STATE OF NORTH CAROLINA

COUNTY OF DURHAM

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CASE NO. 20-CVS-02569

NORTH STATE DELI, LLC d/b/a LUCKY'S DELICATESSEN, MOTHERS & SONS, LLC d/b/a MOTHERS & SONS TRATTORIA, MATEO TAPAS, L.L.C. d/b/a MATEO BAR DE TAPAS, SAINT JAMES SHELLFISH LLC d/b/a SAINT JAMES SEAFOOD, CALAMARI ENTERPRISES, INC. d/b/a PARIZADE, BIN 54, LLC d/b/a BIN 54, ARYA, INC. d/b/a CITY KITCHEN and VILLAGE BURGER, GRASSHOPPER LLC d/b/a NASHER CAFE, VERDE CAFE INCORPORATED d/b/a LOCAL 22, FLOGA, INC. d/b/a KIPOS GREEK TAVERNA, KUZINA, LLC d/b/a GOLDEN FLEECE, VIN ROUGE, INC. d/b/a VIN ROUGE, KIPOS ROSE GARDEN CLUB LLC d/b/a ROSEWATER, and GIRA SOLE, INC. d/b/a FARM TABLE and GATEHOUSE TAVERN,

Plaintiffs,

v.

THE CINCINNATI INSURANCE COMPANY; MORRIS INSURANCE AGENCY INC.; and DOES 1 THROUGH 20, INCLUSIVE,

Defendants.

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

N.C. R. Civ. P. 56

Plaintiffs are multiple restaurant groups that own and operate sixteen highly-acclaimed restaurants in Durham and across North Carolina, including: Vin Rouge, Parizade, Mateo Bar de Tapas, Rosewater, Mothers & Sons Trattoria, Saint James Seafood, Lucky's Delicatessen, Bin 54, City Kitchen, Village Burger, Nasher Cafe, Local 22, Kipos Greek Taverna, Golden Fleece,

Farm Table, and Gatehouse Tavern. By their Motion for Partial Summary Judgment ("Motion"), brought pursuant to North Carolina Rule of Civil Procedure 56, Plaintiffs seek a declaratory judgment under the Amended Complaint's First Claim for Relief, ordering their insurance provider, defendant The Cincinnati Insurance Company ("Cincinnati"), to honor valid contracts of insurance requiring payment for lost business income, extra expenses, and other business-related losses in light of COVID-19 and the related governmental actions requiring closure of their businesses.

It is undisputed that over the past few months, Plaintiffs' restaurants have been forced to close. These shutdowns were ordered by North Carolina state and local governments who expressly limited the *use of* and *access to* Plaintiffs' insured property. These mandated closures resulted in the immediate loss of income for Plaintiffs. Plaintiffs even face the prospect of permanent closures.

To protect against these sorts of unanticipated losses, Plaintiffs purchased business interruption insurance from Cincinnati. Plaintiffs dutifully paid premiums to Cincinnati year-after-year—to the tune of tens of thousands of dollars per year—so that when the unimaginable hit, they would be protected. Plaintiffs purchased "all risks" policies that cover every one of those unimaginable risks unless the policy exclusions remove that risk from coverage.

Nothing in Plaintiffs' insurance policies excludes viruses or the government-mandated closures from coverage. The only question is whether Plaintiffs' loss of use and access constitutes a direct "accidental physical loss." Because Cincinnati chose not to define these terms, the Court must turn to standard dictionary definitions, under which Plaintiffs' loss of use and access unambiguously qualifies for coverage. The dictionary definitions reveal that the key terms are synonymous with unexpected prohibitions or limitations on the real, material, or bodily

use of or access to covered property—that is, the exact consequence of the government orders at issue here.

Even if this Court considers the undefined term "accidental physical loss" to be somehow ambiguous, North Carolina law requires that any policy ambiguity be construed in favor of coverage. In either case, therefore, the policy terms must be found to afford coverage. Accordingly, Plaintiffs request that the Court enter summary judgment on their First Claim for Relief, seeking a declaratory judgment that Cincinnati must replace Plaintiffs' lost income and extra expenses due to government-mandated business interruption.

I. STATEMENT OF UNDISPUTED FACTS

A. The Restaurants

Plaintiffs own and operate sixteen highly-acclaimed restaurants in North Carolina.[1] The first of these, Durham-based Parizade, is the flagship restaurant of the Giorgios Hospitality Group, launched in 1990 by owner Giorgios Nikolas Bakatsias. *See* Bakatsias Aff. at ¶ 2. Mr. Bakatsias' early visionary leadership is credited with helping ignite the food revolution across the Triangle and the entire state. In 2014, Mr. Bakatsias earned a nomination for Outstanding Restauranteur from the James Beard Foundation for his North Carolina restaurants. *Id.* at ¶ 3.

[1] The parent companies of these restaurants are North State Deli, LLC d/b/a Lucky's Delicatessen; Mothers & Sons, LLC d/b/a Mothers & Sons Trattoria; Mateo Tapas, L.L.C. d/b/a Mateo Bar de Tapas; Saint James Shellfish LLC d/b/a Saint James Seafood; Calamari Enterprises, Inc. d/b/a Parizade; Bin 54, LLC d/b/a Bin 54; Arya, Inc. d/b/a City Kitchen and Village Burger; Grasshopper LLC d/b/a Nasher Cafe; Verde Cafe Incorporated d/b/a Local 22; Floga, Inc. d/b/a Kipos Greek Taverna; Kuzina, LLC d/b/a Golden Fleece; Vin Rouge, Inc. d/b/a Vin Rouge; Kipos Rose Garden Club LLC d/b/a Rosewater; and Gira Sole, Inc. d/b/a Farm Table and Gatehouse Tavern (collectively, "Plaintiffs"). *See* Affidavit of Matthew Raymond Kelly at ¶ 2 ("Kelly Aff."); Affidavit of Giorgios Nikolaos Bakatsias at ¶ 1 ("Bakatsias Aff."); Affidavit of Djafar "Jay" Mehdian at ¶ 1 ("Mehdian Aff.").

Mr. Bakatsias is naturally community-minded and has shared the fruits of his experience, especially in mentoring the next generation of aspiring chefs. *Id.* at ¶ 4. After launching Durham-based Vin Rouge in 2002, Mr. Bakatsias promoted then-chef and Raleigh native Matt Kelly to equity ownership in 2007. *Id.*; Kelly Aff. at ¶¶ 3-4. Under Mr. Kelly's tenure, the intimate French bistro garnered national prominence as one of the state's most exciting places to eat and drink. *See* Kelly Aff. at ¶ 4. Mr. Kelly has since launched four solo ventures—Mateo Bar de Tapas, Saint James Seafood, Mothers & Sons, and Lucky's Delicatessen—earning Mr. Kelly four straight semifinalist distinctions from the James Beard Foundation for Best Chef in America (2014-2017). *See* Kelly Aff. at ¶ 5.

