IN THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

USCA Case No. 21-10671-GG
United States District Court, Middle District of Florida
Case No.: 8:20-cv-02374-VMC-TGW

FIRST WATCH RESTAURANTS, INC.,

Plaintiff/Appellant,

v.

ZURICH AMERICAN INSURANCE COMPANY,

Defendant/Appellee.

ANSWER BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE PURSUANT TO FRAP 26.1 AND 11TH CIR. R. 26.1-1

Pursuant to F.R.A.P. 26.1 and 11th Cir. R. 26.1-1, Appellee, ZURICH AMERICAN INSURANCE COMPANY, by and through its undersigned counsel, hereby discloses the following trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the appeal, including subsidiaries, conglomerates, affiliates, and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock:

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18. Zurich American Insurance Company (wholly owned subsidiary of Zurich Holding Company of America, Inc., a Delaware Corporation) (Appellee)

19. Zurich Holding Company of America, Inc. is wholly owned by Zurich Insurance Company Ltd, a Swiss corporation

20. Zurich Insurance Company Ltd is directly owned by Zurich Insurance Group Ltd, a Swiss corporation

21. Zurich Insurance Group Ltd is the only publicly traded parent company, with a listing on the Swiss stock exchange under the symbol ZURN, and a further trading of American Depositary Receipts under the symbol ZURVY

STATEMENT REGARDING ORAL ARGUMENT

The District Court's decision that First Watch's claim for loss of business income is not covered by First Watch's insurance policy is firmly supported by the policy's plain language and Florida case law interpreting that language. Zurich would be pleased to present oral argument if this Court has questions unanswered by the briefs and record or otherwise believes that oral argument will assist it in its decision-making process.

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STATEMENT OF THE ISSUES

The principal issues on appeal are as follows:

(1) First Watch, a restaurant chain, submitted a claim to Zurich under its insurance policy's coverage for loss of business income, which applies only if First Watch's suspension of business activities was "due to direct physical loss of or damage to" insured property. First Watch claimed that COVID-19 orders initially restricted its restaurants to take-out or delivery service and, later, imposed occupancy limits. The first issue is whether the District Court correctly concluded that governmental orders regulating what activities can be conducted on property, as a broad public-health initiative to inhibit the spread of COVID-19, did not cause or constitute "direct physical loss of or damage to" the insured property.

(2) First Watch also made a claim under the policy's civil authority coverage, which provides coverage for loss of business income only if First Watch's suspension of business activities was caused by an order of a civil authority that "prohibits access" to an insured location, and only if that order results from a civil authority's "response to direct physical loss of or damage . . . to property not owned, occupied, leased or rented by" First Watch. The second issue is whether the District Court correctly concluded that none of those requirements was satisfied because no alleged COVID-19 order prohibited access to any insured location or resulted from a civil authority's response to "direct physical loss of or damage to" any property.

(3) In addition, the policy excludes from coverage "Contamination, and any cost due to Contamination "***including the inability to use or occupy property*** or any cost of making property safe or suitable for use or occupancy," and it defines "Contamination" as "Any condition of property due to the actual presence of any . . . pathogen or pathogenic organism, bacteria, ***virus***, disease causing or illness causing agent." The presence of the COVID-19 virus does not cause direct physical loss or damage to property, but even so the third issue is whether such presence is "Contamination" — that is, a condition of property due to the actual presence of virus — excluded from coverage under the policy.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Zurich American Insurance Company ("Zurich") issued to First Watch Restaurants, Inc. ("First Watch") a commercial property insurance policy ("Policy") that, in general, insured First Watch's *property* if it sustained direct *physical* loss or damage. The Policy also insured certain loss of business income caused by necessary suspension of First Watch's business activities if that suspension was due to direct *physical* loss of or damage to property. Here, First Watch seeks coverage for a loss of business income that did *not* result from direct physical loss or damage.

Instead, First Watch argues that the Policy covers business income losses due to COVID-19 stay-at-home orders — that is, economic loss resulting from a slowdown of its restaurant business, *unconnected* to any direct physical loss or damage. Zurich denied First Watch's claim because COVID-19 orders did not cause or constitute "direct physical loss of or damage to" property. Zurich also denied coverage because any physical loss or damage would be excluded under the Policy's "Contamination" exclusion, which specifically applies to any cost, including the inability to use or occupy property, due to the presence of "virus." In this coverage litigation brought by First Watch, the District Court correctly concluded that First Watch failed to state a claim for coverage upon which relief could be granted.

In its complaint, First Watch did not allege that it suffered "direct physical *damage* to" its property. Instead, First Watch claimed that it sustained "direct physical *loss* of" its property because the COVID-19 orders temporarily did not allow First Watch to serve customers inside First Watch's restaurants. However, "direct physical loss of property" in plain English means destruction, ruin, or deprivation of *property* (not of business activities). A government order regulating what business activities can be conducted on property does not cause or constitute direct physical loss of property, as many courts have concluded, including under Florida law and as to COVID-19 stay-at-home orders. A contrary conclusion threatens a sweeping expansion of property insurance coverage for every government regulation impacting a business's activities or income.

On appeal, First Watch all but abandons its claims regarding "direct physical *loss*." Instead, First Watch argues that COVID-19-related restrictions on in-person dining caused "damage" to its restaurants — an argument based on a twisting of the Policy's language. First Watch argues that the words "direct physical" in the phrase "direct physical loss of or damage to" property do not modify the word "damage," such that the word "*damage*" stands alone and can be defined in isolation as "any bad effect on something," including a non-physical effect on First Watch's ability to operate a restaurant business.

First Watch's argument is akin to arguing that the Fourth Amendment's proscription on "unreasonable searches and seizures" bans "unreasonable searches" but *all* "seizures." But an adjective preceding a series of related nouns modifies all the nouns, not just the first one, under standard English usage and familiar canons of contract construction applied by Florida courts. According to the well-established "series-qualifier canon," the words "direct" and "physical" modify both "loss of" and "damage to," thereby requiring First Watch to demonstrate that property was *physically* lost or *physically* damaged, and not merely that business activities were curtailed. First Watch concedes it cannot allege such physical loss or physical damage, so attempts instead to distort the plain meaning of the Policy to reach its goal. The Court should decline First Watch's invitation to distort the plain meaning of the Policy and should affirm the District Court's judgment.

II. COURSE OF PROCEEDINGS BELOW

First Watch filed a complaint against Zurich on October 9, 2020. ECF 1. Zurich filed a motion to dismiss the complaint on December 4, 2020, pursuant to FED. R. CIV. P. 12(b)(6). ECF 19. On February 4, 2021, the District Court granted Zurich's motion to dismiss with prejudice. ECF 31. First Watch then filed a notice of appeal. ECF 32.

III. STATEMENT OF THE FACTS

A. First Watch's Complaint

First Watch's complaint[1] sought both a declaratory judgment and damages because of an alleged breach of contract. First Watch alleged that the insurance policy issued by Zurich covered loss of business income caused by First Watch's compliance with COVID-19 orders regulating what business activities could take place on First Watch's property (*e.g.*, no in-person dining). ECF 1. It alleged that Zurich wrongfully denied this coverage.

First Watch operates a chain of 400 restaurants in 29 states, all of which serve breakfast, brunch, and lunch daily and accommodate take-out and delivery orders. *Id.* ¶¶ 9–11. A national state of emergency was declared on March 13, 2020 due to the COVID-19 pandemic, after which "state and local governments began issuing orders impacting the ability of restaurants to operate and serve the public." *Id.* ¶¶ 13-14. "Initially," First Watch "maintained limited service for take-out and/or delivery," but on April 13, 2020, *First Watch itself* "announced the temporary closure of all company-owned restaurants." *Id.* ¶ 15. First Watch began reopening its restaurants between May and June 2020, "as permitted locally" by governmental authorities, with some restaurants reopening later in the summer of 2020. *Id.* ¶ 16.

[1] The facts recited here are as alleged in First Watch's complaint.

After reopening, many of First Watch's restaurants were "required to operate with reduced dining room capacity pursuant to state and local orders." *Id.* ¶ 17.

First Watch described COVID-19-related orders issued by authorities in Florida and elsewhere. In Florida, Governor DeSantis declared a state of emergency on March 1, 2020, "as a result of COVID-19," and issued three orders, one of which ordered "all restaurants and food establishments…within the State of Florida to suspend on-premises food consumption for customers…." *Id.* ¶¶ 18–20. In other states, governors "issued Executive Orders relating to COVID-19 similar to those issued by Governor DeSantis." *Id.* ¶ 21. First Watch was "required to close *or alter* service at all of its restaurants outside of the State of Florida due to Executive Orders of each State's Governor, or pursuant to local order." *Id.* ¶ 22 (emphasis added).

