IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:21-CV-308-D

KENNEY PROPERTIES, INC., KENNEY HOLDINGS, LLC, KENNEY REALTY SERVICES, LLC, and GRESHAM PARK, LLC, Plaintiffs, v. PHILADELPHIA INDEMNITY INSURANCE COMPANY, Defendant.	)	**ORDER**

On July 27, 2021, Kenney Properties, Inc., Kenney Holdings, LLC, Kenney Realty Services, LLC, and Gresham Park, LLC doing business as Autumn Pointe Apartments (collectively "Kenney" or "plaintiffs") filed a complaint against Philadelphia Indemnity Insurance Company ("Philadelphia" or "defendant") alleging breach of contract for Philadelphia's failure to defend and indemnify Kenney in an underlying state court action, and alleging violations of North Carolina's Unfair and Deceptive Trade Practices Act ("UDTPA"), N.C. Gen. Stat. §§ 75-1, et seq. [D.E. 1]. On September 7, 2021, Philadelphia answered Kenney's complaint and filed a counterclaim seeking a declaratory judgment that it was not required to defend or indemnify Kenney [D.E. 12]. On September 28, 2021, Kenney answered Philadelphia's counterclaim [D.E. 14]. On November 11, 2021, Philadelphia moved for judgment on the pleadings [D.E. 17] and filed a memorandum in support [D.E. 18]. On December 17, 2021, Kenney responded in opposition [D.E. 22]. On December 31, 2021, Philadelphia replied [D.E. 23]. As explained below, the court grants Philadelphia's motion for judgment on the pleadings and dismisses Kenney's complaint.

I.

Kenney Properties is a North Carolina corporation with its principal place of business in Raleigh, North Carolina. See Compl. [D.E. 1] ¶ 4; Answer [D.E. 12] ¶ 4. Kenney Holdings, Kenney Realty, and Gresham Park are North Carolina limited liability companies with member/managers and principal places of business in Raleigh, North Carolina. See Compl. ¶¶ 5–7; Answer ¶¶ 5–7. Philadelphia Indemnity Insurance Company is a Pennsylvania insurance company with its principal place of business in Pennsylvania. See Compl. ¶ 8; Answer ¶ 8. The Kenney entities offer apartments for rent in North Carolina. See Compl. ¶ 17. During the relevant period, Philadelphia insured Kenney Properties under a commercial lines policy. See Compl. ¶¶ 12–16; Answer ¶¶ 12–16; 2016–2017 Policy [D.E. 12-1]; 2017–2018 Policy [D.E. 12-2]; Mem. Supp. Mot. [D.E. 18] 7; Resp. [D.E. 22] 7–8, 7 n.3.

The North Carolina Residential Rental Agreements Act ("RRAA"), N.C. Gen. Stat. §§ 42-38, et seq., governs the rights, obligations, and remedies of parties to a North Carolina residential rental agreement. The RRAA specifies what fees, costs, and expenses a landlord can charge if a tenant fails to timely pay the agreed-upon rent. See N.C. Gen. Stat. § 42-46. Before 2018, the statute explicitly allowed landlords to charge a "Late Fee" and one of the following: "Complaint-Filing Fee," "Court-Appearance Fee," or "Second Trial Fee." Id. § 42-46(a), (e), (f), (g), (h)(1). In 2018, after a court decision holding that charging other eviction fees violated North Carolina law, the North Carolina General Assembly amended the RRAA to allow landlords to charge additional "out-of-pocket expenses," including filing fees charged by the court, costs for service of process, and reasonable attorneys' fees. See N.C. Gen. Stat. § 42-46(i); Brogden Compl. [D.E. 1-1] 5 n.1. Because the RRAA did not specifically delineate these expenses before the 2018 amendment, some litigants argued that the RRAA did not authorize these "out-of-pocket expenses" before the effective

date of the 2018 amendment. These litigants filed numerous lawsuits seeking reimbursement of such expenses that tenants paid before the 2018 amendment took effect. See, e.g., Hampton v. KPM LLC, 423 F. Supp. 3d 172 (E.D.N.C. 2019).

The action underlying this coverage dispute is one such suit. On September 4, 2018, Alisa Brogden filed the underlying state court action (the "Brogden Action") in Wake County Superior Court. See Mem. Supp. Mot. at 5–6; Resp. at 2; Brogden Compl. [D.E. 1-1]. On June 19, 2020, the United States Court of Appeals for the Fourth Circuit addressed the pre-2018 scope of the RRAA in Suarez v. Camden Property Trust, 818 F. App'x 204 (4th Cir. 2020) (unpublished). On October 8, 2020, after the Fourth Circuit's Suarez decision, Kenney settled the Brogden Action. See Resp. at 6 n.2. In the settlement, Kenney agreed to pay $500,000 into a settlement fund to be disbursed to two classes. See Order Appr. Settl. [D.E. 1-2] ¶¶ 15–16. On January 14, 2021, the Wake County Superior Court approved the settlement. See Resp. at 6 n.2; Order Appr. Settl. at 13.

II.

The parties agree that Philadelphia insured Kenney[1] under a commercial lines policy that governed Philadelphia's duties to Kenney regarding the Brogden Action.[2] The parties agree that Coverage A of the policy does not apply. See [D.E. 14]; Mem. Supp. Mot. at 3. And regardless of

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[1] Kenney and Philadelphia dispute whether all of the plaintiffs in this action are insureds under the policy. See, e.g., Mem. Supp. Mot. at 2–3 n.1. For the purposes of this motion, however, "Philadelphia is willing to agree (without waiving its arguments to the contrary) that the [plaintiffs] qualified as 'insureds' under its policies." Id.