Mr. Bakatsias also supported Jay Mehdian, manager of Mr. Bakatsias' earliest restaurants, as Mr. Mehdian launched City Kitchen in 2001 and Village Burger in 2011. *See* Bakatsias Aff. at ¶ 4; Mehdian Aff. at ¶ 2. Both have become successful and frequently-visited dining establishments in Chapel Hill, North Carolina. *See* Mehdian Aff. at ¶ 2.

B. North Carolina Limits Use of and Access to Plaintiffs' Restaurants

As of March 17, 2020, Plaintiffs were forced to close all but two of their restaurants (Local 22 and Parizade continued operating at minimal capacity, providing limited takeout services only; however, even these two restaurants eventually ceased all operations: Local 22 as of May 2, 2020, and Parizade as of May 10, 2020). *See* Bakatsias Aff. at ¶¶ 5-6; Kelly Aff. at ¶ 6; Mehdian Aff. at ¶ 3. These closures were ordered by state and local governments who required Plaintiffs and their employees, customers, vendors, and others to shelter at home, abide by strict "social distancing" requirements, and cease all non-essential activities. *Id.* These government actions—taken in response to the SARS-CoV-2 viral pandemic ("COVID-19")—expressly prohibited or limited the use of or access to Plaintiffs' restaurants.

Specifically, on March 17, 2020, North Carolina Governor Roy Cooper entered Executive Order 118, which imposed sweeping limitations on the use of and access to food and beverage facilities. *See* Declaration of Gagan Gupta at ¶ 2, Attachment 1 ("Order 118") (hereafter, "Gupta Decl."). Order 118 required restaurants to "limit the sale of food and beverages to carry-out, drive-through, and delivery only." *Id.* Further, under Order 118, the State Health Director, acting pursuant to quarantine and isolation authority provided by N.C. Gen. Stat. § 130A-145, "limit[ed] *access* to facilities that sell food and beverage to carry-out, drive-through and delivery services only." *Id.* (emphasis added). Order 118 defined the State's "quarantine authority" to mean "the authority to issue an order to limit *access* by any person or animal to *an area of facility* that may be contaminated with an infection agent." *Id.* (citing N.C. Gen. Stat. § 130A-2(7a)) (emphasis added). Order 118 also defined "quarantine authority" as allowing the State "to limit the freedom of movement or action of persons or animals which [have] been exposed to or are reasonably suspected of having been exposed to a communicable disease" in order to prevent further transmission. *Id.* Order 118 closed bars outright with no exceptions. *Id.* Finally, Order 118 made a prior order's prohibition on gatherings of 100 or more people applicable to restaurants. *Id.*

On March 17, 2020, the Secretary of the North Carolina Department of Health and Human Services, Dr. Mandy Cohen, entered an order carrying out the directives of Order 118. *See* Gupta Decl. at ¶ 3, Attachment 2 ("NCDHHS Order"). The NCDHHS Order required the immediate closure of all restaurant seating areas and the full closure of all bars. *Id.* Specifically, the NCDHHS Order explained that Secretary Cohen had found the existence of an "imminent hazard," defined by statute to mean, *inter alia*, any situation "likely to cause an immediate threat to human life, an immediate threat of serious physical injury, [or] an immediate threat of serious

adverse health effects . . . if no immediate action is taken." *Id.* (citing N.C. Gen. Stat. § 130A-2(3)). Upon finding an imminent hazard, "the Secretary may order the owner, lessee, operator, or other person in control of the property to abate the imminent hazard." *Id.* (citing N.C. Gen. Stat. § 130A-20(a)). Thus, Secretary Cohen declared "that the use of seating areas of restaurants and bars constitutes an imminent hazard for the spread of COVID-19," and therefore ordered all such areas to close immediately. *Id.*

On March 23, 2020, Governor Cooper entered Order 120, further limiting mass gatherings to no more than 50 people, whether indoor or outdoor. *See* Gupta Decl. at ¶ 4, Attachment 3 ("Order 120"). Order 120 also broadened the limitations on restaurants set forth in Order 118 to apply to all "dining facilities." *Id.*

On March 27, 2020, Governor Cooper entered Executive Order 121, requiring individuals to shelter in place at their residence except to conduct certain enumerated essential activities, and requiring individuals to maintain social distancing of at least six feet. *See* Gupta Decl. at ¶ 5, Attachment 4 ("Order 121"). Order 121 also prohibited travel except for those same essential activities. *Id.* The order required non-essential businesses and operations to cease, and defined restaurants as non-essential except for the narrow purpose of preparing food for off-premises consumption only, assuming social distancing requirements could be met. *Id.* The order continued the complete closure of all bars. *Id.*

Order 121 did permit essential and non-essential businesses alike to carry out certain "Minimum Basic Operations," but defined the term narrowly to exclude income-generating activities at restaurants. *Id.* (defining "Minimum Basic Operations" to include, in relevant part, "minimum necessary activities to maintain the value of the business's inventory, preserve the condition of the business's physical plant and equipment, ensure security, process payroll and

employee benefits."). Order 121, by its express terms, was entered under the State's authority (i) "*to prohibit and restrict the operation of . . . business establishments*," and (ii) "to prohibit and restrict activities which may be reasonably necessary to maintain order and protect lives *and property* during a state of emergency." *Id.* (citing N.C. Gen. Stat. §§ 166A-19.30(c); 166A-19.31(b)(2) and (b)(5)) (emphasis added).

Executive Order 121 also set forth "Social Distancing Requirements," requiring that all businesses continuing to operate under the terms of the order comply with, *inter alia*, the following: (i) maintenance of at least six feet distancing from other individuals; (ii) washing of hands using soap and water for at least twenty seconds as frequently as possible or the use of hand sanitizer; and (iii) regular cleaning of high-touch surfaces. *Id.* The order further limited mass gatherings to no more than ten people. *Id.*

On April 9, 2020, Governor Cooper entered Executive Order 131, mandating all retail establishments still permitted to operate under prior orders to follow "Additional Social Distancing Requirements." *See* Gupta Decl. at ¶ 6, Attachment 5 ("Order 131"). Those additional requirements included, in relevant part:

a. Limiting the maximum occupancy to no more than twenty percent of the retail establishment's stated fire capacity, or to five customers for every one thousand square feet of the retail location's total square footage;

b. Upon reaching the maximum occupancy limit, posting staff at entrances and exits to enforce the occupancy limits;

c. Marking clearly six feet of spacing in lines at cash registers and other high traffic areas inside the retail establishment;

d. Marking clearly six feet of spacing in a designated line outside the retail establishment; and

e. Frequent and routine environmental cleaning and disinfecting of high-touch areas with a disinfectant approved by the Environmental Protection Agency ("EPA") for COVID-19.