In its complaint, First Watch acknowledged that the Zurich policy provides that "Time Element loss" is payable only for a suspension of business activities "due to direct physical loss of or damage to Property…." *Id.* ¶¶ 24–36. First Watch nevertheless alleged that the COVID-19-related orders described above rendered First Watch's property "not able to function as intended," since as a result of the orders, First Watch "lost the ability to operate as a dine-in restaurant…." ECF 1 ¶ 37. First Watch theorized that "loss of use of the insured properties and insured property's inability to function as intended…is a direct physical loss." *Id.* ¶ 38. First Watch claimed that the income loss it allegedly sustained as a result of that "direct

physical loss" is covered under "Section IV of the Policy," which is titled "Time Element." *Id.* First Watch also alleged that "[t]he action of civil authority was a result of direct physical loss of or damage to property, other than at the described premises, due to COVID-19, the related pandemic, and other covered causes of loss under Section V of the policy." *Id.* ¶ 39. Section V is titled "Special Coverages & Described Causes of Loss," and includes the "Civil Authority" coverage referenced in First Watch's complaint.

First Watch acknowledged that Zurich denied First Watch's claim for coverage because, among other reasons, "there does not appear to be any claim for direct physical loss of or damage to property at an Insured Location…." *Id.* ¶ 41. First Watch even conceded that, "Of course, there is no direct evidence that any of [First Watch's] insured locations were closed due to active contamination of the virus," but nevertheless alleged it "experienced the 'direct physical loss of' the insured properties due to inability to operate the restaurants as intended." *Id.* ¶ 43. First Watch did not allege that any real or personal property must be repaired or replaced, nor did First Watch seek insurance coverage for any repair to or replacement of any such property at or in any of First Watch's 400 restaurants. ECF 1.

B. First Watch's Insurance Policy Issued By Zurich

As discussed above, First Watch sought coverage under two sections of the Policy[2]: Section IV (Time Element) and Section V (Special Coverages & Described Causes of Loss, which includes Civil and Military Authority). ECF 1 ¶¶ 31–36.

In the Time Element section, the Policy sets out coverages for certain losses that can result due to direct physical loss of or damage to property but that occur over a period of time. For example, if the insured's building burned down and it loses business income while the building is repaired, the Policy provides coverage for loss of business income resulting from necessary suspension of business activity due to "direct physical loss of or damage to" the insured's property. The Policy states, in part:

> The Company will pay for the actual Time Element loss the Insured sustains, as provided in the Time Element Coverages, during the Period of Liability. The Time Element loss must result from the necessary Suspension of the Insured's business activities at an Insured Location. ***The Suspension must be due to direct physical loss of or damage to Property*** (of the type insurable under this Policy other than Finished Stock) ***caused by a Covered Cause of Loss at the Location***, or as provided in Off Premises Storage for Property Under Construction Coverages.

Policy §§ 4.01 *et seq.*, ECF 1-4 at 28 (emphasis added).

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[2] First Watch attached a copy of its insurance policy to the complaint, as Exhibit 4. ECF 1-4. Zurich issued the policy, No. ZMD7740168-00, to First Watch for the policy period covering March 1, 2020 to March 1, 2021 ("Policy"). ECF 1 ¶ 24; ECF 1-4 at 15.

The Policy defines "Suspension" as "The slowdown or cessation of the Insured's business activities…." Policy § 7.56, ECF 1-4 at 67. The Policy defines "Covered Cause of Loss" as "All risks of direct physical loss of or damage from any cause unless excluded." *Id.* § 7.11, ECF 1-4 at 62. "Period of Liability" is defined, in part, as follows:

> For building and equipment: The period starting from ***the time of physical loss or damage of the type insured against*** and ending when with due diligence and dispatch the building and equipment could be ***repaired or replaced, and made ready for operations under the same or equivalent physical and operating conditions that existed prior to the damage***. The expiration of this Policy will not limit the Period of Liability.

Policy § 4.03.01.01, ECF 1-4 at 32 (emphasis added).

Another type of income loss that First Watch sought coverage for is "Extra Expense." ECF 1 ¶ 38. The Policy states:

> The Company will pay for the reasonable and necessary Extra Expenses incurred by the Insured, during the Period of Liability, to resume and continue as nearly as practicable the Insured's normal business activities that otherwise would be necessarily suspended, ***due to direct physical loss of or damage caused by a Covered Cause of Loss to Property of the type insurable under this policy at a Location***.

Policy § 4.02.03, ECF 1-4 at 30 (emphasis added

As for the "Civil or Military Authority" coverage, the Policy covers "Time Element loss" if a civil authority prohibits access to the insured's location for a period of time due to "direct physical loss of or damage" to property not owned by First Watch:

> The Company will pay for the actual Time Element loss sustained by the Insured, as provided by this Policy, resulting from the necessary Suspension of the Insured's business activities at an Insured Location if the Suspension is caused by order of civil or military authority that prohibits access to the Location. ***That order must result from a civil authority's response to direct physical loss of or damage caused by a Covered Cause of Loss to property*** not owned, occupied, leased or rented by the Insured or insured under this Policy and located within the distance of the Insured's Location as stated in the Declarations….

Policy § 5.02.03, ECF 1-4 at 34–35 (emphasis added).

The Policy contains relevant exclusions, including the following:

> 3.03 EXCLUSIONS
>
> The following exclusions apply unless specifically stated elsewhere in this Policy:
>
> 3.03.01. This Policy ***excludes*** the following unless it results from direct physical loss or damage not excluded by this Policy.
>
> 3.03.01.01. Contamination, and any cost due to Contamination ***including the inability to use or occupy property*** or any cost of making property safe or suitable for use or occupancy, except as provided by the Radioactive Contamination Coverage of this Policy.
>
> * * * *
>
> 3.03.01.03. Loss or damage arising from the enforcement of any law, ordinance, regulation or rule r***egulating or restricting the*** construction, installation, repair, replacement, improvement, modification, demolition, occupancy, ***operation or other use***, or removal including debris removal ***of any property***.
>
> 3.03.02. This Policy ***excludes***:
>
> 3.03.02.01. Loss or damage arising from delay, loss of market, or ***loss of use***.

Policy §§ 3.03 *et seq.*, ECF 1-4 at 25–26 (emphasis added).

The Policy defines excluded "Contamination" as "Any condition of property due to the actual presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, ***virus***, disease causing or illness causing agent, Fungus, mold or mildew." Policy § 7.09, ECF 1-4 at 62 (emphasis added).

The District Court accepted all of First Watch's allegations as true and applied the above policy language to First Watch's allegations. ECF 31. The court determined, as a matter of law, that because First Watch's complaint did not allege "direct physical loss of or damage to" any property, which is a prerequisite for coverage under the plain language of all relevant provisions, the Policy did not provide coverage for First Watch's losses. The District Court also determined that First Watch failed to allege facts satisfying other requirements for Civil Authority coverage.

STANDARDS OF REVIEW

The Court "review[s] *de novo* a Rule 12(b)(6) dismissal for failure to state a claim and construe[s] the factual allegations in the complaint in the light most favorable to the plaintiff." *Allen v. USAA Cas. Ins. Co.*, 790 F.3d 1274, 1277–78 (11th Cir. 2015) (citation omitted). In doing so, the court considers the "face of the complaint and documents attached thereto," such as an insurance policy "central to

the plaintiff's claim." *Id.* at 1278 (citation omitted). "To survive dismissal, the complaint's allegations must plausibly suggest that the plaintiff has a right to relief, raising that possibility above a speculative level; if they do not, the plaintiff's complaint should be dismissed." *James River Ins. Co. v. Ground Down Eng'g, Inc.*, 540 F.3d 1270, 1274 (11th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)) (internal quotation omitted).

"The interpretation of provisions in an insurance contract is a question of law reviewed *de novo*." *Ground Down*, 540 F.3d at 1274 (citation omitted). "Contract interpretation is governed by the intent of the parties, which is 'determined from the plain language of the agreement and the everyday meaning of the words used.' " *StarStone Nat'l Ins. Co. v. Polynesian Inn, LLC*, 815 F. App'x 431, 433 (11th Cir. 2020) (citation omitted). The Court "look[s] at the policy 'as a whole and give[s] every provision its full meaning and operative effect.' " *Id.* at 433 (citations omitted). Indeed, "when analyzing an insurance contract, it is necessary to examine the contract in its context and as a whole, and to avoid simply concentrating on certain limited provisions to the exclusion of the totality of others." *Swire Pac. Holdings, Inc. v. Zurich Ins. Co.*, 845 So. 2d 161, 165 (Fla. 2003). While "fanciful, inconsistent, and absurd interpretations of plain language are always possible," the Court has a duty to "prevent such interpretations." *BKD Twenty-One Mgmt. Co., Inc. v. Delsordo*, 127 So. 3d 527, 530 (Fla. Dist. Ct. App. 2012) (citation omitted).

