SUPREME COURT-STATE OF NEW YORK
APPELLATE DIVISION, SECOND DEPARTMENT

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VISCONTI BUS SERVICE, LLC, VISCONTI FAMILY LLC, ROBIN ALLY LLC, 145-147 MILLS ST., LLC,

Appellants,

-against-

UTICA NATIONAL INSURANCE GROUP and UTICA NATIONAL INSURANCE OF TEXAS,

Respondents.

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App. Div. No. 2021-01716
Originating Court No. EF005750-2020

RESTAURANT LAW CENTER, NEW YORK STATE RESTAURANT ASSOCIATION, AND NEW YORK CITY HOSPITALITY ALLIANCE'S MOTION FOR LEAVE TO FILE AN *AMICI CURIAE* BRIEF IN SUPPORT OF APPELLANTS AND REVERSAL

Pursuant to New York Rule of Appellate Procedure 1250.4(f), the Restaurant Law Center, New York State Restaurant Association, and the New York City Hospitality Alliance respectfully move for leave to file a brief as *amici curiae* in support of Appellants. The undersigned will move this Court in the Motion Submission Part, at the Appellate Division, Second Judicial Department Courthouse located at 45 Monroe Place, Brooklyn, New York 11201, on July 23, 2021, at 9:30 a.m., or as soon thereafter as counsel can be heard, for an Order, pursuant to New York Rule of Appellate Procedure 1250.4(f), granting proposed *amici* leave to file

an *amici curiae* brief in support of appellants and reversal, and for such other and further relief as this Court may deem just and proper.

Amici state the following in support of their motion:

1. Appellate courts, including this one, have often permitted non-parties, including *amici*, to file briefs in cases that may have industry-wide implications. *See, e.g.*, *State of N.Y. v. Sec'y of the U.S. Dep't of Labor*, No. 20-3806 (2d Cir. 2021); *New York Statewide Coalition of Hispanic Chambers of Com. v. The New York City Dep't of Health & Mental Hygiene*, No. APL-2013-00291 (Ct. App. N.Y. 2014); *Shields v. Madigan*, 32 A.D.3d 1037 (2d Dep't 2005) (listing *amici* briefs); *Merscorp, Inc. v. Romaine*, 295 A.D.2d 431 (2d Dep't 2002) (noting *amicus* brief).

2. Motions for leave to file *amici curiae* briefs by non-parties—such as industry groups like the Restaurant Law Center, New York State Restaurant Association, and the New York City Hospitality Alliance—are routinely granted because courts recognize they may be of assistance in understanding the significance of the material issues and provide useful context as the Court considers a particular case.

3. "Even when a party is very well represented, an amicus may provide important assistance to the court." *Neonatology Assocs., P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.). "Some friends of the court are entities with particular expertise not possessed by any party to the case. Others argue

points deemed too far-reaching for emphasis by a party intent on winning a particular case. Still others explain the impact a potential holding might have on an industry or other group." *Id.* (internal quotation marks and citation omitted); *see also Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761 (7th Cir. 2020) (Scudder, J., in chambers) (describing how *amicus* briefs may aid the court). In this case, the proposed *amici* brief fulfills all three of these functions.

4. The Restaurant Law Center is a public policy organization affiliated with the National Restaurant Association, the world's largest foodservice trade association. The industry is comprised of over one million restaurants and other foodservice outlets that represent a broad and diverse group of owners and operators—from large national outfits with hundreds of locations and billions in revenue, to small single-location, family-run neighborhood restaurants and bars, and everything in between. The industry employs over 15 million people, and is the nation's second-largest private-sector employer. Through regular participation in *amicus* briefs on behalf of the industry, including in cases like this one, the Restaurant Law Center provides courts with the industry's perspective on legal issues in pending cases that may have industry-wide implications.

5. The New York State Restaurant Association is the leading business association for the restaurant and hospitality industry in New York State. It advocates for businesses and employees in the industry, which serves as the

cornerstone of the state economy and offers opportunities for career advancement and community involvement.

6. The New York City Hospitality Alliance is a not for profit association representing and serving New York City's restaurant and nightlife industry. The Alliance is committed to advancing an agenda focused on opportunity, economic investment and job creation, and on advocating on behalf of its members at all levels of government.

7. *Amici* and their members have a significant interest in the important issues raised by this case. Although this case involves a transportation service provider, not a restaurant, many businesses in the restaurant and hospitality industry have sought business interruption coverage under "all risk" commercial insurance policies for the physical loss or damage they suffered as a direct result of unprecedented state and local executive shutdown orders. Many of those restaurants have been unreasonably and categorically denied coverage on the basis that they supposedly have not incurred physical loss or damage even though their properties have been rendered non-functional, detrimentally altered, and physically impaired as a result of these shutdown orders. Therefore, although whether Appellants have stated a claim for coverage depends on their specific factual allegations, *amici* and their members have a strong interest in highlighting for the Court why certain issues raised in this appeal are important to the restaurant industry as a whole.

8. In their brief, *amici* will offer the Court a useful industry-wide perspective on the issues in this appeal. In particular, the brief will provide the Court with useful information about the state of the restaurant industry, about the broader landscape of business interruption cases being pursued by restaurants and hospitality companies across the country, and about the industry's perspective on those cases. Because *amici* represent the restaurant and hospitality industry as a whole, and the entire industry in New York, the perspective of *amici* may differ from that of Appellants, which are in the transportation business and not the restaurant and hospitality business. In addition, the information and experience that *amici* can offer goes beyond what the parties can provide.

9. Building on briefs addressing similar issues in appeals pending in the Second Circuit,[1] *amici* write to provide this Court with additional context about how New York law applies in cases like this one and practical perspectives on potential outcomes, and to emphasize how restaurant and foodservice companies have suffered physical loss or damage as a result of state and local shutdown orders.

[1] *Kim-Chee LLC v. Phila. Indemnity Ins. Co.*, No. 21-1082 (2d Cir. 2021); *10012 Holdings, Inc. v. Sentinel Ins. Co.*, No. 21-80 (2d Cir. 2021).

