IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ROBERTO & CESARE PICONE d/b/a LA DOLCE CASA,	:	**Civil No. 3:21-CV-700**
Plaintiff,	:	**(Judge Mariani)**
v.	:	**(Magistrate Judge Carlson)**
NATIONWIDE MUTUAL INSURANCE COMPANY,	:	
Defendant.	:	

REPORT AND RECOMMENDATION

I. Introduction

In this case we are called upon, once again, to join with other federal courts in Pennsylvania in assessing the economic consequences of public health measures taken during the course of the coronavirus pandemic. Specifically, we now join other courts in examining the degree to which insurance covers business losses resulting from COVID mandated closings and restrictions. As discussed below, we join the rising tide of caselaw which has found that these losses are not encompassed by the terms of most commercial insurance policies.

Pending before the court is a motion to dismiss the plaintiff's complaint filed by the defendant, Nationwide Mutual Insurance Company ("Nationwide"). (Doc. 7). The plaintiff, Roberto and Cesare Picone ("Picone"), filed this lawsuit against

Nationwide alleging breach of contract in fulfilling the terms of their "all-risk" policy. Specifically, Picone alleges that the all-risk policy covered loss of business income and extra expenses during the mandated closure of their dine-in facilities due to the COVID-19 pandemic, and the defendant breached the contract when it failed to pay for the loss under the policy. Nationwide now moves to dismiss the complaint for failure to state a claim against it. (Doc. 7).

After consideration, and for the reasons that follow, we recommend that the motion to dismiss be granted.

II. Background

The factual background is taken from the plaintiff's complaint, which we must accept as true for purposes of this motion to dismiss.

The plaintiff owns and operates a restaurant, La Dolce Casa, in Tamaqua, Pennsylvania. (Doc. 6, ¶ 1). Picone purchased an "all-risk" policy in April of 2019 from Nationwide, which included coverage for all non-excluded business losses. (Id., ¶ 2; Doc. 6-1, Ex. 1). This coverage extends to "direct physical loss of or damage to Covered Property . . . caused by or resulting from any Covered Cause of Loss." (Doc. 6, ¶ 24; Doc. 6-1, Ex. 1, at 24). Losses under the policy include business income, extra expenses, and losses due to an order of a civil authority. (Doc. 6, ¶ 22).

On March 19, 2020, Pennsylvania Governor Tom Wolf issued an order requiring all non-essential businesses, including restaurants, to close their dine-in facilities due to Covid-19. (Id., ¶ 68). In addition, on April 1, 2020, Governor Wolf's stay-at-home order was extended to the entire Commonwealth. (Id., ¶ 70). Accordingly, the complaint alleges that Picone was forced to discontinue the primary use of its business, or else it would face sanctions and fines. (Id., ¶¶ 77-78).

Picone's complaint asserts that the closure orders put in place by Governor Wolf, as well as Covid-19 itself, caused "direct physical loss or damage" as set forth in the insurance policy with Nationwide. (Id., ¶¶ 77, 89). Thus, the plaintiff filed a claim with Nationwide to recover its ongoing financial losses due to the suspension or reduction of its business. (Id., ¶¶ 5-6). On June 12, 2020, Nationwide denied Picone's claim, asserting that the policy did not cover these losses as set forth by Picone. (Id., ¶ 7; Doc. 6-1, Ex. 2, at 107). Specifically, Nationwide informed Picone that the losses it claimed to have suffered due to the closures and Covid-19 did not amount to "direct physical loss or damage" to the property, and thus were not covered under the policy provisions for the loss of business income and extra expenses. (Doc. 6-1, Ex. 2, at 107). This letter also indicated that Picone's claim was barred by the Virus Exclusion contained in the policy, which excluded coverage of losses caused by viruses. (Id., Ex. 2, at 108).