"It thus follows that where one interpretation of a contract would be absurd and another would be consistent with reason and probability, the contract should be interpreted in the rational manner." *Id.* at 530; *see also Philadelphia Am. Life Ins. Co. v. Buckles*, 350 F. App'x 376, 380 (11th Cir. 2009) (quoting *James v. Gulf Life Ins. Co.*, 66 So.2d 62, 63 (Fla. 1953)) ("[A] construction leading to an absurd result should be avoided.").[3]

SUMMARY OF THE ARGUMENT

The District Court correctly dismissed First Watch's complaint because First Watch did not plausibly allege "direct physical loss of or damage to" any property, a prerequisite for coverage under all relevant provisions. In doing so, the District Court correctly concluded that "First Watch's business losses due to COVID-19 orders are economic losses, not the kind of physical loss or damage contemplated by the policy." ECF 31 at 9. Under the Policy's plain language, COVID-19 orders regulating what activities a business can (and cannot) conduct on its property do not constitute or cause "direct physical loss of or damage to" property. First Watch challenges the District Court's observation of that unassailable fact, but its challenge

[3] The District Court applied Florida law, because the complaint alleged that the policy was issued in Florida. ECF 31 at 5–6 (citing *Trans Caribbean Lines, Inc. v. Tracor Marine, Inc.*, 748 F.2d 568, 570 (11th Cir. 1984) ("Florida applies its own laws to interpret policies which are purchased and delivered in that state"). No party on appeal disputes the application of Florida law.

has no merit. First Watch seeks to rewrite the Policy and well-established Florida law along the way, demanding that the Court set aside its common sense.

The ordinary, everyday meaning of the phrase "direct physical loss of or damage to" property is that there must be either (1) direct physical loss — permanent physical deprivation of the property (such as theft) or complete destruction — or (2) direct physical damage — detrimental physical change in the property itself. First Watch alleged neither. Instead, First Watch alleged that the inability to use its property, which suffered no physical harm whatsoever, because of a government's regulatory actions, satisfies the requirement of "direct physical loss of or damage to" property. This argument has no support in the contract language, as verified by decisions of courts all over the country, including those applying Florida law. In doing so, one court has called the argument "simply nonsense."[4]

Torturing the language further, First Watch argues that the Policy requires only "damage" — not modified by "direct" or "physical" — which First Watch defines as "any bad effect on something," such as a drop in revenue due to restrictions on in-person dining. That argument makes a mockery of the Policy's plain wording and standard canons of contract construction, under which "direct" and "physical" do modify the word "damage" in the phrase, "direct physical loss of

[4] *Turek Enter., Inc. v. State Farm Mut. Auto. Ins. Co.*, 484 F. Supp. 3d 492, 501–02 (E.D. Mich. 2020) (citation omitted).

or damage to" property — and therefore do require First Watch to show that property was *directly* and *physically* damaged. First Watch's argument also leads to an absurd reading of the Policy under which any government regulation with a "bad effect" on First Watch's *business activities* is swept within Policy terms designed to insure against direct physical loss of or damage to *property*.

In addition to properly dismissing First Watch's cause of action under the Policy's plain requirement that there be *physical* loss or damage, the District Court correctly concluded that First Watch failed to allege facts satisfying the other requirements of the Policy's various coverages. Further, although not reached by the District Court, coverage is also excluded under the Policy because even to the extent any presence of virus could be construed as causing direct physical loss or damage, such presence constitutes "contamination" excluded under the Contamination Exclusion.

The Court should affirm the District Court's judgment because, while the COVID-19 pandemic has undoubtedly caused financial loss to First Watch, it has not caused physical loss of or damage to property, and any such loss would be excluded under the Policy's Contamination Exclusion.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT FIRST WATCH DID NOT PLAUSIBLY ALLEGE "DIRECT PHYSICAL LOSS OF OR DAMAGE TO" ANY PROPERTY.

A. All Relevant Parts Of The Policy Require "Direct Physical Loss Of Or Damage To" Property For Coverage To Apply.

The phrase "direct physical loss of or damage to" property, and variations of that phrase, are used throughout all relevant parts of the Policy under which First Watch sought coverage. First Watch's appellate arguments belie its own complaint allegations and the Policy's clear, indisputable wording.

The Time Element coverage applies to lost business income if First Watch's suspension of business activities at an insured location was "due to ***direct physical loss of or damage to Property***…caused by a Covered Cause of Loss at the Location…." Policy § 4.01.05, ECF 1-4 at 28 (emphasis added). "Covered Cause of Loss" is defined as "[a]ll risks of ***direct physical loss of or damage*** from any cause unless excluded." *Id.* § 7.11, ECF 1-4 at 62 (emphasis added). To determine any covered Time Element loss, Zurich "will evaluate the experience of the business before and after the ***loss or damage*** and the probable experience had no ***direct physical loss or damage*** occurred at an Insured Location during the Period of Liability." *Id.* § 4.01.01, ECF 1-4 at 28 (emphasis added). The "Period of Liability" provision similarly is keyed to that phrase: "The period starting from the time of ***physical loss or damage*** of the type insured against and ending when with due

diligence and dispatch the building and equipment could be repaired or replaced…." *Id.* § 4.03.01.01, ECF 1-4 at 32 (emphasis added).

The other parts of the Policy under which First Watch sought coverage also contain the phrase "direct physical loss of or damage to" property, or variations of it. The "Extra Expense" provision, for instance, states that Zurich will pay Extra Expenses incurred during the Period of Liability and "due to ***direct physical loss of or damage*** *caused by a Covered Cause of Loss* ***to Property*** of the type insurable under this policy at a Location." *Id.* § 4.02.03, ECF 1-4 at 30 (emphasis added). The Policy explains that Extra Expenses do not include "the cost of permanent repair or replacement of property that has suffered ***direct physical loss or damage***…." *Id.* (emphasis added). The Civil or Military Authority provision states that Zurich will pay Time Element loss if the suspension of business activities at an insured location is caused by a civil authority order, but only if that order results from the civil authority's "response to ***direct physical loss of or damage*** *caused by a Covered Cause of Loss* ***to property*** not owned occupied, leased or rented by" First Watch. Policy § 5.02.03, ECF 1-4 at 34–35 (emphasis added).

First Watch alleged these same Policy requirements in its complaint, recognizing that its claim depends on a threshold showing of "direct physical loss of or damage to" property. ECF 1 ¶¶ 31–32 (alleging that First Watch's claims "are made under the Section IV – TIME ELEMENT coverage section of the [Policy],"

which states "[t]he suspension must be due to ***direct physical loss of or damage to Property***") (emphasis added); *id.* ¶ 39 (alleging that First Watch "suffered loss of business income and extra expense due to action of civil authority," and that "[t]he action of civil authority was a result of ***direct physical loss of or damage to property***, other than at the described premises") (emphasis added).

Despite conceding, as it must, that relevant parts of the Policy require "direct physical loss of or damage to property" before any income loss is covered, First Watch argues that the Policy does not require "direct physical loss of or damage to property." Instead, based on a contorted reading of the Policy, First Watch argues that the Policy requires either "direct physical loss" or "damage caused by a Covered Cause of Loss to property," Op. Br. at 29–38, which First Watch argues makes this case distinguishable from dozens of cases decided by courts, including this one, applying Florida law. *See Mama Jo's Inc. v. Sparta Ins. Co.*, 823 F. App'x 868, 871 (11th Cir. 2020) (examining the phrase "direct physical loss of or damage to Covered Property" in commercial property insurance policy). But First Watch's own allegations contradict that argument. This Court has no duty to accept First Watch's argument if documents attached to the complaint contradict it. *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1205–06 (11th Cir. 2007). If any of First Watch's allegations or arguments contradict the wording of the Policy, which was attached to First Watch's complaint as an exhibit, "the [Policy] govern[s]." *Id.* at 1206. First Watch's

attempts to rewrite the Policy are properly disregarded here, where the Policy plainly speaks for itself.

B. "Direct Physical Loss Of Or Damage To" Property Requires A Permanent Deprivation Of Property Or An Actual Detrimental Change In Property.

The phrase "direct physical loss of or damage to" property has an ordinary, common-sense meaning, aligned with the very purpose of the Policy — which is to insure First Watch's ***property*** and not its business operations. *See PF Sunset View, LLC v. Atl. Specialty Ins. Co.*, 2021 WL 1341602, at *2 (S.D. Fla. Apr. 9, 2021) ("The Policy is a commercial property policy that generally covers risks associated with the structure of the covered buildings themselves…."); *Selery Fulfillment, Inc. v. Colony Ins. Co.*, 2021 WL 963742, at *7 (E.D. Tex. Mar. 15, 2021) ("[T]he general purpose of the Policy is to insure Selery's commercial building, personal property in or near there, and lost income resulting from that property loss.") (citation omitted); *Real Hosp., LLC v. Travelers Cas. Ins. Co.*, 2020 WL 6503405, at *8 (S.D. Miss. Nov. 4, 2020) ("Plaintiff's *operations* are not what is insured — the building and the personal property in or on the building are.") (emphasis original). The ordinary, common-sense meaning of the phrase "direct physical loss of or damage to" property is that there must be an actual harmful change in the property itself (*i.e.*, "direct physical damage") or First Watch must be permanently

physically deprived of the property (as by theft or complete destruction) (*i.e.*, "direct physical loss").