10. Other federal and state appellate courts have recently granted the Restaurant Law Center and state restaurant associations permission to file briefs in business interruption cases involving state-law issues similar to those in this case.[2]

11. *Amici* certify that counsel for Appellants has represented Appellants do not oppose this motion, and counsel for Appellees has represented that Appellees do not take a position on this motion.

12. Finally, pursuant to Rule 500.23, *amici* certify that no party or party's counsel contributed content to *amici*'s proposed brief, participated in the preparation of the brief, or contributed money to fund submission of the brief. Further, no other person or entity other than *amici* contributed money intended to fund preparation or submission of the brief.

WHEREFORE, given their substantial interest in this case, *amici* respectfully request that this Court grant leave to file a brief supporting Appellants and reversal.

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[2] *See* Order, *Skillets, LLC et al. v. Colony Ins. Co.*, No. 21-1268 (4th Cir. June 29, 2021); Order, *Commodore, Inc. v. Certain Underwriters at Lloyd's of London*, No. 3D21-0671 (Fla. 3d DCA Apr. 29, 2021) (Florida law); Order, *SA Palm Beach, LLC v. Certain Underwriters at Lloyd's of London*, No. 20-14812 (11th Cir. Feb. 25, 2021) (Florida law); Order, *Henry's Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, No. 20-14156 (11th Cir. Jan. 25, 2021) (Georgia law); Order, *Gavrilides Mgmt. Co. v. Mich. Ins. Co.*, No. 354418 (Mich. Ct. App. Mar. 8, 2021) (Michigan law); *Rose's 1 LLC v. Erie Ins. Exch.*, No. 20-cv-0535 (D.C. Ct. App. Oct. 30, 2020) (District of Columbia law); *see also, e.g.*, *TJBC, Inc. v. Cincinnati Ins. Co.*, No. 21-1203 (7th Cir. Apr. 5, 2021) (Illinois law, filed with consent); *Terry Black's Barbecue, L.L.C. v. State Auto. Mut. Ins. Co.*, No. 21-50078 (5th Cir. June 4, 2021) (Texas law, filed with consent).

July 14, 2021

Respectfully submitted,

/s/ Gabriel K. Gillett

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 14, 2021, a true and correct copy of the foregoing has been served via the Court's electronic filing system upon the following:

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BRIEF OF THE RESTAURANT LAW CENTER, NEW YORK STATE RESTAURANT ASSOCIATION, AND NEW YORK CITY HOSPITALITY ALLIANCE AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

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STATEMENT OF INTEREST

Amicus Restaurant Law Center is a public policy organization affiliated with the National Restaurant Association, the world's largest foodservice trade association. The industry is comprised of over one million establishments that represent a broad and diverse group of owners and operators—from large national outfits, to small family-run neighborhood locations, and everything in between. The industry employs over 15 million people and is the nation's second-largest private-sector employer. Through regular participation in *amicus* briefs, the Restaurant Law Center provides courts with the industry's perspective on legal issues in cases that may have industry-wide implications.

Amicus New York State Restaurant Association is the leading business association for the restaurant and hospitality industry in New York State. It advocates for businesses and employees in the industry, which serves as the cornerstone of the state economy, and offers opportunities for career advancement and community involvement.

Amicus the New York City Hospitality Alliance is a not for profit association representing and serving New York City's restaurant and nightlife industry. The Alliance is committed to advancing an agenda focused on opportunity, economic investment and job creation, and on advocating on behalf of its members at all levels of government.

Amici and their members have a significant interest in the important issues in this case. Many in the restaurant industry have sought business interruption coverage under "all risk" commercial insurance policies for the physical loss or damage they suffered as a direct result of unprecedented executive shutdown orders. Those restaurants have been unreasonably and categorically denied coverage on the basis that they supposedly have not incurred physical loss or damage even though their properties have suffered real and tangible losses, and have been rendered non-functional, detrimentally altered, and physically impaired as a result of the orders.

Whether Appellants ("Visconti")—a transportation service provider, not a restaurant or hospitality company—have stated a claim will depend on the specific allegations in their pleadings. Still, *amici* and their members have a strong interest in highlighting why issues raised in this appeal are important to the restaurant industry. *Amici* also have a strong interest in ensuring the Court recognizes that, depending on a complaint's allegations, restaurants and others may adequately plead that executive shutdown orders caused direct physical loss or damage to their property.

SUMMARY OF ARGUMENT

Amici write to provide this Court—which is among the first appellate courts to address these issues—with additional context about this case and practical perspectives on potential outcomes, and to emphasize how restaurant and

foodservice companies specifically have suffered physical "loss or damage" as a result of executive shutdown orders.

I. The restaurant industry is a significant sector of the New York economy and drives economic activity across the country. The industry creates employment and entrepreneurship opportunities, including for women, minorities, and immigrants. It supports local businesses, draws tourists, produces significant tax revenue, and is an integral part of the cultural fabric in New York and beyond.

For years, restaurants have paid substantial premiums for business interruption coverage under "all risk" commercial property insurance policies. These policies cover any and all risks, even unforeseen and unprecedented ones, unless specifically excluded. Restaurants bought this insurance believing it would cover income lost as a result of physical "loss or damage" to their property, as they understood those plain, ordinary, everyday words.

Yet when officials issued executive orders that caused precisely what these restaurant owners believed to be physical "loss or damage" to their property—by detrimentally altering physical property, imposing physical changes, and materially impairing physical spaces that rendered property nonfunctional for its intended purposes—insurers denied coverage without legitimate justification. Facing catastrophic losses, thousands of restaurants have already closed—*permanently*.

Restaurants have turned to the courts to obtain the coverage they are entitled to receive.

II. These are issues of first impression arising in an unprecedented context. This Court applies *de novo* review, considering the issues independently and without according the decision below any deference. That is especially appropriate here. The trial court committed some of the same interpretive and analytical errors as the cases it cited and failed to construe the policy's terms according to the natural meaning a reasonable policyholder would ascribe to them.

