No. 21-1202

United States Court of Appeals
For the First Circuit

LEGAL SEA FOODS, LLC,
Plaintiff-Appellant

v.

STRATHMORE INSURANCE COMPANY,
Defendant-Appellee

ON APPEAL FROM DISMISSAL BY THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
CASE NO. 1:20-CV-10850-NMG
JUDGE NATHANIEL M. GORTON

APPELLEE'S OPPOSITION TO APPELLANT'S MOTION TO CERTIFY A QUESTION TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

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I. PRELIMINARY STATEMENT

This Court should deny the request of the Plaintiff-Appellant, Legal Sea Foods, LLC ("Legal"), to certify a question of law to the Massachusetts Supreme Judicial Court ("SJC"). Put simply, Legal has failed to establish the requirements for certification. *See* Mass. R. Sup. Jud. Ct. 1.03 ("Rule 1.03"). *First*, although certification is solely for resolution of discrete questions of law, Legal seeks an advisory opinion from the SJC on the particular facts alleged in its Second Amended Complaint. *Second*, the proposed issue on which Legal seeks a ruling from the SJC is not outcome determinative. *Third*, Legal wrongly claims that this Court is unable to properly apply Massachusetts law on the proposed question without an advisory opinion from the SJC. *Finally*, Legal failed to raise the certification issue with the District Court below.

The relevant provisions of the commercial property insurance policy at issue in this action are expressed in language that courts nationwide have deemed plain and unambiguous. The District Court determined that Massachusetts law provides clear guidance on the interpretation and application of those provisions, and its thorough decision is in accord with all other courts that have decided similar cases

under Massachusetts state law,[1] a fact readily admitted by Legal. (Motion to Certify ("Mot."), at 3.) Thus, Legal's request for certification should be denied.

II. BACKGROUND

Legal commenced this action on May 4, 2020, asserting causes of action for breach of contract and declaratory judgment against Strathmore. (JA0006, et seq.) Its claims related to Strathmore's denial of an insurance claim for economic losses that Legal attributed to government orders issued in the spring of 2020 to combat the spread of COVID-19, the infectious disease caused by the novel coronavirus known as "SARS-CoV-2" (hereinafter "Coronavirus"). (*Id*.)

In its original Complaint, Legal alleged that, "in an effort to combat the virus and slow the spread of COVID-19," government officials in the states where it operates its restaurants issued "Stay at Home" orders between March and May 2020 that temporarily suspended on-premises dining at restaurants, but permitted restaurants to continue preparing and selling food and beverages to customers through carry-out and delivery services. (JA0012, ¶ 40-47.) According to the

[1] *See Select Hospitality, LLC v. Strathmore Ins. Co.*, 2021 WL 1293407 (D. Mass., Apr. 7, 2021) (Gorton, J.) (1st Cir. No. 21-1380); *American Food Systems, Inc. v. Fireman's Fund Ins. Co.*, 2021 WL 1131640 (D. Mass. Mar. 24, 2021) (Stearns, J.) (1st Cir. No. 21-1307); *Atlántico, LLC v. Greater N.Y. Mut. Ins. Co.*, 2021 WL 1171630 (D. Mass. Mar. 9, 2021) (Saylor, J.) (1st Cir. No. 21-1259); *SAS Int'l Ltd. v. Gen. Star Indem. Co.*, 2021 WL 664043 (D. Mass. Feb. 19, 2021) (Stearns, J.) (1st Cir. No. 21-1219); *Verveine Corp. v. Strathmore Ins. Co.*, 2020 WL 8766370 (Mass. Super. Ct. Dec. 12, 2020) (Sanders, J.) (Mass. App. Ct. No. 2021-P-0231).

Complaint, Legal closed its restaurants, rather than continue serving its customers, because carry-out and delivery services were not in keeping with its "brand" and reputation. (JA0013, ¶ 47.) Having closed its doors to customers, Legal claimed it was entitled to coverage for its economic losses under the "Business Income" and "Extra Expense" provisions of its insurance policy with Strathmore ("Policy"), which grant coverage only where: (1) there is a "necessary 'suspension' of [Legal's] 'operations;'"[2] (2) the suspension of operations is "caused by direct physical loss of or damage to property" at insured premises; and (3) the direct physical loss of or damage to property is "caused by or result[s] from a Covered Cause of Loss. . . ." (JA0418.) Legal also sought coverage under the Policy's "Civil Authority" provision, which requires, *inter alia*, that a civil authority prohibit access to insured premises as a consequence of direct physical loss of or damage to property away from insured premises. (JA0021, et seq.)

