**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW JERSEY**

| | | |
|---|---|---|
| JRJ HOSPITALITY, INC., KMK HOSPITALITY, INC., EIGHT REALTY, LLC, TMK MARKETING, LLC, and GR BRICK, LLC, | ) | |
| Plaintiffs, | ) | No. 3:20-CV-13095-FLW-DEA |
| v. | ) | |
| TWIN CITY FIRE INSURANCE COMPANY d/b/a THE HARTFORD, | ) | |
| Defendant. | ) | |

**PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS**

## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Cases** **Page**

**Rules**

Plaintiffs JRJ Hospitality, Inc. ("JRJ Hospitality") d/b/a Nonna's Citi Cucina, KMK Hospitality, Inc. ("KMK Hospitality") d/b/a Metropolitan Café, Eight Realty, LLC, TMK Marketing, LLC, and GR Brick, LLC ("GR Brick") d/b/a Tre and Rosalita's Roadside Cantina (collectively, "Plaintiffs"), file this opposition to Defendant Twin City Fire Insurance Company d/b/a The Hartford's ("Defendant") Motion for Judgment on the Pleadings pursuant to Fed. R. Civ. P. 12(c).

## I. INTRODUCTION

Insurance contracts are to be interpreted according to their plain and ordinary meaning. Here, Defendant has twisted the plain and ordinary meaning of the insurance policies and denied coverage under all-risk commercial property insurance policies for income Plaintiffs lost as a result of the closure of and restrictions on Plaintiffs' restaurants beginning in March 2020 due to the events associated with the global pandemic. Defendant's denial of coverage is improper and in bad faith because Plaintiffs purchased insurance exactly for such circumstances: to cover lost income due to a suspension of operations.

Defendant's Motion for Judgment on the Pleadings should be denied for the following reasons. First, the exclusion on which Defendant relies does not exclude coverage for pandemics or viruses that cause illness or injury. Instead, the exclusion is contained in a series of provisions intended to address conditions on

the premises that allow wet rot, dry rot, fungi, fungus, mold, mildew, mycotoxins, spores, and viruses to grow, and the clean-up associated with such conditions. But no such conditions existed in Plaintiffs' restaurants. Read as a whole, this provision does not encompass losses associated with business closure due to the events associated with the Coronavirus – a global event occurring outside the restaurants. Because the exclusion at issue does not specify pandemics or viruses outside the premises that cause injuries or illness such as COVID-19, Defendant should not be permitted to contort the plain and ordinary meaning of the exclusion to deny coverage.

Second, because New Jersey Governor Philip D. Murphy's closure orders were the cause of Plaintiffs' losses and there was no virus on Plaintiffs' premises, Defendant's denial of coverage was improper. The "anti-concurrent causation clause" of the policies does not dictate a different result because, for the reasons stated above, the exclusion in which the anti-concurrent clause language is contained is inapplicable. Further, even if this Court finds that the exclusion applies, coverage cannot be denied pursuant to that clause, which specifies that there must be a "presence" of a virus, which there was not.

Third, Plaintiffs' business losses caused by the closure orders are covered under the policies because a "covered cause of loss" is defined to include "risks" of direct physical loss. There need not be physical damage or destruction to the

premises to create a "risk of a direct physical loss." Because Plaintiffs lost the use and functionality of their properties due to the closure orders, Defendant is liable for the business income and related losses.

Finally, Plaintiffs have plausibly pled a bad faith claim under New Jersey law where Plaintiffs alleged that Defendant denied Plaintiffs' claims without any investigation.

Accordingly, and for the reasons set forth herein, Defendant's motion must be denied. However, in the event this Court dismisses any claim, Plaintiffs request leave to replead under the liberal standards of Fed. R. Civ. P. 15(a).

## II. STATEMENT OF FACTS

### A. Plaintiffs Paid for Comprehensive Business Coverage Policies Issued by Twin City.

Plaintiffs operate four restaurants in New Jersey: Nonna's City Cucina, located at 190 US 9 North, Englishtown, Monmouth County; Metropolitan Café, located at 8 East Main St., Freehold, Monmouth County; and Tre and Rosalita's Roadside Cantina, both located at 1048 Cedar Bridge Ave., Brick Township, Ocean County. Amended Complaint ("Am. Cmpl."), ECF 5, ¶ 37.

Defendant issued two comprehensive business coverage insurance policies to Plaintiffs in exchange for premium payments. *Id*. at ¶¶ 49-57. The first is the "JRJ Hospitality Policy," which covers the periods March 23, 2019 to March 23, 2020, and March 23, 2020 to March 23, 2021 and the restaurants Nonna's Citi

Cucina and Metropolitan Café. *Id.* at ¶¶ 50-51. The second is the "GR Brick Policy" which covers the period December 8, 2019 to December 8, 2020 and the restaurants Tre and Rosalita's Roadside Cantina. Plaintiffs appended these policies to their Amended Complaint as Exhibits A-C, respectively. Defendant does not deny that these policies are the operative policies. *See* ECF 15, Exs. 1-3.

Both policies (collectively, the "Policies") have identical relevant provisions and are "all risk" commercial policies which cover all loss or damage to the businesses' covered premises other than those expressly excluded. Am. Cmpl., ¶ 9. For purposes of this case, there are only two forms of the underlying Policies that are at issue for purposes of Defendant's motion: the Special Property Coverage Form and the Limited Fungi, Bacteria or Virus Coverage Form.

Under the Special Property Coverage Form (Form SS 00 07 07 05), Defendant "will pay for direct physical loss of or physical damage to Covered Property … caused by or resulting from a Covered Cause of Loss." Special Property Coverage Form, Am. Cmpl., Ex. A, ECF 5-1, p.38, ¶ A; Ex. C, ECF 5-5, p.31, ¶ A.[1]

A "Covered Cause of Loss" is defined to include "risks of direct physical loss" unless the loss is otherwise excluded. Special Property Coverage Form, Am.

[1] Page references are to the page number in the ECF header.

Cmpl., Ex. A, ECF 5-1, p.39, ¶ A.3; Ex. C, ECF 5-5, p.32, ¶ A.3 (capitalization changed).