[2] Kenney contends there is a dispute about the contents of the policy that was in place during the relevant period because Kenney claims that the policy was amended effective December 15, 2016. See Resp. at 7 n.3. However, the parties agree the definition of "personal and advertising injury" in Coverage B, as modified by the "General Liability Deluxe Endorsement Schools" provision, is the relevant policy language. See Mem. Supp. Mot. at 10–12; Resp. at 8–10. The relevant provisions in the 2016–2017 and the 2017–2018 policies are identical. Compare [D.E.12-1] 88, 112, with [D.E. 12-2] 90, 124.

immaterial disputes about which version of the policy applies, the parties cite the same policy language for Coverage B and the applicable endorsement. See Mem. Supp. Mot. at 10–12; Resp. at 9–10.

Under Coverage B, Philadelphia "will pay those sums that the insured becomes legally obligated to pay as damages because of 'personal and advertising injury' to which this insurance applies." Policy [D.E. 12-1] 79. Philadelphia "will have the right and duty to defend the insured against any 'suit' seeking those damages. However, [Philadelphia] will have no duty to defend the insured against any 'suit' seeking damages for 'personal and advertising injury' to which this insurance does not apply." Id. The policy defines "personal and advertising injury" as "injury, including consequential 'bodily injury', arising out of one or more of the following offenses:

> **a.** False arrest, detention or imprisonment;
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> **b.** Malicious prosecution;
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> **c.** The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
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> **d.** Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
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> **e.** Oral or written publication, in any manner, of material that violates a person's right of privacy;
>
> **f.** The use of another's advertising idea in your 'advertisement'; or
>
> **g.** Infringing upon another's copyright, trade dress or slogan in your 'advertisement'.

Id. at 88. The General Liability Deluxe Endorsement Schools provision modifies the definition of "personal and advertising injury" by, inter alia, changing paragraph 14b. to read: "Malicious prosecution or abuse of process." Id. at 112.

III.

Federal Rule of Civil Procedure 12(c) permits a party to move for judgment on the pleadings "[a]fter the pleadings are closed—but early enough not to delay trial." The court may consider the pleadings along with any materials referenced in or attached to the pleadings that are incorporated by reference. See Fed. R. Civ. P. 10(c). A court also may consider "matters of which a court may take judicial notice." Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007); see, e.g., Thompson v. Greene, 427 F.3d 263, 268 (4th Cir. 2005); Fayetteville Invs. v. Com. Builders, Inc., 936 F.2d 1462, 1465 (4th Cir. 1991).

The same standard applies under Rule 12(b)(6) and Rule 12(c); therefore, a Rule 12(c) motion tests whether the complaint is legally and factually sufficient. See, e.g., Drager v. PLIVA USA, Inc., 741 F.3d 470, 474 (4th Cir. 2014); Edwards v. City of Goldsboro, 178 F.3d 231, 243 (4th Cir. 1999). Accordingly, "judgment on the pleadings requires a court to accept all well-pleaded allegations as true and draw all reasonable factual inferences from those facts in the non-moving party's favor." United States v. Cox, 743 F. App'x 509, 511 (4th Cir. 2018) (per curiam) (unpublished) (cleaned up); Drager, 741 F.3d at 474; Edwards, 178 F.3d at 244. A court need not, however, accept a pleading's legal conclusions drawn from the facts. See Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009); Giarratano v. Johnson, 521 F.3d 298, 302 (4th Cir. 2008). Similarly, a court "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." Giarratano, 521 F.3d at 302 (quotation omitted). Judgment on the pleadings is appropriate when the well-pleaded factual allegations in the complaint and the uncontroverted allegations in the answer, along with any documents attached to the pleadings, show that the case can be decided as a matter of law. See Massey v. Ojaniit, 759 F.3d 343, 353 (4th Cir. 2014); Drager, 741 F.3d at 474;

Firemen's Ins. Co. v. Glen-Tree Invs., LLC, No. 7:11-CV-59-D, 2012 WL 4191383, at *4 (E.D.N.C. Sept. 19, 2012) (unpublished).

The court has diversity jurisdiction, and North Carolina law governs plaintiffs' claims. See Mem. Supp. Mot. at 8; Resp. at 17. Thus, this court must determine how the Supreme Court of North Carolina would rule. See Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C., 433 F.3d 365, 369 (4th Cir. 2005). In doing so, the court must look first to opinions of the Supreme Court of North Carolina. See id.; Parkway 1046, LLC v. U.S. Home Corp., 961 F.3d 301, 306 (4th Cir. 2020); Stahle v. CTS Corp., 817 F.3d 96, 100 (4th Cir. 2016). If there are no governing opinions from the Supreme Court of North Carolina, this court may consider the opinions of the North Carolina Court of Appeals, treatises, and "the practices of other states." Twin City Fire Ins. Co., 433 F.3d at 369 (quotation omitted).[3] In predicting how the highest court of a state would address an issue, this court "must follow the decision of an intermediate state appellate court unless there is persuasive data that the highest court would decide differently." Toloczko, 728 F.3d at 398 (quotation omitted); see Hicks v. Feiock, 485 U.S. 624, 630 & n.3 (1988). Moreover, in predicting how the highest court of a state would address an issue, this court "should not create or expand a [s]tate's public policy." Time Warner Ent.-Advance/Newhouse P'ship v. Carteret-Craven Elec. Membership Corp., 506 F.3d 304, 314 (4th Cir. 2007) (alteration and quotation omitted); see Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3, 4 (1975) (per curiam); Wade v. Danek Med., Inc., 182 F.3d 281, 286 (4th Cir. 1999).

IV.

Philadelphia argues that it need not defend or indemnify Kenney because the Brogden

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[3] North Carolina has no mechanism for certifying questions of state law to the Supreme Court of North Carolina. See Town of Nags Head v. Toloczko, 728 F.3d 391, 398 (4th Cir. 2013).

Complaint does not state a claim within Kenney's coverage. See Mem. Supp. Mot. at 8–19; Reply [D.E. 23] 3–9. Kenney responds that even though the Brogden Complaint did not contain an abuse of process claim, Philadelphia had to defend Kenney because the Brogden Complaint alleged facts consistent with an abuse of process claim. See Resp. at 3–11, 18–22.