Id. The order further encouraged all retail establishments to take the following additional protective steps:

a. Use of cloth face coverings for all employees in positions that do not allow for appropriate social distancing;

b. Marking clearly six feet of spacing in high traffic areas within the staff-only portions of the premises;

c. Placing of hand sanitizer prominently at entry and exit points;

d. Posting signs conveying the terms of the required social distancing; and

e. Use of acrylic or plastic shields at points of sale.

Id. Order 131, by its express terms, was entered pursuant to the same statutory authority as Order 121, authorizing the prohibition and restriction of business operations to protect property during a state of emergency. *Id.*

Local and municipal governments across North Carolina entered their own orders mandating that residents shelter in place and that businesses curtail or cease operations. Often these local orders mandated more stringent restrictions on the movement of people and the use or access to goods, services, and facilities. Such orders have been entered by government entities in four of the five North Carolina counties in which Plaintiffs' restaurants operate: Durham, Wake, Orange, and Buncombe Counties.

For example, on March 25, 2020, the City of Durham entered an order prohibiting individuals from traveling and from engaging in any business activity, with certain enumerated exceptions. *See* Gupta Decl. at ¶ 7, Attachment 6 ("Durham City Stay at Home Order"). The Durham City Stay at Home Order permitted restaurants to prepare and serve food, but for off-premises consumption only. *Id.* The order expressly prohibited restaurants from allowing food to

be consumed "at the site where it is provided, or at any other gathering site due to the virus's propensity to physically impact surfaces and personal property." *Id.*

On March 28, 2020, the County of Durham entered an order with substantially the same requirements, except the order imposed additional social distancing and sanitation requirements, many of which were stricter than the statewide orders. *See* Gupta Decl. at ¶ 8, Attachment 7 ("Durham County Stay at Home Order"). These stricter requirements included performing temperature checks by employers of their employees, requiring any employee with a temperature above 100.4 degrees Fahrenheit to be sent home, forbidding the sharing of work-related instruments unless they have been cleaned between uses, and forbidding handshakes. *Id.* Durham's City and County orders explained that the forgoing emergency protective restrictions were entered in part to protect physical property. *See id.* (restrictions entered "to provide adequate protection for all persons including our businesses"); Gupta Decl. at ¶ 7, Attachment 6 (restrictions entered to protect against "widespread or severe damage, injury, or loss of life or property").[2]

The Counties of Wake, Orange, and Buncombe followed suit, imposing substantially the same requirements as the statewide orders. Wake County imposed additional requirements akin to those promulgated by the City and County of Durham. *See* Gupta at ¶¶ 11-15, Attachments 10-14 (Wake County orders); Gupta Decl. at ¶¶ 16-17, Attachments 15-17 (Orange County orders); Gupta Decl. at ¶¶ 18-21, Attachments 18-21 (Buncombe County orders). The Wake County orders were entered in part for the "protection of lives, safety and property during this

[2] The County of Durham entered a series of additional amendments to its stay at home order, at least the third and fourth of which imposed even stricter social distancing and sanitation requirements. *See* Gupta Decl. at ¶ 9, Attachment 8 ("Durham County Stay at Home Order – Third Amendment"); Gupta Decl. at ¶ 10, Attachment 9 ("Durham County Stay at Home Order – Fourth Amendment").

emergency," and because "the spread of the disease poses an imminent threat to property in the County." *See, e.g.*, Gupta Decl. at ¶ 11, Attachment 10. The Orange County prohibitions on restaurants was entered in part "due to the virus's propensity to physically impact surfaces and personal property." *See* Gupta Decl. at at ¶ 16, Attachment 15.

The forgoing orders are hereafter referred to collectively as "Government Order(s)."

C. Plaintiffs Are Forced to Suspend Their Restaurant Operations

Under each successive Government Order, Plaintiffs' restaurants were limited to narrowly-defined essential activities and minimum necessary operations. The orders also prohibited, via stay-at-home mandates and travel restrictions, all non-essential movement by all residents.

These Government Orders resulted in the complete closure of all sixteen restaurants operated by Plaintiffs. *See* Bakatsias Aff. at ¶¶ 5-6; Kelly Aff. at ¶ 6; Mehdian Aff. at ¶ 3. The orders prohibited access to property at Plaintiffs' restaurant facilities, including but not limited to the restaurants' indoor and outdoor dining areas, bar areas, and seating areas. *See* Bakatsias Aff. at ¶ 8; Kelly Aff. at ¶ 8; Mehdian Aff. at ¶ 5. The sweeping prohibitions mandated by the Government Orders made it financially impossible for Plaintiffs' sixteen restaurants to remain open for the narrowly-permitted purpose of preparing and selling food for offsite consumption. *See* Bakatsias Aff. at ¶ 9; Kelly Aff. at ¶ 9; Mehdian Aff. at ¶ 6. The practical upshot was that the orders effectively foreclosed use of the restaurants as a whole. *Id.* Two restaurants—Parizade and Local 22—attempted to remain open for takeout only. *See* Bakatsias Aff. at ¶ 5. But even these restaurants were eventually forced to close, given that limiting operations to takeout resulted in financial losses (Local 22 closed on May 2, 2020, and Parizade closed on May 10, 2020). *Id.* at ¶¶ 5, 9.

Simply put, the prohibitions and restrictions imposed by the Government Orders caused Plaintiffs and their employees, vendors, and customers to lose physical use of, and physical access to, property at the covered restaurant premises.

D. Plaintiffs' "All Risks" Insurance Policies

To protect against these very sorts of unanticipated losses, Plaintiffs purchased business interruption insurance from Defendant Cincinnati. *See* Bakatsias Aff. at ¶ 11; Kelly Aff. at ¶ 11; Mehdian Aff. at ¶ 8. Plaintiffs were covered by these insurance policies at all times during the COVID-19 pandemic and the entry of the Government Orders described herein.[3] The policies provide coverage for the suspension of business operations caused by government orders. Plaintiffs' policies are the same in all material respects and are hereafter referred to and described collectively as "Policy" or "Policies." *See* Bakatsias Aff. at ¶ 11, Attachment 1 ("Giorgios Policy"), Attachment 2 ("Rosewater Policy"), and Attachment 3 ("Gira Sole Policy"); Kelly Aff. at ¶ 11, Attachment 1 ("North State Policy"). Any policy citations refer specifically to the North State Policy as an exemplar.[4] *See* Kelly Aff. at ¶ 11, Attachment 1.

