STATE OF NORTH CAROLINA
COUNTY OF DURHAM

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20 CVS 002569

NORTH STATE DELI, LLC d/b/a MATEO BAR DE TAPAS, SAINT JAMES SEAFOOD, MOTHERS & SONS TRATTORIA, and LUCKY'S DELICATESSEN; GIORGIOS HOSPITALITY GROUP, INC. d/b/a PARIZADE, VIN ROUGH, BIN 54, CITY KITCHEN, VILLAGE BURGER, KALAMAKI, NASDHER CAFE, LOCAL22, KIPOS, and GOLDEN FLEECE, 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.

DEFENDANT THE CINCINNATI INSURANCE COMPANY'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

I. SUMMARY

Plaintiffs purchased commercial property insurance policies from The Cincinnati Insurance Company ("Cincinnati"). The purpose of a commercial property policy is to insure and protect the insured's property in the event of "direct physical loss or damage" to it. Such policies do not protect the health of people. The policies also provide coverage for economic loss when direct physical loss to property has been suffered. However, the policies do not provide coverage for pure economic harm in the absence of direct physical loss to property, which requires some form of physical alteration to the property. This conclusion is supported by cases nationally, including recent rulings addressing the exact same claim presented here. In the absence of some physical alteration, the policies afford no coverage.

Plaintiffs do not assert that there has been any physical alteration to property. In fact, Plaintiffs tacitly admit there is none. Plaintiffs do not allege that the Coronavirus was even in their buildings. Therefore, even assuming *arguendo* that physical alteration is not necessary, the virus could not have caused any <u>direct physical loss</u> to Plaintiffs' buildings. This fact alone requires denial of Plaintiffs' motion. Instead of proving its buildings have been physically altered, Plaintiffs argue that the "loss of use" of their buildings means they have suffered a direct physical loss to their properties. To reach this conclusion, Plaintiffs ask the Court to violate a principle canon of insurance contract law. This canon requires the Court to read the terms of an insurance policy as a whole and to give meaning to them in the context of the policy as a whole. When read in this way, the meaning and intent of the coverage is established – <u>physical alteration to property</u> is required. To reach a contrary conclusion, Plaintiffs ask the Court to read the terms in isolation without reference to the other terms or portions of the Policies. This includes an invitation to ignore the word "physical" in the phrase direct physical loss or damage or, alternatively, to torture its plain meaning in an effort to manufacture coverage. In this way, Plaintiffs seeks to distort the meaning and intent of the coverage of their policies, to provide coverage for the stand-alone economic harm they have suffered as a result of the Coronavirus pandemic. The Court must refuse this invitation and consider all the terms of the policies together, including the foundational requirement of direct ***physical*** loss to property. When read as a whole, the meaning is clear and inescapable. There must be physical alterations to the buildings to implicate any coverage. By failing to identify any, Plaintiffs surely admit that there is none.

Even if the Court believes that loss of use qualifies as direct physical loss to property, Plaintiffs' motion should still be denied. There are several exclusions that apply including those for loss caused by enforcement of Ordinance or Law. In addition, the facts establish that some plaintiffs continued to use their buildings even after the governmental orders were issued. At a minimum, there are questions of fact as to whether Plaintiffs actually lost the use of their buildings and/or the extent of their loss of use.

For all these reasons, Plaintiffs' motion for summary judgment should be denied.

II. STATEMENT OF UNCONTESTED FACTS

A. The Government Orders

On March 17, 2020, North Carolina Governor Roy Cooper entered Executive Order 118, which imposed limitations on the use of and access to food and beverage facilities. See Declaration of Gagan Gupta, *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*. Order 118 also "limit[ed] access to facilities that sell food and beverage to carry-out, drive through and delivery services only." *Id.* Order 118 closed bars outright with no exceptions. *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., Attachment 2 ("NCDHHS Order"). The NCDHHS Order required the immediate closure of all restaurant seating areas and the full closure of all bars. *Id.* The NCDHHS Order was issued on the basis of the threat to human health posed by the Coronavirus and to slow the spread of the outbreak. *Id.*

On March 23, 2020, Governor Cooper entered Executive Order 120, further limiting mass gatherings to no more than 50 people, whether indoor or outdoor. See Gupta Decl., 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 enumerated “Essential Activities”, “Essential Governmental Operations” or “Covid-19 Essential Business and Operations” and requiring individuals to maintain social distancing of at least six feet. See Gupta Decl., Attachment 4 ("Order 121"). Order 121 also prohibited travel except for those same essential activities. *Id*. Order 121 identified restaurants and other facilities that prepare and serve food, but only for consumption off-premises, within the COVID-19 Essential Business and Operation category. The order continued the closure of bars. *Id*. Executive Order 121 also set forth "Social Distancing Requirements" and 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., Attachment 5 ("Order 131"). Those additional requirements included “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*.

Local and municipal governments across North Carolina entered their own orders mandating that residents shelter in place and that businesses curtail or cease operations, including by government entities in four of the five North Carolina counties in which Plaintiffs' restaurants operate: Durham, Wake, Orange, and Buncombe Counties. (Pls.’ Mot. Sum. J. at 8). 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 exceptions for “Essential Businesses and Operations,” a category including restaurants for off-premises consumption. See Gupta Decl., 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 provided that entities providing food services should not permit the food to be consumed "at the site where it is provided, or at any other gathering site” based in part on the virus' alleged “propensity to physically impact surfaces and personal property." *Id*. No factual or scientific support is provided for that pronouncement by the Durham Mayor or provided in the Durham City Stay at Home Order. *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. See Gupta Decl., Attachment 7 ("Durham County Stay at Home Order"). The Durham County Stay at Home Order is similarly lacking factual or scientific support for the alleged physical impact of the Coronavirus to surfaces and personal property. *Id*. Subsequent orders from the County of Durham added social distancing requirements, including regular cleaning of high-touch surfaces. See Gupta Decl., Attachment 8, Attachment 9.

The Counties of Wake, Orange, and Buncombe imposed 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 Decl., Attachments 10-14 (Wake County orders); Gupta Decl., Attachments 15-17 (Orange County orders); Gupta Decl., Attachments 18-21 (Buncombe County orders). The Wake County orders were entered with the broad, non-specific goal of the "protection of lives, safety and property during this emergency," and in some cases based on a pronouncement that the spread of the disease allegedly poses a threat to life, property, and the economy in the County and its municipalities. See Gupta Decl., Attachments 10-12. No factual or scientific support is provided for the pronouncement that the virus is a threat to property. *Id*. The Orange County orders designate restaurants as “Essential Businesses and Operations,” allowing them to continue to operate for off-premises consumption See Gupta Decl., Attachments 15-17. The March 26, 2020 order refers to the virus' alleged “propensity to physically impact surfaces and personal property, but provides no factual or scientific support for that comment. See Gupta Decl., Attachment 15. The Buncombe County orders generally track the Executive Orders issued by Governor Cooper, including that restaurants and other facilities that prepare and serve food could continue to do so for consumption off-premises. See Gupta Decl., Attachments 18-21.

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

B. Plaintiffs Operations and Response to the Government Orders[1]

Plaintiffs are multiple restaurant groups that own and operate sixteen 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. (Pls.’ Mot. Sum. J. at 1-2). Plaintiffs claim to have closed their restaurants

[1] Plaintiffs have submitted affidavits from Matthew Kelly, Giorgios Nikolaos, and Djafar Mehdian, owners of the restaurants at the heart of the dispute, for the purposes of introducing the relevant policies and to provide background on the businesses. Cincinnati objects to and moves to strike the affidavits to the extent that they are offered for any other purpose. Rule 56(c) of the North Carolina Rules of Civil Procedure provides that affidavits used in a summary judgment proceeding must be made of personal knowledge and otherwise admissible: “Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.” Affidavits not complying with Rule 56(c), or any offending portions contained therein, should not be considered by the trial court, “If an affidavit contains hearsay matters or statements not based on an affiant’s personal knowledge, the court should not consider those portions of the affidavit. (citations omitted). Similarly, if an affidavit sets forth facts that would be inadmissible in evidence . . . , such portions should be struck by the trial court.” *Strickland v. Doe*, 156 N.C.App. 292, 295, 577 S.E.2d 124, 128 (2003)(*citing*, *Williamson v. Bullington*, 139 N.C.App. 571, 578, 534 S.E.2d 254, 258 (2000), aff’d by an equally divided court, 353 N.C. 363, 544 S.E.2d 221 (2001). An affiant's mere legal conclusions, as opposed to facts as would be admissible in evidence, are not to be considered by the trial court on a motion for summary judgment. See N.C.G.S. § 1A–1, Rule 56(e); *Ward v. Durham Life Ins. Co*., 325 N.C. 202, 208, 381 S.E.2d 698, 701 (1989) (upholding trial court’s striking of portions of affidavit as legal conclusions rather than statements of fact); *see also Singleton v. Stewart*, 280 N.C. 460, 467, 186 S.E.2d 400, 405 (1972) (holding an affidavit statement referring to the notice required for a binding contract was not a fact “as would be admissible in evidence.”).

over the past few months following the issuance of orders from North Carolina state and local governments that “limited the use of and access to” the insured premises. (Pls.’ Mot. Sum. J. at 2). As of March 17, 2020, Plaintiffs closed all but two of their restaurants (Local 22 and Parizade continued operating at minimal capacity, providing limited takeout services only). (Pls.’ Mot. Sum. J. at 4). Plaintiffs ceased operations at Local 22 as of May 2, 2020, and at Parizade as of May 10, 2020. (Pls.’ Mot. Sum. J. at 4).