"The duty of an insurer to defend its insured is based upon the coverage contracted for in the insurance policy." Mastrom Inc. v. Cont'l Cas. Co., 78 N.C. App. 483, 484, 337 S.E.2d 162, 163 (1985); see Owners Ins. Co. v. MM Shivah LLC, No. 5:20-CV-21-D, 2022 WL 668382, at *2–4 (E.D.N.C. Mar. 4, 2022) (unpublished); Peerless Ins. Co. v. Strother, 765 F. Supp. 866, 869 (E.D.N.C. 1990). North Carolina law employs the "comparison test," comparing the insurance policy with the allegations in the complaint "to determine whether the events as alleged are covered or excluded." Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co., 315 N.C. 688, 693, 340 S.E.2d 374, 378 (1986). "[E]ven a meritorious allegation cannot obligate an insurer to defend if the alleged injury is not within, or is excluded from, the coverage provided by the insurance policy." Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C., 364 N.C. 1, 7, 692 S.E.2d 605, 611 (2010); see Hartford Cas. Ins. Co. v. Greve, No. 3:17CV183-GCM, 2017 WL 5557669, at *3 (W.D.N.C. Nov. 17, 2017) (unpublished), aff'd sub nom. Hartford Cas. Ins. Co. v. Ted A. Greve & Assocs., PA, 742 F. App'x 738 (4th Cir. 2018) (per curiam) (unpublished).

"When the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend, whether or not the insured is ultimately liable." Waste Mgmt. of Carolinas, Inc., 315 N.C. at 691, 340 S.E.2d at 377; see Fieldcrest Cannon, Inc. v. Fireman's Fund Ins. Co., 124 N.C. App. 232, 242, 477 S.E.2d 59, 66 (1996) ("An insurer's duty to defend arises when the claim against the insured sets forth facts representing a risk covered by the terms of the policy. The duty to defend is much broader than the duty to indemnify, and may attach even in an

action in which no damages are ultimately awarded." (citations omitted)), on reh'g in part, 127 N.C. App. 729, 493 S.E.2d 658 (1997); Peerless Ins. Co., 765 F. Supp. at 869. In determining whether there is a duty to defend, a court focuses on the facts pled and not on how the litigants characterize the claims. See Holz-Her U.S., Inc. v. U.S. Fid. & Guar. Co., 141 N.C. App. 127, 128, 539 S.E.2d 348, 350 (2000); see also State Auto Prop. & Cas. Ins. Co. v. Travelers Indem. Co. of Am., 343 F.3d 249, 255 (4th Cir. 2003). However, "[i]n addressing the duty to defend, the question is not whether some interpretation of the facts as alleged could possibly bring the injury within the coverage provided by the insurance policy; the question is, assuming the facts as alleged to be true, whether the insurance policy covers that injury." Harleysville Mut. Ins. Co., 364 N.C. at 7, 692 S.E.2d at 611; see Plum Props., LLC v. N.C. Farm Bureau Mut. Ins. Co., 254 N.C. App. 741, 745, 802 S.E.2d 173, 176 (2017). "Of course, allegations of facts that describe a hybrid of covered and excluded events or pleadings that disclose a mere possibility that the insured is liable (and that the potential liability is covered) suffice to impose a duty to defend upon the insure[r]." Waste Mgmt. of Carolinas, Inc., 315 N.C. at 691 n.2, 340 S.E.2d at 377 n.2. The insurer has a duty to defend unless the facts as alleged "are not even arguably covered by the policy." Id. at 692, 340 S.E.2d at 378.

While "[a]n insurer's duty to defend is ordinarily measured by the facts as alleged in the pleadings; its duty to pay is measured by the facts ultimately determined at trial." Harleysville Mut. Ins. Co., 364 N.C. at 6, 692 S.E.2d at 610. "Thus, the duty to defend is broader than the duty to indemnify in the sense that an unsubstantiated allegation requires an insurer to defend against it so long as the allegation is of a covered injury; however, even a meritorious allegation cannot obligate an insurer to defend if the alleged injury is not within, or is excluded from, the coverage provided by the insurance policy." Id. at 7, 364 S.E.2d at 610–11; Kubit v. MAG Mut. Ins. Co., 210 N.C.

App. 273, 279, 708 S.E.2d 138, 145 (2011). Because the duty to defend is broader than the duty to indemnify, if the duty to defend "fails, so too does the duty to indemnify." N.C. Farm Bureau Mut. Ins. Co. v. Phillips, 255 N.C. App. 758, 764, 805 S.E.2d 362, 366 (2017).

The insured bears the burden to prove coverage. See N.C. Farm Bureau Mut. Ins. Co. v. Sadler, 365 N.C. 178, 182, 711 S.E.2d 114, 116–17 (2011); Nationwide Mut. Ins. Co. v. McAbee, 268 N.C. 326, 328, 150 S.E.2d 496, 497 (1966); Metric Constructors, Inc. v. Indus. Risk Insurers, 102 N.C. App. 59, 61–62, 401 S.E.2d 126, 128, aff'd, 330 N.C. 439, 410 S.E.2d 392 (1991) (per curiam). Where the relevant facts are not disputed, construing the policy is an issue of law. See Parker v. State Cap. Life Ins. Co., 259 N.C. 115, 117, 130 S.E.2d 36, 38 (1963). "The interpretation of language used in an insurance policy is a question of law, governed by well-established rules of construction." Trophy Tracks, Inc. v. Mass. Bay Ins. Co., 195 N.C. App. 734, 739, 673 S.E.2d 787, 790 (2009) (quotation omitted); see Wachovia Bank & Tr. Co. v. Westchester Fire Ins. Co., 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970); N.C. Farm Bureau Mut. Ins. Co. v. Mizell, 138 N.C. App. 530, 532, 530 S.E.2d 93, 95 (2000). A court must construe an insurance contract as a reasonable person in the position of the insured would have understood it. See Register v. White, 358 N.C. 691, 695, 599 S.E.2d 549, 553 (2004); Marriott Fin. Servs., Inc. v. Capitol Funds, Inc., 288 N.C. 122, 143, 217 S.E.2d 551, 565 (1975); Trophy Tracks, Inc., 195 N.C. App. at 738, 673 S.E.2d at 790. Where a policy defines a term, that definition controls. See Gaston Cnty. Dyeing Mach. Co. v. Northfield Ins. Co., 351 N.C. 293, 299, 524 S.E.2d 558, 563 (2000); Woods v. Nationwide Mut. Ins. Co., 295 N.C. 500, 505–06, 246 S.E.2d 773, 777 (1978). Where a policy does not define a term, a court gives "nontechnical words . . . their meaning in ordinary speech, unless the context clearly indicates another meaning was intended." Woods, 295 N.C. at 506, 246 S.E.2d at 777; see Gaston Cnty. Dyeing Mach. Co., 351 N.C. at 299, 524 S.E.2d at 563; Brown v. Lumbermens Mut. Cas. Co., 326