Then in a section of the Special Property Coverage Form called "Additional Coverages," the policy identifies coverages for which Twin City is responsible. Business income lost due to a suspension of operations is covered in the Special Property Coverage Form:

> We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your 'operations' during the 'period of restoration'. The suspension must be caused by direct physical loss of or direct physical damage to property at the 'scheduled premises' … caused by or resulting from a Covered Cause of Loss.

Am. Cmpl., Ex. A, ECF 5-1, p.47, ¶ A.5.o(1); Ex. C, ECF 5-5, p.40, ¶ A.5.o(1). Defendant is required to pay for "loss of Business Income that occurs within 12 consecutive months after the date of direct physical loss or physical damage. This Additional Coverage is not subject to the Limits of Insurance." Am. Cmpl., Ex. A, ECF 5-1, p.47, ¶A.5.o(3); Ex. C, ECF 5-5, p.40, ¶ A.5.o(3). "Suspension" is defined broadly to include "[t]he partial slowdown or complete cessation of your business activities…." Am. Cmpl., Ex. A, ECF 5-1, p.47, ¶ A.5.o(5)(a); Ex. C, ECF 5-5, p.40, ¶ A.5.o(5)(a).

Extra expenses Plaintiffs incur during a period of restoration is covered under the Special Property Coverage Form:

> We will pay reasonable and necessary Extra Expense you incur during the 'period of restoration' that you would not have incurred if there had been no direct physical loss or physical damage to property at the 'scheduled premises' … caused by or resulting from a Covered Cause of Loss.

Am. Cmpl., Ex. A, ECF 5-1, p.47, ¶ A.5.p(1); Ex. C, ECF 5-5, p.40, ¶ A.5.p(1).

Business income lost from dependent properties is also a loss covered under the Special Property Coverage Form:

> (1) We will pay for the actual loss of Business Income you sustain due to direct physical loss or physical damage at the premises of a dependent property caused by or resulting from a Covered Cause of Loss…

Am. Cmpl., Ex. A, ECF 5-1, p.48, ¶ A.5.r(1); Ex. C, ECF 5-5, p.41, ¶ A.5.r(1).

Business income lost due to an order of a civil authority is also covered under the Special Property Coverage Form:

> (1) This insurance is extended to apply to the actual loss of Business Income you sustain when access to your 'scheduled premises' is specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property in the immediate area of your 'scheduled premises'.
>
> (2) The coverage for Business Income will begin 72 hours after the order of a civil authority and coverage will end at the earlier of: (a) When access is permitted to your 'scheduled premises'; or (b) 30 consecutive days after the order of the civil authority.

Am. Cmpl., Ex. A, ECF 5-1, p.48, ¶ A.5.q(1)-(2); Ex. C, ECF 5-5, p.41, ¶ A.5.q(1)-(2).

The Policies' Limited Fungi, Bacteria or Virus Coverage Form (Form SS 40 93 07 05), provides $50,000 of insurance coverage per location caused by direct physical loss:

> a. The coverage described in 1.b. below only applies when the "fungi", wet or dry rot, bacteria or virus is the result of one or more of the following causes that occurs during the policy period and only if all reasonable means were used to save and preserve the property from further damage at the time of and after that occurrence. (1) A 'specified cause of loss' other than fire or lightening….
>
> b. We will pay for loss or damage by 'fungi', wet rot, dry rot, bacteria and virus. As used in this Limited Coverage, the term loss or damage means: (1) Direct physical loss or direct physical damage to Covered Property caused by "fungi", wet rot, dry rot, bacteria or virus, including the cost of removal of the "fungi", wet rot, dry rot, bacteria or virus;
>
> c. … the coverage described under this Limited Coverage is no more than the Limit of Insurance stated in the Declarations for Building and Business Personal Property, but not greater than $50,000.

*Id.*, Ex. A, ECF 5-1, p.153, ¶ B.1.a(1); Ex. C, ECF 5-6, p.14, ¶ B.1.a(1).

The Policies' Fungi, Wet Rot, Dry Rot, Bacteria Exclusion states:

> We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss:
>
> (1) Presence, growth, proliferation, spread or any activity of 'fungi', wet rot, dry rot, bacteria or virus.
>
> (2) But if 'fungi', wet rot, dry rot, bacteria or virus results in a 'specified cause of loss to Covered Property, we will

> pay for the loss or damage caused by that 'specified cause of loss'.
>
> This exclusion does not apply:
>
> (1) When 'fungi', wet or dry rot, bacteria or virus results from fire or lightning; or
>
> (2) To the extent that coverage is provided in the Additional Coverage – Limited Coverage for 'Fungi', Wet Rot, Dry Rot, Bacteria and Virus with respect to loss or damage by a cause of loss other than fire or lightning.

*Id.*, Ex. A, ECF 5-1, p.152, ¶ A.2.B.1.i; Ex. C, ECF 5-6, p.13, ¶ A.2.B.1.i.

**B. The COVID-19 Pandemic**

On March 9, 2020, New Jersey Governor Philip D. Murphy issued a series of Executive Orders which declared a "Public Health Emergency and State of Emergency" in the State of New Jersey due to the COVID-19 pandemic. The Governor declared that the spread of COVID-19 in the state constituted "an imminent public health hazard that threatens and presently endangers the health, safety, and welfare of the residents of one or more municipalities or counties of the State…." Governor Murphy directed "every person or entity in this State or doing business in this State … to cooperate fully with the State Director of Emergency Management and the Commissioner of DOH in all matters concerning this state of emergency." Am. Cmpl., ¶ 24.

On March 16, 2020, the Centers for Disease Control and Prevention, and members of the National Coronavirus Task Force, issued guidance to the country

styled as "30 Days to Slow the Spread" of COVID-19. This guidance advised individuals to adopt far-reaching social distancing measures, such as working from home, avoiding shopping trips and gatherings of more than 10 people, and staying away from bars, restaurants, and food courts. *Id.*, ¶ 5.

Following this advice, many state governments across the nation recognized the need to take steps to protect the health and safety of their residents from the human to human and surface to human spread of COVID-19. As a result, many governmental entities, including those in the state of New Jersey, entered civil authority orders suspending or severely curtailing business operations of non-essential businesses that interact with the public and provide gathering places for the individuals. *Id.*, ¶ 6.

