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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

SERENDIPITOUS, LLC/MELT; MELT FOOD TRUCK, LLC d/b/a MELT; and FANCY'S ON FIFTH, LLC, d/b/a/ FANCY'S ON FIFTH,	)	
Plaintiffs,	)	Case No.: 2:20-cv-00873
v.	)	
THE CINCINNATI INSURANCE COMPANY,	)	
Defendant.	)	

DEFENDANT THE CINCINNATI INSURANCE COMPANY'S SECOND REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS THE SECOND AMENDED COMPLAINT SUBMITTED IN RESPONSE TO BRIEF OF PLAINTIFFS' AMICI

Defendant, The Cincinnati Insurance Company ("Cincinnati"), submits herewith its Second Reply Brief In Support Of Its Motion To Dismiss The Second Amended and Supplemental Complaint (hereinafter "Complaint") [Dkt. No. 15], Submitted In Response To Brief of Plaintiffs' Amici [Dkt. No. 40].

I. PLAINTIFFS' AMICI IMPROPERLY ARGUE THE COURT SHOULD BASE ITS DECISION ON SYMPATHY RATHER THAN ON LEGAL REASONING AND CONTRACT TERMS.

In a misguided strategy to convince the Court to deny Cincinnati's motion to dismiss on the basis of sympathy rather than legal reasoning, American

Policyholders and the National Independent Venue Association ("Plaintiffs' Amici") argue a "parade of horribles" will result if Plaintiffs are denied recovery in this suit. [Dkt. No. 40, pp. 2-5] They assert that the calamitous result of dismissal of Plaintiffs' suit includes destruction of restaurants and the performing arts sector and the laying off of employees of these businesses. *Id*. Plaintiffs' Amici assert that "[t]he insurance industry's wholesale, across-the-board denial of all claims for business interruption losses related to the 2020 pandemic has produced exactly the kind of calamity predicted" in the case *Bi-Econ. Mkt., Inc. v. Harleysville Ins. Co. of New York*, 886 N.E.2d 127, 131–32 (N.Y. 2008). [Dkt. No. 40, pp. 4-5] Plaintiffs' Amici then attempt to place the "calamity" at the hands of this Court by asserting "[t]he Court's ruling has the potential to impact the Alabama members of the *Amici*, as well as the claims of hundreds of other members of NIVA, and the claims of the thousands of other restaurants and businesses in Alabama and elsewhere that have had their business interruption claims denied." [Dkt. No. 40, p. 5]

Regrettably, plaintiffs across the country and their amici have tried these tactics in other suits, and appropriately, they have been consistently rejected by sound legal reasoning. In a recent Northern District of Illinois decision granting Cincinnati's motion to dismiss in a Coronavirus coverage case, for example, the court expressly recognized that reason and policy language trumps judicial sympathy. "The Court sympathizes with Plaintiff. Nevertheless, the policy's

phrasing requires the Court to find in Defendant's favor." *T&E of Chicago, LLC v. The Cincinnati Insurance Company*, 2020 WL 6801845, *5 (N.D. Ill., Nov. 19, 2020). In another recent Coronavirus coverage decision in Cincinnati's favor, the court held it "is not unsympathetic to the situation facing the Plaintiff and other businesses. But the unambiguous terms of the Policy do not provide coverage for solely economic losses unaccompanied by physical property damage. Therefore, the motion to dismiss must be granted." *Uncork And Create, LLC v. The Cincinnati Insurance Company*, 2020 WL 6436948, *5 (S.D. W. Va. Nov. 2, 2020). In granting dismissal in favor of the insurer a another Coronavirus coverage case, the Northern District of Georgia reminded the plaintiffs that courts make decisions based on contract terms and not judicial sympathy. "This Court recognizes the challenging position the Plaintiffs found themselves in. … This decision merely reflects the plain language of the parties' insurance contract." *Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, 2020 WL 5928755, at *7 (N.D. Ga. Oct. 6, 2020).