By contrast, many other trial courts across the country have found in well-reasoned decisions that a plaintiff stated a claim for business interruption coverage by alleging it suffered physical loss or damage as a result of executive shutdown orders. Indeed, roughly half of state courts to decide these state-law questions have found policyholders stated a claim or were entitled to summary judgment.

Recent decisions also reinforce that a complaint's allegations matter in determining whether a plaintiff has stated a claim. Consistent with that important principle, this Court should make clear that a restaurant may state a claim by alleging that it suffered physical loss or damage when executive orders dispossessed the restaurant of its tangible physical space by mandating real, material, detrimental physical alterations to the premises.

As courts have done in other hotly contested insurance coverage cases, this Court should review the allegations of the complaint and the policy language, apply basic principles of policy interpretation, and resolve this case based on the unprecedented factual circumstances under which it arises.

III. This Court should reverse the trial court's decision. Bedrock canons of insurance policy interpretation require that "unambiguous provisions of an insurance contract must be given their plain and ordinary meaning." *White v. Cont'l Cas. Co.*, 9 N.Y.3d 264, 267 (2007). A court should not inject extrinsic terms or conditions into the policy. If a provision is susceptible to more than one reasonable interpretation, it is ambiguous and should be construed consistent with the policyholder's reasonable expectations of coverage. "In construing an insurance contract, the tests to be applied are 'common speech' and 'the reasonable expectation and purpose of the ordinary businessman.'" *MDW Enters., Inc. v. CNA Ins. Co.*, 4 A.D.3d 338, 340 (2d Dep't 2004). The policy's terms require no judicial redefinition: they should be construed based on a reasonable business's expectations.

Visconti's policy requires Utica to "pay for the actual loss of Business Income" resulting from "direct physical loss of or damage to property." Dkt. 1 ¶43.[1] Visconti has alleged that it suffered "direct physical loss or damage" to its property from the shutdown orders, which "restrict[ed] all or part of [its] business at [its]

[1] Citations to "Dkt.__" refer to the Supreme Court record, No. EF005750-2020.

premises," causing "the loss of use of [its] premises and loss of business income therefrom." *E.g. id*. ¶¶1-2, 47. Visconti further explained that "the direct physical loss" it experienced includes "the loss of use or functionality of the property." Dkt. 69 at 6.

Many other courts have found allegations that physical alterations and impairments to property mandated by executive shutdown orders qualify as direct physical loss or damage for purposes of stating a claim. Those rulings are consistent with longstanding precedent holding that property may suffer physical loss or damage when it is rendered nonfunctional for its intended purpose or when its appearance or form is altered.

The trial court reached a different conclusion because Visconti supposedly had not alleged "any physical harm" to its property and "loss of use or functionality" is not covered "in the absence of actual, demonstrable physical harm thereto." *Id*. at 16. This was error because the Complaint pleads that Visconti suffered "direct physical loss of or damage to" property, the policy does not define "loss or damage," and the policy does not require the policyholder to suffer "demonstrable physical harm" as a condition of business income coverage. Reasonable consumers would expect a policy that covers "loss" or "damage" to include protection if the property was forcibly and tangibly altered by virtue of an executive order. Moreover, the trial court's decision contravenes the core principle that policy terms are to be construed

as they would be understood by a reasonable and ordinary person, and improperly relies on inapposite and non-binding caselaw, without fairly considering decisions to the contrary.

ARGUMENT

I. Restaurants Sought Insurance Coverage To Help Survive Unprecedented Hardship And Continue Their Critical Contributions To New York's Economy And Culture.

A. The Restaurant Industry, Which Drives Billions In Revenue And Employs Millions, Is Working Hard To Stay Afloat.

The restaurant and foodservice industry is the lifeblood of New York's economy. In 2019, the industry accounted for an estimated $54.5 billion in sales across 49,032 locations throughout the state. The industry employed 881,400 people in 2020 and is expected to employ 5.3% more over the next decade.[2]

Consumer spending at restaurants has a multiplier effect too. Every dollar spent at table-service restaurants—the businesses most threatened by state and local shutdown orders—returns roughly two dollars to the state's economy and boosts state's tax revenue.[3] A restaurant contributes to the livelihood of dozens of employees, suppliers, purveyors, and related businesses.[4] That is the case in New York, where ample and diverse dining opportunities drive tourism.

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[2] Nat'l Restaurant Ass'n, *Factbook*: *2020 State of the Restaurant Industry* (2020).
[3] Nat'l Restaurant Ass'n, *New York Restaurant Industry at a Glance* (2019).
[4] Eric Amel et al., *Independent Restaurants Are a Nexus of Small Businesses in the United States and Drive Billions of Dollars of Economic Activity That Is at Risk of Being Lost Due to the COVID-19 Pandemic* (June 10, 2020).

Restaurants are also cultural centers, creating unique neighborhood identities and driving commercial revitalization. Restaurants bring stability and interest in seeing their neighborhoods grow and thrive. That is true of the many small (often family-owned) restaurants that make up the vast majority of the industry and are a vibrant part of the communities where they operate.

The restaurant industry remains a shining example of upward mobility. Eight in ten owners say their first industry job was an entry-level position. Even more managers say the same.[5] Restaurants also provide opportunities for historically disadvantaged communities. More women and minorities are managers in the restaurant industry than in any other industry, and restaurants provide immigrants with opportunities to work and own their own businesses.[6]

The past successes of the industry are not guaranteed in the future. Since March 2020, nationwide restaurant and foodservice sales were "down $270 billion from expected levels" and industry employment has decreased in every state and the District of Columbia.[7] As of late 2020, more than 110,000 establishments—on average in business over sixteen years—were "closed permanently or long-term."[8]

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[5] *Factbook*, *supra* note 2.
[6] *Id*.; Americas Soc'y et al., *Bringing Vitality to Main Street: How Immigrant Small Businesses Help Local Economies Grow* (Jan. 2015).
[7] Nat'l Restaurant Ass'n, *Restaurant sales pulled back from a healthy January* (Mar. 16, 2021); Nat'l Restaurant Ass'n, *Forty states and DC lost restaurant jobs in January* (Mar. 15, 2021) ("*Forty states*").
[8] Nat'l Restaurant Ass'n, *Restaurant Industry in Free Fall; 10,000 Close in Three Months* (Dec. 7, 2020).