For example, on March 21, 2020, Governor Murphy issued Executive Order 107, called a "Stay at Home Order," mandating that all residents must remain at home absent essential travel. The Stay at Home Order continued a prohibition of on-premises consumption of food or beverages, restricting all restaurants, cafeterias, and dining establishments to "offer[ ] only food delivery and/or take out services…." The Governor proclaimed that it was "the duty of every person or entity in this State or doing business in this State … to cooperate fully in all matters concerning this Executive Order." *Id.*, ¶ 28. Further orders were issued on April 7, April 11, May 6, June 2, June 4, June 26, and June 29, 2020. *Id.*, ¶¶ 29-35

(collectively, the "Closure Orders").

In order to comply with the Closure Orders issued by Governor Murphy, Plaintiffs' four restaurants ceased operations, and when subsequently were permitted to re-open, first only provided take-out, and then outdoor dining with limited capacity. When Plaintiffs were eventually permitted to reopen, it was only at limited capacity, all of which caused a dramatic drop in business income beginning in March of 2020 and continuing through today. *Id.*, ¶¶ 38-43.

Plaintiffs submitted claims to Defendant for business interruption and other covered losses under the Policies. Defendant denied Plaintiffs' claims without any investigation or inquiry. *Id.*, ¶¶ 74-79 and Exs. D-F.

Plaintiffs filed an Amended Complaint on October 30, 2020, asserting claims for a Declaratory Judgment, Breach of Contract, and Bad Faith. ECF 5. Defendant answered (ECF 13), and filed a motion for judgment on the pleadings. ECF 15.

## III. LEGAL STANDARD

Defendant's Rule 12(c) motion for judgment on the pleadings is governed by the same standard as a motion to dismiss. *Spruill v. Gillis*, 372 F.3d 218, 223 n.2 (3d Cir. 2004). "[A] complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ill. Nat'l Ins. Co. v. Wyndham Worldwide Operations, Inc.*, 653 F.3d 225, 230 (3d Cir. 2011) (quoting

*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). A claim has facial plausibility when its allegations rise above the "speculative" or "conceivable" (*Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)), and where "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. The Court "must accept all allegations in the complaint as true and draw all reasonable inferences in favor of the plaintiff." *N.J. Carpenters v. Tishman Constr. Corp.*, 760 F.3d 297, 302 (3d Cir. 2014).

Plaintiffs do not dispute that New Jersey substantive law applies. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). When interpreting an insurance policy, courts should give the policy's words "their plain, ordinary meaning." *Zacarias v. Allstate Ins. Co*., 775 A.2d 1262, 1264 (N.J. 2001).

Further:

> If the policy language is clear, the policy should be interpreted as written. If the policy is ambiguous, the policy will be construed in favor of the insured. Because of the complex terminology used in the policy and because the policy is in most cases prepared by the insurance company experts, we recognize that an insurance policy is a 'contract [] of adhesion between parties who are not equally situated.' As a result, 'courts must assume a particularly vigilant role in ensuring their conformity to public policy and principles of fairness.' 'Consistent with that principle, courts also [] endeavor [] to interpret insurance contracts to accord with the objectively reasonable expectations of the insured." …. Important to our analysis is the principle that exclusions

in the insurance policy should be narrowly construed.

*Nav-Its, Inc. v. Selective Ins. Co. of Am.*, 869 A.2d 929, 933 (N.J. 2005) (citations omitted). Thus, it is well-established that the coverage sections of an insurance policy are to be liberally construed in favor of the insured, exclusions are to be read narrowly, and ambiguities are to be construed against the insurer. *Performance Ins. Co. v. Jones*, 887 A.2d 146 (N.J. 2005). *See also Charles Beseler Co. v. O'Gorman & Young, Inc.*, 911 A.2d 47, 49 (N.J. 2006) ("It is the insurer's burden to prove that an exclusion applies."). The above rules of construction apply regardless if the insured is an individual or a corporation. *See, e.g., Nav-Its, Inc.*, 869 A.2d 929; *Charles Beseler Co. v. O'Gorman & Young, Inc.*, 911 A.2d 47.

## IV. ARGUMENT

### A. The Exclusion at Issue Does Not Bar Coverage for Plaintiffs Business Losses.

The parties do not dispute that this Court must apply New Jersey substantive law. *See Erie R.R. Co.*, 304 U.S. at 78. In the absence of any controlling authority from the New Jersey Supreme Court, this Court must predict how the New Jersey Supreme Court would rule if faced with the interpretation of the same exclusion at issue. *See Spence v. ESAB Grp., Inc.*, 623 F.3d 212, 216 (3d Cir. 2010) (applying state law). Because the COVID-19 pandemic is an unprecedented historic event, it is incumbent on this Court to make its own decision regarding the interpretation of

the exclusion at issue when predicting how the New Jersey Supreme Court would rule. This is especially important because the exclusion at issue was in existence long before the COVID-19 pandemic.

**1. The Plain Language of the Exclusion does not Bar Plaintiffs' Claims as a Matter of Law.**

The exclusion at issue cannot defeat Plaintiffs' claims as a matter of law. The exclusion at issue provides as follows:

> We will not pay for loss of damage caused directly or indirectly by any of the following: Presence, growth, proliferation, spread, or any activity of "fungi," wet rot, dry rot, bacteria, or virus.

*Id.*, Ex. A, ECF 5-1, p.152, ¶ A.2.B.1.i; Ex. C, ECF 5-6, p.13, ¶ A.2.B.1.i. Importantly, the policy further provides that under most circumstances, Twin City will not pay for "the cost of removal of the 'fungi', wet rot, dry rot, bacteria or virus" or "[t]he cost to tear out and replace any part of the building or other property as needed to gain access to the 'fungi', wet rot, dry rot, bacteria or virus…." *See Id.*, Ex. A, ECF 5-1, p.153, ¶ B.1.a(1); Ex. C, ECF 5-6, p.14, ¶ B.1.a(1). Read together, the policy is clearly intended to protect against the inept or negligent owner who allows conditions to exist on their property that result in the "[p]resence, growth, proliferation, spread, or any activity" causing damage to the premises. This case is not about damage to Plaintiffs' restaurants or the negligence of Plaintiffs, and thus, the exclusion does not apply.