The other improper tactic Plaintiffs' Amici use here that other courts likewise reject is an attempt to buttress Plaintiffs' complaint with "facts" the Complaint does not allege. Here, Plaintiffs' Amici cite unverified and unauthenticated statistics concerning what they contend would be the adverse economic consequences of this Court granting Cincinnati's motion to dismiss. Courts can, in ruling on a Rule 12(b)(6) motion, consider a document plaintiff refers to in its complaint when the

document is central to plaintiff's claim, its contents are not in dispute, and the defendant attaches the document to its motion to dismiss. *Financial Sec. Assur, Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1284 (11th Cir. 2007). The court cannot, however, consider other extrinsic "facts" like the statistical "proof" Plaintiffs' Amici submit here. *Id*. None of the statistical "facts" cited by Plaintiffs' Amici satisfy the requirements articulated in *Stephens* necessary for the Court to consider evidence extrinsic to the complaint, so the Court should not consider them.

In another recent Coronavirus coverage decision granting Cincinnati's motion to dismiss, *Vandelay Hospitality Group, LC v. The Cincinnati Ins. Co.*, 2020 WL 5946863, *1 (N.D. Texas, Oct. 7, 2020), the court rejected allegations the plaintiff made in its opposition brief and confined itself to the allegations contained in the complaint. "But the allegations of the amended petition—not the contents of [Plaintiff] Vandelay's response to Cincinnati's motion to dismiss—are what count when determining whether Vandelay has pleaded a plausible claim. And those allegations, *see* Am. Pet. ¶¶ 38- 46, are factually conclusory and/or legal conclusions and are therefore inadequate to plead a plausible claim for breach of contract." *Vandelay*, 2020 WL 5946863, at *1 (footnote omitted).[1]

Plaintiffs' Amici disingenuously quote *Bi-Econ* for the proposition that "[t]he purpose of business interruption insurance cannot be clearer – to ensure that [the

[1] Plaintiffs filed an amended complaint in *Vandelay* that Cincinnati has also moved to dismiss.

policyholder] had the financial support necessary to sustain its business in the event disaster occurred . . . Certainly, many business policyholders . . . lack the resources to continue business operations without insurance proceeds." [Dkt. No. 40, p. 4, *citing Bi-Econ.*, 886 N.E.2d at 132] *Bi-Econ* is not a Coronavirus coverage case, so it does not warrant analysis here. More important, in cherry picking an out-of-context quote from *Bi-Econ*, Plaintiffs' Amici omit the obvious, threshold requirement in the policy that there must be direct physical loss in order for there to be coverage. The insured has "the financial support necessary to sustain its business in the event disaster occur[s]" *only when* a direct physical loss has occurred, and no exclusions apply. In Alabama, this means that tangible alteration of property is required. *Hillcrest Optical, Inc. v. Continental Cas. Co.*, 2020 WL 6163142 (S.D. Ala. Oct. 21, 2020). Plaintiffs have failed to allege tangible alteration of property in this case, thus requiring dismissal as a matter of law.

II. PLAINTIFFS' AMICI'S ARGUMENTS FAIL BECAUSE THEY IGNORE ALABAMA PRECEDENT THAT THE CORONAVIRUS DOES NOT CONSTITUTE DIRECT PHYSICAL LOSS AND INSTEAD CITE IRRELEVANT CASES FROM OTHER JURISDICTIONS.

When Plaintiffs' Amici finally try to proffer reasoned, substantive arguments, they cite 24 cases totaling approximately 195 pages. Of these 24 cases, only one of them, *Optical Services USA v. Franklin Mut. Ins. Co.*, Case No. BER-L-3681-20 (Aug. 13, 2020), is a Coronavirus coverage case. *Optical Services* is not applicable,

however, because it is a trial court bench decision by the Superior Court of New Jersey where the court held that it felt it was constrained by New Jersey law. [Dkt. No. 31, p. 40, l. 8-10]

Plaintiffs' Amici cite no Alabama state court Coronavirus coverage decisions that would constrain this Court's decision because there are none. An Alabama federal court decision applying Alabama law, *Hillcrest Optical, Inc. v. Continental Cas. Co.*, 2020 WL 6163142, *6 (S.D. Ala. Oct. 21, 2020), is a Coronavirus coverage case directly on point where the court granted the insurer's motion to dismiss on the basis that allegations of the complaint did not satisfy the direct physical loss requirement. Cincinnati discussed *Hillcrest* extensively in its initial reply brief, and for the sake of brevity will not repeat that discussion here. *See* Dkt. No. 35, pp. 1-7. Significantly, Plaintiffs' Amici's brief ignores *Hillcrest*.