On June 5, 2020, Legal amended its Complaint to add a claim for damages under Massachusetts General Laws Chapter 93A, and new allegations concerning the government orders that allegedly prompted Legal to close its restaurants in March 2020. (JA0044, ¶¶ 134-146.) Like the original Complaint, the First Amended Complaint ("FAC") alleged that Legal closed its restaurants in March

[2] The term "suspension" is defined, in relevant part, as "[t]he slowdown or cessation of your business activities." The term "operations" is defined, in relevant part, as "Your business activities occurring at the described premises." (JA0426.)

2020 in response to the government orders, instead of remaining open for carry-out or delivery service. (JA0031-32, ¶¶ 40-47.)

Though Legal represents in its Motion that the "physical effects of the virus and disease" on its property "caused Legal Sea Foods to close all of its restaurants" (Mot. at 2), neither its Complaint nor its FAC alleged that Coronavirus was actually and physically present in any Legal Sea Foods restaurant. Instead, Legal alleged that its inability to "operate its dining rooms" due to government orders constituted "direct physical loss of or damage to its property" that triggered Business Income and Extra Expense coverage under the policy issued by Strathmore. (JA0032, ¶¶ 46, 48.)

Strathmore moved to dismiss the FAC arguing, among other points, that Legal's allegations that government public health orders impaired its use of its restaurants did not plausibly establish the "direct physical loss of or damage to property" requirement of the Policy's Business Income or Extra Expense coverages. (JA0054-73; JA0101-0111.) In its supporting memoranda, and through notices of supplemental authority submitted in the ensuing weeks, Strathmore directed the District Court to a substantial number of decisions from federal and state courts around the country dismissing similar COVID-19 business interruption lawsuits on the same basis. (*Id.*; JA0167; JA0200; JA0225.)

In September 2020—long after the motion to dismiss was fully briefed, and facing the torrent of unfavorable decisions on the issue of "direct physical loss"—Legal abruptly changed course. In a motion seeking permission to amend its complaint yet again, Legal claimed that in the time since it filed its FAC in June 2020, it suddenly "became aware of" new evidence indicating that "COVID was present on its insured property beginning in March 2020." (JA0236-242; JA0253-257.) Leave was granted (JA0258), and Legal filed its Second Amended Complaint ("SAC") on October 30, 2020 (JA0259, et seq.).

Unlike the two prior iterations of the Complaint, the SAC alleges that there were known cases of COVID-19 infections at certain of its restaurants (JA0269, ¶ 61), and that Coronavirus attached to surfaces and was "hanging in the air" at those locations. (JA0270, ¶ 64.) On that basis, Legal speculated that Coronavirus must have been present in all of its restaurants, though it did not specify when. (JA0270, ¶¶ 59-62) Significantly, the SAC does not plead facts suggesting that the alleged presence of Coronavirus in any restaurant caused any slowdown or cessation of Legal's business activities , *i.e.*, a "suspension" of "operations." Instead, Legal alleges that "the Orders caused the suspension of Legal Sea Foods operations" by, among other things, "(a) Mandating the closure of Legal Sea Foods' restaurant locations; (b) Prohibiting access to Legal Sea Foods' restaurant locations, either in whole or in part (*e.g.*, closure of dining rooms); (c) Restricting guest, vendor, and

employee access to Legal Sea Foods' locations; [and] (d) Limiting guest capacity, where access is not prohibited. . . ." (JA0272, ¶¶ 76-77.)

After allowing each party to submit three briefs (*see* JA 0054-235; JA0554-951), the District Court issued its Order granting Strathmore's motion to dismiss the entire SAC pursuant to Federal Rule of Civil Procedure 12(b)(6). With respect to Business Income and Extra Expense coverage, the District Court agreed with Strathmore that the SAC does not allege facts establishing that the presence of Coronavirus at Legal's restaurants caused any suspension of its operations. (Order at 7 ("Legal does not plausibly allege that its business interruption losses resulted from the presence of COVID-19 at the Designated Properties. Instead, it indicates in the SAC that '[t]he Orders caused and are continuing to cause' the losses for which it claims entitlement to coverage.").) The District Court further held that, even if Legal had plausibly alleged a "suspension" of its "operations" caused by the presence of Coronavirus, "it still would not be entitled to coverage under the Policy" because Coronavirus does not cause "direct physical loss of or damage to property." (*Id.*)

The District Court likewise rejected Legal's claim of entitlement to Civil Authority coverage. (Order at 12-14.) It explained that there exists a clear line between government orders that actually *prohibit* access to insured properties and those that merely *limit* access. *Id* at 12. Noting that "Legal fails to identify any

specific Order that expressly and completely prohibited access" to any of its restaurants, the District Court ruled that Legal "cannot establish a necessary prerequisite of coverage under the civil authority provision of the Policy." *Id*. at 13.