N.C. 387, 392, 390 S.E.2d 150, 153 (1990); Grant v. Emmco Ins. Co., 295 N.C. 39, 42, 243 S.E.2d 894, 897 (1978).

The Brogden Complaint contains claims for statutory violations related to landlord-tenant regulations and debt collection and a UDTPA claim. See Brogden Compl. ¶¶ 74–118 (listing class action claims for alleged violations of the RRAA, the North Carolina Debt Collection Act, N.C. Gen. Stat. §§ 75-50, et seq., and the UDTPA). These claims do not fall within the policy's definition of "personal and advertising injury." See Policy [D.E. 12-1] 88, 112. Kenney, however, argues that the Brogden Complaint alleges facts in the "general background" section consistent with an abuse of process claim and thereby falls within the General Liability Deluxe Endorsement Schools provision, which adds abuse of process to the definition of "personal and advertising injury." See Resp. at 4–7. Philadelphia disagrees. See Mem. Supp. Mot. at 14–19; Reply at 3–9.

In support of Kenney's novel theory, Kenney focuses on language from several North Carolina appellate cases stating that the duty to defend is based on the facts alleged in the complaint, not the legal characterization of those facts. This court doubts Kenney's theory, however, because those cases involved disputes over whether an action was negligent or intentional. See, e.g., Kubit, 210 N.C. App. at 285, 708 S.E.2d at 149 ("The mere fact that the tort complaint 'recasts' the intentional acts into a claim for negligence does not trigger coverage or a duty to defend. Thus, no duty to defend arose from the claim of bodily injury, because the facts alleged in the Welsher complaint fall under the intentional injury exclusion."); Holz-Her, 141 N.C. App. at 128, 539 S.E.2d at 350; State Auto Ins. Cos. v. McClamroch, 129 N.C. App. 214, 220–21, 497 S.E.2d 439, 443 (1998); Eubanks v. State Farm Fire & Cas. Co., 126 N.C. App. 483, 488, 485 S.E.2d 870, 873 (1997). Nonetheless, the court will assume without deciding that it should focus on the alleged injuring event and not the precise claim pleaded. See Harleysville, 364 N.C. at 13–28, 692 S.E.2d

at 614–623 (examining what the complaint alleged as the cause of the injury where the same kind of claim could be covered if the false statements were not about the insured's own products and not covered if the false statements were about the insured's own products); Russ v. Great Am. Ins. Cos., 121 N.C. App. 185, 191, 464 S.E.2d 723, 727 (1995) (sexual harassment was not covered under the policy coverage for invasion of privacy where the plaintiffs in the underlying suit "only alleged and recovered for the torts of intentional infliction of emotional distress and battery, torts not enumerated in the personal injury provisions of the policies" and the plaintiffs "neither alleged nor recovered for the invasion of their privacy rights, an enumerated tort under the policies"); see also Wake Stone Corp. v. Aetna Cas. & Sur. Co., 995 F. Supp. 612, 615, 618–19 (E.D.N.C. 1998); Whiteville Oil Co. v. Federated Mut. Ins. Co., 889 F. Supp. 241, 246–47 (E.D.N.C. 1995), aff'd, 87 F.3d 1310, 1996 WL 327207 (4th Cir. 1996) (per curiam) (unpublished tabled decision). Thus, the court analyzes the injuries alleged in the Brogden Complaint to see whether the Brogden Complaint plausibly includes an abuse of process claim.

Under North Carolina law, "[i]n order to succeed on a claim for abuse of process, the plaintiff must establish that (1) a prior proceeding was initiated against the plaintiff by the defendant or used by him to achieve an ulterior motive or purpose; and (2) once the proceeding was initiated, the defendant committed some willful act not proper in the regular prosecution of the proceeding." Semones v. S. Bell Tel. & Tel. Co., 106 N.C. App. 334, 341, 416 S.E.2d 909, 913 (1992); see Stanback v. Stanback, 297 N.C. 181, 200, 254 S.E.2d 611, 624 (1979), disapproved of on other grounds by Dickens v. Puryear, 302 N.C. 437, 276 S.E.2d 325 (1981); Pinewood Homes, Inc. v. Harris, 184 N.C. App. 597, 602, 646 S.E.2d 826, 831 (2007). A plaintiff satisfies the ulterior motive requirement "when the plaintiff alleges that the prior action was initiated by the defendant or used by him to achieve a purpose not within the intended scope of the process used. The act requirement

is satisfied when the plaintiff alleges that during the course of the prior proceeding, the defendant committed some wilful act whereby he sought to use the proceeding as a vehicle to gain advantage of the plaintiff in respect to some collateral matter." Hewes v. Wolfe, 74 N.C. App. 610, 614, 330 S.E.2d 16, 19 (1985) (citations omitted); see Stanback, 297 N.C. at 200, 254 S.E.2d at 624. "[T]he gravamen of a cause of action for abuse of process is the improper use of the process after it has been issued." Chidnese v. Chidnese, 210 N.C. App. 299, 311, 708 S.E.2d 725, 735 (2011) (emphasis and alteration in original).