At this juncture, therefore, if Plaintiffs' Amici want the Court to consider non-Coronavirus coverage cases in rendering its decision in this case, they should at least cite decisions rendered by Alabama state or federal courts or by the Eleventh Circuit, such as *Mama Jo's, Inc. v. Sparta Ins. Co.*, 2020 WL 4782369 (11th Cir. August 18, 2020) (Proctor, J., sitting by designation). Other than *Mama Jo's*, none of the 24 cases cited by Plaintiffs' Amici was rendered by an Alabama state or federal court or by the Eleventh Circuit. This Court should accordingly disregard all but *Mama Jo's*. And, as discussed extensively in Cincinnati's prior briefing, *Mama Jo's* echoes

Hillcrest in holding that a particle on a surface that can be cleaned-off does not constitute direct physical loss. Again for the sake of brevity, Cincinnati will not repeat those arguments here. *See* Dkt. No. 22, pp. 14-19; Dkt. No. 35, pp. 8-9.[2]

There are dozens of decisions in Cornavirus coverage cases, most of them issued by federal courts from across the country. The vast majority of these cases eschew appeals to judicial sympathy and hold that a virus on a surface or in the air of the insured's premises does not constitute direct physical loss under a property policy of insurance.[3] For example, the federal district courts in *Promotional* and *4431*, f/n 3, *supra*, both decided on December 3, 2020, granted Cincinnati's motions to dismiss on the basis that the term "direct physical loss" requires a physical alteration of the property, and the presence of a virus in or on an insured's property

[2] Plaintiffs' Amici cite two Alabama state court decisions for the proposition that "the insurer must bear the consequences of poor drafting and the choices that the insurer made in crafting its own policy language." *See American States Inc. Co. v. Martin*, 662 So. 2d 245 (Ala. 1995); and *Cook v. Aetna Ins. Co.*, 661 So. 2d 1169 (Ala. 1995). Neither of these cases stands for the proposition cited. *See* discussion p. 11, *infra*. Even if they did, they are not applicable here because they do not address the central issue concerning what constitutes direct physical loss.

[3] In its initial reply brief filed on November 6, 2020, Cincinnati cited 12 cases holding that a virus on or in an insured's property does not constitute direct physical loss. [Dkt. No. 35, p. 8, f/n 5] During the short 31 days since the filing of that brief, a bevy of courts have held likewise. *See El Novillo Restaurant, LLC v. Certain Underwriters at Lloyd's London,* Case No. 1:20-cv-21525; *Promotional Headwear International v. The Cincinnati Insurance Company*, 2020 WL 7078735 (D. Kan., Dec. 3, 2020); *4431, Inc. v. The Cincinnati Insurance Company*, 2020 WL 7075318 (E.D. Penn., Dec. 3, 2020); *Zwillo V. Corp. v. Lexington Ins. Co.*, Case No. 4:20-cv-00339 (W.D. Mo., Dec. 2, 2020); *Whiskey River On Vintage, Inc. v. Ill. Cas. Co.*, 4:20-cv-185 (S.D. Iowa, Nov. 30, 2020); *Toppers Salon & Health Spa, Inc. v. Travelers Prop. & Cas. Co. of America*, 2020 WL 7024287 (E.D. Pa., Nov. 30, 2020); *Graspa Consulting, Inc. v. United Nat'l Ins. Co.*, Case No. 1:20-cv-23245 (S.D. Fla., Nov. 17, 2020); *Long Affair Carpet & Rug, Inc. v. Liberty Mut. Ins. Co.*, 2020 WL 6865774 (C.D. Cal., Nov. 12, 2020); *Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co.*, 2020 WL 6562332 (N.D. Cal., Nov. 9, 2020); *West Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Co.*, 2020 WL 6440037 (C.D. Cal. Oct. 27, 2020).

is not a physical alteration. Relying on *Mama Jo's*, the *Promotional* court held that it "follows the majority of courts to consider identical policy language in the context of COVID-19 and holds that direct physical loss or damage to the property requires a tangible, actual change to or intrusion on the covered property. Like the restaurant in *Mama Jo's*, Plaintiff alleges no loss or damage to the property that required repair or replacement based on an actual or tangible problem with the premises." *Promotional*, at *7.