Legal has appealed the Order, in part, and filed its Appellant's Brief with this Court concurrently with its Motion to Certify. Notably, Legal does not challenge the District Court's Order insofar as it dismisses Legal's claim under the Policy's Civil Authority coverage. That claim, therefore, has been waived. *See U.S. v. Mayendía-Blanco*, 905 F.3d 26, 32 (1st Cir. 2018) ("Relevant here, it is a well-settled principle that arguments not raised by a party in its opening brief are waived."). The sole issue Legal raises on appeal is whether the allegations in the SAC concerning the presence of Coronavirus at its restaurants plausibly alleged "direct physical loss of or damage to property" at those locations for purposes of the Policy's Business Income and Extra Expense coverages.

III. LEGAL STANDARD

The decision to allow certification is discretionary. *Ropes & Gray LLP v. Jalbert (In re Engage, Inc.)*, 544 F.3d 50, 53 (1st Cir. 2008). Not only does this Court carefully examine the conditions set forth in Rule 1.03, it weighs the judicial inefficiencies inherent in certification against the need for a ruling from the SJC. "That a legal issue is close or difficult is not normally enough to warrant

certification, or else diversity cases would regularly require appellate proceedings in two courts." *Boston Gas Co. v. Century Indem Co*., 529 F.3d 8, 15 (1st Cir. 2008).

IV. ARGUMENT

There are three prerequisites to Rule 1.03 certification: (1) the existence of a discrete question of law; (2) which is determinative of the dispute; and (3) for which there is no controlling Massachusetts precedent. None of these prerequisites is satisfied here.

A. Legal Has Not Presented a Discrete Question of Law

The first requirement is that the question proposed for certification must be one of law, not fact. *See* Rule 1.03 (empowering the SJC to "answer certain questions of law"). For example, this Court determined that the question of whether a wrongful death claim was required to be arbitrated "turn[ed] on how state law characterizes wrongful death actions," specifically the Massachusetts wrongful death statute, Mass Gen. Laws c. 229, §2, and therefore, warranted certification. *GGNSC Admin. Servs., LLC v. Schrader*, 917 F.3d 20, 21 (1st Cir. 2019); *see also Steinmetz v. Coyle & Caron, Inc.*, 862 F.3d 128, 131-32 (1st Cir. 2017) (approving certification of a question concerning the viability of a plaintiff's defamation claim in light of Massachusetts' anti-SLAPP statute, Mass. Gen. Laws ch 231, § 59H, which the SJC had earlier reserved for future consideration);

Showtime Entm't, LLC v. Town of Medon, 769 F.3d 61, 82 (2014) (certifying "issues of state constitutional law" concerning the intersection of the right to free speech/expression and local ordinances directed at adult establishments); *Easthampton Sav. Bank v. City of Springfield*, 736 F.3d 46, 53 (1st Cir. 2013) (certifying question of whether municipal ordinances were preempted by state laws and regulations); *In re Engage*, 544 F.3d at 57-58 (certifying whether Massachusetts attorney lien statute applied to patent proceedings). Each of these cases presented a discrete question of state law for the SJC's consideration.

Here, however, Legal seeks to do more, as evidenced by its proposed question:

> Under Massachusetts law, does the phrase "direct physical loss of or damage to" insured property unambiguously require an impact to the structural integrity of insured property, so as to preclude coverage for loss or damage from COVID-19 and SARS-CoV-2 as alleged in the Second Amended Complaint?

(Mot. at 4.)