The Brogden Complaint does not explicitly contain an abuse of process claim. See Brogden Compl. ¶¶ 74–118. And no single claim includes allegations that would state a plausible abuse of process claim. Moreover, even the factual allegations Kenney cites from the "general background" section of the Brogden Complaint do not plausibly allege an abuse of process claim.[4]

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[4] Kenney relies on the following allegations in the Brogden Complaint:

> 28. Eviction Fees are fees set by the North Carolina Legislature for filing a complaint in summary ejectment and for service of process by a sheriff, and Defendants' attorneys' fees for filing an eviction.
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> 29. Upon information and belief, Defendants entered into a legal services agreement with a law firm that charges a flat fee per eviction. Upon information and belief, this legal services agreement limits the scope of the law firm's representation to only seeking possession of the apartment premises on behalf of Defendants and not any money owed. . . .
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> 53. At the time the Eviction Fees were placed on Plaintiff's ledger, no hearing had been held and no attorney had appeared in Court to evict Plaintiff and/or seek the award of Eviction Fees. Upon information and belief, the $96 filing fee and, upon information and belief, the $30 service fee, was paid by Defendants after Plaintiff was charged with the Eviction Fees.
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> 54. At the time the Eviction Fees were placed on Plaintiff's ledger, no hearing had been held and no attorney had appeared in Court to evict Plaintiff and/or seek the award of Eviction Fees.

The eviction action against Brogden is a prior proceeding. And the court assumes without

> 55. At the time the Eviction Fees were placed on Plaintiff's ledger, no attorney had been hired by Defendants to collect any debt.
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> 56. Upon information and belief, Defendants had not served any of the complaints in summary ejectment at the time the Eviction Fees were placed on the ledger.
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> 57. After the Eviction Fees were placed on the ledger, Defendants, upon information and belief, filed Complaints in Summary Ejectment in the Small Claims Division of Wake County General Court of Justice, alleging Plaintiff owed past due rent.
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> 58. Upon information and belief, in each of the Complaints in Summary Ejectment actions filed against Plaintiff, Defendants wrote that they "hereby omit[] any claim for rents or damages and is seeking possession of the premises only. [Defendants] reserve[] the right to seek any monetary damages in a separate civil action." See e.g., Exhibit 4 and 5.
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> 59. Plaintiff paid the Eviction Fees when they were not owed.
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> 60. In some instances, when Plaintiff paid the Eviction Fees to Defendants, Defendants filed a notice of voluntary dismissal without prejudice. By filing a notice of voluntary dismissal without prejudice, Defendants were not the prevailing party. See Exhibit 4. In other instances, Defendants obtained a judgment and the magistrate judge taxed costs against Defendants (identified in the ejectment proceeding as the "plaintiff"). See Exhibit 5. Even when Defendants had costs taxed against them, upon information and belief, they still required Plaintiff to pay Eviction Fees.
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> 61. When Plaintiff ended her lease with Defendants, she received a Move Out Statement that included a section on "Outstanding Charges." See Exhibit 6. According to Defendants, the outstanding charges included "Legal Fees," described as an "Eviction fee of $191 + 5% charge $45.75."
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> 62. Upon information and belief, no court awarded Defendants with Eviction Fees against Plaintiff in any summary ejectment case or thereafter.
>
> 63. At no point did Plaintiff enter into a settlement agreement with Defendants regarding the Eviction Fees during her tenancy with Defendants.

Brogden Compl. ¶¶ 28–29, 53–63 (emphasis omitted).

deciding that charging Brogden the eviction fees could constitute a "wilful act" to gain advantage over Brogden in the collateral matter of collecting the outstanding amount owed on Brodgen's lease. See Hewes, 74 N.C. App. at 614, 330 S.E.2d at 19. However, nothing in the Brogden Complaint suggests that Kenney instituted the eviction proceeding for an ulterior, improper purpose. Specifically, the Brogden Complaint does not allege that Kenney pursued the eviction action for any reason other than to obtain legal possession of the apartment. See Lyon v. May, 108 N.C. App. 633, 639–40, 424 S.E.2d 655, 659 (1993). In fact, the Brogden Complaint explicitly alleges that the eviction action was not an attempt to collect debt. See Brogden Compl. ¶¶ 55, 58. Therefore, even if synthesizing disparate factual allegations to allege a covered tort can trigger the duty to defend, the facts in the Brogden Complaint do not state a claim for abuse of process. Thus, under the comparison test, Philadelphia did not have a duty to defend Kenney in the Brogden Action. See Harleysville Mut. Ins. Co., 364 N.C. at 27–28, 692 S.E.2d at 622–23; see also Main St. Am. Assurance Co. v. Crumley Roberts, LLP, No. 1:19CV220, 2021 WL 1195804, at *3 (M.D.N.C. Mar. 30, 2021) (unpublished); Hartford Cas. Ins., 2017 WL 5557669, at *3–4.

The duty to defend is broader than the duty to indemnify. Accordingly, if the duty to defend "fails, so too does the duty to indemnify." Phillips, 255 N.C. App. at 764, 805 S.E.2d at 366. Because Philadelphia did not have a duty to defend Kenney in the Brogden Action, Philadelphia also did not have a duty to indemnify Kenney.

V.

Kenney alleges UDTPA violations based on (1) Philadelphia's "misrepresentation" of the policy definition of "personal and advertising injury" by omitting reference to the endorsement adding "abuse of process" as a covered enumerated offense; and (2) Philadelphia's failure to timely respond to correspondence from Kenney disputing the denial of coverage for the Brogden Action.

See Compl. ¶¶ 77–90; Resp. at 23–26. In support of its UDTPA claim, Kenney relies on the North Carolina Unfair Claim Settlement Practices statute, N.C. Gen. Stat. § 58-63-15(11), as defining unfair acts under the UDTPA. See Compl. ¶¶ 77–90; Resp. at 23–26. Philadelphia responds that Kenney's UDTPA claims are not distinct from its breach of contract claim related to the coverage dispute, that the crux of Kenney's UDTPA claims is an honest disagreement about coverage, and that Kenney does not state a UDTPA claim. See Mem. Supp. Mot. at 21–28; Reply at 9–11.