New York restaurants have not been spared. Restaurant employment is down more than 30%, representing over 240,000 jobs.[9] The numbers for independent restaurants are even starker.[10] These closures can devastate neighborhoods as the harm from closures reverberates, impacting other local businesses and industries. "Virtually every kind of restaurant is suffering: the corner diner, the independents, the individual owners of full-service restaurant chains."[11]

B. Insurers Have Wrongfully Denied Restaurants Business Interruption Coverage Under "All Risk" Insurance Policies.

Faced with unprecedented losses caused by executive orders forcing restaurants to severely alter and restrict their physical premises, restaurants turned to their insurers for coverage under "all risk" property insurance policies that included protection for business interruption.

"All risk" property policies insure against losses from unexpected and unprecedented circumstances, and provide coverage for risks of any kind or description, unless specifically excluded. "Business interruption" insurance provides coverage—often up to a year or more—to replace business income lost as a result of a covered cause of loss. Under industry-standard "all risk" policies procured by many restaurants, business interruption coverage is triggered when a policyholder

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[9] Nat'l Restaurant Ass'n, *Forty states*, *supra* note 7.
[10] Heather Lalley, *Report: Up To 85% of Independent Restaurants Could Close Due To Pandemic*, Rest. Bus. (June 11, 2020).
[11] Nat'l Restaurant Ass'n, *National Restaurant Association Statement on Congressional Recess Without Recovery Deal* (Oct. 27, 2020).

suffers direct "loss or damage" to its premises. These policies provide businesses with comfort knowing they have coverage for even unforeseeable or unlikely risks that may physically impair or alter their property.

Given the breadth of coverage, restaurants paid substantial premiums for "all risk" policies with business interruption coverage. In doing so, restaurants reasonably understood, expected, and believed their policies would cover business income losses from any and all non-excluded risks. Those risks, to a reasonable policyholder, include shutdown orders causing direct physical "loss or damage," as policyholders understood those words to mean.

The physical design of a restaurant is an essential element of its success. In a business known for tight margins, restaurant owners and operators thoughtfully utilize their physical space to maintain the level of revenue necessary to support their staff and other operational costs. Table service restaurants, for example, were not designed to operate as a hub for take-out or delivery. They have far larger dining areas than a take-out only operation, and most have proportionally smaller kitchens than a restaurant designed only to produce food. Those dining areas are built out, often at significant expense, to create warm, inviting ambience that draws guests in. Restaurant dining is an experience, and physical space and layout play a crucial role in that experience.

Insurers know this. They price and charge premiums based on the policyholder's properties operating in a fully functional manner and based on the available square footage at the outset of the policy period. Insurers also account for the prospect of having to pay claims for lost business at levels commensurate with the policyholder being a fully operational business. Business interruption coverage thus insures against the risk that a business-owner's property will not be able to function as intended.

That kind of interruption is precisely what happened when executive shutdown orders required restaurants to make physical, detrimental alterations that materially impaired the functionality of their premises. In barring or limiting on-premises dining, those orders caused the loss of millions of square feet of vital physical space. The orders dispossessed restaurants of their tangible spaces and forced very real, material detrimental physical changes and alterations to their premises. Dining rooms closed or limited. Areas blocked off. Seating areas eliminated. Barriers erected and dividers installed. Layouts altered. Fixtures and furniture removed. Self-service stations gone. Spaces shuttered. Floors marked. Plexiglass mounted. These are but a few of the physical manifestations of the direct physical loss and damage, not merely loss of use, that restaurants have suffered.

Yet insurance carriers have refused coverage and issued blanket denials without just cause. Those denials are frequently rapid, featuring boilerplate language

asserting that coverage is excluded because the restaurant supposedly has not satisfied the industry-standard "loss or damage" requirement. Those denials followed telegraphed statements by insurers and trade groups,[12] and were frequently issued without meaningful (if any) investigation.

Many restaurants have challenged these wrongful denials. Without judicial relief, many restaurants will be out of business entirely, many industry employees will remain out of work, and many residents will be robbed of the neighborhood places and spaces they treasure.

II. This Is An Important Case Of First Impression Where The Court Applies *De Novo* Review.

This Court should closely scrutinize the policy language, apply well-established principles of policy interpretation, and resolve this case of first impression based on the unprecedented circumstances under which it arises. That is particularly so in light of other pending cases involving claims by restaurants for three reasons.

[12] For example, Society Insurance all but denied coverage "preemptively and *en masse*" through a memo to "agency partners" on March 16, 2020—before most businesses had even submitted claims but after many states limited operations of certain businesses—"observing that 'a quarantine of any size,'" or a "widespread governmental imposed shutdown" would "likely not trigger the additional coverage." *In re Society Ins. Co.*, MDL 2964, 2021 WL 679109, at *4 (N.D. Ill. Feb. 22, 2021). In early April, the American Property Casualty Insurance Association similarly opined, without reference to any policy language, that "[p]andemic outbreaks are uninsured because they are uninsurable." Press Release, APCIA Releases New Business Interruption Analysis (Apr. 6, 2020).

First, New York precedent dictates that "the interpretation of an insurance policy is a question of law." *Broad St., LLC v. Gulf Ins. Co.*, 37 A.D.3d 126, 130 (1st Dep't 2006). For that reason, "a de novo standard of review applies." *Gulf Ins. Co. v. Transatlantic Reinsurance Co.,* 13 A.D.3d 278, 279 (1st Dep't 2004). "On appeal, the standard of review is for this Court to examine the contract's language de novo." *Dreisinger v. Teglasi*, 130 A.D.3d 524, 527 (1st Dep't 2015). As such, the Court must construe the complaint "in the light most favorable to the plaintiff and all allegations must be accepted as true." *24 Franklin Ave. R.E. Corp. v. Cannella*, 139 A.D.3d 717, 717 (2d Dep't 2016). "In this context, 'the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail.'" *Id.*

Second, this Court's review comes at a time when shutdown-related business interruption litigation is in its early stages and no appellate court has yet weighed in.