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[3] Specifically, Plaintiffs North State Deli, LLC d/b/a Lucky's Delicatessen, Mothers & Sons, LLC d/b/a Mothers & Sons Trattoria, Mateo Tapas, L.L.C. d/b/a Mateo Bar de Tapas, and Saint James Shellfish LLC d/b/a Saint James Seafood paid $35,904 for the coverage period of March 1, 2019 through March 1, 2022. *See* Kelly Aff. at ¶ 13. Plaintiffs Calamari Enterprises, Inc. d/b/a Parizade, Bin 54, LLC d/b/a Bin 54, Arya, Inc. d/b/a City Kitchen and Village Burger, Grasshopper LLC d/b/a Nasher Cafe, Verde Cafe Incorporated d/b/a Local 22, Floga, Inc. d/b/a Kipos Greek Taverna, Kuzina, LLC d/b/a Golden Fleece, Vin Rouge, Inc. d/b/a Vin Rouge paid $43,943 for the coverage period of July 25, 2019 through July 25, 2020. *See* Bakatsias Aff. at ¶ 13; Mehdian Aff at. ¶ 10; *see also* Mehdian Aff. at ¶ 10. Plaintiff Kipos Rose Garden Club LLC d/b/a Rosewater paid $10,754 for the coverage period of October 10, 2019 through October 10, 2020. *See* Bakatsias Aff. at ¶ 15. Gira Sole, Inc. paid $8,417 for the coverage period of March 5, 2018 through March 5, 2021. *See id.* at ¶ 17.

[4] The North State Policy is attached to the affidavit of Matthew Raymond Kelly as Attachment 1. For convenience, page numbers have been added to the bottom-center of each page of the North State Policy, which are the page numbers cited herein.

The Policies are "all risks" policies. Such policies cover the insured for any peril, imaginable or unimaginable, unless expressly excluded. Put differently, if a risk, such as government action, is not excluded, then it is covered regardless of whether an insurer specifically considered the risk when creating the premium rate. The Policies provide coverage for these unforeseen, non-excluded perils under the business interruption provisions, which require the payment of lost business income and extra expenses under certain enumerated circumstances.[5] *See* Policy at 55-56, Sections A.5.b(1) ("Business Income"); A.5.b(2) ("Extra Expense").

Specifically, under Subsection A.5 entitled "Coverage Extensions," the business interruption provisions extend coverage as follows:

> (1) **Business Income**
>
> We will pay for the actual loss of "Business Income" and "Rental Value" you sustain due to the necessary "suspension" of your "operations" during the "period of restoration." The "suspension" must be caused by direct "loss" to property at a "premises" caused by or resulting from any Covered Cause of Loss.
>
> . . .
>
> (2) **Extra Expense**
>
> We will pay Extra Expense you sustain during the "period of restoration". Extra Expense means necessary expenses you sustain . . . during the "period of restoration" that you would not have sustained if there had been no direct "loss" to property caused by or resulting from a Covered Cause of Loss.

[5] Business income means net income (net profit or loss) that would have been earned had no loss occurred, together with continuing normal operating expenses (including payroll). *See* Policy at 55-56, Section A.5(b)(1). Extra expense means the costs incurred because of the direct loss—that is, those costs that would have otherwise been avoided. *See id.* at Section A.5(b)(2). In the event of a business interruption, the Policies pay for both.

Id. Under the Policies, "loss" means "accidental physical loss or accidental physical damage." *See* Policy at 75, Section G.8.[6] Therefore, absent an exclusion or limitation, the Policies provide coverage under these provisions where the policyholder shows a (i) direct "accidental physical loss" to property (ii) caused by or resulting from any "Covered Cause of Loss."[7]

E. Procedural History

Pursuant to the terms of the Policies, Plaintiffs promptly asserted claims with Cincinnati for losses due to the Government Orders described herein. *See* Bakatsias Aff. at ¶ 20; Kelly Aff. at ¶ 15; Mehdian Aff. at ¶ 12. Following unsuccessful negotiations with Cincinnati, Plaintiffs filed a Complaint seeking declaratory relief against Cincinnati under N.C. Gen. Stat. § 1-253 *et seq.*, ascertaining entitlement to business interruption coverage under the Policies. Plaintiffs filed their Complaint in Durham County Superior Court on May 18, 2020, and served it on Cincinnati, through the North Carolina Commissioner of Insurance, on May 22, 2020. Plaintiffs filed their Amended Complaint on July 8, 2020, and served it on Cincinnati, through counsel, the same day.

Under the First Claim for Relief, Plaintiffs seek a declaration that (i) the Government Orders issued by the Governor of North Carolina and county and municipal entities in North Carolina constitute covered perils under Plaintiffs' all-risks Policies that caused "direct 'loss' to

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[6] The business interruption provisions provided by the base property policy are amended in part by the "Business Income (and Extra Expense) Coverage Form" and related endorsements. *See, e.g.*, Policy at 110-18, Section A.1 (Business Income); Section A.2 (Extra Expense); Section F (Definitions). Plaintiffs reserve the right to rely on these amendments and endorsements as appropriate.

[7] Plaintiffs' businesses indisputably suffered a "suspension" of "operations" during the "period of restoration" as those terms are defined by the Policies. *See* Policy at 75-77, Section G(19) ("Suspension"); G(10) ("Operations"); G(11) ("Period of restoration"). Plaintiffs' business activities occurring at their restaurants slowed or altogether ceased beginning March 17, 2020, the date of "loss." *See* Bakatsias Aff. at ¶¶ 5-6; Kelly Aff. at ¶ 6; Mehdian Aff. at ¶ 3. During pre-suit negotiations, Cincinnati identified these three requirements for business interruption coverage, but did not contest that the requirements had been met. *See, e.g.*, Bakatsias Aff. at ¶ 21 (Cincinnati's reservation of rights letters); Kelly Aff. at ¶ 16 (same).

property" at the described premises, and (ii) that therefore Cincinnati must pay for the resulting lost business income and extra expenses as defined by the Policies. *See* Amended Complaint at ¶¶ 110-46. The forced closures have caused Plaintiffs to suffer considerable financial losses while incurring ongoing expenses. *See* Bakatsias Aff. at ¶ 9; Kelly Aff. at ¶ 9; Mehdian Aff. at ¶ 6. Absent reversal of the Government Orders and a financial payout from Cincinnati, Plaintiffs may be forced to close their restaurants permanently. *See* Bakatsias Aff. at ¶ 26; Kelly Aff. at ¶ 19; Mehdian Aff. at ¶ 16. Plaintiffs have already been forced to permanently close one restaurant: Lucky's Delicatessen. *See* Kelly Aff. at ¶ 19.

II. LEGAL STANDARDS GOVERNING SUMMARY JUDGMENT

As an initial matter, "[a] party seeking . . . to obtain a declaratory judgment may, at any time after the expiration of 30 days from the commencement of the action . . ., move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof." N.C. Gen Stat. § 1A-1, Rule 56(a). "Commencement of the action" means the date on which the original complaint is filed. N.C. Gen Stat. § 1A-1, Rule 3. The motion for summary judgment need only "be served at least 10 days before the time fixed for the hearing." N.C. Gen Stat. § 1A-1, Rule 56(c).