Following the denial of coverage, Picone brought the instant action, and filed an amended complaint thereafter, which is now the operative pleading in this case. (Docs. 1, 6). Picone contends that it suffered the loss of use of the covered property, as well as business income and extra expenses due to direct physical loss or damage caused by Covid-19 and the Governor's closure orders. It therefore seeks declaratory judgment and damages, and a finding that Nationwide breached the contract when it failed to pay these covered losses under the insurance policy. Nationwide then filed the instant motion to dismiss, alleging that these losses are not covered by its policy since the coronavirus does not cause physical loss or damage under the policy. (Doc. 7).

This motion is fully briefed and is ripe for resolution. (Docs. 7-9). For the following reasons, we join those courts that have construed similar policy provisions, agree with the defendant, and recommend that this motion to dismiss be granted.

III. Discussion

A. Motion to Dismiss – Standard of Review

A motion to dismiss tests the legal sufficiency of a complaint. It is proper for the court to dismiss a complaint in accordance with Rule 12(b)(6) of the Federal Rules of Civil Procedure only if the complaint fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). With respect to this benchmark standard for

the legal sufficiency of a complaint, the United States Court of Appeals for the Third Circuit has aptly noted the evolving standards governing pleading practice in federal court, stating that:

> Standards of pleading have been in the forefront of jurisprudence in recent years. Beginning with the Supreme Court's opinion in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), continuing with our opinion in Phillips [v. County of Allegheny, 515 F.3d 224, 230 (3d Cir. 2008)], and culminating recently with the Supreme Court's decision in Ashcroft v. Iqbal, –U.S.–, 129 S. Ct. 1937 (2009), pleading standards have seemingly shifted from simple notice pleading to a more heightened form of pleading, requiring a plaintiff to plead more than the possibility of relief to survive a motion to dismiss.

Fowler v. UPMC Shadyside, 578 F.3d 203, 209-10 (3d Cir. 2009).

In considering whether a complaint fails to state a claim upon which relief may be granted, the court must accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom are to be construed in the light most favorable to the plaintiff. Jordan v. Fox, Rothschild, O'Brien & Frankel, Inc., 20 F.3d 1250, 1261 (3d Cir. 1994). However, a court "need not credit a complaint's bald assertions or legal conclusions when deciding a motion to dismiss." Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997). Additionally, a court need not "assume that a . . . plaintiff can prove facts that the . . . plaintiff has not alleged." Associated Gen. Contractors of Cal. v. California State Council of Carpenters, 459 U.S. 519, 526 (1983). As the Supreme Court held in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), in order to state a valid cause of action, a

plaintiff must provide some factual grounds for relief which "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of actions will not do." Id., at 555. "Factual allegations must be enough to raise a right to relief above the speculative level." Id.

In keeping with the principles of Twombly, the Supreme Court has underscored that a trial court must assess whether a complaint states facts upon which relief can be granted when ruling on a motion to dismiss. In Ashcroft v. Iqbal, 556 U.S. 662 (2009), the Supreme Court held that, when considering a motion to dismiss, a court should "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." Id., at 679. According to the Supreme Court, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id., at 678. Rather, in conducting a review of the adequacy of a complaint, the Supreme Court has advised trial courts that they must:

> [B]egin by identifying pleadings that because they are no more than conclusions are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Id., at 679.

Thus, following Twombly and Iqbal, a well-pleaded complaint must contain more than mere legal labels and conclusions; it must recite factual allegations

sufficient to raise the plaintiff's claimed right to relief beyond the level of mere speculation. As the United States Court of Appeals for the Third Circuit has stated:

> [A]fter Iqbal, when presented with a motion to dismiss for failure to state a claim, district courts should conduct a two-part analysis. First, the factual and legal elements of a claim should be separated. The District Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions. Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a "plausible claim for relief." In other words, a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to "show" such an entitlement with its facts.

Fowler, 578 F.3d at 210-11.