As stated above, New Jersey law requires exclusions in insurance policies to be strictly construed against the insurer and any ambiguities be resolved in favor of the insured. *Charles Beseler Co.*, 911 A.2d at 49. The above exclusion does not bar coverage because it applies to conditions of the premises, not to protecting against a pandemic.

This interpretation is confirmed by the terms contained in the Limited Fungi, Bacteria or Virus Coverage Form. That form includes terms such as "wet rot" and "dry rot;" refers to "remediation," "restoration," and "[t]he cost to tear out and replace any part of the building;" and specifically defines fungi as "any type or form of fungus, including mold and mildew, and any mycotoxins, spores, scents or by-products produced or released by fungi." *See* Limited Fungi, Bacteria or Virus Coverage Form, Am. Cmpl., Ex. A, ECF 5-1, p.152, 154, ¶¶ A.1, 2.ii, & C; Ex. C, ECF 5-6, p.13, 15 ¶¶ A.1, 2.ii, & C. Each of these terms are situated in the same coverage form and are related to damage or destruction of the premises. "[I]n the insurance world – where scriveners often use series of similar words and phrases as the means of reaching or ensuring a particular goal – 'words of a feather flock together.'" *Gil v. Clara Maass Medical Center*, 162 A.3d 1093, 1103 (N.J. Super. 2017) (refusing to give the phrase "associated company" far greater scope than its neighboring phrases).

This means that words near to or used in combination with each other are

considered to be similar to each other. *See id.* Hence, the various terms in the exclusion at issue, read in their plain and ordinary meaning as they must (*Am. Motorists Ins. Co. v. L-C-A Sales Co*., 713 A.2d 1007, 1013 (N.J. 1998)), suggest a virus associated with rotting, soaking, and deteriorating conditions of the premises caused by the owner's negligence.

Plaintiffs are not, however, seeking losses resulting from the condition of the premises. Rather, Plaintiffs are seeking losses due to closures related to an outside pandemic. Am. Cmpl., ¶¶ 3-4. "Pandemic" is defined as "an outbreak of a disease that occurs over a wide geographic area and affects an exceptionally high proportion of the population: a pandemic outbreak of a disease[.]" *See* https://www.merriam-webster.com/dictionary/pandemic (last visited 4/7/21).[2] Had Defendant intended to exclude pandemics such as COVID-19, it should have been more specific in drafting the exclusionary language, and specifically, should have used pandemic language.

For example, in *Meyer Nat. Foods, LLC v. Liberty Mut. Fire Ins. Co*., 218 F. Supp. 3d 1034, 1038 (D. Neb. 2016), the exclusion encompassed "[t]he actual or suspected presence or threat of any virus, organism or like substance that is

[2] This Court can take judicial notice of dictionary definitions. *See, e.g., Sanofi-Aventis U.S., LLC v. Mylan GmbH*, No. 17-9105, 2019 U.S. Dist. LEXIS, at *33, 2019 WL 267373 (D.N.J. May 9, 2019).

capable of inducing disease, illness, physical distress or death, whether infectious or otherwise, including but not limited to any epidemic, pandemic, influenza, plague, SARS, or Avian Flu." Defendant in this case, however, did not draft an exclusion which addresses a pandemic or epidemic.

Nor did Defendant draft an exclusion that excluded viruses that cause physical injury or illness, such as the Coronavirus. For example, in *Causeway Automotive, LLC v. Zurich Am. Ins. Co*., No. 20-8393, 2021 U.S. Dist. LEXIS 25325, at *4-5, 2021 WL 486917 (D.N.J. Feb. 10, 2021) (cited throughout Defendant's brief), the provision excluded losses caused by "a virus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness or disease." Such language, which is commonly known as the Insurance Service Office exclusion ("ISO exclusion"),[3] is not present here. Words matter, and the absence of the ISO exclusion should be construed against Twin City. Accordingly, because the provision at issue covers conditions on the premises, the exclusion cannot bar coverage when considered in the context of the COVID-19 pandemic.

*Urogynecology Specialist of Florida LLC v. Sentinel Ins. Co., Ltd*., No. 6:20-cv-01174, 2020 U.S. Dist. LEXIS 184774, 2020 WL 5939172 (M.D. Fla.

[3]*See Turek Enters. v. State Farm Mut. Auto. Ins. Co.*, 484 F. Supp. 3d 492, 504 (E.D. Mich. 2020) (discussing the ISO exclusion).

Sept. 24, 2020) confirms this conclusion.[4] There, the court examined the identical Hartford exclusion at issue in the instant case. The court first noted that COVID-19 presents "unique circumstances" which create a significant distinction from prior insurance cases. *Id.*, 2020 U.S. Dist. LEXIS 184774 at *10. The court found the exclusion ambiguous as it related to COVID-19, and denied the insurer's motion to dismiss because COVID-19 did not "align" with the pollutants that the provision had anticipated:

> . . . it is not clear that the plain language of the policy unambiguously and necessarily excludes [p]laintiff's losses. The virus exclusion states that [the insurer] will not pay for loss or damage caused directly or indirectly by the presence, growth, proliferation, spread, or any activity of 'fungi, wet rot, dry rot, bacteria or virus.' Denying coverage for losses stemming from COVID-19, however, does not logically align with the grouping of the virus exclusion with other pollutants such that the Policy necessarily anticipated and intended to deny coverage for these kinds of business losses.

*Id.* at *10-11.

The court's reference to the illogical "grouping of the virus exclusion with other pollutants" is discussed above: It is not logical that the insurer drafted the exclusion with the intent to exclude the Coronavirus (unknown at the time the

---

[4] Although not binding on this Court, this opinion has persuasive value. *See Nat'l Mfg. Co. v. Citizens Ins. Co. of Am.*, No. 13-314, 2016 U.S. Dist. LEXIS 180145, at *14, n.7, 2016 WL 7491805 (D.N.J. Dec. 30, 2016).

exclusion was drafted) in a grouping of pollutants that address bacterium and remediation of the premises. Accordingly, pursuant to *Urogynecology Specialist*, the exclusion is not a basis on which to deny coverage as a matter of law.[5]

**2. Defendant's Argument, that the Exclusion Applies Because Coronavirus is a "Virus," Ignores the Plain Language of the Exclusion Requiring the Contaminant to be on the Premises.**

To support its denial of insurance coverage, Defendant makes a facile argument, contending that the exclusion bars insurance coverage because Coronavirus is a virus. Def. Br. at 10. Defendant asks this Court to take judicial notice that "the coronavirus is a virus" because such a fact is "generally known" and "not subject to reasonable dispute." *Id.*, n.5. Such simplification, however, ignores the unique circumstances of the COVID-19 pandemic, which courts have recognized present "novel and complex" issues. *See Urogynecology Specialist,* 2020 U.S. Dist. LEXIS 184774, at *6.