The words making up the phrase "direct physical loss of or damage to" property should not be read in isolation. *See Purdy Lane, Inc. v. Scottsdale Ins. Co.*, 2021 WL 1053283, at *5 (S.D. Fla. Feb. 11, 2021) ("[I]n applying the 'plain meaning' rule, courts must not construe insurance policy provisions in isolation, but instead should read all terms in light of the policy as a whole, with every provision given its full meaning and operative effect.") (citing, *inter alia*, *Auto–Owners Ins. Co. v. Anderson*, 756 So. 2d 29 (Fla. 2000)). First Watch attempts to define each word in this phrase in isolation, as if their use *together* has no meaning. But the words together have a plain, easily understandable meaning that needs no definition — "direct physical loss of or damage to" property clearly describes the *physical* loss or damage covered by the policy, eliminating the potential that it includes mere inability to *use* property. When the phrase is read as a whole, as it should be, "[t]he plain meaning of the terms 'direct physical loss of or damage to property' unambiguously requires actual, tangible damage to the physical premises itself, not merely economic losses unaccompanied by a demonstrable physical alteration to the premises itself." *Café Int'l Holding Co. LLC v. Westchester Surplus Lines Ins. Co.*, 2021 WL 1803805, at *8 (S.D. Fla. May 4, 2021); *see also AE Mgmt., LLC v. Illinois Union Ins. Co.*, 2021 WL 827192, at *3 (S.D. Fla. Mar. 4, 2021) (quoting *Mama*

Jo's, Inc. v. Sparta Ins. Co., 2018 WL 3412974, at *9 (S.D. Fla. June 11, 2018), *aff'd*, 823 F. App'x 868 (11th Cir. 2020)) ("[U]nder Florida law, the phrase, 'direct physical loss of or damage to property' requires 'a distinct, demonstrable, physical alteration of the property' and does not include 'losses that are intangible or incorporeal'."); *Café La Trova LLC v. Aspen Specialty Ins. Co.*, 2021 WL 602585, at *7 (S.D. Fla. Feb. 16, 2021) (interpreting "direct physical loss of or damage to" property as "contemplat[ing] an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so").

Attacking the everyday meaning of the phrase "direct physical loss of or damage to" property, First Watch argues that the "damage" required by the Policy "does not need to be direct and physical." Op. Br. at 20. First Watch posits that the words "direct" and "physical" modify only the word "loss," and not the word "damage," and therefore "damage" (without any modifiers) can broadly be construed to mean any "bad effect on something," such as First Watch's *non-physical* economic losses caused by COVID-19 orders regulating what activities could be conducted on its property. *Id.* at 20–21, 31.[5]

[5] Citing Black's Law Dictionary, First Watch states that "one definition" of "damage" is "any bad effect on something." Op. Br. at 20. The first definition in Black's for "damage" is "Loss or injury to person or property; esp., *physical harm*

That reading of the Policy, removing "direct" and "physical" from "damage" to property in the relevant Time Element coverages, has no support in ordinary usage or the law. Florida courts employ the "series-qualifier canon" when interpreting contract phrases. *Beach Towing Servs., Inc. v. Sunset Land Assocs., LLC*, 278 So. 3d 857, 861 (Fla. Dist. Ct. App. 2019). "[T]he series-qualifier canon provides that, 'when there is a straightforward, parallel construction that involves all nouns or verbs in a series, a prepositive or postpositive modifier normally applies to the entire series.' " *Id.* at 861 (quoting A. SCALIA & B. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS § 19, at 147-51 (2012)). "[I]n the absence of some other indication," therefore, "the modifier reaches the entire enumeration." *Id.; see also United States v. Gumbs*, 964 F.3d 1340, 1347–48 (11th Cir. 2020) (citing READING LAW: THE INTERPRETATION OF LEGAL TEXTS § 19, at 147-51) (referring to series-qualifier canon as "grade-school grammar," explaining that "forcibly" modified "assaulted, resisted, opposed, impeded or interfered with" — a "string of verbs" separated by the conjunction "or")); *Thomas v. Reeves*, 961 F.3d 800, 803 (5th Cir. 2020) (Costa, J., concurring) (quoting *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920)) ("When several words are followed by a clause

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that is done to something. . . ." DAMAGE, BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis added). Black's then adds, "*By extension*, any bad effect on something." *Id.* (emphasis added). Clearly, the first definition, requiring *physical* harm, is the one intended in the Policy.

which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.").

As applied to the phrase "direct physical loss of or damage to" property, the series-qualifier canon instructs that the adjectives "direct" and "physical" modify *both* "loss" and "damage." Courts reached this uncontroversial conclusion even before the pandemic. *E.g., Fountainbleau 2006, LLC v. United States Fire Ins. Co.*, 2010 WL 11597704, at *6 (N.D. Ga. Dec. 21, 2010) (citing *AFLAC Inc. v. Chubb & Sons, Inc.*, 581 S.E.2d 317, 319 (Ga. Ct. App. 2003) ("[T]he plain meaning of 'direct physical loss or damage' indicates that 'direct physical' is intended to modify both 'loss' and 'damage'."); *Ward Gen. Ins. Servs., Inc. v. Employers Fire Ins. Co.*, 114 Cal. App. 4th 548, 554, 7 Cal. Rptr. 3d 844, 849 (2003) ("[W]e construe the words 'direct physical' to modify both 'loss of' and 'damage to'," because "[m]ost readers expect the first adjective in a series of nouns or phrases to modify each noun or phrase in the following series unless another adjective appears."). In the context of the COVID-19 pandemic, courts continue to conclude that " 'direct physical' modifies both 'loss' and 'damage'." *Atma Beauty, Inc. v. HDI Glob. Specialty SE*, 2020 WL 7770398, at *3 (S.D. Fla. Dec. 30, 2020) (citing *Mama Jo's Inc. v. Sparta Ins. Co.*, 823 F. App'x 868, 879 (11th Cir. 2020)).

Because "damage" (like "loss") is modified by "direct" and "physical," First Watch's attempt to redefine "damage" to mean just a "bad effect," including a non-

physical bad effect, is absurd and foreclosed by the language of the Policy itself. Op. Br. at 20. As one court in this Circuit put it when interpreting "direct physical loss of or damage to" property, an argument like First Watch makes here "is unpersuasive because Florida law and the plain language of the [Policy] reflect that ***actual, concrete damage*** is necessary" to trigger coverage. *Infinity Exhibits, Inc. v. Certain Underwriters at Lloyd's London*, 489 F. Supp. 3d 1303, 1307 (M.D. Fla. 2020) (emphasis added); *see also 15 Oz Fresh & Healthy Food LLC v. Underwriters at Lloyd's London*, 2021 WL 896216, at *5 (S.D. Fla. Feb. 22, 2021) (quoting *Infinity Exhibits*, 489 F. Supp. 3d at 1307) (endorsing the "actual, concrete damage" requirement, observing that "it is hardly alone" in doing so) (collecting cases).[6]

[6] First Watch's reading of the Policy's insuring clauses renders the Policy incomprehensible. The Policy's insuring clauses generally require "direct physical loss of or damage to" "property," and such loss or damage must be "caused by a Covered Cause of Loss." The fact that in some places the phrase "caused by a Covered Cause of Loss" is inserted in the phrase "direct physical loss of or damage to property" does not create a different insuring clause altogether, transforming it to mean "direct physical loss" and wholly separate "damage caused by a Covered Cause of Loss to property." Indeed, First Watch's interpretation is shown faulty by the fact that "Covered Cause of Loss" itself is defined as a "risk of *direct physical loss of or damage* from any cause unless excluded." Policy § 7.11, ECF 1-4 at 62 (emphasis added). Thus, "direct physical loss," not just "damage," must be caused by a "Covered Cause of Loss," too, meaning First Watch's effort to artificially segregate these words makes no sense. First Watch's argument that the "damage" need not be "direct" or "physical" is therefore incorrect even under its own "strained, forced [and] unrealistic interpretation." *American Mfrs. Mut. Ins. Co. v. Horn*, 353 So. 2d 565, 568 (Fla. Dist. Ct. App. 1977) (citation omitted).

First Watch's argument does not simply rewrite the Policy; it rewrites Florida case law, too. First Watch argues that "Florida law does not require actual harm to a building structure for there to be coverage for direct physical loss to a business," citing *Azalea, Ltd. v. American States Ins. Co.*, 656 So. 2d 600 (Fla. Dist. Ct. App. 1995). Op. Br. at 37. But that argument misapprehends *Azalea*. There was no dispute in *Azalea* about whether "direct physical loss of or damage to" property required "actual harm to a building structure." In fact, that was the very standard the Florida court applied in that case, reversing the trial court because the evidence supported the conclusion that the insured's property did sustain "actual harm" because of vandalism:

> ***Appellee's assertion that there was no actual harm to the insured premises is not supported by either the facts or the law***. The only evidence presented demonstrates that the bacteria colony is an integral part of the sewage treatment facility. The colony was specifically attached to and became part of the treatment facility structure. The facility could not operate or exist unless this colony was replaced….The residue from the dumped substance actually covered and adhered to the interior of the structure ***causing destruction*** of the bacteria colony which was an integral part of the covered facility. Therefore, there was ***direct damage to the structure*** which was caused by the vandalism.