As the Court of Appeals has observed:

> The Supreme Court in Twombly set forth the "plausibility" standard for overcoming a motion to dismiss and refined this approach in Iqbal. The plausibility standard requires the complaint to allege "enough facts to state a claim to relief that is plausible on its face." Twombly, 550 U.S. at 570, 127 S. Ct. 1955. A complaint satisfies the plausibility standard when the factual pleadings "allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 129 S. Ct. at 1949 (citing Twombly, 550 U.S. at 556, 127 S. Ct. 1955). This standard requires showing "more than a sheer possibility that a defendant has acted unlawfully." Id. A complaint which pleads facts "merely consistent with" a defendant's liability, [ ] "stops short of the line between possibility and plausibility of 'entitlement of relief.' "

Burtch v. Milberg Factors, Inc., 662 F.3d 212, 220-21 (3d Cir. 2011), cert. denied, 132 S. Ct. 1861 (2012).

In practice, consideration of the legal sufficiency of a complaint entails a three-step analysis:

> First, the court must "tak[e] note of the elements a plaintiff must plead to state a claim." Iqbal, 129 S. Ct. at 1947. Second, the court should identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." Id., at 1950. Finally, "where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement for relief."

Santiago v. Warminster Twp., 629 F.3d 121, 130 (3d Cir. 2010) (quoting Iqbal, 129 S. Ct. at 1950).

In considering a motion to dismiss, the court generally relies on the complaint, attached exhibits, and matters of public record. Sands v. McCormick, 502 F.3d 263, 268 (3d Cir. 2007). The court may also consider "undisputedly authentic document[s] that a defendant attached as an exhibit to a motion to dismiss if the plaintiff's claims are based on the [attached] documents." Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir. 1993). Moreover, "documents whose contents are alleged in the complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered." Pryor v. Nat'l Collegiate Athletic Ass'n, 288 F.3d 548, 560 (3d Cir. 2002); see also U.S. Express Lines, Ltd. v. Higgins, 281 F.3d 382, 388 (3d Cir. 2002) (holding that "[a]lthough a district court may not consider matters extraneous to the pleadings, a document integral to or explicitly relied upon in the complaint may be considered without converting the motion to dismiss in one for summary judgment"). However, the court may not rely on other parts of the record in

determining a motion to dismiss, or when determining whether a proposed amended complaint is futile because it fails to state a claim upon which relief may be granted. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994).

B. This Motion to Dismiss Should Be Granted.

Picone brings claims for declaratory relief and compensatory damages for breach of contract against Nationwide after Nationwide denied COVID closure related business loss coverage to Picone. In its motion to dismiss, Nationwide invites us to follow other courts that have interpreted the language of similar insurance policies and denied coverage. Specifically, Nationwide argues that the coronavirus does not cause a physical loss or damage under either the direct loss or civil authority provisions of this insurance policy, and it has therefore not breached its contract with Picone. Nationwide further argues that Picone's claims are barred under the Virus Exclusion contained in the policy. Finally, Nationwide contends that the Civil Authority coverage was not triggered by the Governor's closure orders. For the following reasons, we agree, joining a rising tide of case law which has reached similar conclusions, and accordingly recommend that Nationwide's motion to dismiss be granted.

1. The Defendant's Policy Unambiguously Requires Direct Physical Loss, Which the Coronavirus Does Not Cause.

Nationwide argues that the policy purchased by Picone unambiguously requires direct physical damage or loss to covered property, and the presence of the

coronavirus does not constitute physical damage or loss within the meaning of the policy's provisions.

At the outset, we note that

> In construing an insurance policy to determine whether coverage was improperly denied, the Court must first determine whether a policy's language is unambiguous, or whether it is reasonably susceptible to different readings. "When policy language is clear and unambiguous, a court applying Pennsylvania law must give effect to that language."

4431, Inc. v. Cincinnati Ins. Cos., 504 F.Supp.3d 368, 381-82 (E.D. Pa. 2020) (quoting Toppers Salon & Health Spa, Inc. v. Travelers Property Casualty Co. of Am., 503 F.Supp.3d 251, 255 (E.D. Pa. 2020)). Here, the plaintiff contends that because the words "loss" and "danger" are not defined in the policy, they are therefore ambiguous. We disagree.