"In order to establish a prima facie claim for unfair trade practices, a plaintiff must show: (1) defendant committed an unfair or deceptive act or practice, (2) the action in question was in or affecting commerce, and (3) the act proximately caused injury to the plaintiff." SciGrip, Inc. v. Osae, 373 N.C. 409, 426, 838 S.E.2d 334, 347 (2020); see Dalton v. Camp, 353 N.C. 647, 656, 548 S.E.2d 704, 711 (2001); Griffith v. Glen Wood Co., 184 N.C. App. 206, 217, 646 S.E.2d 550, 558 (2007).

As for the first element, a plaintiff must show that the "defendant committed an unfair or deceptive act or practice." SciGrip, Inc., 373 N.C. at 426, 838 S.E.2d at 347. "A practice is unfair when it offends established public policy as well as when the practice is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. . . . [A] practice is deceptive if it has the capacity or tendency to deceive." Marshall v. Miller, 302 N.C. 539, 548, 276 S.E.2d 397, 403 (1981); see Walker v. Fleetwood Homes of N.C., Inc., 362 N.C. 63, 71–72, 653 S.E.2d 393, 399 (2007).

"Mere breach of contract is not sufficient to sustain" a UDTPA action unless "the breach is surrounded by substantial aggravating circumstances." Griffith, 184 N.C. App. at 217, 646 S.E.2d at 558; see SciGrip, Inc., 373 N.C. at 426, 838 S.E.2d at 348. The Supreme Court of North Carolina and the North Carolina Court of Appeals have emphasized the need to guard against permitting a

litigant to transform a breach of contract claim into a UDTPA claim. See, e.g., SciGrip, Inc., 373 N.C. at 426, 838 S.E.2d at 348; Birtha v. Stonemor, N.C., LLC, 220 N.C. App. 286, 298, 727 S.E.2d 1, 10 (2012); see also PCS Phosphate Co. v. Norfolk S. Corp., 559 F.3d 212, 224 (4th Cir. 2009); Martinez v. Nat'l Union Fire Ins. Co., 911 F. Supp. 2d 331, 339 (E.D.N.C. 2012). Moreover, "a fundamental disagreement about a contract is not a substantial aggravating circumstance." Martinez, 911 F. Supp. 2d at 339, see Griffith, 184 N.C. App. at 217, 646 S.E.2d at 558.

To differentiate its UDTPA claim from a breach of contract claim, Kenney claims that Philadelphia allegedly violated provisions in North Carolina's Unfair Claim Settlement Practices statute, N.C. Gen. Stat. § 58-63-15(11), and claims that those alleged acts are unfair or deceptive acts or practices. Violating a regulatory statute that "governs business activities" can constitute an unfair act or practice under the UDTPA because the regulated conduct offends North Carolina's public policy or is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. Walker, 362 N.C. at 70, 362 S.E.2d at 398. In the insurance context, committing the acts or practices proscribed by N.C. Gen. Stat. § 58-63-15(11) is unfair and deceptive as a matter of law. See Gray v. N.C. Ins. Underwriting Ass'n, 352 N.C. 61, 71, 529 S.E.2d 676, 683 (2000); Country Club of Johnston Cnty., Inc. v. U.S. Fid. & Guar. Co., 150 N.C. App. 231, 246, 563 S.E.2d 269, 279 (2002). As the Supreme Court of North Carolina has explained, N.C. Gen. Stat. § 58-63-15(11) "defined in detail unfair methods of settling claims and unfair and deceptive acts or practices in the insurance industry, thereby establishing the General Assembly's intent to equate a violation of that statute with the more general provision of § 75-1.1." Walker, 362 N.C. at 71, 653 S.E.2d at 399.

Once a plaintiff has plausibly alleged a violation of N.C. Gen. Stat. § 58-63-15(11), the Fourth Circuit has stated it is an open question whether the plaintiff has then satisfied its burden to plausibly allege a UDTPA claim or whether a plaintiff also must plausibly allege that the violation

of N.C. Gen. Stat. § 58-63-15(11) was in or affecting commerce and proximately caused the plaintiff's injuries. See DENC, LLC v. Philadelphia Indem. Ins. Co., 32 F.4th 38, 50 n.4 (4th Cir. 2022); Elliott v. Am. States Ins. Co., 883 F.3d 384, 396 n.7 (4th Cir. 2018). This court predicts that the Supreme Court of North Carolina would hold that a plaintiff need not independently allege that a section 58-63-15(11) violation was in or affecting commerce, but a plaintiff would have to plausibly allege that the section 58-63-15(11) violation proximately caused the plaintiff's injuries.

Resolving this question depends on the relationship between several statutory provisions. N.C. Gen. Stat. § 58-63-15(11) defines 14 categories of activities that are unfair and deceptive in settling insurance claims. The statute provides no private cause of action. See N.C. Gen. Stat. § 58-63-15(11). The conduct that section 58-63-15(11) proscribes animates the more general prohibition against unfair and deceptive practices in the insurance industry. That prohibition states that "[n]o person shall engage in this State in any trade practice which is defined in this Article as or determined pursuant to this Article to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance." N.C. Gen. Stat. § 58-63-10. This prohibition is similar to N.C. Gen. Stat. § 75-1.1(a), which provides: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C. Gen. Stat. § 75-1.1(a). Like N.C. Gen. Stat. § 58-63-15(11), section 75-1.1 itself does not provide a person, firm, or corporation with a private right of action. Rather, N.C. Gen. Stat. § 75-16 grants a person, firm, or corporation a private right of action for violations of section 75-1.1. Section 75-16 states in relevant part: "If any person shall be injured or the business of any person, firm, or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm, or corporation in violation of this Chapter, such person, firm, or corporation so injured shall have a right of action on account of such injury . . . ." N.C. Gen. Stat. § 75-16.

