COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. 13172

Suffolk, SS

VERVEINE CORP. D/B/A COPPA, 1704 WASHINGTON LLC D/B/A TORO, AND JFKFOODGROUP LLC D/B/A LITTLE DONKEY, Appellants,

v.

STRATHMORE INSURANCE COMPANY AND COMMERCIAL INSURANCE AGENCY, INC., Appellees

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On Appeal From Judgment of the
Massachusetts Superior Court, Suffolk County,
Civil Action No. 2084CV01378-BLS2

BRIEF OF AMICUS CURIAE MASSACHUSETTS INSURANCE AND REINSURANCE BAR ASSOCIATION

This Brief Supports Appellees Strathmore Insurance Company And Commercial Insurance Agency, Inc. and Affirmance of the Superior Court's Judgment

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Date: December 15, 2021

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CORPORATE DISCLOSURE STATEMENT

In accordance with Supreme Judicial Court ("Court") Rule 1:21(b)(i), Amicus Curiae Massachusetts Insurance and Reinsurance Bar Association ("MIReBA" or "Amicus") states that it is not a for-profit corporation and that it has no parent corporations. MIReBA is a non-profit corporation that has Members but does not have any stockholders.

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STATEMENT OF INDEPENDENCE

In accordance with Mass. R. App. P. 17(c)(5), MIReBA and its counsel declare that they are independent from the parties and have no economic interest in the outcome of this case.

They further state that:

(A) No party, nor any party's counsel, authored this brief in whole or in part;

(B) No party, nor any party's counsel, contributed any money that was intended to fund preparing or submitting this brief;

(C) No person or entity – other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief; and

(D) Neither the amicus curiae nor its counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.

IDENTITY OF AMICUS CURIAE

MIReBA is a non-profit corporation that was formed in January of 2009 with the goal of improving the resolution of complex insurance and reinsurance coverage disputes, while promoting education and collegiality in the insurance and reinsurance bar in Massachusetts. MIReBA has monthly meetings to discuss key trends in the insurance and reinsurance industry, recent decisions and legislation of note, and ongoing developments at insurance and reinsurance companies in the U.S. and abroad.

MIReBA's mission is to promote the highest standards of excellence for legal professionals practicing in the insurance and reinsurance field. From its early beginnings, MIReBA has also served as a resource for the judicial, legislative, and executive branches of government in the areas of insurance and reinsurance.

As part of its educational mission, MIReBA organizes panels and symposia on issues and topics of importance to insurers and reinsurers, including a yearly "Arbitrator Roundtable," where arbitrators present to MIReBA members on topics of interest concerning the resolution of insurance and reinsurance

disputes through arbitration and mediation. In addition, MIReBA holds annual symposia on emerging insurance and reinsurance topics that are attended by its members, insurance practitioners, and industry professionals.

ISSUES ADDRESSED BY AMICUS CURIAE

This appeal arises from the dismissal of Appellant policyholders' claim for insurance coverage for business losses associated with the COVID-19 pandemic. Among other things, Appellant policyholders assert that the policy language at issue, which requires that there be "direct physical loss of or damage to property" in order for coverage to apply, is ambiguous and should therefore be construed to provide coverage for their losses. In support of this argument, the Appellants suggest that because a few judges in other jurisdictions have construed similar policy language to reach a result different from the conclusion made by the Superior Court in the proceedings below, the disputed text must be ambiguous and must therefore be construed in favor of coverage. Appellant's Br. at 18, 36-39.

MIReBA submits this Amicus Brief to address the limited issue of whether a split in non-Massachusetts judicial interpretations of particular policy language should be considered in determining whether the language is ambiguous. As will be discussed in greater detail below, both existing Massachusetts insurance law and sound policy dictate that the Court should not

consider such a split in determining whether policy language is ambiguous.

STATEMENT OF FACTS

MIReBA adopts the Statement of Facts set forth in the brief filed by Appellee Strathmore Insurance Company to the extent that they are relevant to the issues discussed herein.

ARGUMENT

THE EXISTENCE OF CONFLICTING NON-MASSACHUSETTS INTERPRETATIONS DOES NOT COMPEL A CONCLUSION THAT POLICY LANGUAGE IS AMBIGUOUS

A. Under Massachusetts Law, The Court Must Perform An Independent Examination Of The Policy Language To Determine Whether It Is Ambiguous.

Massachusetts law concerning insurance policy construction and the determination of whether a particular provision is ambiguous is well settled. The proper construction of the language of an insurance contract is a question of law for the court. *Cody v. Connecticut Gen. Life Ins. Co.*, 387 Mass. 142, 146 (1982). The court must construe and enforce unambiguous terms according to their plain meaning. *Somerset Sav. Bank v. Chicago Title Ins. Co.*, 420 Mass. 422, 427 (1995).