The Third Circuit has held that physical damage to a property means "a distinct, demonstrable, and physical alteration" of its structure such that "its function is nearly eliminated… or the structure is made useless or uninhabitable." Port Auth. v. Affiliated FM Ins. Co., 311 F.3d 226, 235-36 (3d Cir. 2002). Further, "even though 'physical loss' is not defined in the Policy, that does not render the term ambiguous." Kahn v. Pa. Nat'l Mut. Ins. Co., 517 F.Supp.3d 315, 322 (M.D. Pa. 2021) (citing Telecomm. Network Design v. Brethren Mut. Ins. Co., 5 A.3d 331, 336-37 (Pa. Super. Ct. 2010)). Rather, the Kahn court aptly explained in a similar context:

> [T]he term is clear when one considers the ordinary meaning of the words and when read in the context of the policy. See id. The word "physical"—which modifies both "loss" and "damage" in the Business Income provision—means "[o]f, relating to, or involving *material* things; pertaining to real, tangible objects." Physical, BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis added). As a preeminent insurance treatise has explained, insurance policies that include "physical loss or damage" as a prerequisite for coverage have been "widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property." 10A Couch on Ins. § 148:46 (3d ed. 2020). "When the structure of the property itself is unchanged to the naked eye, however, and the insured alleges that its usefulness for its normal purposes has been destroyed or reduced, there are serious questions whether the alleged loss satisfies the policy trigger." Id.

Kahn, 517 F.Supp.3d at 322-23. Accordingly, we cannot conclude that these terms are ambiguous simply because they are not defined in the policy.

Moreover, in the context of insurance claims following Covid-19 closures, courts in this circuit have held that the presence of Covid-19 does not constitute physical loss or damage for purposes of insurance policies. See, e.g., Kahn, 517 F.Supp.3d at 326 (denying plaintiff's claim for business income loss because the plaintiff failed to allege "some physical alteration to or issue with the structure, or some physical contamination inside the building); 44 Hummelstown Assocs., LLC v. Am. Select Ins. Co., 542 F.Supp.3d 328, 338 (M.D. Pa. 2021) (denying the plaintiff's claim for business income and extra expense losses because "none of the allegations in the amended complaint plausibly supports Plaintiff's contention that

COVID-19 and the Governor's orders 'h[ad] something to do with the physical condition of the premises'") (citations omitted); Boscov's Dep't Store, Inc. v. American Guarantee and Liability Ins. Co., 546 F.Supp.3d 354, 365 (E.D. Pa. 2021) (finding that "[t]hough Boscov's business has undoubtedly been impacted by the pandemic, its alleged losses bear no causal connection to the physical condition of its properties").[1] Indeed, the Kahn court determined that "the Third Circuit in Port Authority clearly distinguished between a *building* (not a business) that was physically unusable and one that was contaminated but still physically safe to inhabit." Kahn, 517 F.Supp.3d at 324 (emphasis in original).

In the instant case, the plaintiff alleges that the presence of coronavirus constitutes direct physical damage or a direct physical loss that is covered under the insurance policy. The complaint also posits that the actual or suspected presence of Covid-19 on the premises, as well as the general risk of the presence of the virus constitute physical loss or damage. However, as we have explained, these allegations are insufficient to state a claim for a direct physical loss or physical damage under the policy. The complaint does not allege that any part of the physical structure of the premises was damaged or lost. The complaint vaguely asserts that the business