First, Legal cites to no Massachusetts law that needs to be examined, unlike the authorities cited above. Second, there is no reference to a specific holding by the District Court that Legal believes is legally incorrect or unsupported by Massachusetts law. Finally, in its phrasing of its proposed issue, Legal strategically ties the question to the allegations of its SAC in this action, as evidenced by the final phrase "as alleged in the Second Amended Complaint." *Id.* This stands in

marked contrast to the questions certified in such cases as *Steinmetz* (which asked whether all third-party consultants in administrative proceedings were shielded by the anti-SLAPP law) and *Showtime* (which sought a determination whether local ordinances could "abridge expressive [adult] activity" without running afoul of the Massachusetts Constitution). Even *Boston Gas*, which involved an issue of insurance law rather than interpretation of a state statute, presented a discrete question regarding how liability would be allocated amongst multiple insurers where there was a "long tail" claim for environmental cleanup liability. 529 F.3d at 12-13.

What Legal seeks is not a ruling on a discrete question of law, but simply another opportunity to argue that the factual allegations concerning its economic losses were sufficient to trigger coverage under the Policy. Legal's proposed question is not suitable for certification and should be rejected on that basis. Legal has not presented a genuine request for advice from the SJC on an important legal issue; it is merely forum shopping.

B. Legal's Proposed Question Is Not Outcome Determinative

Legal also fails to establish the second requirement for certification: that its proposed legal question is "outcome determinative." *See* Rule 1.03. Legal focuses only on the question of whether its SAC adequately alleges any "direct physical loss of or damage to property," but utterly ignores a second and equally crucial

requirement of Business Income and Extra Expense coverage—a necessary "suspension" of Legal's "operations" caused by such direct physical loss or direct physical damage. Because this Court can affirm based on Legal's failure to plead facts supporting the "suspension of operations" requirement, the question Legal presents for certification is, by definition, not outcome determinative.

As explained above, the District Court agreed with Strathmore that the SAC does not plausibly allege that Legal's business activities ceased or slowed down due to the alleged presence of Coronavirus at any of its restaurants—a condition it supposedly "became aware of" in September 2020 when it decided to seek leave to amend the FAC. The SAC reiterates that Legal closed its restaurants in response to government orders that temporarily banned on-premises dining and limited it to carry-out and delivery service, which it opted not to offer. (JA0272, ¶¶ 76-77.)

Thus, even if Legal had plausibly alleged "direct physical loss of or damage to property" at its restaurants due to the alleged presence of Coronavirus (it did not), it would not be entitled to coverage under the Policy's Business Income and Extra Expense provisions because the SAC does not allege any *facts* suggesting that the presence of the virus caused a necessary suspension of its business activities at any insured location. Because this Court can affirm the District Court's dismissal of this action based on Legal's failure to plead facts supporting the "suspension of operations" requirement, the proposed issue Legal has presented for

certification is not outcome determinative.

C. Well-Established Massachusetts Law Supports the District Court's Order

The final requirement for certification may be stated as follows: Is the legal question at issue one which has neither been decided in Massachusetts nor is it "reasonably clear" what a Massachusetts court would do? *See* Rule 1.03; *see also*, *e.g.*, *Easthampton*, 736 F.3d at 51 ("We have interpreted the SJC's requirement that there be no 'controlling precedent' to prevent certification in cases when 'the course [the] state court[ ] would take is reasonably clear.'" (quoting *In re Engage*, 544 F.3d at 53)); *Showtime*, 769 F.3d at 79 (federal court is sometimes tasked with making an "informed prophecy" of what forum state's law requires). This Court has interpreted the third prong to mean that it would be difficult (or inappropriate) for a federal court to predict the direction the SJC might take on a given issue. However, "even in the absence of controlling precedent, certification would be inappropriate where state law is sufficiently clear to allow us to predict its course." *In re Engage, Inc.*, 544 F.3d at 53.

1. Massachusetts Law on Insurance Contract Interpretation and on the Meaning of "Direct Physical Loss of or Damage to Property" Is Reasonably Clear

Certification under Rule 1.03 is inappropriate because the District Court's dismissal of the SAC pursuant to Federal Rule of Civil Procedure 12(b)(6) was

consistent with well-established Massachusetts law, including the principles governing the interpretation of insurance contracts.