Plaintiffs commenced this action by filing their original Complaint on May 18, 2020 (Plaintiffs filed an Amended Complaint on July 8, 2020). By their Motion for Partial Summary Judgment—filed and served on August 3, 2020, at least 10 days before the hearing—Plaintiffs seek summary judgment as to the First Claim for Relief (declaratory judgment) only. Summary judgment is therefore procedurally proper at this stage of the litigation. This is true even if a pre-answer motion to dismiss is pending. *See Kavanau Real Estate Tr. v. Debnam*, 41 N.C. App.

256, 261-62, 254 S.E.2d 638, 641-42 (1979), *aff'd* 299 N.C. 510, 513, 263 S.E.2d 595, 597 (1980).

"The purpose of summary judgment [is] to bring litigation to an early decision on the merits without the delay and expense of a trial where it can be readily demonstrated that no material facts are in issue." *Kessing v. Nat'l Mortg. Corp.*, 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971). For this reason, Rule 56(c) provides that the Court may enter summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen Stat. § 1A-1, Rule 56(c); *Ron Medlin Constr. v. Harris*, 364 N.C. 577, 580, 704 S.E.2d 486, 488 (2010). The moving party has the burden "to show the lack of a triable issue of fact . . . ." *Ron Medlin Constr.*, 364 N.C. at 580, 704 S.E.2d at 488 (2010). But "[i]f the moving party satisfies its burden of proof, then the burden shifts to the non-moving party to 'set forth *specific facts* showing that there is a genuine issue for trial.'" *Lowe v. Bradford*, 305 N.C. 366, 369-70, 289 S.E.2d 363, 366 (1982) (emphasis in original) (quoting N.C. Gen Stat. § 1A-1, Rule 56(e)).

Summary judgment "may be rendered on the issue of liability alone although there is genuine issue as to the amount of damages." N.C. Gen Stat. § 1A-1, Rule 56(c).

III. ARGUMENT

The "meaning of language used in an insurance policy is a question of law . . ., as is the construction and application of the policy's provisions to the undisputed facts." *N.C. Farm Bureau Mut. Ins. Co. v. Martin*, 833 S.E.2d 183, 186 (N.C. Ct. App. 2019); *see also Accardi v. Hartford Underwriters Ins. Co.*, 373 N.C. 292, 295, 838 S.E.2d 454, 456 (2020). "[H]having been prepared by the insurer," insurance policies "will be liberally construed in favor of the

insured, and strictly against the insurer." *Wake County Hosp. Sys., Inc. v. National Casualty Co.*, 804 F. Supp. 768, 773-774 (E.D.N.C. 1992) (citing *White v. Mote*, 270 N.C. 544, 155 S.E.2d 75 (1967)). This departure from the normal rules of contract interpretation acknowledges the "special relationship between the insured and the insurer" whereby "'[policy] conditions are by and large dictated by the insurance company to the insured.'" *Fountain Powerboat Indus. v. Reliance Ins. Co.*, 119 F. Supp. 2d 552, 555 (E.D.N.C. 2000) (quoting *Great American Ins. Co. v. C. G. Tate Const. Co.*, 303 N.C. 387, 279 S.E.2d 769 (1981)).

Where a term in an insurance policy is undefined, courts are to give it its "ordinary meaning"; in doing so, North Carolina courts have determined that it is "appropriate to consult a standard dictionary." *Allstate Ins. Co. v. Chatterton*, 135 N.C. App. 92, 95, 518 S.E.2d 814, 817 (N.C. Ct. App. 1999). If the term is nevertheless "reasonably susceptible to more than one interpretation," then it is ambiguous and only then is the contract subject to judicial construction. *Allstate*, 135 N.C. App. at 94, 518 S.E.2d at 817; *see also Joyner v. Nationwide Ins.*, 46 N.C. App. 807, 809, 266 S.E.2d 30, 31 (1980) ("[I]n deciding whether the language is plain or ambiguous, the test is what a reasonable person in the position of the insured would have understood it to mean, and not what the insurer intended."). Even where insurance contract language is ambiguous, however, extrinsic evidence is not admissible. Rather, "any ambiguity or uncertainty as to the words used in the policy should be construed against the insurance company and in favor of the policyholder or beneficiary." *Accardi*, 373 N.C. at 295, 838 S.E.2d at 456. Put differently, "any ambiguity in the language of a policy must be construed to afford coverage, and any exclusions from, conditions on, or limitations contained within a policy are to be strictly construed." *Fountain Powerboat*, 119 F. Supp. 2d at 555 (citing *Wachovia Bank and Trust v. Westchester Fire Ins. Co.*, 276 N.C. 348, 172 S.E.2d 518 (1970)).

Here, the Government Orders are covered perils that directly resulted in an "accidental physical loss" to property at Plaintiffs' covered premises. Specifically, the Government Orders caused Plaintiffs to lose the physical use of and access to property at their sixteen restaurants, including the seating, bar, and kitchen areas. Plaintiffs were prohibited from putting their property to use for the very income-generating purposes for which that property was insured. The relevant policy provisions therefore unambiguously cover lost business income and extra expenses resulting from the Government Orders that forced Plaintiffs' restaurants to close. To the extent the Court finds that the relevant terms are ambiguous, the terms must nevertheless be construed in favor of coverage. In either event, Plaintiffs are entitled to summary judgment on their First Claim for Relief.

A. Plaintiffs Are Entitled to Summary Judgment on Their First Claim for Relief Because the Government Orders Are Covered Perils that Directly Resulted in "Accidental Physical Loss" to Property.

As discussed above, *see* Part I-D, *supra*, the Policies provide coverage under the business interruption provisions where the policyholder shows a (i) direct "accidental physical loss" to property (ii) caused by or resulting from any "Covered Cause of Loss." These requirements are easily met.

i. The North Carolina Government Orders Are Non-Excluded "Covered Causes of Loss."

Plaintiffs' Policies are all-risk policies, meaning that any peril is covered unless expressly limited or excluded. *See* Part I-D, *supra*. Here, no limitation or exclusion applies to the Government Orders at issue. The Policies' exclusions are found in Section A.3.b. *See* Policy at 42. Subsection A.3.b(1)(c) excludes coverage for loss caused directly or indirectly by governmental action only insofar as that action consists of seizure or destruction of property (unless the destruction was ordered to prevent the spread of a fire). *See* Policy at 43. As

ordinarily used, "seizure" means "taking possession of person or property by legal process." *Seizure*, Merriam-Webster (Online ed. 2020). The governmental orders affecting Plaintiffs' property do not require seizure or destruction. The government did not take physical possession of or title to, or destroy, Plaintiffs' property. Therefore, the Policies do not exclude the governmental actions described herein. The Government Orders are non-excluded "Covered Causes of Loss."

ii. The Government Orders Resulted in Plaintiffs Losing Physical Use of and Access to Their Covered Property.