III. DIRECT PHYSICAL LOSS CANNOT BE SPECULATIVELY "PRESUMED" BY THE ALLEGED PRESENCE OF THE CORONAVIRUS ON PLAINTIFFS' PREMISES.

Plaintiffs' Amici assert that "[p]hysical loss or damage is . . . presumed", because "many infected by SARS-CoV-2 are asymptomatic yet able to transmit the virus", and because "it is statistically certain that the virus was and continues to be present in high-trafficked restaurants." [Dkt. No. 40, p. 6] This argument fails, initially, because it violates the well-established rule discussed in *Vandelay* and other cases that a court may not consider allegations in plaintiff's opposition brief when resolving a Rule 12(b)(6) motion to dismiss. This rule is particularly applicable here where the allegations are made in an amicus curiae brief.

This argument also fails because the Complaint does not assert any facts showing the virus was ever detected on Plaintiffs' premises. It also does not allege the assertion in Plaintiffs' Amici's brief that "it is statistically certain that the virus

was and continues to be present in high-trafficked restaurants." The Complaint alleges no facts showing a causal relation between the employees or patrons contracting the virus and the employees or patrons contracting it from Plaintiffs' premises. Rather, the Complaint improperly attempts to establish causation by speculatively asserting two events that correlate in time – the employees or patrons being on the premises and then later contracting the virus – in an effort to establish that they contracted the virus from the premises. Clearly, the employees or patrons could have contracted the virus from anywhere – public transportation, the grocery store, a church service, a social event, members of their households, *etc*.

In short, direct physical loss is not "presumed" by speculative assertions that the presence of persons on the premises who might have been infected with the virus might have deposited it on the premises. Even if the assertions in Plaintiffs' Amici's brief could be considered, they are rank speculation that fails to satisfy the pleading requirements of *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–50 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief,'" the *Twombly* court held, "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555.

The failure of Plaintiffs' Amici's argument that the "presumed" presence of a virus on Plaintiffs' premises constitutes "direct physical loss" is illustrated by the factually unestablished assertion that an asymptomatic patron at a restaurant in China "infected nine other diners from three different tables." [Dkt. No. 40, p. 7] Even if the Court could consider this assertion, and even if it were actually pleaded in the Complaint, the alleged transmission to the nine other diners would have to have been airborne. Plaintiffs' Amici cannot seriously argue that the air in Plaintiffs' premises was physically damaged by the airborne presence of the Coronavirus. The coverage here requires that damaged property be repaired or that the business be resumed at a new permanent location, so how would one "repair" the air? Posing these rhetorical questions illustrates the absurdity of Plaintiffs' Amici's' arguments that Plaintiffs' Complaint adequately pleads direct physical loss to property.

IV. PLAINTIFFS' AMICI'S ARGUMENT THAT COVERAGE IS CREATED BY CINCINNATI'S FAILURE TO MODIFY THE WORD "PHYSICAL" WITH THE WORD "STRUCTURAL" IS CONTRARY TO *HILLCREST* AND IS NOT SUPPORTED BY THE CASES PLAINTIFFS' AMICI CITE.

Plaintiffs' Amici argue there is coverage because Cincinnati "chose not to include the word 'structural,' 'visible,' or any other term as a modifier to the terms 'physical loss' or 'physical damage.'" They errantly support this argument by citing *American States Inc. Co. v. Martin*, 662 So. 2d 245 (Ala. 1995), and *Cook v. Aetna Ins. Co.*, 661 So. 2d 1169 (Ala. 1995) for the proposition that "under Alabama law

the insurer must bear the consequences of poor drafting and the choices that the insurer made in crafting its own policy language." [Dkt. No. 40, p. 7] Apparently, the Orwellian conclusion the Court is supposed to draw from Cincinnati not having included the word "structural" as "a modifier" to the term direct physical loss is that incorporeal economic loss that is devoid of any physical injury nevertheless constitutes direct physical loss anyway. In other words, direct physical loss does not mean direct physical loss. The word "physical" is written out of the policy.