Further, when the authorities cited by Defendant are examined, it is evident that Defendant attempts to compare apples to oranges by applying exclusionary

[5] The decision in *N&S Rest. LLC v. Cumberland Mut. Fire Ins. Co*., No. 20-05289, 2020 U.S. Dist. LEXIS 206972, at *3-4, 2020 WL 6501722 (D.N.J. Nov. 5, 2020), relied on by Defendant, fails to credit or mention the *Urogynecology Specialist* court finding the exclusion ambiguous. *Compare N&S Rest. LLC,* 2020 U.S. Dist. LEXIS 206972, at *14-15 with *Urogynecology Specialist,* 2020 U.S. Dist. LEXIS 184774 at *10-11.

language to an unanticipated and unprecedented world health problem that the exclusion never contemplated. For example, as stated above, *Causeway Automotive,* relied on by Defendant throughout its brief, contains a distinctly different exclusion, the ISO exclusion. *See* 2021 U.S. Dist. LEXIS 25325, at *4-5. There, losses caused by "a virus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness or disease" are excluded. *Id.* at *4-5. In this case, however, there is no language that references a virus that "induc[es] physical distress, illness or disease." Instead, the provision at issue relates to virus, mold, mildew, fungi, and spores on the premises.

The different ISO exclusion is also at issue in the laundry list of other cases

cited by Defendant applying New Jersey law[6] and other states' laws,[7] and thus none of those cases are applicable here. That Defendant conflates the instant exclusion with the ISO exclusion is evident by its repeated reference throughout its brief to a "similar" exclusion. *See* Def. Br. at 2, 8, 11, 12, 13 & n.7, and 14.

One case on which Defendant relies, *Eye Care Centers of NJ v. Twin City Fire Ins. Co.*, No. 20-05743, 2021 WL 457890, at *1-2, 2021 WL 457890 (D.N.J. Feb. 8. 2021), does address the same exclusion at issue in the instant case. There,

---

[6] *See* Def. Br. at 11, 13-14 (citing *Del. Valley Plumbing Supply v. Merchs. Mut. Ins. Co.*, No. 1:20-cv-08257, 2021 U.S. Dist. LEXIS 28265, at *2, 2021 WL 567994 (D.N.J. Feb. 16, 2021); *N&S Rest. LLC v. Cumberland Mut. Fire Ins. Co.*, No. 20-05289, 2020 U.S. Dist. LEXIS 206972, at *3-4, 2020 WL 6501722 (D.N.J. Nov. 5, 2020); *MAC Prop. Grp. LLC v. Selective Fire & Cas. Ins. Co.*, No. L-2629-20, 2020 N.J. Super. Unpub. LEXIS 2244, at *11, 2020 WL 7422374 (N.J. Super. Nov. 5, 2020); *FAFB LLC v. Blackboard Ins. Co.*, MER L 000892-20 (N.J. Super. Oct. 30, 2020) (transcript attached to Defendant's Brief as Ex. 7, Tr. at 12-13 (ECF 15-8, pp.10 of 14)).

[7] *See* Def. Br. at 12-13 (citing *Toppers Salon & Health Spa, Inc. v. Travelers Prop. Cas. Co. of Am., No*. 2:20-CV-03342, 2020 U.S. Dist. LEXIS 223356, at *3-4, 2020 WL 7024287 (E.D. Pa. Nov. 30, 2020); *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indemn. Co.*, No. 2:20-cv-04423, 2020 U.S. Dist. LEXIS 188463, at *3 2020 WL 5938689 (C.D. Cal. Oct. 2, 2020); *Martinez v. Allied Ins. Co. of Am.*, No. 2:20-cv-00401, 2020 U.S. Dist. LEXIS 165140, at *2, 2020 WL 5240218 (M.D. Fla. Sept. 2, 2020); *Turek Enters., Inc. v. State Farm Mut. Auto. Ins. Co.*, No. 20-1165, 2020 U.S. Dist. LEXIS 161198, at *2-5, 2020 WL 5258484 (E.D. Mich. Sept. 3, 2020); *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-cv- 461, 2020 U.S. Dist. LEXIS 147276, at *6, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020); *Travelers Cas. Ins. Co. of Am. v. Geragos & Geragos*, CV 20-3619, 2020 U.S. Dist. LEXIS 196932, at *4, 2020 WL 6156584 (C.D. Cal. Oct. 19, 2020); *10E, LLC v. Travelers Indem. Co. of Ct.*, No. 2:20-cv-044118, 2020 U.S. Dist. LEXIS 156827, at *1 (C.D. Cal. Sept. 2, 2020); *Seifert v. IMT Ins. Co.*, No. CV 20-1102, 2020 U.S. Dist. LEXIS 192121, *2, 2020 WL 6120002 (D. Minn. Oct. 16, 2020)).

the court granted Twin City's motion to dismiss, finding that the exclusion barred coverage. However, the court, like Defendant, relied on cases that interpreted different exclusions. *See id*., at *6, *citing N&S Rest., supra* (ISO exclusion)*; Mac Prop. Grp. LLC, supra* (same)*; Boulevard Carroll Ent. Grp., Inc. v. Fireman's Fund Ins. Co.*, No. 20-11771, 2020 U.S. Dist. LEXIS 234659, at * 2, 2020 WL 7338081 (D.N.J. Dec. 14, 2020) (Allianz provision which excluded losses from "disease, sickness, any conditions of health, bacteria, or virus), *appeal docketed*, No. 21-1061 (3d Cir. Jan. 12, 2021); *7th Inning Stretch LLC v. Arch Ins. Co.*, Civ. No. 20-08161, 2021 U.S. Dist. LEXIS 11326, at *4 (D.N.J. Jan. 19, 2021) (ISO exclusion). For the reasons set out above, treating an exclusion focused on disease as interchangeable with an exclusion focused on the condition of the premises is inappropriate.