Plaintiffs claim that the restaurant 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.* Plaintiffs allege that government actions-taken in response to the SARS-Co V-2 viral pandemic ("COVID-19") expressly prohibited or limited the use of or access to Plaintiffs' restaurants, including the restaurants' indoor and outdoor dining areas, bar areas, and seating areas. (Pls.’ Mot. Sum. J. at 4, 10). Under the Government Orders, Plaintiffs' restaurants were deemed Covid-19 Essential Business and Operations, Essential Businesses and Operations, or otherwise identified in some manner that allowed them to continue to operate for off-premises consumption. See Gupta Decl., Attachments 1-21. For financial reasons, Plaintiffs elected to close the Restaurants completely although the Government Orders expressly allowed them to remain open for purposes of preparing and selling food for off-site consumption. (Pls.’ Mot. Sum. J. at 10).

C. Plaintiffs’ Commercial Property Policies

The Cincinnati Insurance Company issued three policies to Plaintiffs:

- The North State 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) seek coverage under Policy No. ECP 042 94 72, effective for the policy period of March 1, 2019 through March 1, 2022. (Pls.’ Mot. Sum. J., Kelly Aff. at Attachment 1).

- Plaintiff Kipos Rose Garden Club LLC d/b/a Rosewater seeks coverage under with Policy No. ECP 055 57 70, effective for the policy period of October 10, 2019 through October 10, 2020. (Pls.' Mot. Sum. J., Bakatsias Aff. at Attachment 2).

- Plaintiffs Gira Sole, Inc. d/b/a Farm Table and Gatehouse Tavern seek coverage under Policy No. ECP 031 16 48, effective for the policy period of March 5, 2018 through March 5, 2021. (Pls.' Mot. Sum. J., Bakatsias Aff. at Attachment 3).

The Cincinnati Casualty Company[2] issued Policy No. ECP 027 19 15, to the Giorgios Hospitality Group 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, and Vin Rouge, Inc. d/b/a Vin Rouge) effective for the policy period of July 25, 2019 through July 25, 2020. (Pls.' Mot. Sum. J., Bakatsias Aff. at Attachment 1)(all policies collectively referred to herein as "the Policies").

The Policies provide business income coverage under forms FM 101 05 16, the main property coverage form, and FA 213 05 16. Form FM 101 05 16 is the Building and Personal Property Coverage Form and contains the following insuring agreement:

> **SECTION A. COVERAGE**
>
> We will pay for direct "loss" to Covered Property at the "premises" caused by or resulting from any Covered Cause of Loss.

(Pls.' Mot. Sum. J., Kelly Aff. at Attachment 1, p. 40).[3] The Policies define "loss" as "accidental physical loss or accidental physical damage." (p. 75). The Policies define "Covered Causes of

[2] The Cincinnati Insurance Company did not issue the Giorgios Hospitality Group policy. Plaintiffs have filed a motion for leave to file a Second Amended Complaint, to which counsel for Cincinnati has consented. Because the Court has not yet ruled on Plaintiffs' motion, the parties' respective briefing in this matter treats the Amended Complaint as the operative complaint. But should the Second Amended Complaint become the operative complaint, the parties jointly stipulate that all briefing submitted to the Court to date remains valid and not subject to change. Notably, the Second Amended Complaint seeks only to add an additional Cincinnati defendant (The Cincinnati Casualty Company), and makes no substantive changes to the complaint nor any changes to paragraph ordering or numbering.
[3] Plaintiffs added page numbers to the North State Plaintiffs' Policy (Attachment 1 to the Kelly Affidavit) for easy reference. All subsequent policy references herein will refer to those page numbers and will be presented as (P. _).

Loss" as "direct 'loss' unless the 'loss' is excluded or limited in this Coverage Part. (P. 42). The Policies' exclusions sections state:

> **(1)** We will not pay for "loss" caused directly or indirectly by any of the following, unless otherwise provided. Such "loss" is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the "loss".
>
> **(a)** **Ordinance or Law**
>
> Except as provided in **SECTION A. COVERAGE, 4. Additional Coverages, g. Ordinance or Law,** the enforcement of or compliance with any ordinance or law:
>
> **1)** Regulating the construction, use or repair of any building or structure; . . .
>
> This exclusion applies whether "loss" results from:
>
> **1)** An ordinance or law that is enforced even if the building or structure has not been damaged; or
>
> **2)** The increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition of any building or structure, or removal of its debris, following a direct '1oss" to that building or structure.
>
> *　*　*
>
> **(2)** We will not pay for "loss" caused by or resulting from any of the following
>
> **(b)** **Delay or Loss of Use**
>
> Delay, loss of use or loss of market.
>
> *　*　*
>
> **(3)** We will not pay for "loss" caused by or resulting from any of the following . . . :
>
> *　*　*
>
> **(b)** **Acts or Decisions**
>
> Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body.

(Pp. 42, 45, 47).

Plaintiffs seek Business Income and Extra Expense coverage, which requires, in part, "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." (P. 18).

The Policies define "period of restoration" to mean:

the period of time that:

a. Begins at the time of "loss".

b. Ends on the earlier of:

(1) The date when the property at the "premises" should be repaired, rebuilt or replaced with reasonable speed and similar quality; or

(2) The date when business is resumed at a new permanent location.

(Pp. 75-76).

Form FA 213 05 16 contains substantially the same Business Income provision and requirements for coverage, and incorporates by reference form FM 101 05 16's definition of Covered Causes of Loss and its exclusions. (P. 110). This form also supplies the coverage limit stated at the Declarations page, while Form FM 101 05 06's coverage limit is $25,000.

III. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate 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. R. Civ. P. 56(c). It is appropriate in two types of cases: "(a) Those where a claim or defense is utterly baseless in fact, and (b) those where only a question of law on the indisputable facts is in controversy and it can be appropriately decided without full exposure of trial." *Kessing v. Nat'l Mortg. Corp*., 278 N.C. 523, 533, 180 S.E.2d 823, 829 (1971). All factual inferences must be drawn against the movant. *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 572, 579, 573 S.E.2d 118, 124 (2002).

IV. RULES GOVERNING INTERPRETATION OF INSURANCE POLICIES

An insurance policy is a contract and "the goal of construction is to arrive at the intent of the parties when the policy was issued," giving effect to every word and provision. *Woods v. Nationwide Mut. Ins. Co*., 295 N.C. 500, 505-506, 246 S.E.2d 773, 777 (1978). Because the intent of the parties is derived from the language in the policy, the language of the policy necessarily controls the interpretation of the policy. *See Nationwide Mut. Ins. Co. v. Mabe,* 115 N.C.App. 193, 198, 444 S.E.2d 664, 667 (1994), *aff'd*, 342 N.C. 482, 467 S.E.2d 34 (1996); *see also Kruger v. State Farm Mut. Auto. Ins. Co*., 102 N.C.App. 788, 789, 403 S.E.2d 571, 572 (1991).

If the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations, the doubts will be resolved against the insurance company and in favor of the policyholder. *Woods*, 295 N.C. at 506, 246 S.E.2d at 777. Whereas, if the meaning of the policy is clear and only one reasonable interpretation exists, the courts must enforce the contract as written; they may not, under the guise of construing an ambiguous term, rewrite the contract or impose liabilities on the parties not bargained for and found therein. *Id*.; *Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C*., 364 N.C. 1, 10, 692 S.E.2d 605, 612 (2010). Further, ambiguity is not established by the mere fact that the insured asserts an understanding of the policy that differs from that of the insurance company. *Accardi v. Hartford Underwriters Insurance Company*, 373 N.C. 292, 295, 838 S.E.2d 454, 457 (2020). Terms defined in insurance policies are applied to all clauses of the insurance contract, while undefined terms are construed in accordance with their ordinary meaning. *Harleysville*, 364 N.C. 1, 692 S.E.2d 605, 612 (N.C. 2010).

The insured has the [initial] burden of bringing itself within the insuring language of the policy. *Wm. C. Vick Constr. Co. v. Pa. Nat'l Mut. Cas. Ins. Co.*, 52 F.Supp.2d 569, 580 (E.D.N.C.1999) (quoting *Hobson Constr. Co., Inc. v. Great Am. Ins. Co.*, 71 N.C.App. 586, 590, 322 S.E.2d 632, 635 (1984), disc. review denied, 313 N.C. 329, 327 S.E.2d 890 (1985)), *aff'd* per curiam, 213 F.3d 634, 2000 WL 504197 (4th Cir.2000).