Laying aside the Orwellian nature of this argument, it quite literally flops because neither *Martin* nor *Cook* expressly or even impliedly held that an "insurer must bear the consequences of poor drafting and the choices that the insurer made in crafting its own policy language." Plaintiffs' Amici's entire thesis, therefore, is based upon a citation to cases that do not stand for the proposition cited.

Plaintiffs' Amici's argument also fails because the only decision applying Alabama law, *Hillcrest*, expressly held that the words "direct" and "physical" are modifiers to the word "loss" that limit coverage to an actual physical alteration of the property: "The words 'direct' and 'physical' modify the word 'loss' in the phrase 'direct physical loss of property.'" *Hillcrest*, 2020 WL 6163142, at *6. The *Hillcrest* court reasoned that "analysis of this phrase must account for both words as they apply to the type of loss of property Plaintiff must have suffered to trigger coverage." *Id*. (citing *Henry's Louisiana Grill, Inc. v. Allied Insurance Company of America*,

2020 WL 5928755, at *4, and *Malaube, LLC v. Allied Insurance Company of America*, 2020 WL 5051581, at *7. Consequently, the *Hillcrest* court held, "a direct physical loss requires a tangible injury to property." *Hillcrest*, 2020 WL 6163142, at *7 (citing COUCH ON INSURANCE, 10A § 148:46) (footnote omitted). *See also Promotional*, *supra* at *4, holding "Plaintiff wholly ignores the modifiers 'direct' and 'physical' that precede both 'loss' and 'damage' in the Policy definition. Although neither word is further defined by the Policy, Plaintiff's interpretation of 'loss' and 'damage' would write out these modifiers entirely."

V. PLAINTIFFS' AMICI'S LOSS OF USE ARGUMENT WAS EXPRESSLY REJECTED IN *HILLCREST*.

Plaintiffs' Amici argue that Plaintiffs have alleged loss of use of their properties from the shut-down orders, and that "[t]he inability to use the property or a portion of the property for its intended use constitutes direct physical loss. [Dkt. No. 40, p. 13] [citations omitted] They argue "structural damage is not required to show 'physical loss or damage' where the insured property cannot be used for or is unsafe for its intended purpose." [Dkt. No. 40, pp. 11-12] [citations omitted] Finally, Plaintiffs' Amici contend that "the failure of something to sustain its 'essential functionality,' can constitute a physical loss." [Dkt. No. 40, p. 12] [citations omitted]

Plaintiffs' Amici attempt to support loss of use arguments by citing cases from other jurisdictions that do not address whether a virus on an insured's premises constitutes direct physical loss to property. Accordingly, those cases are irrelevant,

especially since the one decision applying Alabama law, *Hillcrest*, expressly rejected that loss of use of property constitutes direct physical loss.

> Though Plaintiff maintains its inability to use its property constitutes a direct physical loss, the Court is not persuaded. Plaintiff's loss of usability did not result from an immediate occurrence which tangibly altered its property – the Order did not immediately cause some sort of tangible alteration to Plaintiff's office. Rather, Plaintiff was only temporarily precluded from performing routine medical procedures while the Order was in effect. Under Plaintiff's interpretation, possession carries the same meaning as usability; therefore, loss of possession is equivalent to the inability to use something. However, not every instance of possession leads to use. For instance, a person can possess a car but be unable to use it due to gas rationing ordered by the government. This type of argument has been attempted in this Circuit before and found unavailing. *See Northeast Georgia Heart Center, P.C. v. Phoenix Insurance Company*, 2014 WL 12480022, *1 (N.D. Ga. 2014) (applying Georgia law: "Without doubt, losing physical possession may qualify as a direct physical loss. Nonetheless, there is a difference between a loss of physical possession and a loss of use. This difference is critical because the policy covers only lost business income *caused by* direct physical loss. Even though plaintiff suffered a direct physical loss by returning the generator, that loss did not cause plaintiff's lost business income."). As one district court describes it, Plaintiff's argument here would "potentially make an insurer liable for the negative effects of operations changes resulting from any regulation or executive decree, such as a reduction in a space's maximum occupancy." Henry's Louisiana Grill, Inc., 2020 WL 5938755, at *5.