Among trial-level decisions to date in state courts—where the judiciary is well-versed at applying the state law that governs insurance policies—roughly half of these decisions have found a plaintiff stated a claim for business interruption coverage or granted summary judgment to the plaintiff on that claim.[13] Many federal

[13] *See e.g.*, Tr., *Santino, LLC v. Society Ins. Co.*, No. 20-CV-358 (Wis. Cir. Ct. Mar. 1, 2021); Tr., *Colectivo Coffee Roasters, Inc. v. Society Ins. Co.*, No. 2020-CV-002597 (Wis. Cir. Ct. Feb. 25, 2021); *Cherokee Nation v. Lexington Ins. Co.*, 2021 WL 506271 (Okla. Dist. Ct. Jan. 28, 2021);

district courts, applying state substantive law as required and predicting how state courts would apply state law, have reached the same conclusion.[14]

While other decisions have favored insurers, many turn on the specific facts or circumstances alleged. Others fail to apply the reasonable-interpretation rule and other basic policy interpretation principles—including by redefining the policy based on extrinsic case law or arcane publications that ordinary people would never consult.

Most troubling, many decisions appear to be the result of a reflexive self-fulfilling feedback loop in which federal district courts appear to effectively treat other federal district courts as establishing a sort of federal common law on business

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North State Deli, LLC v. The Cincinnati Ins. Co., 2020 WL 6281507 (N.C. Super. Ct. Oct. 9, 2020); *McKinley Dev. Leasing Co. v. Westfield Ins. Co.*, 2021 WL 506266 (Ohio Ct. C.P. Feb. 9, 2021); Order, *Macmiles, LLC v. Erie Ins. Exch.*, No. GD-20-7753 (Pa. Ct. C.P. May 25, 2021); *Scott Craven DDS v. Cameron Mut. Ins. Co.,* 2021 WL 1115247 (Mo. Cir. Ct. Mar. 9, 2021); *Goodwill Indus. of Orange Cnty. v. Phila. Indem. Ins. Co.*, 2021 WL 476268 (Cal. Super. Ct. Jan. 28, 2021); *Optical Servs. USA/JCI v. Franklin Mut. Ins. Co.*, 2020 WL 5806576 (N.J. Super. Ct. Law Div. Aug. 13, 2020); *Taps & Bourbon on Terrace, LLC v. Underwriters at Lloyds London*, 2020 WL 6380449 (Pa. Ct. C.P. Oct. 26, 2020); *Perry St. Brewing Co. v. Mut. of Enumclaw Ins. Co.*, 2020 WL 7258116 (Wash. Spokane Cnty. Nov. 23, 2020); *Hill and Stout PLLC v. Mut. of Enumclaw Ins. Co.*, 2020 WL 6784271 (Wash. Super. Ct. Nov. 13, 2020); *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.*, 2020 WL 7190023 (Nev. Dist. Ct. Nov. 30, 2020); *Johnston Jewelers, Inc. v. Jewelers Mut. Ins. Co.,* 2020 WL 6556842 (Fla. Cir. Ct. Sept. 22, 2020).

[14] *See, e.g.*, *Seifert v. IMT Ins. Co.*, 2021 WL 2228158 (D. Minn. June 2, 2021); *Legacy Sports Barbershop LLC v. Cont'l Cas. Co.*, 2021 WL 2206161 (N.D. Ill. June 1, 2021); *Henderson Rd. Rest. Sys., Inc. v. Zurich Am. Ins. Co.*, 2021 WL 168422 (N.D. Ohio Jan, 19, 2021); *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, 2020 WL 7249624 (E.D. Va. Dec. 9, 2020); *Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co.,* 489 F. Supp. 3d 1297 (M.D. Fla. 2020); *In re Society*, 2021 WL 679109; *Derek Scott Williams PLLC v. Cincinnati Ins. Co.*, 2021 WL 767617 (N.D. Ill. Feb. 28, 2021); *Susan Spath Hegedus, Inc. v. ACE Fire Underwriters Ins. Co.*, 2021 WL 1837479 (E.D. Pa. May 7, 2021); *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794 (W.D. Mo. 2020); *Serendipitous, LLC v. The Cincinnati Ins. Co.*, 2021 WL 1816960 (N.D. Ala. May 6, 2021).

interruption insurance. For example, early yet unremarkable decisions have been cited dozens of times by other courts, even though the decisions are not particularly detailed or persuasive, did not arise after an amended complaint, and have not been subject to appellate review. *See, e.g.*, *10E, LLC v. Travelers Indem. Co. of Conn.*, 483 F. Supp. 3d 828 (C.D. Cal. 2020), *appeal pending* No. 20-56206 (9th Cir.); *Michael Cetta, Inc. v. Admiral Indem. Co.*, 2020 WL 7321405 (S.D.N.Y. Dec. 11, 2020), *appeal dismissed* No. 21-57 (2d. Cir.).

Rather than tally decisions by other courts, each court must focus on a complaint's allegations, liberally construed in plaintiff's favor, and determine whether those specific allegations satisfy the applicable standard. *See Seifert*, 2021 WL 2228158, at *3-4 (denying motion to dismiss amended complaint that adequately alleged shutdown orders caused physical loss, after granting motion to dismiss initial complaint); *Legacy Sports*, 2021 WL 2206161, at *2-3 (denying motion to dismiss and distinguishing allegations from cases where the same judge had granted dismissal). Indeed, in affirming dismissal of a plaintiff's business interruption claim (albeit one arising under Iowa law and involving different policy language than at issue here), the U.S. Court of Appeals for the Eighth Circuit stressed that its decision was based on the plaintiff's failure to plead physical loss or damage—not a categorical rule that such damage cannot be pleaded. *See Oral*

Surgeons, P.C. v. The Cincinnati Ins. Co., 2021 WL 2753874, at *3 & n.2 (8th Cir. July 2, 2021).