[1] See also Spring House Tavern, Inc. v. American Fire and Casualty Co., 544 F.Supp.3d 517 (E.D. Pa. 20210; Hair Studio 1208, LLC v. Hartford Underwriters Ins. Co., 539 F.Supp.3d 409 (E.D. Pa. 2021); Whiskey Flats Inc. v. Axis Ins. Co., 519 F.Supp.3d 231 (E.D. Pa. 2021); 1 S.A.N.T., Inc. v. Berkshire Hathaway, Inc., 513 F.Supp.3d 623 (W.D. Pa. 2021).

owner and several employees tested positive for Covid-19 but fails to specify whether those individuals were in the building and the timeframe of these positive tests. Nonetheless, several courts have held that employees testing positive for the virus does not amount to physical loss or damage to allow for coverage under the policy. See e.g., Arash Emami, M.D., P.C., Inc. v. CAN and Transportation Ins. Co., 2021 WL 1137997, at 2, n.4 (D.N.J. March 11, 2021) (citing Pappy's Barber Shops, Inc. v. Farmers Grp., Inc., 2020 WL 5847570, at *1 (S.D. Cal. Oct. 1, 2020) (holding that "the presence of the virus itself, or of individuals infected [with] the virus, at Plaintiff's business premises or elsewhere do not constitute direct physical losses of or damage to property")); Olmsted Medical Center v. Continental Casualty Co., 2022 WL 126336, at *7 (D. Minn. Jan. 13, 2022) ("Olmsted's claim of physical loss or damage based on persons testing positive for COVID-19 or the presence of the virus in the building fails").

Accordingly, we recommend adherence to the majority view that coronavirus contamination does not constitute physical damage or loss. The plaintiff in this case does not point to any physical loss or damage beyond the coronavirus; thus, Picone points only to losses of business, not property. As physical damage or loss to the covered property stands as a firm prerequisite for direct loss coverage under this policy language, we conclude that such coverage was never triggered. Further, although the policy was labeled as "all-risk," we again note that "'all risks' does not

mean 'every risk'… '[a] loss which does not properly fall within the coverage clause cannot be regarded as covered thereby merely because it is not within any of the specific exceptions.'" Port Auth., 311 F.3d at 233-34 (quoting 10 Couch on Insurance § 148:48 (3d ed. 1998)). Thus, the plaintiff's breach of contract claim should be dismissed.

Moreover, although we have concluded that the defendant properly denied coverage under the business income provision, we further conclude that the Virus Exclusion bars coverage of a claim for losses based on Covid-19. The Virus Exclusion in Picone's policy with Nationwide states that Nationwide "will not pay for loss or damage caused directly or indirectly by . . . [a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." (Doc. 6-1, at 43, 45). Courts in this circuit have considered identical exclusions in insurance policies and have concluded that these exclusions are "unambiguous and clearly applicable 'to COVID-19, which is caused by a coronavirus that causes physical illness and distress.'" Body Physics v. Nationwide Ins., 524 F.Supp.3d 372, 380 (D.N.J. 2021) (quoting Humans & Resources, LLC v. Firstline Nat'l Ins. Co., 512 F.Supp.3d 588, 601 (E.D. Pa. 2021); Toppers Salon & Health Spa, Inc., 503 F.Supp.3d at 255). See also Big Red Management Corp. v. Zurich American Ins. Co., --F.Supp.3d--, 2022 WL 79623, at *4 (E.D. Pa. Jan. 7, 2022) (concluding that the virus exclusion barred the plaintiff's claim for coverage);

Spring House Tavern, Inc., 544 F.Supp.3d at 528-29 (finding that the plaintiff's claims for business income and extra expenses were barred by the virus exclusion). This is so even in cases which claim coverage based on both Covid-19 and the civil authority closure orders. See Body Physics, 524 F.Supp.3d at 380; Big Red Management Corp., 2022 WL 79623, at *4.