Hillcrest, 2020 WL 6163142, at *7.

VI. PLAINTIFFS' AMICI'S ATTEMPT TO DISTINGUISH *MAMA JO'S* IS UNAVAILING.

Plaintiffs' Amici try to distinguish *Mama Jo's* by arguing that the restaurant in *Mama Jo's* "remained open every day, customers were always able to access the restaurant, and there is no evidence that dust had an impact on the operation other

than requiring daily cleaning." [Dkt. No. 40, p. 13] "[T]he SARS-CoV-2 virus," Plaintiffs' Amici argue, "is inherently noxious and even its presumed presence or imminently threatened presence renders a restaurant unusable or unsafe for its intended purpose." [Dkt. No. 40, p. 14] Once again, Plaintiffs' Amici's argument is rejected by a substantial majority of Coronavirus coverage decisions. In *Uncork*, for example, the court recognized that since "routine cleaning, perhaps performed with greater frequency and care, eliminates the virus on surfaces, there would be nothing for an insurer to cover . . ." *Uncork*, 2020 WL 6436948, at *5. This holding is a clear and specific rejection of the attempt by Plaintiffs' Amici to distinguish *Mama Jo's*.

VII. PLAINTIFFS' AMICI'S ARGUMENT THAT THERE IS COVERAGE BECAUSE THE POLICY LACKS A VIRUS EXCLUSION HAS BEEN REPEATEDLY REJECTED BY OTHER COURTS.

Plaintiffs' Amici make the standard argument that all plaintiffs make in Coronavirus coverage cases against Cincinnati, which is that the absence of a virus exclusion in the policy establishes that Coronavirus related losses are covered. [Dkt. No. 40, p. 9] This argument fails here just as it has in courts in other jurisdictions which granted Cincinnati's and other insurers' motions to dismiss under policies substantially similar to Plaintiffs' policies in this case where, like here, the policies at issue did not contain a virus exclusion. *See, e.g.*, *Uncork*, 2020 WL 6436948; *Oral Surgeons, PC v. The Cincinnati Ins. Co.*, Case No. 4-20-CV-222 (S.D. Iowa

September 29, 2020); and *Sandy Point Dental, PC v. The Cincinnati Ins. Co.*, 2020 WL 5630465 (N.D. Ill. September 21, 2020).

CONCLUSION

The purpose of Plaintiffs' Amici's intervention is to evoke a favorable coverage ruling based upon sympathy for the Plaintiffs' Amici's members and for Plaintiffs herein. In a recent decision granting an insurer's motion to dismiss on the basis that the Coronavirus in or on an insured's property does not constitute direct physical loss to property, the court emphasized the need to base a coverage decision on policy language rather than sympathy. "This Court is sympathetic to the plight of so many business owners in the wake of the COVID-19 pandemic. Yet, this Court cannot allow sympathy to cloud its review of the plain meaning of an insurance policy." *DAB Dental PLLC v. Main Street America Protection Ins. Co.*, Case No. 20-CA-5504, p. 4 (Hillsborough Co. Fla., Nov. 6, 2020). Cincinnati issued a commercial property policy and not a stand-alone business interruption policy. Cincinnati agreed to provide coverage for business income losses while insured property is being repaired, rebuilt or replaced as a result of tangible, physical alteration of property. There is no tangible, physical alteration of property in this case, and Plaintiffs' Amici cite no authority showing otherwise. The Court should grant Cincinnati's motion to dismiss accordingly.

Dated this 7th day of December, 2020.

Respectfully submitted,

/s/ Augusta S. Dowd
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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of December, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all the CM/ECF participant counsel of record.

/s/ Augusta S. Dowd
OF COUNSEL