Third, history shows that early decisions on issues of first impression are often viewed differently after appellate courts have the opportunity to weigh in. That has been true in insurance coverage cases involving the interpretation of industry-standard policy language. For example, "the meaning of the standard pollution exclusion clause's exception for discharges that are 'sudden and accidental' … precipitated 'a legal war ... in state and federal courts from Maine to California.'" *N. Ins. Co. of N.Y. v. Aardvark Assocs., Inc.*, 942 F.2d 189, 191 (3d Cir. 1991). Eventually, courts viewed the split in authority as "at least suggesting that the term 'sudden' is susceptible of more than one reasonable definition." *New Castle Cnty. v. Hartford Accident & Indem. Co.*, 933 F.2d 1162, 1196 (3d Cir. 1991).

The current disagreement among trial courts about whether plaintiffs have stated a claim—and the fact that roughly half of state courts have concluded that plaintiffs either stated a claim or were entitled to summary judgment—reinforces that this Court is on solid ground in reversing the decision below. This Court should conclude that the plain meaning of the undefined, disjunctive terms physical "loss or damage"—as a layperson would understand them—applies to cover losses allegedly caused by executive shutdown orders that imposed material physical alterations on restaurants.

III. Policy Language, Interpretation Principles, And Precedent Support Finding Executive Shutdown Orders Caused Physical Loss Or Damage.

Visconti alleges that it suffered "direct physical loss or damage" and the "loss of utility of its property," due to a series of executive orders issued starting in March 2020. *See* Dkt. 1 ¶¶1-2, 47, 76-77. Utica, like other insurers, has insisted that the orders that impaired policyholders' property have not caused physical "loss or damage." But that position is inconsistent with the policy's language, foundational policy-interpretation principles, and both recent and historical precedent.

A. Policy Language And Policy-Interpretation Principles Support Reversal.

Under New York law, insurance policies are "construed liberally in favor of the insured and strictly against the insurer." *In re Liberty Mut. Fire Ins. Co.*, 75 A.D.3d 967, 968 (3d Dep't 2010). "New York follows the maxim of *contra proferentem* in insurance cases: where the plain language of a policy permits more than one reasonable reading, a court must adopt the reading upholding coverage." *VAM Check Cashing Corp. v. Fed. Ins. Co.*, 699 F.3d 727, 732 (2d Cir. 2012). "[W]hen an insurer wishes to exclude certain coverage from its policy obligations, it must do so in clear and unmistakable language." *MDW*, 4 A.D.3d at 340. "Such exclusions or exceptions … must be specific and clear in order to be enforceable, and they are not to be extended by interpretation or implication, but are to be accorded a strict and narrow construction." *Id.*

"As with any contract, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning." *White*, 9 N.Y.3d at 267. A phrase's "plain and ordinary meaning" is determined by "'common speech' and 'the reasonable expectation and purpose of the ordinary businessman.'" *MDW*, 4 A.D.3d at 340. It is "common practice" for New York courts "to refer to the dictionary to determine the plain and ordinary meaning of words to a contract." *Mazzola v. Cnty. of Suffolk*, 143 A.D.2d 734, 735 (2d Dep't 1988).

Here, the plain language of the policy supports finding coverage for loss or damage caused by executive shutdown orders that physically impaired property. Utica agreed to pay for "direct physical loss of or damage to" property. The disjunctive "or" in that phrase means that "loss" must cover something different from "damage." *See Certain Underwriters at Lloyd's London v. Advance Transit Co.*, 188 A.D.3d 523, 523-24 (1st Dep't 2020). As many courts have recently held, to read the policy otherwise would improperly collapse the meaning of "loss" with the meaning of "damage."[15]

[15] *See, e.g.*, *Cherokee Nation*, 2021 WL 506271, at *6-7; *North State Deli*, 2020 WL 6281507, at *3; *Seifert*, 2021 WL 2228158, at *3; *In re Society*, 2021 WL 679109, at *8-10; *Henderson Rd.*, 2021 WL 168422, at *11-12; *Urogynecology Specialist,* 489 F. Supp. 3d at 1301-03; *Serendipitous, LLC*, 2021 WL 1816960, at *4-6; *Susan Spath Hegedus, Inc.*, 2021 WL 1837479, at *8-9.

Had Utica wanted "loss" and "damage" to mean the same thing, or to narrow their meaning, it was obligated to do either explicitly, "in clear and unmistakable language." *MDW*, 4 A.D.3d at 340. But Utica chose not to do either despite knowing these terms can reasonably be construed (and indeed have been construed by many courts) more broadly than the narrow reading Utica favors. Each of those terms must therefore be given its plain and ordinary meaning consistent with the expectations of a reasonable consumer, and construed in favor of coverage.

Merriam-Webster defines physical as "of or relating to material things" that are "perceptible especially through the senses."[16] Loss is defined as "the act of losing possession," "deprivation," and the "failure to gain, win, obtain, or utilize."[17] Put together, the ordinary meaning of "physical loss" includes when a property can no longer function as intended in the real, material world.

For many restaurants, that was exactly what happened when shutdown orders imposed real, detrimental, physical alterations to their spaces—closing or limiting dining rooms, blocking off areas, erecting barriers, and altering layouts, among other direct physical changes. The shutdown orders "deprived" restaurant owners of property in a way that is perceptible through the senses because they no longer

[16] Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/physical (last accessed June 30, 2021).
[17] Merriam-Webster Dictionary, http://www.merriam-webstercollegiate.com/dictionary/loss (last accessed June 30, 2021).

possessed the same rights to their property and large swaths of their property were rendered non-functional.

The trial court erred in finding otherwise. It read caselaw to require Visconti to plead that it suffered "actual, demonstrable physical harm" to its property. Dkt. 69 at 16. But that requirement does not appear in any relevant portion of the policy. Utica left "loss" undefined and no reasonable policyholder would have understood "loss" to require physical alteration to the structure of the premises, much less closely read judicial decisions to discern the supposed true meaning of the policy's language.

Reasonable policyholders would, however, understand that interposing physical barriers within their property, blocking off physical space, and detrimentally changing property in other material physical ways constitute physical alterations. Therefore, even under the trial court's interpretation of the meaning of the policy language, policyholders like restaurants have suffered physical loss or damage as a result of shutdown orders.