V. ARGUMENT

The requirement of "direct physical loss" is a core element in property insurance policies like Plaintiffs'. The requirement appears in multiple places. The basic insuring agreements provides:

> We will pay for direct "loss" to Covered Property at the "premises" caused by or resulting from any Covered Cause of Loss.

(P. 40). The term "loss" is defined as "accidental ***physical*** loss or accidental <u>***physical***</u> damage." (Kelly Aff. at Attachment 1, p. 75(Emphasis added)). Therefore, the Policies require direct physical loss or damage to "Covered Property" to have coverage in the first instance. Direct physical loss to Plaintiffs' buildings is also required for Business Income coverage:

> We will pay for the actual loss of "Business Income" 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 "premises" which are described in the Declarations and for which a "Business Income" Limit of Insurance is shown on the Declarations. The "loss" must be caused by or result from a Covered Cause of Loss.

(P. 55). As established, the term "loss" is defined to require ***physical*** loss or ***physical*** damage. (*Id.*, p. 75). Thus, "direct 'loss' to property" means "direct 'accidental physical loss' or 'direct accidental physical damage' to property".

Direct physical loss additionally appears as a threshold requirement for any coverage requiring a Covered Cause of Loss. Covered Cause of Loss is defined as "direct 'loss' unless the 'loss' is excluded or limited in this Coverage Part." (P. 42). Since "loss" is defined, in relevant part, as ***physical*** loss or damage, direct physical loss is a necessary element of Covered Cause of Loss. (P. 75 (Emphasis added)). Because it is an element of Covered Cause of Loss, direct physical loss to property is an integral part of all coverage in the Policies.[4]

Plaintiffs have not met and cannot meet their burden to establish that their claims satisfy the core requirement of "direct physical loss" to property. First, the alleged loss of use of Plaintiffs' businesses is not "direct physical loss to property" because it does not involve any physical alteration to property. Second, even if the Policies' direct physical loss requirements were satisfied, exclusions preclude coverage for Plaintiffs' claims. Third, the undisputed facts (or taken in the light most favorable to Defendant, pursuant to Rule 56 of the North Carolina Rules of Civil Procedure) demonstrates that Plaintiffs did not lose the use of their businesses because of the Coronavirus or COVID-19. Accordingly, and for the reasons that follow, this Court should deny Plaintiffs' motion for partial summary judgment (and, for the same reasons, grant judgment to Cincinnati's Motion to Dismiss).

A. Direct Physical Loss To Covered Property Requires Physical Alteration.

Plaintiffs argue that they have lost the use of their businesses due to the governmental orders. Further, they claim that this alleged loss of use qualifies as the direct physical loss to

[4] While the definition of Covered Cause of Loss refers to exclusions, exclusions do not come into play unless and until there is first a covered 'loss', i.e. a direct physical loss. Thus, if an insured demonstrates direct physical loss is present, then exclusions may nevertheless apply. *Defeat The Beat, Inc. v. Underwriters At Lloyd's London*, 194 N.C.App. 108, 115, 669 S.E.2d 48, 52 (2008). If there is no direct physical loss, then the exclusions need not be consulted because there is no coverage to begin with. *Hobson Constr. Co. v. Great American Ins. Co*., 71 N.C.App. 586, 590, 322 S.E.2d 632, 635 (1984), *disc. review denied*, 313 N.C. 329, 327 S.E.2d 890 (1985) (where the loss was not within the insuring language, there was no need to reach the issue of whether the injury was excepted from coverage by an exclusion).

property required for coverage under the Policies. Plaintiffs, however, do not allege that their properties were structurally altered in any way. This is fatal to their claim under North Carolina law. *Harry's Cadillac-Pontiac-GMC Truck Co. v. Motors Ins. Corp.* holds that the loss of use of a property without structural alteration is not direct physical loss. 126 N.C.App. 698, 702, 486 S.E.2d 249, 251 (1997). In *Harry's Cadillac*, the plaintiff auto dealership claimed it lost profits because customers could not access its property due to a snowstorm. However, the dealership did not lose any business because of direct physical loss or damage. Rather, it lost business because its customers did not appear. The Court held that there could be no business interruption coverage where the loss of income was not caused by direct physical loss. *Harry's Cadillac*, 126 N.C.App. at 702, 486 S.E.2d at 252. Indeed, in *Harry's Cadillac*, there was actual physical damage to the dealership's roof. Importantly, however, the roof damage did not <u>cause</u> the business interruption. *Harry's Cadillac*, 126 N.C.App. at 702, 486 S.E.2d at 251. Here, Plaintiffs' claim, unlike Harry's Cadillac's claim, does not even allege physical damage to their properties. Accordingly, a finding of no coverage is warranted.

In a substantively related case, the Eleventh Circuit Court of Appeals recently held that there must be an actual change in property in order for there to be a direct physical loss. *Mama Jo's Inc. v. Sparta Ins. Co.*, --- F. App'x. ---, No. 18-12887, 2020 WL 4782369 (11th Cir. Aug. 18, 2020). The insured alleged that dust and debris from a nearby road construction project was causing its customers to avoid the insured premises (a restaurant), thus resulting in a loss of business income. The insured further alleged that the dust and debris caused damage to its property. *Id.* at *1. However, the insured was not able to identify any actual change to the structure. Instead, the insured alleged that it required additional cleaning and painting. *Id.* at *2. The trial court found that these allegations were insufficient to demonstrate any actual, direct physical loss. *Id.* at *5. As such, the trial court granted summary judgment in favor of the insurer. The Eleventh Circuit affirmed this holding. *Id.* at *8-*9 ("[U]nder Florida law, an item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical.'").

Additionally, several recent decisions, including decisions involving Coronavirus claims similar to that asserted by Plaintiffs, establish that direct physical loss requires tangible, physical alteration to property. *10E, LLC v. Travelers Indem, Co. of Conn*., No. 2:20-cv-04418-SVW-AS at 7, 2020 WL 5359653 (C.D. Cal. Sept. 2, 2020), *as amended*. In *10E, LLC*, a Los Angeles restaurant sought business income and civil authority coverage related to similar Coronavirus orders. The insured alleged that physical loss or damage occurred at its restaurant and other nearby locations; that in-person dining restrictions prohibited access to its restaurant; and that the restrictions caused physical damage by labeling the property as non-essential and preventing the ordinary intended use of the property. *Id*. at *1. The court granted the insurer's motion to dismiss because the insured had not alleged direct physical loss of or damage to property as required for Business Income, Extra Expense, and Civil Authority coverages. *Id*. at *5. Noting first that "[a]n insured cannot recover by attempting to artfully plead temporary impairment to economically valuable use of property as physical loss or damage," the court refused to allow the plaintiff to substitute temporary impaired use or diminished value for physical loss or damage. *Id*. While restrictions might interfere with the use or value of the property, the court held that the insured could not plausibly allege that the restrictions caused direct physical loss or damage to its property as required by the Business Income and Extra Expense coverage. *Id*. at *5-6.

A similar decision was reached in *Rose's 1, LLC v. Erie Insurance Exchange*, No. 2020 CA 002424 B, 2020 WL 4589206 (D.C. Super. Aug. 06, 2020)(Ex. I to Cincinnati's Memorandum in Support of Motion to Dismiss). There, the plaintiffs operate a number of prominent restaurants in the District of Columbia. The plaintiffs alleged that in response to Coronavirus, the mayor issued several orders, which essentially required the plaintiffs to close their respective businesses. As a result, the plaintiffs incurred significant revenue losses. The plaintiffs brought suit against their insurer, Erie, alleging that the insurance policy provided coverage for the losses sustained. The court disagreed, finding that there was no direct physical loss to property. *See Rose's 1*, 2020 WL 4589206 at *5. That decision's holding includes the following:

> Standing alone and absent intervening actions by individuals and businesses, **the orders did not effect any direct changes to the properties** . . . . **Further, none of the cases cited by Plaintiffs stand for the proposition that a governmental edict, standing alone, constitutes a direct physical loss under an insurance policy** . . . . In contrast, courts have rejected coverage when a business's closure was not due to direct physical harm to the insured premises . . . . But again, **even in the absence of such an exclusion, Plaintiffs would still be required to show a "direct physical loss**."

Rose's 1, No. 2020 CA 002424 B, 2020 WL 4589206, at *2-*5.

A recent decision involving a claim exactly like that presented here confirm that physical alteration to property is required. *See, e.g., Diesel Barbershop, LLC v. State Farm Lloyds,* No. 5:20-CV-461-DAE, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020) (Ex. L to Cincinnati's Memorandum in Support of Motion to Dismiss). There, a series of executive orders were issued on a county and state level in response to the Coronavirus pandemic. In relevant part, the executive orders required the closure of "non-essential" businesses to help prevent the spread of Coronavirus to other individuals. *Id.* at *2. The plaintiffs argued that as a result of these orders, they suffered and continue to suffer significant economic losses, which they alleged were covered under their insurance policy issued by State Farm Lloyds. The court disagreed. Specifically, the court held that Coronavirus did not cause a direct physical loss, as "the loss needs to have been a 'distinct, demonstrable physical alteration of the property.'" *Id.* at *5.

