their first complaint was effectively a written

1 notice that they wanted out. And so we said we would construe
2 it that way, and we were talking to them. So it wasn't a
3 timing issue with respect to the motions to dismiss when we
4 issued the refund. It was simply that there was a result of no
5 more discussions between us and the -- and plaintiffs' lawyers
6 about how to resolve this. So when we -- when the AIG, or AIG,
7 the owner of all of these entities refunded the money to the
8 Gustafson's in the middle of December, we -- they told us that
9 -- we actually asked them, do you want it by check or do you
10 want it by credit card? They just didn't really answer, so
11 they refunded it by credit card. Last week, on May 7th, which
12 is I think in their papers, they sent us back a check after
13 your order.

14 THE COURT: Right.

15 MR. BURCK: For \$417. It wasn't a day after, it
16 wasn't a month after, it was five months later, and obviously,
17 in response to your order, you know. So we think that that is
18 very improper behavior. We think that that's not the kind of
19 thing that should be tolerated. It's effectively trying to
20 create their own harm by refunding our refund. We obviously
21 have not deposited the check. It's being held by Shook as we
22 speak, and it will be disposed of whenever this litigation is
23 resolved. But we just wanted to point that out, Your Honor,
24 because that I think emphasizes, I think, the court's instinct,
25 which I think is right and supported by the evidence that this

1 is a plaintiffs' lawyer driven case, not a plaintiffs' driven
2 case. So we just want to point that out. But Your Honor, in
3 terms of futility, we agree. I'm not going to waste the
4 court's time by repeating what you've said much better than I
5 could.

6 THE COURT: Well, you probably would have been nicer
7 about it.

8 MR. BURCK: Well, Your Honor, I think that everything
9 you've said is -- is dead on. We think the best thing to do
10 would be to dismiss it with prejudice at this point, allow the
11 plaintiffs to appeal, if that's what they choose to do. We
12 don't see how there's any way to cure any of the issues. We
13 actually think the court was very generous in giving the
14 opportunity to do that, despite the fact that it seemed
15 fundamentally, there was a contractual issue here, there were
16 constitutional issues here with the standing and the mootness,
17 all those things didn't seem to be curable with these
18 plaintiffs. So we do think it's futile. We think that a
19 dismissal with prejudice would be the best route to go. We
20 don't see any other viable alternative, because there's --
21 there's been a mediation, of course, that's been ordered, but
22 Your Honor, in light of the second amended complaint and the
23 proposed second amended complaint, there's nothing for us to
24 discuss on our side. I mean, this is not a fair or viable
25 complaint. So we think that that would be the best result, and

1 I'm actually -- I'm happy to answer any specific questions you
2 might have about any -- anything relating to the case, but
3 again, I don't want to waste the court's time.

4 THE COURT: So I think it's pretty clear from my
5 comments that I think Counts 1 and 3 of the proposed second
6 amended complaint would be futile, and therefore, I would not
7 allow them those claims to be amended in that way, and as a
8 derivative ruling, Count 2 would be futile, because it's really
9 premised on plaintiffs succeeding under Counts 1 and 3. So all
10 of those address the second amended complaint. Do the parties
11 agree that whatever the merit of those rulings, they would
12 apply equally to the first amended complaint?

13 MR. BURCK: We certainly do, Your Honor, because we
14 don't think they've done anything to change their theory from
15 the first amended complaint to the second amended complaint.
16 And they've changed the definition of the class in a way that
17 we don't quite understand, but also would exclude their own
18 client. It's people who have not received refunds and not
19 requested refunds, so that would exclude themselves. So that's
20 the only thing that we think materially changed between the two
21 complaints. So we think that by definition, it would dismiss
22 the first and second amended complaints.