Plaintiffs lost the use of and access to their covered restaurants beginning March 17, 2020, with entry of the first Government Order described herein. The Government Orders were entered under the State's quarantine authority, which allows the State to "limit *access* by any person or animal to *an area of facility* that may be contaminated with an infection agent." *See* Gupta Decl. at ¶ 2, Attachment 1 (Order 118) (citing N.C. Gen. Stat. § 130A-2(7a)) (emphasis added). Indeed, Order 118, the first applicable statewide order, expressly limited "*access*" to Plaintiffs' restaurants. *Id.* (emphasis added). The Government Orders were also entered under the State's authority to limit *use* of private business facilities. Order 121, for example, was entered under express statutory authority "(i) "*to prohibit and restrict the operation of* . . . business establishments." *See* Gupta Decl. at ¶ 5, Attachment 4 (Order 121) (citing N.C. Gen. Stat. §§ 166A-19.30(c), 166A-19.31(b)(2)) (emphasis added).

Each successive order limited Plaintiffs' use of and access to property at their restaurant premises, including the indoor and outdoor seating, dining, and bar areas. The orders acknowledged that these prohibitions were physical. *See, e.g.*, Gupta Decl. at ¶ 7, Attachment 6 (Durham City Stay at Home Order) (prohibiting on-site food consumption "due to the virus's propensity to physically impact surfaces and personal property."); Gupta Decl. at ¶ 16,

Attachment 15 (Orange County Stay at Home Order) (same); Gupta Decl. at ¶ 8, Attachment 7 (Durham County Stay at Home Order) (restrictions entered to protect against "widespread or severe damage, injury, or loss of life or property"); Gupta Decl. at ¶ 11, Attachment 10 (Wake County State of Emergency Order) ("the spread of the disease poses an imminent threat to property in the County."); Gupta Decl. at ¶ 5, Attachment 4 (Order 121) (explaining ongoing prohibitions and restrictions aimed at "protect[ing] lives and property").

While the Government Orders permitted narrowly-defined essential activities and minimum necessary operations—including preparing and selling food for off-premises consumption only—the sweeping prohibitions made it financially impossible for any of Plaintiffs' sixteen restaurants to continue operating under these restrictions. Plaintiffs were unable to limit their restaurants to take-out and delivery only without incurring substantial financial losses. Any prospects of success were worsened by the further prohibitions against all non-essential movement by all residents, the successively narrower restrictions on mass gatherings, and the wide-ranging social distancing and physical sanitation requirements. The practical upshot was that the Government Orders effectively foreclosed use of the restaurants as a whole. Two restaurants—Parizade and Local 22—did make an effort to remain open for takeout only. But even these two restaurants closed, both having operated at a financial loss under the government restrictions (Local 22 closed on May 2, 2020, and Parizade closed on May 10, 2020). Plaintiffs have already been forced to permanently close one restaurant: Lucky's Delicatessen.

iii. This Loss of Use and Access Constitutes Direct "Accidental Physical Loss."

The Government Orders indisputably and directly resulted in Plaintiffs losing physical use of and access to property at their covered premises. The only remaining question is whether

this loss of use and access constitutes "accidental physical loss." Although Cincinnati contends that "accidental physical loss" should be construed narrowly, *see* Bakatsias Aff. at ¶ 21 (Cincinnati's reservation of rights letters); Kelly Aff. at ¶ 16 (same), there is nothing ambiguous about the terms or their use in the Policies. Thus, this Court should avoid judicial construction and instead look to the ordinary meaning of the terms as provided in standard dictionaries.

Merriam-Webster defines "physical" as relating to "material things" that are "perceptible especially through the senses." *Physical*, Merriam-Webster (Online ed. 2020). It is also defined in a way that is tied to the body: "of or relating to the body." *Id.* Webster's Third New International Dictionary defines the concept of physical this way: "of or relating to natural or material things as opposed to things mental, moral, spiritual, or imaginary." *Physical*, Webster's Third New International Dictionary (2020). The definition from Black's Law Dictionary comports: "Of, relating to, or involving material things; pertaining to real, tangible objects." *Physical*, Black's Law Dictionary (11th ed. 2019).

Merriam-Webster defines "accidental" as "occurring unexpectedly or by chance." *Accidental*, Merriam-Webster (Online ed. 2020). Another dictionary elaborates, explaining the concept as "taking place unexpectedly, unintentionally, or out of the usual course." *Accidental*, Funk & Wagnalls Standard Dictionary (Int'l ed. 1970).[8] These dictionary definitions reveal that

[8] The North Carolina Supreme Court relied on a substantially similar definition of "accidental" in an automobile insurance lawsuit where the insured's son burned a covered vehicle for purposes of collecting insurance proceeds. *See Pleasant v. Motors Ins. Co.*, 280 N.C. 100, 103, 185 S.E.2d 164, 166 (1971). In finding the burning to be "accidental," the Supreme Court explained, "an automobile insurance policy providing for payment for accidental loss or damage to the automobile includes loss caused by the intentional act of another when in the line of causation the act, *from the standpoint of the policyholder or named insured*, is *unintended, unexpected, unusual, or unknown*." *Id.* (emphasis added); *cf. Gaston Cty. Dyeing Mach. Co. v. Northfield Ins. Co.*, 351 N.C. 293, 302, 524 S.E.2d 558, 564 (2000) (defining "accident" in the context of accident insurance as "an unplanned and unforeseen happening or event, usually with unfortunate consequences.").

the ordinary and standard use of the key policy terms is synonymous with an unexpected deviation from the normal course in the real, material, or bodily world.

In the context of Plaintiffs' Policies, therefore, the policy language "accidental physical loss" unambiguously provides coverage for loss sustained because of unexpected prohibitions or limitations on the real, material, or bodily use of or access to covered property. Nothing about the ordinary meaning of the terms requires structural alteration to the property. Nor do the terms require a total loss. Rather, the ordinary meaning of the words in the phrase "accidental physical loss" describes the scenario where businessowners lose the full range of rights and advantages of using or accessing their business property. This is especially true where the value insured derives from the very physical use or access now prohibited. Plaintiffs are expressly and unexpectedly forbidden by government decree from putting their property to use for the income-generating purposes for which the property was insured. In common parlance, this is unambiguously an "accidental physical loss," and the Court must therefore find coverage.