Mastellone v. Lightning Rod Mutual Insurance Co., 884 N.E.2d 1130 (Ohio App. Ct. Jan. 31, 2008) is also on point. Like the Policies here, the policy in *Mastellone* required direct physical loss. *Id.* at 1144. There, the court held that mold on building siding did not constitute direct physical loss because it did not adversely affect the building's structural integrity. The court rejected the insured's argument that dark staining on the siding was physical loss because the staining was "only temporary and did not affect the structure of the wood." Indeed, the mold could be removed by cleaning and its presence "did not alter or otherwise affect the structural integrity of the siding." *Id.* Accordingly, *Mastellone* held there was no coverage.

In *Gavrilides Management Co., LLC v. Michigan Insurance Co.*, No. 20-258-CB-C30, 2020 WL 4561979 (Mich. Cir. Ct., Ingham Cnty. July 21, 2020) (attaching a copy of the hearing transcript as Exhibit A), two restaurants in Lansing, Michigan alleged loss of business income resulting from Coronavirus and sought business interruption, extra expense and civil authority coverage under a policy issued by Michigan Insurance Company. The court rejected the insureds' claims and granted summary disposition to the insurer. Specifically, the court held:

> [I]t is clear from the policy coverage provision **only direct physical loss is covered.** Under their common meanings and under federal case law as well, that the plaintiff has cited that interprets this standard form of insurance, direct physical loss of or damage to the property has to be something with material existence. Something that is tangible. **Something** according to the one case that the plaintiff has cited from the Eastern District, **that alters the physical integrity of the property.** The complaint here does not allege any physical loss of or damage to the property . . . . So, again, the plaintiff just can't avoid the requirement that there has to be something that physically alters the integrity of the property. **There has to be some tangible, i.e., physical damage to the property**.

Ex. A, *Gavrilides* Trans. 18-20 (emphasis added).

Likewise, *Social Life Magazine, Inc. v. Sentinel Insurance Co., Ltd.* considered whether the Coronavirus constituted direct physical loss and held that it did not. 1:20-cv-03311-VEC

(S.D.N.Y.), ECF No. 24-1.[5] The Court in *Social Life* denied a motion for preliminary injunction. The Court's principal basis for that denial was the absence of direct physical loss; a virus does not cause direct physical loss. As the judge deciding *Social Life* stated during argument, the virus damages lungs; not printing presses. *Id.*, Ex. B at 5. The judge ruled, "New York law is clear that this kind of business interruption needs some damage to the property to prohibit you from going." *Id.*, Ex. B at 15. *See also The Inns by the Sea v. Cal. Mut. Ins. Co.*, Case No. 20CV001274 (Cal. Super. Ct. Monterey Cnty., Aug. 6, 2020) (dismissing complaint seeking coverage for Coronavirus related business losses)[6].

These Coronavirus coverage decisions are consistent with others across the country holding that "direct physical loss" requires physical alteration of property. *See e.g. Source Food Technologies, Inc. v. USF&G Co.*, 465 F.3d 834, 838 (8th Cir. 2006). In *Food Source*, the U.S. government imposed an embargo on the import of Canadian beef following the detection of Mad Cow Disease in Canadian cattle. Despite no evidence that *its* beef was contaminated, Source Food could not import it into the U.S. because of the embargo. That policy, like Plaintiffs', provided coverage if the suspension of business operations was "caused by ***direct physical loss to Property***". *Id.* at 835. Source Food argued this requirement was satisfied and sought coverage for the loss of its beef. The court rejected the insured's argument: "To characterize Source Food's inability to transport its truckload of beef product across the border and sell the beef product in the United States as direct physical loss to property would render the word 'physical' meaningless." *Id.* at 838; *see also Phila. Parking Auth. v. Fed. Ins. Co.*, 385 F. Supp. 2d 280, 287-88 (S.D.N.Y. 2005)

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[5] The plaintiff in *Social Life* apparently gave up, voluntarily dismissing the case before a written opinion was entered by the court. Nevertheless, a file-stamped copy of the transcript reflecting the Court's ruling and rationale is attached hereto as Exhibit B.

[6] Copies of the Order granting defendant a demurrer and the hearing transcript from *Inns By The Sea* are submitted as Exhibit C.

(noting that "'direct physical' modifies both loss and damage," and therefore "the interruption in business must be caused by some physical problem with the covered property . . . which must be caused by a 'covered cause of loss"').[7] Accordingly, as a matter of law, the mere presence of the virus is not a direct physical loss to property. But even assuming that it is, Plaintiffs do not allege that the virus was ever on their premises.

Significantly, the virus cannot live on a surface for very long. It always dies on its own. Moreover, the virus can be removed from surfaces with common household cleaners. Ex. D, Centers for Disease Control and Prevention (CDC), *CDC Reopening Guidance for Cleaning and Disinfecting Public Spaces, Workplaces, Businesses, Schools, and Homes*, April 28, 2020, available at https://www.cdc.gov/coronavirus/2019-ncov/community/pdf/Reopening_America_Guidance.pdf (accessed Sept 16, 2020); Ex. E, United States Environmental Protection Agency, *How does EPA know that the products on List N work on SARS-CoV-2?*, last updated Aug. 20, 2020, https://www.epa.gov/coronavirus/how-does-epa-know-products-list-n-work-sars-cov-2 (accessed Sept. 16, 2020)). Also, the CDC has instructed that the Coronavirus can be wiped off surfaces.[8] And, a recent study published in the New England Journal of Medicine states that the maximum amount of time the virus can live on certain surfaces is three days, but it dies on most surfaces within 24 hours.[9]

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[7] *See also Pentair, Inc. v. Am. Guar. & Liab. Ins. Co.*, 400 F.3d 613, 616 (8th Cir. 2005); *City of Burlington v. Indem. Ins. Co. of N. Am.*, 332 F.3d 38, 44 (2d Cir. 2003); *N.E. Ga. Heart Ctr., P.C. v. Phoenix Ins. Co.*, 2014 WL 12480022, at *7 (N.D. Ga. May 23, 2014); *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 780 (2010); 10A *Couch on Ins.* § 148:46 ("The requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property").

[8] *See* Ex. D at 1 ("The virus that causes COVID-19 can be killed if you use the right products. EPA has compiled a list of disinfectant products that can be used against COVID-19, including ready-to-use sprays, concentrates, and wipes."); *see also* Ex. E at 1 (describing EPA's classification of hundreds of separate products that may be used to clean away Coronavirus).

[9] *Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1*, April 16, 2020, N. Engl. J. Med. 2020; 382:1564-1567, available at https://www.nejm.org/doi/full/10.1056/nejmc2004973 (accessed Aug. 28, 2020).

Thus, even if Coronavirus was at the Plaintiffs' buildings, no physical alteration to the property would have resulted because the virus either dies naturally in days or can be cleaned up. *See, e.g.*, *Mama Jo's Inc.*, No. 18-12887, 2020 WL 4782369 at *8 ("[A]n item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical.'"); *Universal Image Prods., Inc. v. Chubb Corp.*, 703 F. Supp. 2d 705, 710 (E.D. Mich. 2010) (cleaning of a ventilation system was not a direct physical loss), *aff'd*, 475 F. App'x 569 (6th Cir. 2012); *Social Life*, Ex. B at 5 (finding that the Coronavirus damages lungs, not printing presses); *MRI Healthcare Ctr.*, 187 Cal. App. 4th at 779 ("A direct physical loss 'contemplates an actual change in insured property . . .'"); *Mastellone*, 884 N.E.2d at 1144 (finding no direct physical damage because mold can be removed and cleaned); *AFLAC Inc. v. Chubb & Sons, Inc.* 581 S.E. 2d 317, 319 (Ga. App. Ct. 2003) (holding that "loss of" and "damage to" policy language require a change in the property resulting from an external event).

Cases across the country universally confirm that the mere presence of a virus in the community or even on an insured's premises does not constitute direct ***physical*** loss ***to property***. Rather, these cases, including those directly addressing loss of income related to Coronavirus shut-down orders, establish that direct physical loss requires some physical alteration to property before coverage is available. *See* 10A *Couch on Ins.* § 148:46 (3d Ed.1998) ("The requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal . . . .") Here, Plaintiffs do not even claim, let alone prove, any direct, physical alteration or impact to their buildings. In fact, Plaintiffs' effectively admit that there has been none. (Pls.' Mot. Sum. J. at 21.) Therefore, Plaintiffs admit that they have not suffered "direct physical loss" to property and their motion should be denied.

B. Loss of Use is not Direct Physical Loss to Property

In an attempt to by-pass the physical alteration requirement, Plaintiffs argue that "loss of use" in the absence of any physical impact to the building qualifies as "direct physical loss." (Pls.' Mot. Sum. J. at 19-26.) To support this argument, Plaintiffs engage in convoluted interpretation that violates a cardinal canon of policy construction: reading the document as a whole. *See North Carolina Farm Bureau Mut. Ins. Co., Inc. v. Martin by and through Martin*, 833 S.E.2d 183, 186-87 (N.C. Ct. App. 2019); *Harleysville*, 364 N.C. at 9-10, 692 S.E.2d at 612.