In conclusion, because the exclusion in Plaintiffs' Policies fails to mention the word "pandemic," or a virus that "causes physical distress, illness, or disease," the exclusion does not bar coverage for Plaintiffs' losses as a matter of law.

At a minimum, this Court should view the provision as ambiguous, requiring that the language be construed against the insurer. *Boswell v. Travelers Indem. Co*., 120 A.2d 250, 253 (N.J. Super. 1956). Where the language of an insurance policies is ambiguous or vague it must be given any reasonable interpretation that will provide coverage. See *Kopp v. Newark Ins. Co*., 499 A.2d 235, 237 (N.J. Super.

1985). "[P]urchasers of insurance are entitled to the broad measure of protection necessary to fulfill their reasonable expectations." *Id.* Defendant's motion for judgment on the pleadings should therefore be denied. *See Optical Servs. USA/JCI v. Franklin Mut. Ins. Co*., 2020 N.J. Super. Unpub. LEXIS 1782, at *25 (N.J. Super. Aug. 13, 2020) ("plaintiff should be permitted to engage in issue-oriented discovery and also be permitted to amend its complaint accordingly prior to an adjudication on the merits of any policy language").[8]

### B. A Virus on the Premises was not the Proximate Cause of Plaintiffs' Losses.

Even if this Court determines that the exclusion applies, coverage is not precluded because Governor Murphy's Closure Orders were the cause of Plaintiffs' business income losses. Under New Jersey's "Appleman Rule," "when an insurance policy uses an exclusion which bars coverage for losses caused by a particular peril, the exclusion applies only if the excluded peril was the 'efficient proximate cause of the loss.'" *Zurich Am. Ins. Co. v. Keating Bldg. Corp*., 513 F. Supp. 2d 55, 70 (D.N.J. 2007) (*citing* John Allen Appleman*, Insurance Law &*

[8] Under the New Jersey rules, unpublished opinions are not binding (N.J. Ct. R. 1:36-3), but Rule 1:36-3 does not prevent a party from properly calling an unpublished opinion to the attention of the court (*see Falcon v. Am. Cyanamid*, 534 A.2d 403, 407, n.2 (N.J. Super. 1987)), nor prevent a court from acknowledging the persuasiveness of a reasoned decision on analogous facts. *See Nat'l Union Fire Ins. Co. of Pittsburgh v. Jeffers*, 884 A.2d 229, 232 (N.J. Super. 2005).

*Practice*, § 3038, at 309-11 (1970)). "[C]overage is available if the covered peril was the efficient proximate cause of a loss and an excluded peril merely occurred in the chain of events that followed." *Zurich Am. Ins. Co.,* 513 F. Supp. 2d at 70. Here, the efficient cause of the loss was not any virus on the premises but the Closure Orders, which closed Plaintiffs' business and thereafter severely curtailed their operations, leading to Plaintiffs' lost revenue. The Policies at issue specifically cover "the actual loss of Business Income you sustain when access to your 'scheduled premises' is specifically prohibited by order of a civil authority…." Am. Cmpl., Ex. A, ECF 5-1, p.48, ¶ A.5.q(1); Ex. C, ECF 5-5, p.41, ¶ A.5.q(1).

Defendant responds that parties can contract around the "Appleman Rule," and the parties have done so here with the "anti-concurrent causation clause." This clause, contained in the exclusion at issue, bars all coverage under the Policies regardless of whether it is the sole cause of loss. *See* Def. Br. at 15-16.

If this Court finds that the exclusion does not apply, Defendant's argument automatically fails because the anti-concurrent causation clause is contained within the exclusion. And even if this Court finds that the exclusion is applicable, the anti-concurrent causation clause does not bar Plaintiffs' claims because the virus was not on the premises. The anti-concurrent causation clause applies only if there is "Presence, growth, proliferation, spread [of a] virus." Am. Cmpl., Ex. A, ECF 5-

1, p.152, ¶ A.2.B.1.i; Ex. C, ECF 5-6, p.13, ¶ A.2.B.1.i. Here, Plaintiffs' restaurants were unaffected by the Coronavirus itself. There are no allegations of customers or employees infected with COVID-19. Instead, the Closure Orders caused Plaintiffs' businesses to shut down, and it was the Closure Orders which significantly curtailed Plaintiffs' business operations, leading to Plaintiffs' business income losses.

Defendant cites various cases to support its anti-concurrent causation clause argument. However, the following cases did not involve the COVID-19 pandemic and they were decided on summary judgment and after development of the factual record. *See, e.g., Assurance Co. of America, Inc. v. Jay-Mar, Inc*., 38 F. Supp. 2d 349, 355 (D.N.J. 1999) (denying a motion for summary judgment); *Keelen v. QBE Ins. Corp*., No. 13-cv-6941, 2016 U.S. Dist. LEXIS 55895, at *12, 2016 WL 1690088 (D.N.J. Apr. 27, 2016) (summary judgment); *Um v. Cumberland Ins. Grp.*, No. A-0625-06T2, 2008 N.J. Super. Unpub. LEXIS 2800, at *5, 2008 WL 656805 (N.J. Super. Mar. 13, 2008) (appeal after summary judgment). These cases support the development of a factual record.

And while *N&S Rest. LLC*, 2020 U.S. Dist. LEXIS 206972, at *3-4 (D.N.J.

Nov. 5, 2020)[9] and *MAC Prop. Grp., L.L.C.*, 2020 N.J. Super. Unpub. LEXIS 2244, at *11 (2020), did indeed involve a COVID-19 coverage denial, it was the ISO exclusion. As discussed above, the ISO exclusion which addresses viruses that causes physical illness or injury, is distinctly different from the exclusion at issue which pertains to a virus (or mold, mildew, or spores) contaminating the premises.