Even if this Court considers the undefined term "accidental physical loss" to be somehow ambiguous in the context of the Policies, this Court must first take guidance from a bedrock principle of insurance policy interpretation. North Carolina law requires that any policy ambiguity be construed in favor of coverage. Time and again, North Carolina courts, including our Supreme Court, have re-affirmed this rule. *See, e.g.*, *Wachovia Bank*, 276 N.C. at 354, 172 S.E.2d at 522 ("The words used in the policy having been selected by the insurance company, any ambiguity or uncertainty as to their meaning must be resolved in favor of the policyholder, or the beneficiary, and against the company."); *Pleasant v. Motors Ins. Co.*, 280 N.C. 100, 102-03, 185 S.E.2d 164, 166 (1971); *Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C.*, 364

N.C. 1, 9, 692 S.E.2d 605, 612 (2010); *Accardi*, 373 N.C. at 295, 838 S.E.2d at 456; *Fountain Powerboat*, 119 F. Supp. 2d at 555.

This principle means that if there are two reasonable interpretations of the same language, then the Court *must* favor the pro-coverage view. "The test in construing the language of . . . an insurance policy is not what the insurer intended the words to mean, but what a reasonable person in the position of the insured would have understood them to mean." *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 508, 246 S.E.2d 773, 779 (1978). Moreover, Provisions extending coverage—like the Business Income and Extra Expense provisions in Subsection A.5.b—must be "construed liberally so as to provide coverage, whenever possible by reasonable construction." *State Capital Ins. Co. v. Nationwide Mut. Ins. Co.*, 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986); *see also Harleysville*, 364 N.C. at 9-10, 692 S.E.2d at 612.

A reasonable insured under Plaintiffs' Policies would have understood and expected that the Business Income and Extra Expense provisions would provide coverage not only when the covered property was structurally damaged, but also when full use of the property was limited by government fiat. The Policies cover "physical loss *or* . . . physical damage." *See* Policy at 75, Section G.8 (emphasis added). While "damage" indisputably includes tangible or structural damage such as inflicted by a tornado, the conjunctive *or* indicates that "loss" must mean something different from "damage." *See C. D. Spangler Constr. Co. v. Industrial Crankshaft & Engineering Co.*, 326 N.C. 133, 142, 388 S.E.2d 557, 563 (1990) ("The various terms of the policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect."). Here, the government orders prevented Plaintiffs from making full use of their restaurant property. This kind of loss constitutes a *physical loss* because the restaurants cannot be used for their insured, income-generating purpose. The logical upshot of Cincinnati's apparent

requirement of a structural coverage trigger is that the word "loss" would be collapsed into and mean the same thing as "damage."

Recently, in a pair of cases, a Missouri federal district court made this distinction between "accidental physical loss" and "accidental physical damage" *in the exact same context at issue here*. *See Studio 417, Inc. et al. v. Cincinnati Ins. Co.*, No. 20-cv-03127-SRB (W.D. Mo. Aug. 12, 2020), ECF No. 40; *K.C. Hopps v. Cincinnati Ins. Co.*, No. 20-cv-00437-SRB, 2020 U.S. Dist. LEXIS 144285 (W.D. Mo. Aug. 12, 2020). Both cases rendered judgment on a first-party property policy *sold by Cincinnati*—under the *exact same* business interruption policy language—for losses incurred by restaurants and a hair salon due to COVID-19-related government shutdown orders.[9] The Court, relying on the same principles governing interpretation of insurance contracts as apply in North Carolina, rejected Cincinnati's argument that "'direct physical loss requires actual, tangible, permanent, physical alteration of property." *Studio 417*, No. 20-cv-03127-SRB, ECF No. 40 at 8-9. As the Court explained, "the Policies provide coverage for 'accidental physical loss ***or*** accidental physical damage,'" and Cincinnati "conflates 'loss' and 'damage,'" whereas under insurance contract interpretation principles, "the Court must give meaning to both terms." *Id.* (emphasis in original); *K.C. Hopps*, No. 20-cv-00437-SRB (same). As in *Studio 417* and *K.C. Hopps*, coverage under Plaintiffs' Policies for "physical loss" is not predicated on physical damage. The conjunctive "or" demands that "physical loss" be given separate meaning. *See also Advance Cable Co., LLC v. Cincinnati Ins. Co.*, No. 13-cv-229-wmc, 2014 U.S. Dist. LEXIS 32949, at *30 (W.D. Wis. Mar. 12, 2014), *aff'd*, 788 F.3d 743 (7th Cir. 2015) (analyzing similar language *in a Cincinnati insurance policy*

[9] Notably, the same law firm representing Cincinnati here represented Cincinnati in these twin cases in Missouri.

and noting "that where [an] insurance policy explicitly covered physical loss *and* physical damage, 'direct physical loss' must mean something other than 'direct physical damage,' since otherwise policy language would be rendered superfluous." (emphasis in original)). This conclusion is in accord with the Eastern District of North Carolina's decision in *Fountain Powerboat*, 119 F. Supp. 2d at 556-57, which similarly found that when analyzing a provision that covered business interruptions "*caused by loss*, damage, *or* destruction *by any of the perils* not excluded," the use of the "conjunction 'or'" required that "loss" be given separate meaning from "damage." *See also Great Am. Ins. Co. v. Mesh Cafe, Inc.*, No. COA02-840, 2003 N.C. App. LEXIS 1095, at *5 (Ct. App. June 3, 2003) (finding coverage under business interruption provision requiring "direct physical loss or damage by a Covered Cause of Loss" given that a "reasonable person could understand 'direct physical loss' to be an alternative to 'damage by a Covered Cause of Loss' because of the conjunction 'or.'").

These precedents comport with a long line of majority-rule cases nationwide finding that physical damage to property is not necessary where the property has been rendered uninhabitable or unusable for its intended purpose. *See, e.g.*, *Port Auth. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (holding that "an imminent threat of the release of a quantity of asbestos fibers that would cause . . . loss of utility" constitutes "physical loss or damage" to property, even if that threat never materializes); *Or. Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, 2016 U.S. Dist. LEXIS 74450, *17 (D. Or. June 7, 2016) ("The Court finds that defendant's interpretation, which would add the word 'structural,' . . . is not a plausible plain meaning of the term 'direct physical loss of or damage to property.'"); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-cv-04418 (WHW) (CLW), 2014 U.S. Dist. LEXIS 165232, at *13 (D.N.J. Nov. 25, 2014) ("While structural alteration provides the most obvious sign of