Instead of reading the Policies in total and giving meaning to the terms as a whole, Plaintiffs cherry pick terms from the Policies in an effort to muddy the waters and create an ambiguity where none exists. In addition to construing some words in isolation, Plaintiffs disregard the requirement that the direct physical loss must be ***to property***. After reading out the direct physical loss to property requirement, Plaintiffs then claim that their inability to run their businesses at optimum profit-making efficiency due to the COVID-19 pandemic qualifies as direct physical loss to property. Plaintiffs' policy interpretation is not reasonable, particularly under a comprehensive view of the commercial property policy.

1. Plaintiffs' Interpretation is Facially Unreasonable

Plaintiffs parse and dissect the Policies terms. It starts with the word "physical." (Pls.' Br. Sum. J. at 20). Plaintiffs offer dictionary definitions of "physical". In a separate section, Plaintiffs next address the definitions of "accidental." (Pls.' Mot. Sum. J. at 20-21). Plaintiffs never get around to definition of "direct." This disjointed analysis is a purposeful attempt to take words out of context by disassociating them from each other. However, "direct", "accidental" and "physical" all modify the term "loss" in the Policies. (P. 75). As established, these words must be interpreted as a phrase, not as words in isolation. *See Woods*, 295 N.C. at 505-506, 246 S.E.2d at 777. Plaintiffs' interpretation of each word in isolation fails to do this. Moreover, this deconstruction tactic is contrary to North Carolina law, which requires the Court to construe the Policies as a whole and harmonize their provisions to effect their purpose. *Id.*. Therefore, Plaintiffs' interpretation is unreasonable given the plain language of the Policies and the law governing the interpretation of insurance policies. In reciting Policies' provisions in isolation or out of context, Plaintiffs strive to manufacture an ambiguity to create coverage where no coverage exists. But an ambiguity does not exist because the parties disagree over the meaning of the policy. *Accardi, 373 N.C. at 295, 838 S.E.2d at 457*. Instead, both parties must offer reasonable interpretations to create an ambiguity. Here, Plaintiffs' notion of direct physical loss to property as the inability to operate their restaurants to their financial satisfaction is a strained and unreasonable interpretation of the Policies.

Moreover, the cases discussed above establish that when the words direct physical loss to property are read together, they convey the inescapable conclusion that there must be some physical alteration to property. *Mama Jo's Inc. v. Sparta Ins. Co.*, 2020 WL 4782369, *8; *Diesel Barbershop*, No. 5:20-CV-461-DAE, 2020 WL 4724305, *5; *Rose's 1*, No. 2020 CA 002424 B, 2020 WL 4589206, at *2-*5; *Gavrilides*, 2020 WL 4561979, *1 & Ex. A; *Social Life*, Ex. B. This is not satisfied by mere "loss of use."

"A court may not rewrite an insurance contract." *Woods*, 295 N.C. at 506, 246 S.E.2d at 777. Also, as noted in *North Carolina Farm Bureau*, "the Supreme Court of North Carolina has also warned against result-orientated outcomes, instructing that 'if a policy is not ambiguous, then the court must enforce the policy as written and may not remake the policy under the guise of interpreting an ambiguous provision.'" *North Carolina Farm Bureau*, 833 S.E.2d at 187. Plaintiffs improperly ask the Court to violate these rules of construction and rewrite the Policies by analyzing words in isolation, apart from the phrase that contains them. For example, Plaintiffs list multiple dictionary definitions for the word "physical." (Pls.' Mot. Sum. J. at 20.) Yet at no point do Plaintiffs interpret these definitions based on all of the other relevant words in the phrase including the word loss.[10] This is contrary to North Carolina rules of construction. If the parties have defined a term in the agreement, then we must ascribe to the term the meaning the parties intended. *Woods*, 295 N.C. 500, 505-506, 246 S.E.2d at 777 ("As with all contracts, the goal of construction is to arrive at the intent of the parties when the policy was issued. Where a policy defines a term, that definition is to be used."). "We supply undefined, nontechnical words ... a meaning consistent with the sense in which they are used in ordinary speech, unless the context clearly requires otherwise." *Harleysville*, 364 N.C. at 9-10, 692 S.E.2d at 612 (2010) (internal citation and quotation omitted).

Plaintiffs never link the word "direct" to its alternate version of "accidental physical loss." Plaintiffs merely argue that they have been directly impacted by the loss of the use of their properties. (Pls.' Mot. Sum. J. at 21.) This is another example of Plaintiffs' improper "deconstruction" tactic. By failing to apply the term "direct" in the context of "physical loss to property," Plaintiffs distort its meaning. Whether Plaintiffs, as entities, were directly impacted is not what the Policies require. Instead, it is the "property" that must be directly impacted by "physical loss." Plaintiffs were, at most, deprived of the intangible value they derive from their desired uses of their buildings. This is not a direct physical loss to property.

As noted above, North Carolina law holds that the loss of use of a property without structural alteration is not direct physical loss. *Harry's Cadillac*, 126 N.C.App. 698, 702, 486 S.E.2d 249, 251 (1997). The argument was also analyzed and soundly rejected in an analogous case, *Roundabout Theatre Co. v. Cont'l Cas. Co.*, 302 A.D.2d 1 (N.Y. App. Div. 2002). A theater company ("Roundabout") lost all access to its premises due to a municipal order that closed the

[10] Notably, most English words have more than one dictionary definition. Indeed, each of the preceding ten words has more than one. (*See* Dictionary.com). Thus, it is a hallmark of our language that words be understood in context.

street on which the theater was located. *Id.* at *3 The order was issued as a result of a construction accident on a nearby property, but the theatre sustained only minor damage to its roof and air conditioning system, which was repaired within one day. *Id.* The street, however, was closed for nearly a month "because of the substantial damage to the area and the danger from the partially collapsed scaffold. . . ." *Id.* As a result, the theater was completely inaccessible to the public and Roundabout was forced to cancel all performances during that time. *Id.* Roundabout sought business interruption coverage for monetary losses in the form of ticket and production-related sales as well as additional expenses incurred in reopening the production under an insurance policy which stated in relevant part: "'This coverage insures against all risks of direct physical loss or damage to the property described in Paragraph I [i.e., the theatre building or facilities] . . ., except as hereinafter excluded.'" *Id.* The Appellate Division of the Supreme Court of New York held there was no "direct physical loss or damage" under the policy, rejected the argument that "loss" should be read as including "loss of use," and held the policy unambiguously required direct physical damage to the theater itself for coverage. *Id.* at 7; ***see also*** *Newman Myers Kreines Gross Harris, P.C. v. Great Northern Ins. Co.,* 17 F. Supp. 3d 323, 331 (S.D.N.Y. 2014) ("The critical policy language here—'direct physical loss or damage'—similarly, and unambiguously, requires some form of actual, physical damage to the insured premises to trigger loss of business income and extra expense coverage. Newman Myers simply cannot show any such loss or damage to the 40 Wall Street Building as a result of either (1) its inability to access its office from October 29 to November 3, 2012, or (2) Con Ed's decision to shut off the power to the Bowling Green network. The words 'direct' and 'physical,' which modify the phrase 'loss or damage,' ordinarily connote actual, demonstrable harm of some form to the premises itself, **rather than forced closure of the**

premises for reasons exogenous to the premises themselves, or the adverse business consequences that flow from such closure.") (emphasis added).

These cases, particularly *Harry's Cadillac*, establish that "loss of use" in the absence of direct physical harm is not direct physical loss.

2. Plaintiffs' Interpretation Is Not Reasonable Because It Improperly Nullifies Other Provisions Of The Policies

Plaintiffs' interpretation is unreasonable for additional reasons. It nullifies provisions of the Policies. If Plaintiffs' interpretation that their alleged loss of use of their buildings qualifies as "loss" is correct, then a separate coverage for "Business Income" is irrelevant. This is because under Plaintiffs' interpretation, Plaintiffs would be indemnified for its loss of use of their buildings under the Building coverage provided in the FM 101 05 16. There would be no need for a coverage extension providing Business Income coverage. It would be superfluous.

Plaintiffs' interpretation also nullifies the "Delay or Loss of Use" exclusion. If standalone "loss of use" is considered a form of "direct physical loss" then the Loss of Use exclusion would never have any application. For instance, if there were actual physical alteration from a Covered Cause of Loss to a building, the economic damages suffered by the insured would be covered as Business Income, because the loss of business income was caused by the physical alteration. This is how the Policies are meant to operate. However, if an insured only suffers a loss of use that causes the alleged loss of business income, as is the case here, then under Plaintiffs' proffered interpretation of "loss", the Policies would apply. In this way, damages caused by a "loss of use" would always be covered. The "Delay or Loss of Use" exclusion could never apply to any claim. The exclusion would be a "dead letter."