Under section 75-16, such injured private parties can seek redress for violations of section 75-1.1.

As discussed, North Carolina courts have held that violating N.C. Gen. Stat. § 58-63-15(11) also constitutes a violation, as a matter of law, of the broader standards in section 75-1.1. See Walker, 362 N.C. at 70, 362 S.E.2d at 398; Gray, 352 N.C. at 71, 529 S.E.2d at 683; Country Club, 150 N.C. App. at 246, 563 S.E.2d at 279. Section 75-1.1's plain language encompasses the "unfair or deceptive acts or practices" and the "in or affecting commerce" prongs of a UDTPA claim. See N.C. Gen. Stat. § 75-1.1; SciGrip, Inc., 373 N.C. at 426, 838 S.E.2d at 347 (stating the elements of a UDTPA claim). Accordingly, because conduct that violates section 58-63-15(11) also violates section 75-1.1, a plaintiff need not independently show that the conduct was in or affecting commerce. It suffices that the unfair or deceptive conduct violates section 58-63-15(11). After all, "[t]he business of insurance is unquestionably 'in commerce' insofar as an 'exchange of value' occurs when a consumer purchases an insurance policy; people who buy insurance are consumers whose welfare [the UDTPA] was intended to protect." Pearce v. Am. Def. Life Ins. Co., 316 N.C. 461, 469, 343 S.E.2d 174, 179 (1986); see Murray v. Nationwide Mut. Ins. Co., 123 N.C. App. 1, 10, 472 S.E.2d 358, 363 (1996) ("Our courts have repeatedly defined the insurance business as affecting commerce."); Miller v. Nationwide Mut. Ins. Co., 112 N.C. App. 295, 301–02, 435 S.E.2d 537, 542 (1993). To the extent a plaintiff must show that the section 58-63-15(11) violation was in or affecting commerce, the burden is minimal. For example, a defendant's "act of selling plaintiff a policy affects commerce." Murray, 123 N.C. App. at 12, 472 S.E.2d at 364. In short, plausibly alleging an insurance-specific unfair or deceptive act or practice under N.C. Gen. Stat. § 58-63-15(11) necessarily encompasses conduct in or affecting commerce. See id.[5]

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[5] The parties do not dispute that Philadelphia's actions were in or affecting commerce. See Resp. at 25 n.9.

Although plausibly alleging a violation of section 58-63-15(11) satisfies the first two elements of a UDTPA claim, it does not satisfy the proximate cause and injury element. See SciGrip, Inc., 373 N.C. at 426, 838 S.E.2d at 347 (stating that the third element of a UDTPA claim is that "the act proximately caused injury to the plaintiff"). As discussed, section 75-1.1 alone does not give private parties a cause of action to seek redress for unfair and deceptive trade practices. Instead, section 75-16, a separate statutory provision, provides the cause of action. And section 75-16 contains its own prerequisite—i.e., the proximate cause and injury element of a UDTPA claim. Section 75-16 authorizes a plaintiff to seek redress when that plaintiff has been "injured by reason of any act or thing done by any other person, firm, or corporation in violation of the provision of this Chapter." N.C. Gen. Stat. § 75-16. Section 75-16 goes further though, expressly specifying that the plaintiff "shall have a right of action on account of such injury done." Id. (emphasis added). Decisions such as Walker, Gray, and Country Club confirm that violating "N.C.G.S. § 58-63-15(11) constitutes a violation of N.C.G.S. § 75-1.1, as a matter of law." Gray, 352 N.C. at 71, 529 S.E.2d at 683. But the strong parallels between sections 58-63-10 and 75-1.1 that underpin those decisions do not override the separate statutory requirement for a party to state a section 75-16 private cause of action—i.e., that the plaintiff suffered injury as a result of an unfair or deceptive act or practice. See N.C. Gen. Stat. § 75-16. Thus, to state a UDTPA claim, a plaintiff must allege a violation of section 75-1.1 (i.e., an unfair or deceptive act or practice in or affecting commerce) and the requisite injury proximately caused by the section 75-1.1 violation to state a claim under section 75-16. See, e.g., Ellis v. Smith-Broadhurst, Inc., 48 N.C. App. 180, 184, 268 S.E.2d 271, 273–74 (1980). Demonstrating a violation of a regulatory statute such as section 58-63-15(11) accomplishes the former but not the latter. Accordingly, a plaintiff must plausibly allege that the regulatory violation

proximately caused the plaintiff's injuries to state a UDTPA claim. See, e.g., Pearce, 316 N.C. at 463–68, 343 S.E.2d at 176–79.

In Pearce v. American Defender Life Insurance Company, the plaintiff sued the defendant insurance company for claims arising from a life insurance contract and alleged, inter alia, a UDTPA claim based on the defendant insurance company's alleged violation of a regulatory statute (i.e., N.C. Gen. Stat. § 58-54.4) that prohibited misrepresenting the terms of an insurance policy. See Pearce, 316 N.C. at 463–68, 343 S.E.2d at 176–79. The Supreme Court of North Carolina held that violating section 58-54.4 "as a matter of law constitutes an unfair or deceptive trade practice in violation of N.C.G.S. § 75-1.1." Id. at 470, 343 S.E.2d at 179. Nevertheless, the Supreme Court of North Carolina held that "to make out a claim under [the regulatory statute] as augmented by section 75-1.1," the plaintiff still had to show an "actual injury as a proximate result of defendant's deceptive statement or misrepresentation." Id. at 470–71, 343 S.E.2d at 180; see also Bumpers v. Cmty. Bank of N. Va., 367 N.C. 81, 88–89, 747 S.E.2d 220, 226 (2013).