Policyholders should not have to hire lawyers to understand what the word "loss" means. They should not have to guess whether a judge will require a loss to involve something beyond what the policy describes. A policy term's meaning is determined by common speech and reasonable expectations of ordinary business owners. Plain policy terms require no judicial redefinition or clarification.

The plain language of the policy—in conjunction with settled policy-interpretation principles that honor a reasonable policyholder's expectations—dictates that Visconti has sufficiently alleged as a matter of fact that the relevant executive orders have caused "physical loss" by dispossessing it of its property and rendering that property nonfunctional. Visconti should be able to test whether it can offer sufficient evidentiary support to obtain a jury verdict in its favor.

B. New York Cases Do Not Categorically Bar Coverage For Policyholders, Like Restaurants, That Suffered Physical Loss Or Damage From Executive Orders.

The trial court erred by subordinating these foundational principles to distinguishable and non-binding decisions in *Roundabout Theater Co. v. Continental Casualty Co.*, 302 A.D. 2d 1 (1st Dep't 2002) and *Newman Myers Kreines Gross Harris, P.C. v. Great Northern Insurance Co.*, 17 F. Supp. 3d 323 (S.D.N.Y. 2014), and the federal district court decisions that subsequently relied on those cases, while disregarding on-point precedent in *Pepsico, Inc. v. Winterthur International America Insurance Co.*, 24 A.D. 3d 743 (2d Dep't 2005).

Roundabout, which involved different policy language and circumstances than those here,[18] addressed exclusively off-site injury. Indeed, there was no meaningful loss or damage to the theater itself. 302 A.D. 2d at 2-5. But Visconti has

[18] For example, Roundabout's policy explicitly excluded losses covered by "civil commotion[s]" (not an endorsement for civil authority coverage, as here), and Roundabout had taken the exact opposite position about the policy's meaning in other litigation. 302 A.D. 2d at 5, 8-10.

alleged the executive shutdown orders applied directly to its property and caused direct physical loss or damage to that property. And, the *Roundabout* court impermissibly found coverage for "loss or damage" was only triggered if the property "suffers direct physical damage," although the policy *also* covered physical loss. *Id.* at 6-7.

The trial court failed to recognize these differences, and instead treated *Roundabout* as "fully applicable" because it believed Visconti had not suffered "physical loss or damage." Yet *Roundabout* is inapplicable in any case where the policyholder—including a restaurant whose property was rendered non-functional, detrimentally altered, and physically impaired—suffered physical loss or damage.

Newman Myers, which largely relied on *Roundabout*, is similarly inapposite. It concerned preemptive power shutdown orders that, unlike the executive orders at issue here, did not actually cause physical loss or damage. *See* 17 F. Supp. 3d at 324-25. And like the trial court here, the *Newman Myers* court erroneously imposed an extra-contractual requirement that the policyholder show "actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons exogenous to the premises[.]" *Id.* at 331.

The trial court here compounded these errors by relegating *Pepsico, Inc. v. Winterthur International America Insurance Co.*, which involved products that were "off-tasting" due to "faulty raw ingredients," to a brief footnote. 24 A.D. 3d at 743;

see Dkt. 69 at 9 n.2. The court there rejected the insurer's argument that the products were not physically damaged and instead concluded that the policyholder need not prove a distinct demonstrable alteration of the physical structure of the products. It was "sufficient under the circumstances," the court explained, "that the product's function and value have been seriously impaired, such that the product cannot be sold." *Id*. at 744. The same can be said of the situation facing restaurants and hospitality companies who had the function of their property impaired as a result of executive shutdown orders.

This Court should not make the same mistake, as a handful of federal district courts have recently done.[19] Consistent with the principles discussed above and the precedent discussed below, this Court should find Visconti has stated a claim. This Court should also make clear that neither *Roundabout* nor *Newman Myers* categorically foreclose a policyholder from adequately alleging physical loss or damage arising from an executive order—especially when the policyholder's property was rendered non-functional, detrimentally altered, and physically impaired as restaurants across New York were.

[19] *See* Dkt. 69 at 6-16. As federal courts are bound by state law, district court rulings lack persuasive value here. In any event, of the three recent decisions from New York federal courts cited by the court below, one is currently on appeal, one was never subjected to appellate review, and one was transferred to a multidistrict litigation before the district court ruled on the plaintiff's objections to the magistrate's report and recommendation. *See, e.g.*, *10012 Holdings, Inc. v. Sentinel Ins. Co.*, No. 21-80 (2d. Cir.) (appeal pending); *Michael Cetta*, No. 21-57 (2d. Cir.) (appeal dismissed); *Tappo of Buffalo, LLC v. Erie Ins. Co.*, No. 20-cv-00754 (W.D.N.Y.).

C. Recent And Longstanding Precedent Outside New York Supports Reversal.

In reversing the judgment below, this Court will be squarely within the mainstream of recent coverage decisions that have found restaurants and other businesses adequately alleged that they suffered physical "loss or damage" as a result of state and local executive shutdown orders.

In *Elegant Massage, LLC v. State Farm Mutual Automobile Insurance Co.*, the court denied an insurer's motion to dismiss, explaining that if the insurer "wanted to limit liability of 'direct physical loss' to strictly require structural damage to property, then Defendants, as the drafters of the policy, were required to do so explicitly." 2020 WL 7249624, at *6-10. The court reasoned that, although the plaintiff's property was not "structurally damaged"—an extra-contractual requirement that the district court below imposed—it plausibly alleged a "direct physical loss" by pleading that executive orders rendered the property "uninhabitable [and] inaccessible." *Id.* at *10.

Several other powerful examples come from the Northern District of Illinois, where district courts denied motions to dismiss and found that plaintiffs "need not plead or show a change to the property's physical characteristics" where policies cover "loss" in addition to "damage." *In re Society*, 2021 WL 679109, at *8; *Derek Scott Williams PLLC*, 2021 WL 767617, at *1, *3-4 (noting broad agreement on the basic principle that "each word [in a contract] has some significance and meaning").