The court construes policy provisions by examining the text at issue with reference to the

insurance policy as a whole and its intended purpose. *Massachusetts Prop. Ins. Underwriting Ass'n v. Wynn*, 60 Mass. App. Ct. 824, 828 (2004)(court must "construe the contract as a whole, in a reasonable and practical way, consistent with its language, background, and purpose."); *LES Realty Tr. "A' v. Landmark Am. Ins. Co.*, 82 Mass. App. Ct. 694, 696–97 (2012)(court must consider policy provisions in context and in light of the policy as a whole).

While reading and understanding an insurance policy's provisions regarding coverage, exclusions, and exceptions may be a complicated task, difficulty in comprehension does not create ambiguity. *Wynn*, 60 Mass. App. Ct. at 827; *see also Sullivan v. Southland Life Ins. Co.*, 67 Mass. App. Ct. 439, 443 (2006).

Nor is ambiguity created "simply because a controversy exists between parties, each favoring an interpretation contrary to the other." *Lumbermens Mut. Cas. Co. v. Offices Unlimited, Inc.*, 419 Mass. 462, 466 (1995) (citing *Jefferson Ins. Co. v. City of Holyoke,* 23 Mass. App. Ct. 472, 475 (1987)) (further citation omitted); *see also Surabian Realty Co. v. NGM Ins. Co.*, 462 Mass. 715, 718 (2012).

Similarly, although a dictionary definition may assist the court in construing a policy, the existence of multiple dictionary definitions for a given word, without more, is not sufficient to create ambiguity. *Citation Ins. Co. v. Gomez,* 426 Mass. 379, 381 (1998)(noting that most words have several dictionary definitions).

An insurance policy term is considered ambiguous under Massachusetts law only if it is susceptible of more than one meaning, and reasonably intelligent persons would differ as to which meaning is the proper one to apply. *Gomez*, 426 Mass. at 381 (further citation omitted); *City of Holyoke*, 23 Mass. App. Ct. 475-76 (rejecting insured's claim that provision was ambiguous because the text could not reasonably be interpreted in the manner advanced by the insured). Words or provisions that are clear by themselves may nevertheless become ambiguous when read in the context of the entire policy or as applied to the subject matter. *Nelson v. Cambridge Mut. Fire Ins. Co.*, 30 Mass. App. Ct. 671, 673 (1991); *City of Holyoke,* 23 Mass. App. Ct. at 475–76.

Massachusetts courts have used these guiding principles for decades to resolve coverage disputes

based upon the language of the provision at issue. The principles discussed above are cited repeatedly, in almost every Massachusetts decision involving the interpretation of an insurance policy.

Tellingly, however, no Massachusetts decision has held that a split in non-Massachusetts judicial authority interpreting a particular policy provision compels a conclusion that the provision is ambiguous. To the contrary, this Court has routinely found provisions to be unambiguous, despite the existence of conflicting judicial interpretations. *See, e.g., Mount Vernon Fire Ins. Co. v. Visionaid, Inc.*, 477 Mass. 343, 349–50 (2017) (discussing conflicting judicial interpretations of the term "defend" but nevertheless concluding that the term is unambiguous, and does not permit an interpretation (found by some courts) that an insurer's duty to defend includes an obligation to prosecute insured's counterclaims); *Lumbermens Mut. Cas. Co. v. Belleville Indus., Inc.*, 407 Mass. 675, 679-81 (1990)(noting split in judicial authority interpreting the term "sudden" in the context of a "sudden and accidental" exception to pollution exclusion, but finding the term was unambiguous and included a temporal element that required release of

contaminants to happen abruptly for exception to apply).[1]

The Appellants have offered no good reason for the Court to diverge from its usual approach of performing a textual analysis in order to construe an insurance policy. Moreover, adopting such a rule in Massachusetts would be contrary to important public policy considerations, including the preservation of the Court's ability to conduct an independent analysis and reach its own conclusions concerning the interpretation of insurance policy language, as discussed below.

B. Sound Policy Dictates That The Court Should Not Consider The Existence Of A Split Of Authority In Determining Whether Policy Language Is Ambiguous.

Numerous courts outside of the Commonwealth have concluded that the mere existence of a split between courts over the proper interpretation of an insurance policy provision does not compel a conclusion that the provision is ambiguous. *See, e.g., Employers Mut. Cas.*

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[1] *Cf. Metropolitan Life Ins. Co. v. Cotter*, 464 Mass. 623, 635-38 (2013)(considering conflicting judicial interpretations of requirement that insured receive care that is "appropriate for the condition causing the disability," and adopting interpretation that imposed a higher burden upon insured to show that care was intended to enable him to return to work (and not just medically appropriate), as this was more consistent with the language of disability policy as a whole and its purpose).

Co. v. DGG & CAR, Inc., 218 Ariz. 262, 266–67, 183 P.3d 513, 517–18 (Ariz. 2008) ("Varying judicial interpretations, however, do not automatically render an insurance policy ambiguous."); *Erie Ins. Grp. v. Sear Corp.*, 102 F.3d 889, 894 (7th Cir. 1996) (after noting conflicting jurisprudence regarding the proper interpretation of disputed term, the court stated that its decision that the term is unambiguous "is not shaken by disagreement among other courts about the meaning of [the term] in those contexts.").