North Carolina courts are required to interpret a policy in a way that gives effect to all provisions. An interpretation that nullifies other portions of the policy violates this requirement and must be rejected. *See Mabe,* 115 N.C.App. at 198, 444 S.E.2d at 667. Plaintiffs' proffered interpretation does just that. It nullifies other facets of the Policies, including the Business Income coverage and the "Delay or Loss of Use" exclusion. Plaintiffs are prohibited from rewriting the Policies by offering an interpretation that nullifies its provisions. *Id*. Therefore, this Court must reject Plaintiffs' interpretation.

3. Plaintiffs' Interpretation Conflicts With Other Portions of the Policies

Plaintiffs' cite multiple orders issued by various civil authorities. Plaintiffs asserts that they closed their restaurants in response to one or more of these orders. (Pls.' Mot. Sum. J. at 17, et seq.). The Policies contains a Civil Authority coverage as part of the "Business Income" coverage. That provision states as follows:

> When a Covered Cause of Loss causes damage to property other than Covered Property at a "premises", we will pay for the actual loss of "Business Income" and necessary Extra Expense you sustain caused by action of civil authority that prohibits access to the "premises", provided that both of the following apply:
>
> **(a)** Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage; and
>
> **(b)** The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property. . . .

(P. 56)

Despite describing how orders of civil authority resulted in the alleged need to close the restaurants, Plaintiffs do not move for summary judgment based on the Civil Authority coverage. This is for obvious reasons.

Plaintiffs are unable to satisfy the requirements of that coverage. It requires direct physical loss to property other than property at Plaintiffs' premises. This requirement is part of the requirement for a Covered Cause of Loss to other property. Moreover, civil authority actions must be "as a result of the damage" to other property. Plaintiffs have not alleged any actual damage to any property. Indeed, they are not able to do so.

Moreover, the absence of Civil Authority coverage here further highlights the unreasonableness of Plaintiffs' interpretation of "loss of use" as "direct physical loss." Plaintiffs argue they are entitled to lost "Business Income" following multiple restrictions by civil authorities, yet the portion of the Policies that specifically addresses Civil Authority coverage does not apply. This argument is only possible because of Plaintiffs' mistaken argument that "loss of use" qualifies as "direct physical loss."

4. Plaintiffs Ignore That The Physical Loss Must Be "To Covered Property"

Plaintiffs also completely ignore other critical language in the Policies. The direct physical loss must be **to** Covered Property. (P. 40). Many of the cases Plaintiffs rely on to support their interpretation involved policies that insured either direct "physical loss ***of***" property, or specifically defined "loss" or "damage" to include "loss of use." *See e.g., Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 826 (3d Cir. 2005) (policy defined "property damage" to include "loss of use of tangible property"). Plaintiffs' Policies do not contain this language.

Several courts have addressed the difference between policies covering loss "of" property, as opposed to those covering loss "to" property. Some cases hold that coverage for loss "of" property may include "loss of use of property," while coverage for physical loss "to" property does not. Also, physical loss "to" property does not include purely financial loss where property has not sustained actual, tangible, injury or damage, *i.e.*, physical or structural alteration of property. This is made clear in *Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, No. CV 17-04908 AB (KSX), 2018 WL 3829767 (C.D. Cal. July 11, 2018).[11]

In *Total Intermodal*, the insured lost cargo when it mistakenly caused the cargo to be sent back to China, rather than delivering it to the intended customer. *Total Intermodal*, 2018 WL 3829767 at *3. The cargo was eventually destroyed with the consent of the customer. *Id.* at *3. Unlike the Policies here, the policy in *Total Intermodal* covered the "direct physical loss ***of*** or damage ***to*** Covered Property caused by or resulting from a Covered Cause of Loss." *Id.* (emphasis added). *Total Intermodal* holds that the policy provided coverage for the lost cargo. The insurer's promise to pay for "physical loss ***of*** property," rather than "physical loss ***to*** property" was outcome determinative:

> [Insurer] points to *MRI Healthcare Center of Glendale, Inc. v. State Farm General Ins. Co.*, 187 Cal.App.4th 766 (2010) and *Newman Myers Kreines Gross Harris, P.C. v. Great Northern Ins. Co.*, 17 F.Supp.3d 323 (S.D.N.Y. 2014) as holding that "direct physical loss" requires some damage or alteration to the property. In *MRI*, the operative language was "direct physical loss ***to*** business personal property," and in *Newman*, the operative language was "direct physical loss or damage." But again, those phrases omit the preposition "**of**" present in the Coverage term here. Thus, contrary to [Insurer]'s argument, *MRI* and *Newman* did not construe the coverage term "physical loss **of**" that is in issue here. In fact, *MRI* and *Newman* cut against [Insurer]: because the clauses in those cases differ from the Coverage clause here, it stands to reason that they also differ in meaning, such that "direct physical loss ***of***" should be construed differently from "direct physical loss ***to***" or "direct physical loss." . . . [T]he phrase "loss of" includes the permanent dispossession of something.

Id. at *3–4 (italics in original; bolding added).

Like *Total Intermodal*, *Gregory Packaging* also construed a policy that expressly insured covered loss "of" property. *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-

[11] Cincinnati does not concede that a policy providing coverage for physical loss ***of*** property would apply to Plaintiffs'' claim. In fact, courts hold that policies containing "loss of" language still require physical alteration to property. *See e.g.*, *Mama Jo's*, No. 18-12887, 2020 WL 4782369, at *8-*9; *J. O. Emmerich & Assocs., Inc. v. State Auto Ins. Cos.*, No. 3:06CV00722-DPJ-JCS, 2007 WL 9775576, at *4 (S.D. Miss. Nov. 19, 2007); *AFLAC*, 581 S.E.2d at 319.

CV-04418 WHW, 2014 WL 6675934, at *1 (D.N.J. Nov. 25, 2014) (policy covered "direct physical loss of or damage to Covered Property caused by or resulting from a Covered Cause of Loss.").[12]

Source Food specifically addressed the "loss of" versus "loss to" distinction. There, as here, the policy required "direct physical loss ***to*** property." *Source Food,* 465 F.3d at 838 (emphasis added). *Source Food* holds "to characterize Source Food's inability to transport its truckload of beef product across the border and sell the beef product in the United States as direct physical loss to property would render the word 'physical' meaningless." *Id*. Further:

> [T]he policy's use of the word "to" in the policy language "direct physical loss *to* property" is significant. Source Food's argument might be stronger if the policy's language included the word "of" rather than "to," as in "direct physical loss *of* property" or even "direct loss *of* property." But these phrases are not found in the policy. Thus, the policy's use of the words "to property" further undermines Source Food's argument that a border closing triggers insurance coverage under this policy.

Id. (emphasis in original).

2. Construing the Policy Language as a Whole Further Confirms That "Physical" Loss or Damage Requires a Demonstrable Alteration of the Property.

Other provisions of the Policies provide additional context and meaning. The Business Income and Extra Expense coverage is limited by its own terms to the Period of Restoration. (Pp. 55-56; 110). The definition of "Period of Restoration" in the Policies provides additional context to the meaning of the phrase direct physical loss. "Period of Restoration" is defined as the period of time that: a. Begins at the time of direct physical "loss" and b. Ends on the earlier of: (1) The date when the property at the "premises" should be repaired, rebuilt or replaced with reasonable

[12] Additionally, as discussed below, the loss of use at issue in these cases was a total loss. In *Intermodal*, there was a "permanent dispossession" of the insured cargo. In *Gregory Packing* the premises were rendered uninhabitable. Thus, even a policy that provides coverage for "loss of property" does not apply, where, as here, Plaintiffs remained in full possession of their property throughout the duration of the Orders, and the premises were not uninhabitable.

speed and similar quality; or (2) The date when business is resumed at a new permanent location. (Pp. 75-76; 118).

Read together, it is clear that the phrase direct physical loss refers to a loss that requires physical repair, rebuilding, or replacement of property that has been actually, tangibly, permanently, and physically altered. *See, e.g.*, *Newman Myers*, 17 F. Supp. 3d at 332 (explaining that "repair" and "replace" in period of restoration clause "contemplate physical damage to the insured premises as opposed to loss of use of it"); *Roundabout Theatre*, 302 A.D.2d at 8 (explaining that, absent a physical damage requirement, a provision limiting coverage to the time necessary to "rebuild, repair, or replace" would "be meaningless").

Here, there can be no "Period of Restoration." Plaintiffs do not even allege that anything needs to be repaired, rebuilt or replaced. Nor has any restaurant moved to new location. Even if the Coronavirus had been present, it does not constitute direct physical loss to property requiring any physical repair, rebuilding, replacement or resumption at a new location. Indeed, the properties can be cleaned. Cleaning is not physical repair, rebuilding or replacement. *Mama Jo's*, No. 18-12887, 2020 WL 4782369, at *8; *Mastellone*, 884 N.E.2d at 1144-45. It is certainly not a resumption at a new place. The inapplicability of the "Period of Restoration" element to Plaintiffs' alleged loss further demonstrates that there is no direct physical loss to property. This serves as a strong additional indication that property damage coverages are not designed to cover purely economic losses that were not occasioned by direct physical loss to property. As such, absent direct physical loss resulting in the physical alteration of property, there is no Business Income and Extra Expense coverage. Plaintiffs engage in a tortured deconstruction analysis of the Policies, isolating certain words and completely ignoring others to reach the conclusion they want. Plaintiffs invoke irrelevant definitions of otherwise clear terms to try to create a specter of ambiguity that is not reasonably present. This violates North Carolina rules of construction. Moreover, based on Plaintiffs' own proffered definitions and interpretation, its claim still fails. Plaintiffs have not suffered a "direct physical loss to property." Plaintiffs have suffered, at most, an intangible loss of value of the use of its property. This does not satisfy the terms of the Policies.