656 So. 2d at 602 (emphasis added); *see also Three Palms Pointe, Inc. v. State Farm Fire & Cas. Co.*, 250 F. Supp. 2d 1357, 1364 (M.D. Fla. 2003), *aff'd*, 362 F.3d 1317 (11th Cir. 2004) (observing that *Azalea*'s "two rationales" for concluding there was "direct physical loss of or damage to" property were that (1) "the ***structure had been harmed*** when the chemical residue adhered to the interior of the structure causing

the facility to become inoperable," and (2) "the bacteria was an integral part of the plant and ***destruction of the bacteria colony*** also caused ***actual harm to the plant***") (emphasis added). Thus, if anything, *Azalea* also requires that First Watch show "actual harm" to property to establish "direct physical loss of or damage to" property, just like all the other Florida case law discussed herein.

Consistent with *Azalea*, the "direct physical loss of" part of the phrase also requires either a permanent deprivation of property or complete destruction of property — a total loss. First Watch concedes, as it must, that the term "loss" is defined as "the act of losing possession" and "deprivation." Op. Br. at 19; *see also Royal Palm Optical, Inc. v. State Farm Mut. Auto. Ins. Co.*, 2021 WL 1220750, at *4 (S.D. Fla. Mar. 30, 2021) ("The dictionary definitions of the word 'loss' include specific words like 'destruction,' 'ruin,' and 'deprivation'….") (citation omitted). Indeed, property that is destroyed is property the insured is permanently deprived of, requiring a replacement of that property. In *Azalea*, for instance, the "destruction" of a bacteria colony that formed "an integral part of the sewage treatment facility" rendered the facility inoperable "unless [the] colony was replaced." 656 So. 2d at 602.

The "direct physical loss of" part of the phrase is therefore "complementary" to the other part of the phrase, "direct physical damage to," as courts in this Circuit have concluded. *E.g., Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, 495 F.

Supp. 3d 1289, 1295 (N.D. Ga. 2020). Examining the plain meaning of the words in the phrase "direct physical loss of or damage to" property, the district court in *Henry's* explained:

> These definitions can support two different meanings—that loss is the "disappearance of value" or "the act of losing possession" by complete destruction, while damage is any other injury requiring repair. As an illustrative example, a tornado that destroys the entirety of the restaurant results in a "loss of" the restaurant, while a tree falling on part of the kitchen would represent "damage to" the restaurant.

495 F. Supp. 3d at 1295; *see also Woolworth LLC v. Cincinnati Ins. Co.*, 2021 WL 1424356, at *4 (N.D. Ala. Apr. 15, 2021) ("[A] person of ordinary understanding would define 'physical damage' to be a perceptible, material harm to property. The same person would define 'physical loss' to be a material, perceptible destruction or ruin of property. In other words, a person of ordinary understanding would read the policy to cover a spectrum of property damage that ranges from lesser harm (*i.e.* physical damage) to total ruin (*i.e.* physical loss).").

In a last-ditch effort, First Watch argues that the Policy's "Computer Systems Damage" provision[7] shows that "physical" doesn't actually mean "physical," and so

[7] The "Computer Systems Damage" provision states that Zurich "will pay for direct physical loss of or damage to [First Watch's] Electronic Data, Programs, Software and the actual Time Element loss sustained, as provided by this Policy, during the Period of Interruption directly resulting from mysterious disappearance of code, any failure, malfunction, deficiency, deletion, fault, Computer Virus or corruption to [First Watch's] Electronic Data, Programs, Software at an Insured Location." ECF 1-4, Policy § 5.02.04, ECF 1-4 at 35.

the Policy covers non-physical loss or damage, too. First Watch asserts, as a purportedly irrefutable legal conclusion, that "[t]here is no dispute that electronic data and software are neither tangible nor physical," because "[t]he digital code described in this coverage exists as a series of magnetic ones and zeroes on computer memory chips." Op. Br. at 36. First Watch is wrong, and not just because courts have rejected such arguments. *E.g., NMS Svcs., Inc. v. The Hartford*, 62 F. App'x 511, 515 (4th Cir. 2003) (Widener, J., concurring) ("[A] computer stores information by [rearranging] atoms or molecules of a disc or tape to effect the formation of a particular order of magnetic impulses, and a meaningful sequence of magnetic impulses cannot float in space.") (citation omitted).

The Policy's plain language contradicts First Watch's argument that "Electronic Data" is "neither tangible nor physical." The Policy defines "Electronic Data" has having a physical, material existence, by defining it as "[d]ata of any kind that is recorded or transmitted in a form usable in electronic computer systems or networks, microchips, integrated circuits or similar devices in non-computer equipment, and which can be stored on Media," which the Policy defines as "*Tangible* personal property on which Electronic Data or Programs can be recorded…." ECF 1-4, Policy §§ 7.18, 7.29, ECF 1-4 at 63, 65 (emphasis added). Thus, the "Computer Systems Damage" coverage, like the relevant coverages First

Watch actually sought in this lawsuit, clearly refers to tangible, physical property and requires an actual harmful change to or permanent deprivation of it.

Contrary to First Watch's implausible interpretations, the phrase "direct physical loss of or damage to" property unambiguously requires an actual harmful change in the property itself or a permanent deprivation of the property. The phrase does not mean a "bad effect" on First Watch's financial well-being caused by an inability to serve customers inside its restaurants. The District Court did not err in concluding that " 'direct physical' modifies both 'loss' and 'damage'," and that, "to be covered, an interruption in business 'must be caused by some *physical problem* with the covered property'." ECF 31 at 9 (citing *Malaube, LLC v. Greenwich Ins. Co.*, 2020 WL 5051581, at *7 (S.D. Fla. Aug. 26, 2020)) (emphasis original).

C. Other Policy Language, Such As The "Period Of Liability" Provision, Confirms That The Zurich Policy Requires An Actual Harmful Change In The Property Itself Or A Permanent Deprivation Of The Property.

The phrase "direct physical loss of or damage to" property has an ordinary and common-sense meaning, as explained above. Other language in the Policy only reinforces that meaning.

The Policy's "Period of Liability" provision is the most obvious example. The Policy pays income loss and expenses only "***during the 'Period of Liability'.***" Policy §§ 4.01.01; 4.02.03; 5.02.03, ECF 1-4 at 28–30; 34. For "direct physical loss of or damage to" First Watch's "building and equipment," the "Period of Liability"

is "[t]he period starting from the time of physical loss or damage…and ending when with due diligence and dispatch the building and equipment could be ***repaired or replaced***, and ***made ready for operations under the same or equivalent physical and operating conditions*** that existed ***prior to the damage***." *Id.* § 4.03.01.01, ECF 1-4 at 32 (emphasis added). The period of time in which any covered business income loss occurs is therefore directly tied to when physical loss or damage occurs and when it is (or should be) repaired or replaced. There is no provision allowing business interruption loss during the period that "the location cannot be used as desired." This and other Policy language supports the conclusion that "direct physical loss of or damage to" property requires an actual change in the property itself (requiring repair), or a permanent deprivation of the property (requiring replacement).[8]

[8] The Policy's "Valuation" provision provides further support for this conclusion. Policy §§ 6.22 *et seq.*, ECF 1-4 at 58–59. The Policy states that, "[i]n the event of any claim for direct physical loss of or damage to Covered Property," the "basis of adjustment is on a replacement cost basis," which means "the cost to repair, rebuild or replace the damaged property…with materials of like kind, quality and capacity at the same or another site…." *Id.* § 6.22.01, ECF 1-4 at 58. The Policy also states that, "[i]f there is direct physical loss of or damage to Covered Property for which repair, rebuilding or replacement has not started within two (2) years from the date of direct physical loss or damage, [Zurich] will not be liable for more than the actual cash value of the property destroyed." *Id.* § 6.22.02, ECF 1-4 at 58. This provision, like the "Period of Liability" provision, is rendered meaningless if "direct physical loss of or damage to" property means non-physical economic loss without an actual change in or permanent deprivation of property.

Numerous courts applying Florida law in the COVID-19 context dutifully have taken this read-the-whole-policy approach, concluding that such other policy language supports the conclusion that "direct physical loss of or damage to" property requires an actual change in or permanent deprivation of property. In *Malaube, LLC v. Greenwich Ins. Co.*, 2020 WL 5051581 (S.D. Fla. Aug. 26, 2020), for example, Magistrate Judge Torres recommended dismissal of a complaint which, like here, sought coverage for business-income losses resulting from a COVID-19-related government order, in part because the policy's "period of restoration" language "contemplate[d] physical damage to the insured premises as opposed to loss of use of it." *Id.* at *9 (citations omitted). Like the "Period of Liability" provision in First Watch's Policy, the "period of restoration" provision in *Malaube* set the timeline for coverage as "beginning…after the time of direct physical loss or damage," and ending "on the earlier of (1) [t]he date when the property at the described premises should be ***repaired, rebuilt or replaced*** with reasonable speed and similar quality; or (2) [t]he date when business is ***resumed at a new permanent location***." *Id.* (emphasis added). To "construe 'direct physical loss or damage' to require actual harm," Judge Torres stated, was to "give[] effect to the other provisions in the policy," which is a task "Florida law requires [courts] to do so that no section of the

insurance policy is left meaningless." *Id.* (citing *Aucilla Area Solid Waste Admin. v. Madison Cty.*, 890 So. 2d 415, 416–17 (Fla. Dist. Ct. App. 2004)).[9]