23 THE COURT: Mr. Richards?

24 MR. RICHARDS: The only thing I'd say in response to
25 that, Your Honor, is that I deny on the record that I was ever

1 advised that I had an option between credit card, credit and a
2 check. There's an e-mail that they cited, and it's Mr. Burck's
3 affidavit, stating we're going to send it to his address on
4 file, the refund. Didn't say anything about a credit card, and
5 then they issue a -- well, the credit when we last talked had
6 all ready been issued, and it wasn't discussed then either.

7 THE COURT: Okay. But do you agree that -- that my
8 thinking with regard to the second amended complaint would be
9 equally applicable to the first amended complaint?

10 MR. RICHARDS: Yeah, in the sense that it's futile,
11 because how you -- well, for the reason that you think that the
12 amendments are futile, you think those -- and apply to a first
13 amend complaint, and you've got a dismissal.

14 THE COURT: Okay. And I know you take issue with the
15 defendants' tender of the full amount of the premium, but in
16 addition to the issues about failure to state a claim, I would
17 hold that the named plaintiffs lack standing to pursue the
18 claims in Counts 1, 2, and 3 because of the payments which were
19 made to them before the class was certified, and I know you
20 take issue with that. I think your respective points are both
21 well preserved on the record. But in support of my ruling that
22 plaintiff lacks standing, and that the -- that they have not
23 stated actionable claims under Counts 1, 2, or 3, I would
24 incorporate the arguments in defendants' briefs on that issue,
25 and I guess the appropriate way to tee this up would be to say

1 that the defendants' motion to dismiss the first amended
2 complaint, which is now the operative pleading, is sustained
3 for the reasons stated in defendants' motions substantially.
4 Defendants' motion to strike the class action allegations which
5 was filed on December 17, 2020, I think becomes moot.
6 Plaintiffs' motion to strike new arguments raised in
7 defendants' reply briefs is also moot. Also, I think for the
8 reasons stated in the defendants' opposing briefs, that motion
9 lacked merit -- lacks merit. So the motion to dismiss will be
10 sustained. All other motions would be overruled, and we would
11 enter judgment for defendants with prejudice. So I think
12 that's what I need to do to get you on the road to the Court of
13 Appeals, and if I'm wrong, I'm wrong. So we'll see how that
14 plays out. Should I notify Judge Gale that it won't be
15 necessary to have that mediation, or would you like to proceed
16 in front of him in the hopes of a global resolution?

17 MR. RICHARDS: We're not hopeful, Your Honor. I think
18 it would be a waste of effort.

19 MR. BURCK: Your Honor, we agree.

20 THE COURT: Okay. Well, like I said, this is not
21 personal.

22 MR. RICHARDS: Okay, Your Honor. I appreciate the
23 comment, and neither was ours to you. I mean --

24 THE COURT: Right. Well, I will say this. As I
25 plowed through all the motions and briefing on the motion to

1 strike and the motion to dismiss, I kept thinking, this is
2 really so well briefed. It's just too bad that it doesn't
3 relate to the issues, you know, that I have to decide.

4 MR. RICHARDS: That's a problem.

5 THE COURT: So you did a really good job. It's well
6 written, it's well researched. It just, like I said, lost its
7 moorings in the actual state of the case, so I guess lesson
8 learned.

9 MR. RICHARDS: Appreciate it, Your Honor.

10 MR. BURCK: Thank you, Your Honor.

11 THE COURT: All right. Thank you all, and stay safe.
12 Court's in recess.

13 (Whereupon, court recessed proceedings.)

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C E R T I F I C A T E

I, Nancy Moroney Wiss, a Certified Shorthand Reporter and the regularly appointed, qualified and acting official reporter of the United States District Court for the District of Kansas, do hereby certify that as such official reporter, I was present at and reported in machine shorthand the above and foregoing proceedings.

I further certify that the foregoing transcript, consisting of 36 typewritten pages, is a full, true, and correct reproduction of my shorthand notes as reflected by this transcript.

SIGNED May 17, 2021.

S/ _____

Nancy Moroney Wiss, CSR, CM, FCRR