C. Loss or Damage Both Require Physical Alteration

In the Policies' definition of "loss," the word "or" separates "accidental physical loss" from "accidental physical damage". (P. 75). Plaintiffs assert that a requirement of physical alteration is not reasonable because "loss" being separated from "damage" by the word "or" has to mean something other than "damage." (Pls.' Br. Sum. J. at 22). This argument does not change the fact that the Policies require "direct ***physical*** loss or damage ***to property***." Thus, here again, Plaintiffs divorce words from the phrase that contains them in an effort to torture the plain meaning of the phrase.

Moreover, Plaintiffs are wrong that the only possible meaning of the word "or" is one or the other, not both. The word "or" can mean another in a series, as with a list of synonyms. This is well-established in the law. *See e.g. Indiana Ins. Co. v. N. Vermillion Cmty. Sch. Corp.*, 665 N.E.2d 630, 635 (Ind. Ct. App. 1996) ("The use of the disjunctive "or" before "disparaging" suggests that something different though <u>similar</u> and additional to "defamatory" is intended.") (emphasis added); *see also AFLAC*, 581 S.E.2d at 319 (discussing the use of "or" as a coordinating conjunction, instead of disjunctive: "Moreover, the words "loss of" in the International Policy and the words "damage to" used in both policies, make it clear that coverage is predicated upon a change in the insured property resulting from an external event rendering the insured property, initially in a satisfactory condition, unsatisfactory."); *Bethel Vill. Condo. Assn. v. Republic-Franklin Ins. Co.*, 2007–Ohio–546, 2007 WL 416693, ¶¶ 17-18 (Ohio App. Ct.) (holding that insured's interpretation of disjunctive "or" was unreasonable). Thus, the terms "loss" and "damage" should be read together and given a similar meaning. This is supported by cases analyzing commercial property policies. The terms "physical loss" is commonly used to refer to the complete destruction of property, whereas "physical damage" is construed as less than complete destruction, but still involving some physical alteration to the property. *See e.g. Gellman v. The Cincinnati Ins. Co.*, 602 F.Supp.2d 705 (W.D.N.C.2009) aff'd, 357 Fed.Appx. 512 (4th Cir. 2009)(coverage dispute concerning the proper measure of determining the covered loss under a property policy as between the value of the repairs for the physical damage caused to building versus the amount owed if the building was a total loss).

D. Even if "Loss" is Construed to Mean "Loss of Use" or "Loss of Access" as Plaintiffs Suggest, that does not Change the Result Here.

Plaintiffs were not physically/tangibly deprived of their premises. Although Plaintiffs' use of its building was regulated by the Government Orders that restricted the use to providing food for off-site consumption, the Orders did not dispossess or deprive Plaintiffs of their buildings. Plaintiffs were free to continue to operate out of the restaurants so long as they followed the restrictions. Indeed, Plaintiffs admit they made the decision to close based on a cost-benefit analysis; not on an inability to serve customers. (Pls.' Mot. Sum. J. at 10-11). At most, Plaintiffs lost or were temporarily deprived of the intangible, economic value derived from the buildings when they host customers there. Moreover, to the extent that "loss" requires or means loss of possession or tangible deprivation that did not happen here. Again, Plaintiffs were not dispossessed or physically deprived of their properties. In any event, as established, Plaintiffs must prove "physical damage" to their buildings. They have not done so. *Harry's Cadillac*, 126 N.C.App. at 702, 486 S.E.2d at 251.

E. Plaintiffs' Cases are Distinguishable and do not Support Their Interpretation

The cases cited by Plaintiffs to establish the meaning of the word "loss" are inapposite.

None of them are controlling North Carolina law. Also, none of them address the pure economic impact caused by a virus or pandemic as addressed in the cases cited above. *See 10E, LLC*, No. 2:20-cv-04418-SVW-AS at 7, 2020 WL 5359653; *Diesel Barbershop*, No. 5:20-CV-461-DAE, 2020 WL 4724305, *5; *Rose's 1*, No. 2020 CA 002424 B, 2020 WL 4589206, at *2-*5; *Gavrilides Mgmt.*, No. 20-258-CB-C30, 2020 WL 4561979, *1 & Ex. A; *Social Life*, Ex. B. In addition, the facts of the cases cited by Plaintiffs demonstrate that the property at issue in those cases had suffered some direct physical impact, that the cases involved different policy language or both.

Plaintiffs cite first to *Studio 417, Inc., et al. v. The Cincinnati Ins. Co.*, No. 20-cv-03127-SRB (W.D. Mo. Aug. 12, 2020) and *K.C. Hopps, Ltd. v. The Cincinnati Ins. Co.*, No. 20-cv-00437-SRB (W.D. Mo. Aug. 12, 2020) (collectively, *Studio 417*). Those rulings were wrongly decided and distinguishable. The *Studio 417* court erroneously accepted legal conclusions and other unsupported conclusions. *Id*. at *2, *6-*8. It also overlooked the absence of an allegation that the virus was on plaintiffs' premises. *Id*. at *6. In this case Plaintiffs fail to allege the Coronavirus is present on their premises at all, in *Studio 417* plaintiff alleged only that the premises was "likely" infected. *Id*. at *2. In addition, *Studio 417* erroneously interprets Missouri law and relies on poorly reasoned non-Missouri cases. The Missouri law cases are *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349 (8th Cir. 1986) and *Mehl v. The Travelers Home & Marine Ins. Co.*, Case No. 16-CV-1325-CDP (E.D. Mo. May 2, 2018). In *Hampton Foods* there was a physical alteration to property and thus the direct physical loss requirement was met. *Hampton Foods*, 787 F.2d at 349. In *Mehl* the policy expressly supplied coverage for a "loss of use" of property.[13] The Policies do not state that they cover loss of use. *Studio 417* also impermissibly deconstructs the policy's direct physical loss requirement. It relies on the fact that the virus has a physical aspect to it. *Studio*

[13] A copy of the Court's Memorandum and Order in *Mehl* is attached as Exhibit F.

417, 2020 WL 4692385 at *4. But, under the plain language of the Policies, it is the alleged loss or damage itself, not the damage-causing agent, that must be physical. Finally, *Studio 417* contradicts the growing wave of well-reasoned decisions holding that there is no coverage on facts like those here.

Other distinguishable cases cited by Plaintiffs, based on policies that expressly insured "loss of use" or that covered loss "of" property, unlike the Policies here, include the following:

- *Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (affirming that "unless asbestos in a building was of such quantity and condition as to make the structure unusable, the expense of correcting the situation was not within the scope of a first party insurance policy covering 'physical loss or damage.'");

- *Advance Cable Co., LLC v. Cincinnati Ins. Co.* , No. 13-cv-229-wrnc, 2014 WL 975580 (W.D. Wis. Mar. 12, 2014)(policy defined "loss" as "accidental loss or damage"; coverage found on hail damage claim that involved direct physical loss as there was no meaningful dispute that a physical alteration to the property occurred);

- *Fountain Powerboat Indus. v. Reliance Ins. Co.*, 119 F. Supp. 2d 552 (E.D.N.C. 2000)(coverage found under policy's ingress/egress coverage provision which applied to loss resulting from the necessary interruption or reduction of business operations conducted by the insured and caused by loss, damage, or destruction by any peril not excluded);

- *Great Am. Ins. Co. v. Mesh Cafe, Inc.*, No. COA02-840, 158 N.C.App. 312, 580 S.E.2d 431 (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.'");

- *Oregon Shakespeare Festival Ass'n (OSF) v. Great Am. Ins. Co.*, No. 1:15-CV-01932-CL, 2016 WL 3267247, at *4 (D. Or. June 7, 2016), *vacated*, No. 1:15-CV-01932-CL, 2017 WL 1034203 (D. Or. Mar. 6, 2017).[14] (analysis performed on issue providing coverage for "direct physical loss ***of*** or damage to covered property" and coverage granted on a claim involving both damage caused by particulate matter and lost use of a theater while the smoke was allowed to dissipate);

[14] *OSF* is a vacated trial court order from Oregon and for that reason alone, should not be considered by the Court. Even if the court were inclined to consider the case, it is distinguishable as the policy language is different from the Policies here and because there was evidence of actual physical damage in addition to lost use of the theater. *OSF* does not hold that stand-alone "lost use" is a form of direct physical loss or damage to property as Plaintiffs contend.