In Massachusetts, "[t]he interpretation of an insurance contract is a question of law." *Boston Gas*, 454 Mass. at 355–56. Massachusetts law construes insurance policies under the general rules of contract interpretation. *See Brazas Sporting Arms, Inc. v. Am. Empire Surplus Lines Ins. Co.*, 220 F.3d 1, 4 (1st Cir. 2000). When the words of a policy are clear, a court should construe them "in their usual and ordinary sense." *Hakim v. Massachusetts Insurers' Insolvency Fund*, 424 Mass. 275 (1997). Further, a court must "read the policy as written and '[is] not free to revise it or change the order of the words.'" *Id.* at 281. "Every word in an insurance contract 'must be presumed to have been employed with a purpose and must be given meaning and effect whenever practicable,'" *Allmerica Fin. Corp. v. Certain Underwriters at Lloyd's, London*, 449 Mass. 621, 628 (2007), "without according undue emphasis to any particular part over another." *Mission Ins. Co. v. United States Fire Ins. Co.*, 401 Mass. 492, 497 (1988). Finally, Massachusetts courts acknowledge that in an insurance dispute, the insured has the initial burden to establish coverage. *Demers Bros. Trucking v. Certain Underwriters at Lloyd's, London, Subscribing to Certificate No. SRS IM MA 04-124*, 600 F. Supp. 2d 265, 272 (D. Mass. 2009). Only if the insured meets its burden does the burden shift to the insurer to show that an exclusion applies. *Id*.

The District Court properly relied on these well-established principles of Massachusetts law in its Order. It also properly relied on Massachusetts precedent interpreting the meaning of "direct physical loss of or damage to property"—a requirement that is fundamental to and has been commonly used in commercial property insurance policies for decades. (Order at 7-8 (citing *Harvard St. Neighborhood Health Ctr., Inc. v. Hartford Fire Ins. Co.*, 2015 WL 13234578, at *8 (D. Mass. Sept. 22, 2015); *Crestview Country Club, Inc. v. St. Paul Guardian Ins. Co.*, 321 F. Supp. 2d 260, 264 (D. Mass. 2004).)

Significantly, the District Court's Order is consistent with the decisions reached by every other Massachusetts court to address the availability of coverage under a property insurance policy for economic losses attributed to the COVID-19 pandemic. *See supra* note 2. These decisions are likewise consistent with the overwhelming majority of decisions nationwide dismissing similar claims for business losses caused by government public health orders on the grounds that the insureds failed to allege "direct physical loss of or damage to property."[3] Thus, this

[3] *See, e.g., Food for Thought Corp. v. Sentinel Ins. Co., Ltd.*, No. 1:20-cv-03418-JGK, 2021 WL 860345 (S.D.N.Y. Mar. 6, 2021) (concluding that "contamination of the premises by a virus does not constitute a 'direct physical loss' because the virus's presence can be eliminated by routine cleaning and disinfecting, and an item or structure that merely needs to be cleaned has not suffered a direct physical loss." (internal quotations omitted)); *Promotional Headwear Int'l v. Cincinnati Ins. Co.*, 2020 WL 7078735, at *6 (D. Kan. Dec. 3, 2020) ("[T]he overwhelming majority of cases to consider business income claims stemming from COVID-19 with similar policy language hold that 'direct physical loss or damage' to property

case is dramatically different from those situations where this Court held certification was advisable in light of significant differences of opinion on the issue, either locally or nationally. *See Schrader*, 917 F.3d at 25 (noting "profound conflict across the nation"); *Showtime*, 769 F.3d at 81-82 (precedents fell at poles of spectrum "with most cases falling somewhere in between"); *Boston Gas Co.*, 529 F.3d at 13 (acknowledging no "clear consensus among the states" as to correct methodology).

Recently, in *Wade K. Marler, DDS v. Aspen American Ins. Co.*, 2021 WL 1599193 (W.D. Wash. Apr. 23, 2021), the federal district court considered and rejected a request for certification to the Washington State Supreme Court made by plaintiffs who had sued their insurers for coverage for economic losses sustained due to the COVID-19 pandemic. 2021 WL 1599193, at *2. The plaintiffs sought certification on two questions, one addressing the meaning of "direct physical loss of" property and the other on the doctrine of efficient proximate causation. *Id*. Like Legal here, the plaintiffs argued that the highest court in the forum state had not addressed these questions, and that their importance to pending litigation compelled certification. *Id*. But the district court disagreed, emphasizing that federal courts "regularly decide issues of state law without certifying questions to

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requires some showing of actual or tangible harm to or intrusion on the property itself.").

the state's highest court" and "such issues frequently include interpreting insurance contracts . . . ." *Id.*, at *3. Thus, the court ruled that "the proposed questions, while new, substantial, and not yet addressed by the Washington Supreme Court, do not present such unique and exceptional issues as to warrant certification," especially considering the "additional delay and cost that would be incurred." *Id.*, at *5.