The only case cited by Defendant that contains the same exclusion at issue and applies the anti-concurrent clause to bar coverage is *Eye Care Ctr. of NJ*, 2021 U.S. Dist. LEXIS 24344, at *5-6. However, as discussed *supra* at pages 20-21, the court conflated the language of the various exclusions. The court's reasoning there is unsound. Accordingly, Defendant's motion must be denied.

### C. The Closure Orders Caused Plaintiffs Losses Which are Covered Under the Policies.

Defendant next argues that governmental orders aimed at slowing the spread of COVID-19 do not constitute a covered cause of loss under the Policies and, therefore, cannot trigger coverage. Def. Br. at 17. Defendant first repeats its earlier argument that Plaintiffs' losses are not covered because they are caused by the Coronavirus which is excluded from coverage. *Id.* at 17-18. In support of this argument, Defendant cites cases from other jurisdictions which are not binding on

[9] In its brief, Defendant suggests that this decision is awaiting publication in the Federal Supplement, 3d reporter. *See* Def. Br. at 16. This decision was not selected for publication.

this Court. *Banner Life Ins. Co. v. Lukacin*, No. 13-cv-6589, 2014 U.S. Dist. LEXIS 134675, at *9, 2014 WL 4724902 (D.N.J. Sept. 22, 2014). In addition and determinatively, those cases interpret the different ISO exclusion and, thus, afford Defendant no support.[10]

Defendant next argues that civil authority orders are not a covered cause of loss because they are not a "peril" or something that caused physical damage or destruction to the premises. *See* Def. Br. at 18. Again Defendant contorts the policy language by equating the phrase "risk of direct physical loss" to physical damage. Yet the Policies provide coverage for "*risks* of direct physical loss" (Special Property Coverage Form, Am. Cmpl., Ex. A, ECF 5-1, p.39, ¶ A.3; Ex. C, ECF 5-5, p.32, ¶ A.3 (capitalization changed, emphasis added)) – there need not be physical damage. Plaintiffs plausibly allege that they suffered a risk of direct physical loss when the Closure Orders deemed all non-essential business unsafe which thereby prevented Plaintiffs from accessing their businesses.

In *Optical Servs.,* 2020 N.J. Super. Unpub. LEXIS 1782, plaintiffs similarly argued that they suffered a direct physical loss to trigger coverage when they were

---

[10] *See* Def. Br. at 18 (citing *Border Chicken AZ LLC v. Nationwide Mut. Ins. Co*., No. CV-20-00785, 2020 U.S. Dist. LEXIS 217649, *3-4, 2020 WL 6827742 (D. Ariz. Nov. 20, 2020) (ISO exclusion); *W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos*., 2020 U.S. Dist. LEXIS 201161, at *2-3, 2020 WL 6440037 (C.D. Cal. Oct. 27, 2020) (same); *Martinez v. Allied Ins. Co. of Am.*, 483 F. Supp. 3d 1189, 1191-92 (M.D. Fla. 2020) (same)).

forced to close their business by the New Jersey governor's order of civil authority. Like Defendant here, defendant responded that plaintiffs' loss of use of their respective properties did not constitute a direct physical loss and therefore was not a direct covered loss defined by the policies. 2020 N.J. Super. Unpub. LEXIS 1782, at *24.

In denying defendant's motion to dismiss, the *Optical Servs.* court found that defendant's argument was a "blanket statement unsupported by any common law in the State of New Jersey or by a blanket review of the policy language." *Id.* at *24-25. The court ruled that plaintiff "should be afforded the opportunity to develop their case and prove before this Court that the event of the COVID-19, Loss of Income, when occupancy of the described premises is prohibited by civil authorities." *Id.* at *27. The court noted that the argument, "that physical damage occurs where a policy holder loses functionality of their property and by operation of civil authority such as the entry of an executive order results in change to the property" is an "interesting" one that plaintiffs should be permitted to develop. *Id.* at *27-28.

The *Optical Svs.* court relied on *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 968 A.2d 724 (N.J. Super. 2009), where the court had ruled that the trial court improperly granted summary judgment for the insurer. There, a group of grocery stores sought insurance coverage when an electrical grid lost power for

four days, and plaintiffs lost business. Plaintiffs' premises were not damaged. The insurer denied coverage for lost income, arguing that its policy only applied to "physical damage" and that there was no physical damage and therefore no coverage. The policy did not define the term "physical damage."

In reversing the trial court's grant of summary judgment, the court stated that "[s]ince the term 'physical' can mean more than material alteration or damage, it is incumbent on the insurer to clearly and specifically rule out coverage in the circumstances where it was not to be provided." *Id.* at 735. The court concluded that the undefined term "physical damage" in the policy was ambiguous and that the trial court construed the term too narrowly, in a manner favoring the insurer and inconsistent with the reasonable expectations of the insured. *Id.* at 734.

Here, the New Jersey governor's Closure Orders are a "risk[] of direct physical loss" that impacted Plaintiffs' business in the same way that the loss of power from the grid affected the grocery stores' business. That such phrase does not equate to physical damage is confirmed by the business income clause in the Policies. Business income losses "must be caused by direct physical loss of *or physical damage* to the property…." Am. Cmpl., Ex. A, ECF 5-1, p.47, ¶ A.5.o(1); Ex. C, ECF 5-5, p.40, ¶ A.5.o(1) (emphasis added). If Defendant intended that "physical loss" equate to "physical damage" as Defendant argues, there would be no need for the clause "physical damage" to the property to be included in the

above section. Coverage clauses are to be interpreted liberally, and to the extent coverage is unclear or uncertain, the provision must be constructed against Defendant in favor of coverage. *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 968 A.2d 724, 735 (N.J. Super. 2009).

For the foregoing reasons, Defendant's Motion for Judgment on the Pleadings should be denied.