Many other courts in the Eleventh Circuit, including those applying Florida law, have reached a similar conclusion based on similar "period of restoration" language. *E.g., Café Int'l Holding Co.*, 2021 WL 1803805, at *12 ("The Policy provides Business Income and Extra Expense coverage only during the 'period of restoration,' which is tied to the time when the property is 'repaired, rebuilt[,] or replaced' — a phrase that…plainly requires an actual, physical change in the insured property."); *Woolworth*, 2021 WL 1424356, at *4 ("[A] person of common understanding would understand the 'period of restoration' to run from the moment that business property is 'physically damaged' until it is 'repaired' or 'rebuilt.' Or for property that was 'physically lost,' the period runs from the moment the property

[9] In *Malaube*, the plaintiff voluntarily dismissed its complaint without prejudice shortly after Magistrate Judge Torres filed his Report and Recommendation. *Id.* Dkt. 22 (Sept. 8, 2020). Despite being a magistrate judge's report, *Malaube* has been cited favorably 27 times by district courts in this Circuit, including 21 times by Florida district courts. *E.g., Island Hotel Props., Inc. v. Fireman's Fund Ins. Co.*, 2021 WL 117898, at *3 (S.D. Fla. Jan. 11, 2021) (Moore, C.J.) (quoting *Malaube*, 2020 WL 5051581, at *7) ("Because 'direct physical' modifies both 'loss' and 'damage,' ... any 'interruption in business must be caused by some *physical problem* with the covered property' to be a covered loss.") (emphasis original). Florida state courts also routinely have relied on *Malaube*. *E.g., Catlin Dental, P.A. v. The Cincinnati Indem. Co.*, 2020 WL 8173333, at *5 (Fla. Cir. Ct. Dec. 11, 2020); *Dime Fitness, LLC v. Markel Ins. Co.*, 2020 WL 6691467, at *3 (Fla. Cir. Ct. Nov. 10, 2020); *DAB Dental PLLC v. Main Street America Protection Ins. Co.*, 2020 WL 7137138, at *5 (Fla. Cir. Ct. Nov. 10, 2020).

was ruined until the day the property is replaced or the business reopens in another location."); *K D Unlimited Inc. v. Owners Ins. Co.*, 2021 WL 81660, at *5 (N.D. Ga. Jan. 5, 2021) (observing that the "period of restoration" provision's "range of contemplated harms aligns with an understanding that 'direct physical loss or damage to' requires a physical change in the property subject to restoration").[10]

First Watch repeatedly contends that the Policy does not contain a "period of restoration" provision like the ones in the foregoing cases. First Watch argues that the Policy "does not limit Time Element to the 'period of restoration,' so it does not imply the same connection to tangible physical injury to property as the cases on which [Zurich] relies." Op. Br. at 33–34. But the Policy ***does*** contain a provision like that in the cases above — it is just called the "Period of Liability." Like the provisions in the cases above, the "Period of Liability" requires a repair or replacement of property, or some other restoration to make the property "ready for operations under the same or equivalent physical and operating conditions that existed prior to the damage." Policy § 4.03.01.01, ECF 1-4 at 32. That, of course, was neither alleged nor even possible here.

[10] Courts elsewhere also continue to draw the same conclusion. *E.g., Isaac's Deli, Inc. v. State Auto Prop. & Cas. Ins. Co.*, 2021 WL 1945713, at *5 (E.D. Pa. May 14, 2021) ("Interpreting 'direct physical loss' to include an ephemeral 'loss of use' theory of recovery would impermissibly relegate the 'period of restoration' language to mere surplusage. The Court must decline to manufacture such uncertainty by stretching the language of the Policy beyond its plain meaning.") (citation omitted).

D. COVID-19 Orders Regulating First Watch's Activities On Its Property Did Not Cause "Direct Physical Loss Of Or Damage To" Property.

As the foregoing discussion makes clear, a COVID-19 order regulating what activities First Watch could (and could not) conduct on physically unharmed property that First Watch still possesses does not cause "direct physical loss of or damage to" property, as a matter of law and common sense. An order does not cause damage requiring a repair, nor does an order cause destruction requiring a replacement of property. No basis exists in the text for First Watch's theory that the Policy covers income loss caused by the mere inability to use physically unharmed property. As the District Court correctly concluded, "First Watch's business losses due to COVID-19 orders are economic losses, not the kind of physical loss or damage contemplated by the policy." ECF 31 at 9. Any other conclusion "would misallocate the ordinary costs of doing business from the company to the insurer." *MarkWest Hydrocarbon, Inc. v. Liberty Mut. Ins. Co.*, 558 F.3d 1184, 1192 (10th Cir. 2009).

Suspension of business activities — *i.e.*, a loss of use — must be caused by direct physical loss of or damage to property, not the other way around. The Policy states that it covers income loss that "result[s] from the necessary Suspension of [First Watch's] business activities at an Insured Location," but only if that suspension is "*due to* direct physical loss of or damage to Property…*caused by* a

Covered Cause of Loss," which is defined as a risk of direct physical loss or damage not otherwise excluded. Policy §§ 4.01.01; 7.11, ECF 1-4 at 28; 62 (emphasis added). Thus, a risk of direct physical loss or damage (*e.g.*, fire or hurricane) must cause direct physical loss of or damage to property which, in turn, must cause the suspension of business activities.

First Watch's theory of coverage ***reverses*** that sequence, allowing coverage where the suspension of business activities (*e.g.*, the suspension of "on-premises food consumption for customers," ECF 1 ¶ 19) allegedly causes the direct physical loss or damage, rather than the other way around. "Yet the Policy is clear that a direct physical loss must cause the suspension of operations. . . ." *Karmel Davis & Assocs., Att'ys-at-L., LLC v. Hartford Fin. Servs. Grp., Inc.*, 2021 WL 420372, at *4 (N.D. Ga. Jan. 26, 2021); *see also Malaube,* 2020 WL 5051581, at *4 ("[T]he insurance policy only provides coverage for the actual loss of business income if a direct physical loss or damage to the property causes a suspension to Plaintiff's operations[.]"). Contrary to First Watch's theory, the suspension of business activities cannot be both the "direct physical loss of or damage to" property ***and*** the result of loss or damage. That theory fails on its face.

Exclusions in the Policy further preclude First Watch's "loss of use" theory. The Policy "excludes…[l]oss or damage arising from . . . loss of use," and "[l]oss . . . resulting from the Insured's suspension of business activities, except to the extent

provided by this Policy." Policy §§ 3.03.02.01 & -.05, ECF 1-4 at 25. Thus, loss arising out of loss of use is explicitly not covered, and so is loss of income resulting from a suspension of business activities not caused by "direct physical loss of or damage to" property. First Watch does not attempt to, and indeed cannot, point to a provision in the Policy supporting coverage for "loss of use" of property that has not been physically lost or damaged. Indeed, the Policy explicitly excludes such loss of use. *See Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 487 F. Supp. 3d 834, 842–43 (N.D. Cal. 2020) ("The separate provision for loss of use suggests that the 'direct physical loss of ... property' clause was not intended to encompass a loss where the property was rendered unusable without an intervening physical force. The provision also undermines Mudpie's claim that 'a reasonable purchaser of insurance would read the policy as providing coverage for a loss of functionality'."); *Ballas Nails & Spa, LLC v. Travelers Cas. Ins. Co. of Am.*, 2021 WL 37984, at *4 (E.D. Mo. Jan. 5, 2021) ("[C]construing the policy's requirement of 'direct physical loss or damage' to include the mere loss of use of insured property with nothing more would negate the 'loss of use' exclusion.").

First Watch's "loss of use" theory also demands that the Court set aside its common sense, which is built into the standard for reviewing dismissal orders. *E.g., James v. Bartow Cty., Georgia*, 798 F. App'x 581, 583 (11th Cir. 2020) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). Courts examining identical policy

language in the COVID-19 context persuasively have explained why First Watch's "loss of use" theory lacks common sense:

> The idea that "loss of use" does not constitute a "direct physical loss of or damage to" property resonates in ordinary experience outside the context of insurance coverage. Say, for example, a teenager broke curfew, and his parents punished him by taking away the keys to his car. The teen undoubtedly lost the ability to use the car. However, we would not say that there had been a "direct physical loss of or damage to" the car. The teenager was precluded from driving it. But the car's physical condition remained unchanged, and its presence likely remained at the residence. Similarly, imagine a fisherman visits a public pond each day to cast his line. One morning he arrived and found that the pond was closed for fishing because a nearby town was hosting its annual swim race. Did the fisherman lose the use of the pond for the day? Yes. He could not enjoy the premises for his intended use (i.e., to fish). But could anyone reasonably conclude there was a "direct physical loss of or damage to" the pond because he could not fish? No. The condition of the pond was not altered physically.