- *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-CV-04418 WHW, 2014 WL 6675934, at *1 (D.N.J. Nov. 25, 2014) (policy covered ammonia discharge claim based on language affording coverage for "direct physical loss of or damage to Covered Property caused by or resulting from a Covered Cause of Loss");

- *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co*., 968 A.2d 724, 728, 734 (N.J. App. Div. 2009) (interpreting coverage extension applicable to "consequential loss or damage resulting from an interruption of electrical power" and holding that electrical grid was "physically damaged" due to a physical incident or series of incidents and that undisputed evidence showed some damaged equipment had to be replaced);

- *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 826 (3d Cir. 2005) (holding that policy defining "property damage" to include "loss of use of tangible property" might apply where testing had confirmed e-coli contamination in drinking well after owners sickened and had to move out);

- *Three Palms Pointe, Inc. v. State Farm Fire & Cas. Co.*, 250 F. Supp. 2d 1357 (M.D. Fla. 2003) (property's collapse was covered and caused an "accidental direct physical loss" to the property leading to determination that repair costs may include more than costs to repair the structure of a building, including relocation expenses directly related and were made necessary by the reconstruction of the units);

- *Matzner v. Seaco Ins. Co*., No. CIV. A. 96-0498-B, 1998 WL 566658, at *3 (Mass. Super. Aug. 12, 1998) (holding "carbon-monoxide contamination constitutes 'direct physical loss of or damage to' property" where parties did not dispute that the fire department measured a high-level of carbon monoxide at the insured premises);

- *Sentinel Mgmt. Co. v. N.H. Ins. Co*., 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (holding that insured could recover for release of asbestos fibers and resultant contamination inside building, but "not for the mere presence of [asbestos] in the buildings . . . .");

- *Western Fire Insurance Co. v. First Presbyterian Church*, 437 P.2d 52, 54-55 (Co. 1968) ("loss of use" of the church premises, standing alone, did not in and of itself constitute a "direct physical loss," but coverage was found based on parties' stipulation that gasoline had infiltrated "the soil under and around the building, which gasoline and vapors thereof *infiltrated and contaminated* the foundation and halls and rooms of the church building")(emphasis added);

- *Hughes v. Potomac Ins. Co*., 18 Cal. Rptr. 650, 655 (Cal. Ct. App. 1962), abrogated on other grounds (holding that landslide taking ground beneath home resulted in direct physical loss to dwelling, which included the lost ground of its curtilage);

- *Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799, 803, 805 (N.H. 2015) (holding that presence of pervasive cat urine odor inside of condo from neighboring cats might constitute *physical* loss because the odor could be perceived by the sense of smell only if changes perceived by smell were "distinct and demonstrable");

- *Nautilus Grp., Inc. v. Allianz Glob. Risks US*, No. C 11-528 lBHS, 2012 WL 760940 (W.D. Wash. Mar. 8, 2012) (policy provision providing coverage for "all risks of direct physical loss or damage to Insured Property" found to support coverage for theft of covered personal property as "physical loss");

- *Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 150–52 (Minn. Ct. App. 2001) (holding that application of unapproved pesticide permeated oats and could not be removed, which "supported a finding of physical damage");

- *Prudential Prop. & Cas. Co. v. Lillard-Roberts*, No. CV-01-1362-ST, 2002 WL 31495830, at *8 (D. Or. June 18, 2002) (holding that water damage <u>and</u> resulting mold physically altered the property).

These cases apply materially different policy language or involve permanent physical harm to property, or both. When examined, it is clear that they do not counter Cincinnati's position or support Plaintiffs' position.

G. Loss Caused by Shut-Down Orders Is Not A Covered Cause of Loss

The Policies only provide coverage for a Covered Cause of Loss. A Covered Cause of Loss is defined to mean "direct physical loss" that is not excluded or limited. (P. 42). As established, Plaintiffs' property has not sustained "direct physical loss" and therefore there is no Covered Cause of Loss. Even if Plaintiffs' property had suffered direct physical loss, one or more exclusions apply.

As argued by Plaintiffs, they shut their restaurants down based on the issuance of the Government Orders. Thus, any direct "loss" suffered by Plaintiffs resulted at least in part from the governmental entities acting under North Carolina law to protect the public health. The Policies excludes from coverage "loss" caused directly or indirectly by "Ordinance or Law". "Ordinance or Law" is defined to include, "the enforcement of or compliance with any ordinance or law . . . [r]egulating the . . . use . . . of any building or structure. . . This exclusion applies whether "loss" results from: . . . An ordinance or law that is enforced even if the building or structure has not been damaged . . . ." (P. 14).

Here, Plaintiffs did not close the restaurants until after the Government Orders began to be issued and their operations were impacted. (Pls.' Mot. Sum. J. at 4-11). In fact, Plaintiffs specifically allege that "the Government Orders resulted in the complete closure of all sixteen restaurants." (Pls.' Mot. Sum. J. at 10). Thus, Plaintiffs' closure of the restaurants and alleged loss of use of their premises was caused by the enforcement of an ordinance or law. Accordingly, the unambiguous language of the Ordinance or Law exclusion precludes coverage for Plaintiffs' loss of use of the premises. *Woods*, 295 N.C. at 506, 246 S.E.2d at 777.

Similar to the Ordinance or Law exclusion, the Acts or Decisions exclusion precludes coverage for acts or decisions of a governmental body. The exclusion precludes coverage "for 'loss' caused by or resulting from . . . Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body." (P. 47). The record demonstrates that Plaintiffs' alleged loss of use of their buildings was caused by or resulted from the Government Orders. If this Court finds that the Government Orders were not an ordinance or law for purposes of the Ordinance or Law exclusion, then they must nevertheless be acts or decisions of a governmental body. The Acts or Decisions exclusion would apply equally to "loss" resulting from the decision by Plaintiffs' management to cease operating altogether. Accordingly, coverage for Plaintiffs' claim is excluded under the Policies.

2. The "Loss of Use" Exclusion Precludes Coverage

Plaintiffs assert that the loss of the use of their premises is the "loss" at issue. As established, that does not qualify as "direct physical loss to property" and is not covered. It also does not represent Plaintiffs' actual loss. Plaintiffs' actual loss was the revenue derived from serving food to customers. Plaintiffs alleges as much in the Amended Complaint and now again in their motion: Plaintiffs request that the Court enter summary judgment on their First Claim for Relief, seeking a declaration that Cincinnati must replace Plaintiffs' lost income and extra expenses due to government-mandated business interruption. (Pls. Mot. Sum. J. at 3). However, Plaintiffs do not assert loss of revenue as the actual loss for two reasons. First, the Policies do not define "Covered Property" to include "Business Income." In fact, the Policies specifically state that "Accounts, bills, currency, deeds . . . [or] 'money' . . . ." is not Covered Property. (P. 41). Therefore, Plaintiffs' loss of income is not Covered Property.

Second, according to Plaintiffs, the actual cause of the loss of income is the loss of use, which implicates the Policies' "Delay or Loss of Use" exclusion. That exclusion states that Cincinnati "will not pay for 'loss' caused by or resulting from . . . delay, *loss of use* or loss of market." (P. 45) (emphasis added). Because Plaintiffs' actual damage is lost income and because the sole cause of that lost income is the loss of the use of its building, the Delay or Loss of Use exclusion bars coverage.

G. Plaintiffs Did Not Lose the Use of Their Premises

Even if the Court finds that loss of use can constitute direct physical loss to property under the Policies, Plaintiffs must still prove that they actually lost the use of the premises. They have not done so. As shown, under the Government Orders, Plaintiffs' restaurants were deemed Covid-19 Essential Business and Operations, Essential Businesses and Operations, or otherwise identified in some manner that allowed them to continue to operate for off-premises consumption. See Gupta Decl., Attachments 1-21. For financial reasons, Plaintiffs elected to close the Restaurants completely although the Government Orders expressly allowed them to remain open for purposes of preparing and selling food for off-site consumption. (Pls.' Mot. Sum. J. at 10). Thus, the evidence demonstrates that Plaintiffs and their employees were permitted to continue working in Plaintiffs buildings. These facts are all inconsistent with Plaintiffs assertion that they actually lost the use of their insured premises.

The evidence is that Plaintiffs had the ability to use their insured premises, but elected not to do so. This means that there was no loss of use. In any event, this creates, at a minimum, a question of fact as to whether Plaintiffs actually lost the use of the building and to what extent. This question of fact precludes summary judgment in Plaintiffs' favor. *See e.g. War Eagle, Inc. v. Belair*, 204 N.C.App. 548, 552, 694 S.E.2d 497, 500 (2010)(if findings of fact are necessary to resolve an issue as to a material fact, summary judgment is improper).

VI. CONCLUSION

The burden rests with Plaintiffs to produce evidence demonstrating that they have satisfied all of the Policies' requirements for coverage. Plaintiffs cannot do this. Plaintiffs' claims are not covered since the Coronavirus does not cause direct physical loss to property. For both the Business Income and Extra Expense coverage, the law requires structural damage. This is the majority view nationally, including decisions pertaining to Coronavirus-related claims. Therefore, Plaintiffs cannot prevail on summary judgment.

Dated: September 17, 2020

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document was served upon counsel for all parties by electronic mail addressed as follows:

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This the 17th day of September, 2020.

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