**D. Plaintiffs Have Plausibly Stated A Claim of Bad Faith**

All contracts in New Jersey impose an implied obligation of good faith and fair dealing in their performance and enforcement. *Thunder, Inc. v. Borden, Inc.*, 690 A.2d 575, 587 (N.J. 1997). The New Jersey Legislature has codified these principles by defining what is unfair or deceptive business practices in the area of insurance claims settlement. Such practices include "[r]efusing to pay claims without conducting a reasonable investigation based upon all available information." N.J.S.A. § 17:29B-4(9)(d). Plaintiffs have alleged that "Defendant denied Plaintiffs' claim without any investigation or inquiry." Am. Cmpl., ¶¶ 74, 78. Regarding the JRJ Policies, Defendant sent a denial letter (*id*., Ex. D), and then sent a second letter indicating that a claim representative is available to assist with all claim related questions. *Id.*, Ex. E. The sequential letters, first denying coverage and then offering a claims representative for coverage questions when coverage had been denied, suggests that the denial was *pro forma* and sent without

any consideration or investigation. As to the GR Brick Policies, Defendant's denial letter was similar in substance to the JRJ Policies.

No investigation was conducted by Defendant prior to denial (Am. Cmpl., ¶¶ 74, 48), and Plaintiffs specifically allege that "Defendant acted with malice and in bad faith by denying comprehensive business insurance coverage to Plaintiffs in light of the polices and the facts, without any investigation or inquiry." *Id*., ¶ 104. Plaintiff has plausibly pled a bad faith claim.

Defendant argues that there can be no bad faith because there is no coverage for Plaintiffs' insurance claim. Def. Br. at 19. Plaintiffs disagree. If this were the case, insurers could deny claims without investigating, forcing policyholders to sue. The insurers could then avoid liability for punitive damages for failing to investigate if the claim was ultimately deemed not covered under the policy. This scenario would lead to an absurd result, making the statutes regarding the insurers' obligations of good faith meaningless.

In *Taddei v. State Farm Indem. Co*., 951 A.2d 1041, 1048 (N.J. Super. 2008), the court cited with approval the holding in *Skaling v. Aetna Ins. Co.*, 799 A.2d 997, 1011 (R.I. 2002), which held that "we are not persuaded that an insurer is relieved of its obligations to deal with its insured consistent with its implied obligations of good faith and fair dealing simply because the claim is fairly debatable." *See also Strategic Capital Bancorp Inc. v. St. Paul Mercury Ins. Co.,*

2014 U.S. Dist. LEXIS 18992, at *15-16, 2014 WL 562970 (C.D. Ill. Feb. 13, 2014) (declining to dismiss bad faith claim even though there may be a bona fide coverage dispute because the court did not have the benefit of all evidence to consider the totality of the circumstances under the Illinois statute addressing bad faith denial). Because Plaintiffs have alleged that Defendant's denial of their claim was without investigation, even if coverage claim is fairly debatable, *Taddei* suggests that Plaintiffs have plausibly pled a claim for bad faith.

Defendant's second argument is that Plaintiffs have not alleged sufficient facts to establish bad faith. Def. Br. at 20. Defendant argues that "Plaintiffs here have alleged no such conduct by Twin City" such as "[r]efusing to pay claims without conducting a reasonable investigation." *Id.* To the contrary, Plaintiffs have specifically alleged that "Defendant denied Plaintiffs' claim without any investigation or inquiry" (Am. Cmpl., ¶¶ 74, 78), and that "Defendant acted with malice and in bad faith by denying comprehensive business insurance coverage to Plaintiffs in light of the polices and the facts, without any investigation or inquiry." *Id.*, ¶ 104. New Jersey law provides that "the insurer must have no valid reason to deny benefits or delay processing of the claim, and must have known or recklessly disregarded the fact that no reasonable basis existed for denying the claim." *Pickett v. Lloyd's*, 621 A.2d 445, 447 (N.J. 1993). Plaintiffs have pled the elements of bad faith under the statute, and accordingly, Defendant's motion must be denied.

Based on the foregoing, Plaintiffs have plausibly alleged that Defendant acted with malice and in bad faith by denying comprehensive business insurance coverage to Plaintiffs without any investigation of the claims.

### E. If this Court Enters Judgment on any Claim, Plaintiffs Request Leave to Amend.

In the event this Court is inclined to grant Defendant's Motion for Judgment on the Pleadings and dismiss any claim, Plaintiffs request leave to amend. Courts are free to grant a party leave to amend whenever "justice so requires" (Fed. R. Civ. P. 15(a)(2)), and "leave to amend 'shall be freely given when justice so requires.'" *Foman v. Davis*, 371 U.S. 178 (1962). Rule 15(a)(2) furthers the policy of considering claims on their merits rather than dismissing them on technicalities. *Schomburg v. Dow Jones & Co.*, 504 F. App'x 100, 105 (3d Cir. 2012); *see also Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316 (1988) ("the requirements of the rules of procedure should be liberally construed and . . . 'mere technicalities' should not stand in the way of consideration of a case on its merits."). Thus, Plaintiffs should be afforded leave to amend.

## V. CONCLUSION

For the foregoing reasons, Defendant's Motion for Judgment on the Pleadings should be denied, and this Court should grant other and further relief as is just and appropriate.

Dated: April 15, 2021

By: */s/ Jonathan Lindenfeld*

Jonathan Lindenfeld
Fegan Scott LLC
140 Broadway, 46th Floor
New York, NY 10005
Phone: (332) 216-2101
Facsimile: (312) 264-0100
jonathan@feganscott.com

Lynn A. Ellenberger (pro hac vice)
Fegan Scott LLC
500 Grant St., Suite 2900
Pittsburgh, PA 15219
Phone: (412) 346-4104
Facsimile: (312) 264-0100
lynn@feganscott.com

Elizabeth A. Fegan (pro hac vice)
Nathaniel D. French (pro hac vice)
Fegan Scott LLC
150 S. Wacker Dr., 24th Floor
Chicago, IL 60606
Phone: (312) 741-1019
Facsimile: (312) 264-0100
beth@feganscott.com
nate@feganscott.com

*Counsel for Plaintiffs JRJ Hospitality, Inc. d/b/a Nonna's Citi Cucina, KMK Hospitality, Inc. d/b/a Metropolitan Café, Eight Realty, LLC, TMK Marketing, LLC, and GR Brick, LLC d/b/a Tre and Rosalita's Roadside Cantina*

**CERTIFICATE OF SERVICE**

I, Jonathan D. Lindenfeld, an attorney, affirm that the foregoing was filed on April 15, 2021 on ECF, which automatically served all counsel of record.

By: */s/ Jonathan D. Lindenfeld*
Jonathan D. Lindenfeld