Consistent with Pearce, the North Carolina Court of Appeals repeatedly has held that even if a plaintiff plausibly alleges a section 58-63-15(11) violation as part of its UDTPA claim, the plaintiff still must plausibly allege proximate cause and damages. See, e.g., Defeat The Beat, Inc. v. Underwriters At Lloyd's London, 194 N.C. App. 108, 117, 669 S.E.2d 48, 54 (2008) ("While these actions would satisfy the unfair and deceptive trade act or practice element of the claim, plaintiff has presented no evidence of any present monetary injury caused by these alleged actions during the settlement phase; therefore, plaintiff's evidence does not establish the third element of a claim under N.C. Gen. Stat. § 75-1.1."); Burrell v. Sparkkles Reconstruction Co., 189 N.C. App. 104, 111, 657 S.E.2d 712, 717–18 (2008) (same); Nelson v. Hartford Underwriters Ins. Co., 177 N.C. App. 595, 612–13, 630 S.E.2d 221, 233 (2006) (same); Murray, 123 N.C. App. at 10–12, 472

S.E.2d at 363–64 (same); Kron Med. Corp. v. Collier Cobb & Assocs., Inc., 107 N.C. App. 331, 335, 341, 420 S.E.2d 192, 194, 197–98 (1992) (same); see also Guessford v. Pa. Nat'l Mut. Cas. Ins. Co., 983 F. Supp. 2d 652, 660 (M.D.N.C. 2013) (same); cf. D C Custom Freight, LLC v. Tammy A. Ross & Assocs., Inc., 273 N.C. App. 220, 227, 848 S.E.2d 552, 559, disc. review denied, 851 S.E.2d 45 (N.C. 2020).

Kenney alleges that Philadelphia violated N.C. Gen. Stat. § 58-63-15(11)(a)–(d), (f), and (n) in handling Kenney's coverage claim in the Brogden Action and thereby violated the UDTPA. See Compl. ¶¶ 77–90. The cited statutory provisions regulate:

> a. Misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue;
>
> b. Failing to acknowledge and act reasonably promptly upon communications with respect to claims arising under insurance policies;
>
> c. Failing to adopt and implement reasonable standards for the prompt investigation of claims arising under insurance policies;
>
> d. Refusing to pay claims without conducting a reasonable investigation based upon all available information; . . .
>
> f. Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear; . . .
>
> n. Failing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement.

N.C. Gen. Stat. § 58-63-15(11)(a)–(d), (f), (n).

Because Philadelphia was not obligated to provide a defense under the policy, section 58-63-15(11)(f) does not apply. Cf. Elliott, 883 F.3d at 398. As for Philadelphia's alleged violations of subsections (c) and (d), they rest on Kenney's assumption that if Philadelphia conducted a prompt and proper investigation of Kenney's claims, Philadelphia would have concluded that it was

obligated to defend Kenney. See Compl. ¶¶ 41–42; Resp. at 13–16, 24–26 ("The lack of a re-evaluation of its coverage position after July 23, 2020 should have at that point relieved [Kenney] of the continued incurred costs of defending the Brogden action."). Kenney, however, does not allege any specific deficiencies in Philadelphia's investigation process, and Philadelphia correctly determined that Kenney's coverage did not apply to the claims in the Brogden action. Thus, section 58-63-15(11)(c) and (d) do not help Kenney. See, e.g., Barbour v. Fid. Life Ass'n, 361 F. Supp. 3d 565, 575 (E.D.N.C. 2019).

As for Philadelphia's alleged violations of section 58-63-15(11)(a), (b), and (n), see Resp. at 11–16, 23–26, Kenney does not allege any injury that proximately resulted from any of these alleged unfair acts. First, as for Kenney's allegations that Philadelphia misrepresented the policy coverage in violation of N.C. Gen. Stat. § 58-63-15(11)(a) or (n) by failing to include the abuse of process language in its letter denying a duty to defend, Kenney admits that it "did not suffer damages by the misrepresentation of the definition of a 'personal and advertising injury' under Part B . . . since [Kenney] independently eventually figured out the letter omitted 'abuse of process' from the applicable policy grant of coverage." Id. at 23. As for Philadelphia's subsequent failure to respond to Kenney's communication about the coverage, Kenney alleges that Philadelphia's failure to communicate about the coverage demand "establishes the unfair, if not deceptive, aspects of [Philadelphia's] claims handling" and violates N.C. Gen. Stat. § 58-63-15(11)(b). Id. at 24–25. Kenney, however, does not allege independent harm from Philadelphia's alleged deficient communication. Indeed, Kenney predicated its allegations about Philadelphia's failure to respond on the assumption that if Philadelphia had responded to Kenney, Philadelphia would have concluded that it had a duty to defend and indemnify. See id. at 25 ("The lack of a re-evaluation of its coverage position after July 23, 2020 should have at that point relieved [Kenney] of the continued incurred

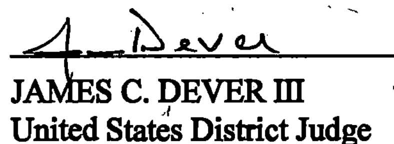
costs of defending the Brogden action. Instead the Plaintiffs have been damaged by those additional incurred expenses and costs of settlement."). In fact, Kenney states that "[t]he damages are the funds paid by the Plaintiffs to themselves fund the defense and the eventual settlement of the Brogden action." Id. at 24. Kenney also alleges that the costs of bringing this action are UDTPA damages. See Compl. ¶ 83. However, because Philadelphia did not owe Kenney a duty to defend or to indemnify, Kenney does not plausibly allege any injury that proximately resulted from the unfair acts.

Kenney does not allege any independent injury proximately caused by the alleged section 56-63-15(11) violations. See, e.g., Barbour, 361 F. Supp. 3d at 575. Thus, the court dismisses Kenney's UDTPA claim.

VI.

In sum, the court GRANTS defendant's motion for judgment on the pleadings [D.E. 17] and DISMISSES plaintiffs' complaint. Defendant had no duty to defend or indemnify plaintiffs. The clerk shall close the case.

SO ORDERED. This 13 day of July, 2022.



JAMES C. DEVER III
United States District Judge