Michael Cetta, Inc. v. Admiral Indem. Co., 2020 WL 7321405, at *6 (S.D.N.Y. Dec. 11, 2020). Here, too, First Watch "undoubtedly lost the ability to use" parts of its restaurant premises for on-premises food consumption for customers, but "we would not say that there had been a 'direct physical loss of or damage to' the [premises]," because the premises' "physical condition remained unchanged[.]" *Id.*

Indeed, under First Watch's theory, any government action affecting First Watch's profit margin would qualify as "direct physical loss of or damage to" property, resulting in a "sweeping expansion of insurance coverage without any manageable bounds." *Plan Check Downtown III, LLC v. AmGuard Ins. Co.*, 485 F. Supp. 3d 1225, 1231 (C.D. Cal. 2020). The *Plan Check* court offered several

scenarios in which coverage would apply to regulatory actions, based on a novel theory (similar to First Watch's) that loss of the ability to use physically intact property constitutes "direct physical loss of or damage to" property:

> (1) a city changes its maximum occupancy codes to lower the caps, meaning that a particular restaurant can no longer seat as many customers as it used to; (2) a city amends an ordinance requiring restaurants located in residential zones to cease operations between 1:00 a.m. and 5:30 a.m. to expand the window to 12:00 a.m. to 6:00 a.m.; (3) a city issues a mandatory evacuation order to all of its residents due to nearby wildfires (a consequence of this is that all businesses must suspend operations), but lifts the order three weeks later when the wildfires are extinguished without, fortunately, any destruction of property. Under Plan Check's standard, all of these instances would trigger insurance coverage….

485 F. Supp. 3d at 1232.[11] "The manageability issue is not limited to government action," the *Plan Check* court observed, "but with anything that interferes with the permitted physical activities on a property," such as "a snowstorm [that] interfere[s] with a restaurant's outdoor dining service." *Id.* The Policy obviously is not meant to cover such "ordinary costs of doing business," *MarkWest*, 558 F.3d at 1192, but rather risks of "direct physical loss of or damage to" property.

Contrary to First Watch's assertions, the Policy is not a contract guaranteeing the success of First Watch's restaurant business, freeing it from the inevitable

[11] Florida and California law are in sync on this point, as relevant case law demonstrates. *See, e.g., Mama Jo's*, 823 F. App'x at 879 (citing *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779, 115 Cal. Rptr. 3d 27, 37 (2010)) ("A direct physical loss contemplates an actual change in insured property.").

constraints of local, state, and federal regulation. The Policy pays for loss of business income only if there is "an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so." *Café La Trova*, 2021 WL 602585, at *7; *see also Ramada Inn Ramogreen, Inc. v. Travelers Indem. Co.*, 835 F.2d 812, 814 (11th Cir. 1988) (quoting 1 G. COUCH, COUCH ON INSURANCE § 1:28 (2d ed. 1984)) ("[T]he purpose of a business interruption policy is to indemnify the insured 'for loss caused by the interruption of a going business ***consequent upon the destruction of the building, plant, or parts thereof***'….") (emphasis added).

That did not happen here. The referenced COVID-19 orders did not tangibly alter any of First Watch's properties, nor did the orders permanently physically deprive First Watch of any property. Instead, First Watch's restaurants remained in the same condition they were in the moment after the orders went into effect. First Watch's loss of its ability to serve customers inside its restaurants was not caused by some "unsound and or unhealthy condition of the property itself, which necessitated repair, rebuilding, or replacement," but by a government's decision to prevent people from gathering indoors. *Drama Camp Prods., Inc. v. Mt. Hawley Ins. Co.*, 2020 WL 8018579, at *6 (S.D. Ala. Dec. 30, 2020). That is not "direct physical loss of or damage to" property.

Small wonder, then, that Florida courts considering the type of claim First Watch presses here overwhelmingly have rejected it. "[T]he bottom line is clear: nearly every court to confront this issue in the context of identical or nearly identical policy language has dismissed claims against insurers for economic losses unaccompanied by a demonstrable physical alteration to the premises itself." *Royal Palm Optical*, 2021 WL 1220750, at *5. After all, "the loss needs to come directly from an actual, demonstrable, physical harm to the premises itself," *Café Int'l Holding*, 2021 WL 1803805, at *9, but "government orders closing businesses to slow the spread of COVID-19 are not covered…because such losses were not caused by direct physical loss of or damage to the insured property," *AE Mgmt.*, 2021 WL 827192, at *2 (citation omitted). This is the "nearly unanimous view" under Florida law, because " 'direct physical loss of or damage to property' requires 'a distinct, demonstrable, physical alteration of the property' and does not include 'losses that are intangible or incorporeal'," such as "loss of use of the premises, or loss of access to the premises." *Id.* at *3 (citing *Mama Jo's,* 2018 WL 3412974, at *9 (S.D. Fla. June 11, 2018), *aff'd*, 823 F. App'x 868 (11th Cir. 2020)).

There is unity among courts in this Circuit that loss of the ability to use physically unharmed property still in the insured's possession does not constitute "direct physical loss of or damage to" property. In Alabama, one court held that the "loss of usability" of property was not covered because it does "not result from an

immediate occurrence which tangibly altered [the] property[.]" *Hillcrest Optical, Inc. v. Cont'l Cas. Co.*, 497 F. Supp. 3d 1203, 1211 (S.D. Ala. 2020). In *Hillcrest*, as here, the insured argued that a COVID-19 order caused "direct physical loss of or damage to" property, but "the Order did not immediately cause some sort of tangible alteration to [the insured's] office," and "only temporarily precluded [the insured] from performing routine medical procedures while the Order was in effect." *Id.* Georgia courts similarly have rejected claims that COVID-19 orders cause "direct physical loss of or damage to" property. *E.g., Henry's Louisiana Grill*, 495 F. Supp. 3d at 1295 ("[T]he Order . . . did not represent an external event that changed the insured property. Every physical element of the dining rooms — the floors, the ceilings, the plumbing, the HVAC, the tables, the chairs — underwent no physical change as a result of the Order."). [12]

[12] First Watch directs the Court to non-Florida case law, such as to a Missouri decision, *Studio 417, Inc. v. Cincinnati Ins. Co.*, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020), to support its "loss of use" theory. Op. Br. at 19. First, the "loss of use" exclusion in the Policy precludes coverage for "loss of use," making *Studio 417* readily distinguishable. Second, courts in this Circuit routinely have declined to follow *Studio 417* as either not persuasive or inconsistent with Florida, Alabama, and Georgia law. *E.g., Digital Age Mktg. Grp., Inc. v. Sentinel Ins. Co. Ltd.*, 2021 WL 80535, at *6 (S.D. Fla. Jan. 8, 2021); *Akridge Family Dental, Inc. v. Cincinnati Ins. Co.*, 2021 WL 2020605, at *4 (S.D. Ala. May 6, 2021); *Gilreath Family & Cosmetic Dentistry, Inc. v. Cincinnati Ins. Co.*, 2021 WL 778728, at *6 (N.D. Ga. Mar. 1, 2021). "Additionally, courts have either tiptoed around the holding in [*Studio 417*], criticized it, or treated it as the minority position," *American Food Sys., Inc. v. Fireman's Fund Ins. Co.*, 2021 WL 1131640, at *4 n.7 (D. Mass. Mar. 24, 2021) (collecting cases), including in Missouri itself, *e.g., Seoul Taco Holdings, LLC v. Cincinnati Ins. Co.*, 2021 WL 1889866, at *5 (E.D. Mo. May 11, 2021) (declining

Accordingly, the District Court correctly concluded that "First Watch's business losses due to COVID-19 orders are economic losses, not the kind of physical loss or damage contemplated by the policy." ECF 31 at 9.

II. THE DISTRICT COURT CORRECTLY HELD THAT FIRST WATCH DID NOT PLAUSIBLY ALLEGE FACTS SATISFYING THE "CIVIL AUTHORITY" COVERAGE.

A. First Watch Did Not Plausibly Allege That Any COVID-19 Order Resulted From A Civil Authority's Response To "Direct Physical Loss Of Or Damage To" Property.

First Watch alleged in a single conclusory paragraph that it "suffered loss of business income and extra expense due to the action of civil authority that prohibits access to Plaintiff's insured premises;" and that "[t]he action of civil authority was a result of direct physical loss of or damage to property, other than at the described premises, due to COVID-19, the related pandemic, and other covered causes of loss under Section V of the policy." ECF 1 ¶ 39.

But First Watch failed to identify, let alone describe in any detail, any "property not owned, occupied, leased or rented by" First Watch. Policy § 5.02.03, ECF 1-4 at 34–35. Its failure to allege any facts about the other property allegedly sustaining "direct physical loss of or damage to" property is one reason, sufficient on its own, to conclude that Civil Authority coverage does not apply. *See 15 Oz*,

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to follow *Studio 417* over "[o]ther Missouri district court cases, and the majority of the other district courts across the country"); *MMMMM DP, LLC v. Cincinnati Ins. Co.*, 2021 WL 2075565, at *3 (E.D. Mo. May 24, 2021) ("*Studio 417* is an outlier.").

2021 WL 896216, at *7 ("Plaintiff fails to allege with specificity that a property within the immediately surrounding area other than [Plaintiff's] restaurant was damaged by a covered loss.") (citation omitted).