physical damage, [courts] have also found that property can sustain physical loss or damage without experiencing structural alteration."); *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.*, 406 N.J. Super. 524, 543, 968 A.2d 724, 736 (App. Div. 2009) (holding that property can be physically damaged without undergoing structural alteration when it loses its essential functionality); *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 826 (3d Cir. 2005) (holding that bacterial contamination in a well that supplied water to an insured house could constitute physical loss if it made the house useless or uninhabitable); *Three Palms Pointe, Inc. v. State Farm Fire & Cas. Co.*, 250 F. Supp. 2d 1357, 1364 (M.D. Fla. 2003) ("[U]nder Florida law 'direct physical loss' includes more than losses that harm the structure of the covered property."); *Matzner v. Seaco Ins. Co.*, No. 96-0498-B, 1998 WL 566658, at *3 (Mass. Super. Aug. 12, 1998) (holding that loss of use of an apartment due to buildup of carbon monoxide in the building was covered because "the phrase 'direct physical loss or damage' is ambiguous [and can include more than] tangible damage to the structure of insured property."); *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) ("Direct physical loss also may exist in the absence of structural damage to the insured property."); *W. Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 38, 437 P.2d 52, 55 (1968) (rejecting insurer's argument that mere "loss of use" to insured church premises occasioned by local fire department's shutdown order did not constitute "direct physical loss"); *Hughes v. Potomac Ins. Co.*, 199 Cal. App. 2d 239, 249, 18 Cal. Rptr. 650, 655 (Cal. Ct. App. 1962) (finding that a house that had not been physically damaged by a landslide was covered because it was rendered unsafe to use as a result of the loss of lateral support soil); *Mellin v. N. Sec. Ins. Co.*, 167 N.H. 544, 550, 115 A.3d 799, 805 (2015) (finding that the loss of use of a condo due to cat urine odor coming from a neighboring property was covered because "physical loss may include not only tangible changes

to the insured property, but also changes that are perceived by the sense of smell and that exist in the absence of structural damage."); *Nautilus Grp., Inc. v. Allianz Glob. Risks US*, No. C11-5281BHS, 2012 U.S. Dist. LEXIS 30857, at *18-19 (W.D. Wash. Mar. 8, 2012) ("[I]f 'physical loss' was interpreted to mean 'damage,' then one or the other would be superfluous. The fact that they are both included in the grant of coverage evidences an understanding that physical loss means something other than damage."); *Mehl v. Travelers Home & Marine Ins. Co.*, No. 4:16 CV 1325 CDP, 2018 U.S. Dist. LEXIS 74552, at *2 (E.D. Mo. May 2, 2018) ("'Direct physical loss' is not defined in the policy, and [the insurer] points to no language in the policy that would lead a reasonable insured to believe that actual physical damage is required for coverage."); *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, No. CV-01-1362-ST, 2002 U.S. Dist. LEXIS 20387, at *26 (D. Or. June 18, 2002) (citing case law from Massachusetts and Colorado for the proposition that "the inability to inhabit a building [is] a 'direct, physical loss' covered by insurance."); *Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. Ct. App. 2001) (finding coverage where certain General Mills food products were fit for human consumption but nevertheless unable to be sold or used due to government regulations, given that "direct physical loss can exist without actual destruction of property or structural damage to property; it is sufficient to show that insured property is injured in some way.").

iv. No Exclusions Preclude Coverage.

No exclusions or limitations apply to preclude coverage for Plaintiffs' losses under the Policies. Nothing in Plaintiffs' Policies' commercial property coverage provisions excludes losses arising from viruses or viral-related causes.

Nor does the provision excluding "[d]elay, loss of use or loss of market" preclude coverage. The provision reads in full:

> "We will not pay for 'loss' caused by or resulting from any of the following: . . . (b) . . . Delay, loss of use or loss of market."

See Policy at 45, Section A.3.b(2)(b). This provision states the Policies will not pay for losses caused by or resulting from any "loss of use." Losses are excluded under this provision only to the extent they flow from the "loss of use." Here, Plaintiffs' losses were not caused by and do not flow from the "loss of use." Rather, Plaintiffs' loss *is* the "loss of use," which itself was caused by the Government Orders. The insured-against peril—governmental action—resulted directly and immediately in Plaintiffs' direct physical loss of use or access.

Put differently, the exclusion for "loss of use" applies only to losses that are consequential. Consequential losses, or consequential damages, are special or indirect damages: "[l]osses that do not flow directly and immediately from an injurious act but that result indirectly from the act. — Also termed *indirect damages*." *Consequential Damages*, Black's Law Dictionary (11th ed. 2019) (emphasis in original). The plain language of the exclusion clause speaks of excluding consequential losses only. *See, e.g.*, *Ashland Hosp. Corp. v. Affiliated FM Ins. Co.*, No. 11-16-DLB-EBA, 2013 U.S. Dist. LEXIS 114730, at *31-32 (E.D. Ky. Aug. 14, 2013) (holding that a "loss of use" exclusion "cannot be so broad as to encompass *all* loss of use of insured property," instead reading the exclusion "as barring certain *consequential damages* resulting from physical loss or damage." (emphases in original)); *Schneider Equip., Inc. v. Travelers Indem. Co. of Ill.*, No. CV 04-1482-HA, 2005 U.S. Dist. LEXIS 50185, at *21 (D. Or. June 29, 2005) ("The provision's use of the terms 'delay' and 'loss of market' in the same phrase as 'loss of use' indicates that the exclusion covers intangible economic losses, not the type of tangible, direct damages resulting from direct physical loss at issue here.").

Limiting the "loss of use" exclusion to consequential losses also renders sensible an exclusion that otherwise swallows the entire policy. Considering that the inability to use one's

property is a precondition for most conceivable first-party property claims, a broad reading of the exclusion clause would render any coverage contained in the Policies illusory. Because exclusionary clauses are disfavored and must be construed narrowly to provide coverage which would otherwise be afforded by the policy, *Fountain Powerboat*, 119 F. Supp. 2d at 555 (citing *Wachovia Bank*, 276 N.C. 348, 172 S.E.2d 518); *Maddox v. Colonial Life & Accident Ins. Co.*, 303 N.C. 648, 650, 280 S.E.2d 907, 908 (1981), the "loss of use" exclusion does not preclude Plaintiffs' recovery.

IV. CONCLUSION

The Government Orders entered by North Carolina authorities resulted directly in Plaintiffs' losing physical access to and physical use of their covered property. Under the terms of the Government Orders, Plaintiffs and their owners, customers, vendors, and others were prohibited from putting the physical aspects of the restaurants to use for the very income-generating purposes for which the restaurants were insured. This is unambiguously a direct "accidental physical loss" as ordinarily understood. Even if the Court finds ambiguity, however, that ambiguity must be construed in favor of coverage.

Accordingly, the forced closures of Plaintiffs' businesses require a declaration of coverage under the Policies for business income and extra expenses, with coverage beginning at the time of the earliest governmental action: March 17, 2020. Plaintiffs hereby respectfully request partial summary judgment for declaratory relief under the Amended Complaint's First Claim for Relief against Cincinnati.

This the 17th day of August, 2020.

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the attorney is, and at all times hereinafter mentioned was, more than eighteen (18) years of age; and that on this day, copies of the foregoing will be served on the following by electronic mail addressed as follows:

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This the 17th day of August, 2020.

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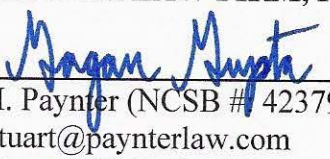

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