These principles apply with equal force here. Because the District Court's decision dismissing this case was grounded in well-established principles of Massachusetts law, and whereas this Court is well suited to, and does frequently, apply those same state law principles to adjudicate disputes involving insurance coverage, there is no cause to certify the proposed question to the SJC.

2. There Are No Overriding Policy Concerns or Issues of Federalism Presented Which Need to Be Balanced by the SJC

A rash prediction by a federal court of what a host state's law is (or, worse, should be) might be perceived as an intrusion by the federal government into matters reserved exclusively to the states. Thus, this Court has expressed its concern that principles of federalism caution against it from wading into issues particular to state proceedings, statutes, or local ordinances. *See Easthampton*, 736 F.3d at 53; *Showtime*, 769 F.3d at 81-82; *see also Pearson v. Hodgson*, 2021 WL 1210358 *3 (D. Mass. Mar. 31, 3021) (question involved sheriff's collection of revenue from inmate calling services).

Similarly, where the pertinent legal issue concerns policy decisions, this Court has held that it should defer to the SJC. *See Schrader*, 917 F.3d at 25 (question certified presented an unresolved and unclear issue of Massachusetts law implicating policy judgments); *In re Engage*, 544 F.3d at 57 (question certified where policy arguments did not "line up solely behind one solution"); *Boston Gas. Co.*, 529 F.3d at 14 (same).

Neither circumstance is present in this case; interpretation of the subject policy language does not implicate any peculiar state interest, invokes no identifiable state law or regulation, and is unburdened by policy arguments. It is a relatively straightforward application of basic contract principles and, as articulated above, is sufficiently like other already-decided cases that the District Court was perfectly comfortable with undertaking its resolution, confident that it would reach the same conclusion as a Massachusetts state court judge. Indeed, it did. *See Verveine, supra* note 2, 2020 WL 8766370 (Mass. Super. Dec. 21, 2020) (observing that "[t]he phrase 'direct physical loss of or damage to property' in a property insurance policy like this one cannot therefore be construed to cover physical loss in the absence of some physical damage to the insured's property.") (citing *HRG Dev. Corp. v. Graphic Arts. Mut. Ins. Co.*, 26 Mass. App. Ct. 374, 377, 527 N.E.2d 1179 (1998)).

D. Legal Did Not Seek Certification in the District Court

This Court has recognized "that failure to request certification in the district court 'considerably weakens' the case for certification on appeal." *See Boston Car Co. v. Acura Auto. Div.*, 971 F.2d 811, 817 n.3 (1st Cir. 1992) (citing *Fischer Bar Harbor Banking and Trust Co.*, 857 F.2d 4, 8 (1st Cir. 1988)). The reason, of course, is that otherwise, the initial federal court decision is "nothing but a gamble with certification sought only after an adverse decision." *Id.* (quoting *Perkins v. Clark Equipment Co.*, 823 F.2d 207, 210 (8th Cir. 1987); *see also Tidemark Bank for Sav., F.S.B. v. Morris*, 57 F.3d 1061, at *1, n. 5 (1st Cir. 1995) ("Tidemark's failure to seek certification in the district court 'considerably weakens' its argument for certification.").

Here, Legal Sea Foods did not seek certification to the SJC on the meaning of "direct physical loss of or damage to property" while in the District Court. Instead, it argued vociferously that Massachusetts law and the precedent of this Court afforded that phrase a certain meaning. (*See, e.g.*, JA0088-89.) The fact that Legal now raises certification for the first time on appeal and only after an adverse judgment weighs considerably against certification.

V. CONCLUSION

In sum, this case is unlike those unique cases where this Court has found it both necessary and advisable to certify a question of law to the SJC. Legal has

simply not shown that there is a dominant, discrete, unsettled, Massachusetts-centric legal question which needs to be sent to the SJC. Accordingly, Strathmore respectfully requests the Court to deny the Motion to Certify.

Respectfully submitted,

DEFENDANT-APPELLEE
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By its attorneys,

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Dated: May 13, 2021

CERTIFICATE OF COMPLIANCE

I hereby certify that this Opposition complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because:

1. This Opposition contains 4,311 words, excluding the parts of the Opposition exempted by Fed. R. App. P. 32(f); and

2. This Opposition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point font proportionally spaced using Times New Roman font.

/s/ Jonathan E. Small
Jonathan E. Small

CERTIFICATE OF SERVICE FOR ELECTRONIC FILINGS

I hereby certify that on May 13, 2021, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

/s/ Jonathan E. Small
Jonathan E. Small