First Watch also failed to allege facts showing that an order *resulted from* a civil authority's response to "direct physical loss of or damage to" such other property. The Florida orders identified by First Watch were issued "as a result of COVID-19," ECF 1 ¶ 18, not because of any "direct physical loss of or damage to" property. First Watch alleged that the same COVID-19 orders that allegedly caused "direct physical loss of or damage to" First Watch's property also caused loss or damage to other property not owned by First Watch. First Watch argues that "[t]he damage to other property need only be intangible because requiring tangible damage nullifies the policy language." Op. Br. at 40. This is nonsensical. The Policy explicitly requires that any civil authority order be in response to direct physical loss or damage to property — precluding mere "intangible" loss as a reason for such an order, as the District Court observed. ECF 31 at 10. The phrase indisputably requires actual physical harm to or permanent deprivation of property, and COVID-19 orders did not and could never cause that. Thus, even if First Watch identified someone else's property in its complaint (which it did not), COVID-19 orders were not issued in response to "direct physical loss of or damage to" that property, as a matter of law.

First Watch's theory for Civil Authority coverage is fundamentally flawed. Under First Watch's theory, a COVID-19 order can be both the ***cause*** of the "direct physical loss of or damage to" someone else's property, ***as well as the response*** to that loss or damage. First Watch is not the first policyholder in the COVID-19 context to "hurt its own position with arguments and hypotheticals that are, at best, nonsensical." *South Fla. ENT Assocs., Inc. v. Hartford Fire Ins. Co.*, 2020 WL 6864560, at *11 (S.D. Fla. Nov. 13, 2020). Indeed, numerous courts have rejected First Watch's nonsensical theory for Civil Authority coverage. *E.g., Pez Seafood DTLA, LLC v. Travelers Indem. Co.*, 2021 WL 234355, at *7 (C.D. Cal. Jan. 20, 2021) ("Plaintiff's first theory would render the Civil Authority provision nonsensical. If an act of civil authority could be a 'Covered Cause of Loss,' the result would be a circular logic in which the Orders (as a Covered Cause of Loss) caused direct physical loss of or damage to properties, which caused the Orders (an action of civil authority)."); *Moody v. Hartford Fin. Grp., Inc.*, 2021 WL 135897, at *6 n.7 (E.D. Pa. Jan. 14, 2021) ("[A] civil authority order cannot itself be a 'Covered Cause of "Loss' that causes loss of or damage to Moody Jones's property if the same order is required to be 'the direct result of a Covered Cause of Loss' for purposes of Civil Authority coverage."). The District Court correctly concluded that First Watch failed to allege an order resulted from a civil authority's response to "direct physical loss of or damage to" property.

B. First Watch Did Not Plausibly Allege That Any Order Prohibited Access To First Watch's Properties.

Civil Authority coverage also requires that an order of civil authority "prohibited access" to First Watch's property. The District Court correctly determined that this requirement also was not satisfied. ECF 31 at 10.

Once more, First Watch asserted a single legal conclusion that civil authority orders prohibited access to its 400 properties in 29 states. ECF 1 ¶ 39. The District Court was not obligated to credit First Watch's naked legal conclusion. Complaints providing only 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action' [are] not adequate to survive a Rule 12(b)(6) motion to dismiss." *Worthy v. City of Phenix City, Alabama*, 930 F.3d 1206, 1217 (11th Cir. 2019) (quoting *Twombly*, 550 U.S. at 555). A single allegation that COVID-19 orders prohibited access to First Watch's 400 restaurants in 29 states is a "legal conclusion[] masquerading as [a] fact[]," *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002), and therefore properly disregarded.

Indeed, far from alleging that access was *prohibited* at any of its 400 restaurants, First Watch alleged that *it continued operating* its restaurants after COVID-19 orders were issued, until First Watch *itself decided* it no longer wished to do so. First Watch alleged that, "[i]nitially, where permitted, [First Watch] maintained limited service for take-out and/or delivery." ECF 1 ¶ 15. In fact, "the executive orders actually encouraged restaurants — considered essential businesses

— to continue providing take-out, delivery, and curbside services." *15 Oz*, 2021 WL 896216, at *7. Because "[t]he cited actions of civil authority did not completely cut off access to [First Watch's] restaurant[s], nor did they specifically prohibit customers from purchasing delivery or take-out," *Rococo Steak, LLC v. Aspen Specialty Ins. Co.*, 2021 WL 268478, at *6 (M.D. Fla. Jan. 27, 2021), First Watch did not and could not establish that any COVID-19 order "prohibited access" to First Watch's property. The District Court was correct in reaching that conclusion.

III. THE ZURICH POLICY'S "CONTAMINATION" EXCLUSION EXCLUDES COVERAGE.

For all the reasons above, the Policy does not provide any coverage for First Watch's claims, because First Watch cannot allege facts to satisfy the Policy's insuring agreements for Time Element and Civil Authority coverage. Since it found there is no coverage in the first place, the District Court had no need to examine the Policy's Contamination Exclusion. *See, e.g., Mid-Continent Cas. Co. v. Frank Casserino Const., Inc.*, 721 F. Supp. 2d 1209, 1214–15 (M.D. Fla. 2010) (only after the insured shows coverage does the insurer have the burden of proving an exclusion applies) (citing *LaFarge Corp. v. Travelers Indem. Co.*, 118 F.3d 1511, 1516 (11th Cir. 1997)). However, First Watch's claim also fails based on that Exclusion.[13]

[13] "This Court may affirm for any reason supported by the record, even if not relied upon by the district court." *Allen v. USAA Cas. Ins. Co.*, 790 F.3d at 1278 (citation omitted); *see also Walden v. Centers for Disease Control & Prevention*, 669 F.3d 1277, 1283 (11th Cir. 2012).

The Policy requires that First Watch's alleged "Time Element loss" must result from direct physical loss or damage caused by a "***Covered Cause of Loss***" at First Watch's property. Policy §§ 4.01.01, 4.02.01, 4.02.03, ECF 1-4 at 28–30. Similarly, Time Element loss sought under the Civil Authority coverage must result from direct physical loss or damage caused by a "***Covered Cause of Loss***" to someone else's property. *Id.* § 5.02.03, ECF 1-4 at 34–35. The Policy defines "Covered Cause of Loss" as "All risks of direct physical loss of or damage from any cause ***unless excluded***." *Id.* § 7.11, ECF 1-4 at 62 (emphasis added).

Here, the Contamination Exclusion excludes the presence of virus as a Covered Cause of Loss. The Policy excludes "Contamination, and any cost due to Contamination *including the inability to use or occupy property* or any cost of making property safe or suitable for use or occupancy." *Id.* § 3.03, ECF 1-4 at 25 (emphasis added). The Policy defines "Contamination" as "[a]ny condition of property due to the actual presence of any…virus [or] disease causing or illness causing agent…." *Id.* § 7.09, ECF 1-4 at 62. When the Contamination Exclusion and its defined terms are read together, the Zurich Policy explicitly does not cover any Time Element loss due to "[a]ny condition of property due to the actual presence of any … virus [or] disease causing or illness causing agent," or any cost due to that contamination, including the inability to use or occupy property, because any such condition of property is excluded as a "Covered Cause of Loss."

First Watch never alleged the presence of the virus on or in any of its restaurant properties, let alone that the virus's presence caused any physical loss of or damage to property. But even if First Watch attempted to switch gears and seek to construe its complaint that broadly, the presence of the COVID-19 virus does not constitute or cause direct physical loss of or damage to property. Also, the presence of the virus on property is "contamination," as defined by the Policy, and therefore excluded from coverage. *See Ascent Hosp. Mgmt. Co., LLC v. Employers Ins. Co. of Wausau*, 2021 WL 1791490, at *4-5 (N.D. Ala. May 5, 2021) (concluding that "to the extent Ascent seeks coverage for losses resulting from the presence of COVID-19 in its properties, the Contamination Exclusion applies," because "contamination" is defined as a "condition of property that results from a contaminant," and "a virus is a type of contaminant identified in the policy"); *Manhattan Partners, LLC v. American Guar. & Liab. Ins. Co.*, 2021 WL 1016113, at *2 n.3 (D.N.J. Mar. 17, 2021) ("[T]he Policy's Contamination exclusion…clearly and explicitly excludes coverage for damage, loss or expense arising from a virus[.]"); *Ralph Lauren Corp. v. Factory Mut. Ins. Co.*, 2021 WL 1904739, at *4 (D.N.J. May 12, 2021) ("[E]ven if Plaintiff did plead the existence of actual or imminent 'physical loss or damage,' its claim fails under the Contamination Exclusion. . . . [B]ecause the Stay-at-Home Orders were issued to mitigate the spread of the highly contagious Virus, the relief Plaintiff seeks is tied inextricably to

the suspected presence of the Virus and is not recoverable under the Policy."). This is but another reason to affirm the District Court's judgment.

CONCLUSION

For all the reasons above, the Court should affirm the District Court's order dismissing with prejudice First Watch's complaint against Zurich.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B). This brief contains 12,811 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii). This brief complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

/s/ Patrick F. Hofer
PATRICK F. HOFER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 26, 2021, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system, which will automatically send a copy to all counsel of record in this case registered on the CM/ECF system.

/s/ Patrick F. Hofer
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