These courts recognize that interpretation of insurance provisions is a highly individualized process, making it inappropriate to conclude that a term is ambiguous simply because courts have reached diverging interpretations. As one court has observed:

> [c]ontext is often central to the way in which policy language is applied; the same language may be found both ambiguous and unambiguous as applied to different facts. Language in an insurance contract, therefore, must be construed in the circumstances of [a particular] case, and cannot be found to be ambiguous [or unambiguous] in the abstract. In sum, the same policy provision may shift between clarity and ambiguity with changes in the event at hand; and one court's determination that the term [in question] was unambiguous, in the specific context of the case that was before it, is not dispositive of whether the term is clear in the context of a wholly different matter.

Lexington Ins. Co. v. Lexington Healthcare Grp., Inc., 84 A.3d 1167, 1175 (Conn. 2014)(internal quotes, cites, and parentheticals omitted).[2]

Such decisions also recognize that permitting a party to utilize a split of authority to prove ambiguity would essentially mandate a finding of ambiguity once courts had reached differing interpretations of the disputed language. *See, e.g., Sullins v. Allstate Ins. Co.*, 667 A.2d 617, 624 (Md. 1995) ("Surely we would be abdicating our judicial role were we to decide such cases by the purely mechanical process of searching the nation's courts to ascertain if there are conflicting decisions."); *Aearo Corp. v. American Int'l Specialty Lines Ins. Co.*, 676 F. Supp. 2d 738, 744 (S.D. Ind. 2009)(observing that a

[2] At least one court has also candidly acknowledged that reliance upon a split of authority to prove ambiguity is inappropriate because courts do not always reach the correct result:

> The fact that the courts below have read the policy otherwise and found it susceptible of another meaning is urged as establishing the fact that reasonable and intelligent men may honestly differ as to its meaning, and that it must therefore be construed against the insurer. It is, however, for this court to say, as matter of law, whether reasonable men may reasonably differ as to such meaning, or whether the indulgence of the lower courts has not written a new contract for the parties and extended the defendant's liability beyond the plain and unambiguous language of the policy.

Breed v. Insurance Co. of N. Am., 385 N.E.2d 1280, 1283 (N.Y. 1978).

rule permitting a split of authority to prove an ambiguity that must be resolved in favor of the insured would essentially delegate insurance coverage questions to the court most likely to favor the insured).

Courts have also recognized that allowing a split of authority to establish an ambiguity would undermine the court's ability to conduct an independent analysis of the policy provisions at issue. As one court has commented:

> [The insured] directs us to a number of judicial decisions supporting its interpretation of "sudden" as meaning merely "unexpected," and thereby imparting no temporal element. Indeed a substantial number of courts nationwide have examined the construction of "sudden," but without reaching a consensus. [The insured] proffers that this split in authority regarding the meaning of "sudden" suggests that the term is ambiguous, thereby rendering its construction of the qualified polluter's exclusion clause reasonable. We disagree. The presence of conflicting judicial decisions is insufficient to create an ambiguity as a matter of law. To hold otherwise would unduly restrict the ability of courts to engage in meaningful contextual analyses of contract terms. Courts would no longer be free to reach their own conclusions regarding contract interpretation once other courts had developed differing interpretations.

Gulf Metals Indus., Inc. v. Chicago Ins. Co., 993 S.W.2d 800, 806–07 (Tex. App. 1999)(internal citations

omitted); *see also O'Brien v. Progressive N. Ins. Co.*, 785 A.2d 281, 289 (Del. 2001)("This Court would place itself in an untenable position if it were to recognize every split in judicial authority as *prima facie* evidence of ambiguity. In the context of interpreting insurance agreements, an adoption of this policy would unduly restrict the power of the Delaware courts to render decisions independent of our sister courts.").

In sum, and as numerous other courts have recognized, a split in judicial interpretation of policy language does not compel a conclusion that the language is ambiguous. Accordingly, the Court should decline to permit a split of authority to factor into the determination of whether the policy language at issue in this matter is ambiguous.

CONCLUSION

For the reasons discussed above, the Court should affirm the Superior Court's dismissal of the underlying Complaint.

Respectfully submitted,
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Date: December 15, 2021

CERTIFICATE OF COMPLIANCE

I, John G. O'Neill, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Rule 16 (a)(13) (addendum);

Rule 16 (e) (references to the record);

Rule 17 (brief of amicus curiae)

Rule 20 (form and length of briefs, appendices, and other documents); and

I further certify that the foregoing brief complies with the applicable length limitation in Rule 20 because it is produced in the monospaced font, Courier New, at size 12, 10.5 characters per inch, and contains no more than 35 total non-excluded pages.

/s/ John G. O'Neill
John G. O'Neill

Date: December 15, 2021

CERTIFICATE OF SERVICE

Pursuant to Rule 13(e), I hereby certify, under the penalties of perjury, that on this 15th day of December 2021, I have made service of this document upon all parties of record through the Court's Electronic Filing System.

/s/ John G. O'Neill
John G. O'Neill

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