Both courts further reasoned that a jury could find plaintiffs suffered physical losses because the shutdown orders "impose a *physical* limit: the restaurants are limited from using much of their physical space." *Society* 2021 WL 679109, at *8-9; *see Williams* 2021 WL 767617, at *3-4 (finding a reasonable factfinder could determine that "physical loss" includes "a deprivation of the use of … business premises"); Tr., *Colectivo*, No. 2020-CV-002597, at 43-44 (noting that losing a dining room via shutdown order constitutes a physical loss).

A third district court concluded that, although "loss of or damage to" property required "physical damage or alteration," policyholders had satisfied that standard by alleging they were required to "build a new outdoor patio, install social distancing barriers and germ sanitation stations, and remove work stations in order to promote proper social distancing." *Legacy Sports*, 2021 WL 2206161, at *2-3. In so finding, and distinguishing its own prior decisions dismissing business interruption claims in other cases, the court made clear that whether a plaintiff has stated a claim turns on the individual allegations in each case.

Another example is *Henderson Road Restaurant Systems, Inc. v. Zurich American Insurance Co.*, 2021 WL 168422 (N.D. Ohio Jan. 19, 2021). The district court granted summary judgment for the policyholder and found that executive orders caused "physical loss" under the plain language of the policy at issue because "the properties could no longer be used for their intended purposes—as dine-in

restaurants." *Id.* at *10. Notably, the court in *Henderson Road* explicitly rejected the contrary conclusions in the cases on which the district court relied heavily in erroneously dismissing Visconti's claims.

Courts around the country have come to similar conclusions. In *Seifert v. IMT Insurance Co.*, the Chief Judge of the District of Minnesota denied a motion to dismiss and "conclude[d] that a plaintiff would plausibly demonstrate a direct physical loss of property by alleging that executive orders forced a business to close because the property was deemed dangerous to use and its owner was thereby deprived of lawfully occupying and controlling the premises to provide services within it." 2021 WL 2228158, at *4-5.

In *North State Deli, LLC v. The Cincinnati Insurance Co.*, the court reasoned that "the ordinary meaning of the phrase 'direct physical loss' includes the inability to utilize or possess something in the real, material, or bodily world." 2020 WL 6281507, at *3. The court concluded that "'direct physical loss' describes the scenario" where policyholders "lose the full range of rights and advantages of using or accessing their business property," which was "precisely the loss caused by" state and local shutdown orders that forbade the policyholders from "putting their property to use for the income-generating purposes for which the property was insured." Granting summary judgment to the plaintiff, the court then concluded that

"direct physical loss" includes "the loss of use or access to covered property even where that property has not been structurally altered." *Id.*

Numerous other courts have ruled against insurers for the same reasons. *See, e.g.*, *supra* notes 13, 14.

The cases favoring policyholders are consistent with longstanding precedent. For example, nearly sixty years ago, a California appellate court considered a case involving a home left "standing on the edge of and partially overhanging a newly formed 30-foot cliff," resulting from a landslide. *Hughes v. Potomac Ins. Co. of District of Columbia*, 199 Cal. App. 2d 239, 243 (Cal. Ct. App. 1962).

The insurer argued the policy only insured the house itself, which had not been damaged. *Id.* at 245-49. The court rejected that argument, reasoning that it would "render the policy illusory" because the insurer's position "would be to conclude that a building which has been overturned or which has been placed in such a position as to overhang a steep cliff has not been 'damaged' so long as its paint remains intact and its walls still adhere to one another. Despite the fact that a 'dwelling building' might be rendered completely useless to its owners, [the insurer] would deny that any loss or damage had occurred unless some tangible injury to the physical structure itself could be detected. Common sense requires that a policy should not be so interpreted in the absence of a provision specifically limiting coverage in this manner." *Id.*

Similarly, in *Murray v. State Farm Fire & Cas. Co.*, large boulders had fallen onto two homes, leaving two other plaintiffs' homes at risk of further rockfalls. 203 W. Va. 477, 481, 493-93 (1998). The insurer argued that, while the policies might cover the damage to those homes actually hit by rocks, they "do not cover any losses occasioned by the potential damage that could be caused by future rockfalls." *Id.* at 492-93. The West Virginia Supreme Court disagreed, reasoning that "'[d]irect physical loss' provisions require only that a covered property be injured, not destroyed." *Id*. at 493.

The court continued: until the risk of rockfalls abates "plaintiffs' houses could scarcely be considered 'homes' in the sense that rational persons would be content to reside there." *Id.* The court thus held that "direct physical loss[es]" covered by the policy, "including those rendering the insured property unusable or uninhabitable, may exist in the absence of structural damage to the insured property."[20]

Visconti has alleged it suffered the "loss of utility of its property" due to restrictions placed on its business. Focusing exclusively on structural damage

[20] *See also, e.g.*, *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, at *5 (D.N.J. Nov. 25, 2014) ("property can sustain physical loss or damage without experiencing structural alteration"); *Dundee Mut. Ins. Co. v. Marifjeren*, 587 N.W.2d 191, 194 (N.D. 1998) (finding coverage where properties "no longer performed the function for which they were designed"); *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, 2016 WL 3267247, at *9 (D. Ore. June 7, 2016) (finding "direct property loss or damage" when property became "uninhabitable and unusable for its intended purpose"); *Sentinel Mgmt. Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (finding "direct, physical loss" when "a building's function may be seriously impaired or destroyed").

ignores the well-reasoned analysis suggesting that a business suffers cognizable physical loss even if it is not physically damaged. Just like a home suffers physical loss when it is uninhabitable, an art gallery—or a restaurant—suffers physical loss when it becomes non-functional and cannot serve customers as intended.

This Court should hold that, when evaluating the sufficiency of such allegations of physical loss or damage caused by shutdown orders that imposed material, detrimental, physical alterations to a plaintiff's property, New York courts should liberally construe plaintiff's allegations and properly apply policy-interpretation principles. Under those well-established standards, this Court should conclude that Visconti has stated a claim by alleging the shutdown orders caused "physical loss" of its property and rendered the property non-functional for its intended purpose.

CONCLUSION

The judgment below should be reversed.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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