In the instant case, the plaintiff contends that its losses of business income and extra expenses are both a result of Covid-19 itself and the Governor's closure orders. Thus, any claim that the loss or damage was caused by Covid-19 is plainly barred by the Virus Exclusion. Moreover, as we have explained, courts in this circuit have held that a parallel claim of loss due to the Civil Authority orders cannot circumvent the Virus Exclusion, as the closure orders were issued "to stop the spread of the virus," and thus fall under the exclusion. Big Red Management Corp., 2022 WL 79623, at *4; see Frank Van's Auto Tag, LLC v. Selective Ins. Co. of the Se., 516 F.Supp.3d 450, 460 (E.D. Pa. 2021) ("[T]he plain text of the provision bars coverage for loss or damage caused 'indirectly' by any virus.... [T]he March 2020 Closure Orders were issued with the plan to stem the spread of COVID-19"). Accordingly, we conclude that the plaintiff's claim for business income and extra expenses is barred by the Virus Exclusion.[2]

[2] While the plaintiff contends that regulatory estoppel should bar the application of the Virus Exclusion, we note that this argument has been considered by several courts in this circuit, all concluding that regulatory estoppel is inapplicable in this

2. The Defendant's Civil Authority Coverage Unambiguously Requires Direct Physical Loss to Adjacent Property.

Nationwide further argues that the provisions for Civil Authority coverage were similarly not triggered in the instant case. Nationwide points to the policy's requirement of physical damage or loss to adjacent property, arguing that the complaint has not alleged any damage to a property other than the covered property which deprived Picone of access to the covered property.

Under the Civil Authority provisions, Nationwide's policy provides coverage for loss of business income and extra expenses "[w]hen a Covered Cause of Loss causes damage to property other than the property at the described premises," action is taken by a civil authority in response to "dangerous physical conditions," and "[a]ccess to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage." (Doc. 6-1, Ex. 1, at 30). Thus, the plaintiff must allege a dangerous physical condition which caused damage to a property within one mile of the covered property. (Id.)

On this score, the only dangerous condition alleged by the plaintiff in this case is the presence of Covid-19. However, as we have noted, it is the current consensus in the Third Circuit that contamination by the coronavirus does not render a building

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specific context. See e.g., Benamax Ice, LLC v. Merchant Mutual Ins. Co., 529 F.Supp.3d 350, 358-59 (D.N.J. 2021); Brian Handel D.M.D, P.C. v. Allstate Ins. Co., 499 F.Supp.3d 95, 100-01 (E.D. Pa. 2020).

physically unusable or unsafe, and therefore does not constitute physical loss or damage. See generally Kahn, 517 F.Supp.3d 315; 44 Hummelstown Assocs., LLC, 2021 WL 2312778; 4431, Inc., 504 F.Supp.3d 368; Boscov's Dep't Store, Inc., 546 F.Supp.3d 354; Hair Studio 1208, LLC, 539 F.Supp.3d 409; 1 S.A.N.T., Inc. 513 F.Supp.3d 623. Rather than losses of physical property, the coronavirus causes losses of business. Such losses, while real, are not encompassed by the terms of this insurance policy as those terms have been construed by the courts. See Kahn, 517 F.Supp.3d at 324.

Because Nationwide's policy thus unambiguously requires physical loss or damage to adjacent property for Civil Authority coverage to take effect, we conclude that Picone has failed to demonstrate sufficient physical loss or damage to trigger the Civil Authority provision of the policy. Although Picone alleges a continuous presence of the coronavirus around its property, such a claim does not evidence physical damage or loss within the Third Circuit. Because the plaintiff does not meet a prerequisite for Civil Authority coverage under Nationwide's policy, such coverage remains inapplicable to Picone's claim. We therefore cannot conclude that Nationwide breached its contract with the plaintiff, and we recommend that the defendant's motion to dismiss be granted.

IV. Recommendation

Accordingly, for the foregoing reasons, IT IS RECOMMENDED THAT Nationwide's motion to dismiss (Doc. 7) be GRANTED.

The parties are further placed on notice that pursuant to Local Rule 72.3:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Submitted this 27th day of April 2022.

s/ Martin C. Carlson
Martin C. Carlson
United States Magistrate Judge