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.

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT THE CINCINNATI INSURANCE COMPANY'S RULE 12(b)(6) MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

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. Since March 2020, however, all sixteen restaurants have been forced to close. These shutdowns were ordered by state and local governments across North Carolina who expressly limited the *use of* and *access to* Plaintiffs' insured property. These mandated closures—enacted in response to the SARS-CoV-2 viral pandemic ("COVID-19")—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 defendant The Cincinnati Insurance Company ("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 closure orders from coverage. Nevertheless, Cincinnati failed to affirm coverage and indemnify Plaintiffs' business interruptions. This lawsuit followed.

Cincinnati's Motion to Dismiss argues that Plaintiffs' Amended Complaint fails to state any viable claims against Cincinnati and should be dismissed under Rule 12(b)(6). *See* Motion to Dismiss at 1. Cincinnati challenges whether Plaintiffs suffered a "direct physical loss" under the policies. But Cincinnati chose not to define those terms. The Court must therefore turn to standard dictionary definitions, under which Plaintiffs' loss of use and access unambiguously qualifies for coverage. The dictionary definitions reveal that "direct physical loss" is synonymous with 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 "direct physical loss" to be somehow ambiguous, North Carolina law requires that any policy ambiguity be construed in favor of coverage. Cincinnati's central and virtually sole theory is that "[the policies] protect Plaintiffs only for income losses tied to physical damage to property" caused by events like fires or storms. *Id.* at 1-2. Cincinnati's argument is baseless. Cincinnati points to *nothing* in Plaintiffs' policies that unambiguously limits coverage to physical damage.

Indeed, the key disputed policy language on which this case turns states that coverage is provided for "direct physical loss *or* . . . direct physical damage." The policies cover *both*. North Carolina courts require that every term in an insurance policy be given meaning and effect. Thus, 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." Cincinnati repeatedly ignores this inescapable distinction. The Motion to Dismiss carefully avoids using "physical loss" and "physical damage" at the same time because doing so would make it obvious that Cincinnati's self-serving, newly-created definition of "physical loss" is synonymous with the definition of "physical damage." Plaintiffs' coverage is not as narrow as Cincinnati would have this Court believe.

To present even a plausible argument for dismissal as a matter of law, Cincinnati must show that under North Carolina law the disputed language "physical loss" is unambiguous and synonymous with "physical damage." This is simply impossible. Cincinnati ignores the ordinary meaning of the policy terms, and the cases on which it relies render judgment on different procedural postures, different state-specific insurance law, different state-specific shutdown orders, and most importantly, *different underlying policy language*. These cases provide no guidance. Moreover, the question has already been settled by North Carolina courts. *See, e.g.*,

Great Am. Ins. Co. v. Mesh Cafe, Inc., No. COA02-840, 2003 N.C. App. LEXIS 1095 (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.'"). And the only COVID-19-related insurance coverage decision to rule on a *Cincinnati* policy with *the same exact language disputed here* found for the policyholders, explaining that "the Policies provide coverage for '. . . physical loss or . . . physical damage,'" and Cincinnati "conflates 'loss' and 'damage,'" whereas under insurance contract interpretation principles, "the Court must give meaning to both terms." *Studio 417, Inc. et al. v. Cincinnati Ins. Co.*, No. 20-cv-03127-SRB (W.D. Mo. Aug. 12, 2020), ECF No. 40.

Cincinnati's remaining argument for dismissal is that "no government order issued in North Carolina prohibits access to Plaintiffs' premises," as required for coverage under the Civil Authority provisions. *See* Motion to Dismiss at 20. But Cincinnati's argument is plainly contradicted by the *very first applicable government order*, which on its face and by its express terms limits "*access*" to restaurant premises.

Under North Carolina law, which requires the Court to read Plaintiffs' policies from the standpoint of a reasonable insured, the policies unambiguously cover Plaintiffs' loss of use and access to their restaurants. Even if the undefined term "direct physical loss" is somehow ambiguous, that ambiguity must be construed in favor of coverage. Because Cincinnati cannot show that "physical loss" has the unambiguous and narrow meaning that Cincinnati asserts, and because none of its other arguments for dismissal are valid for the reasons explained below, this Court should deny Cincinnati's Motion to Dismiss in its entirety.

I. STATEMENT OF FACTS

A. The Restaurants

Plaintiffs own and operate sixteen highly-acclaimed restaurants in North Carolina.[1] *See* Amended Complaint at ¶ 38. The first of these, Durham-based Parizade, is the flagship restaurant of the Giorgios Hospitality Group, launched in 1990 by owner Giorgios Nikolas Bakatsias. *Id.* Mr. Bakatsias' early visionary leadership is credited with helping ignite the food revolution across the Triangle and the entire state. *Id.* In 2014, Mr. Bakatsias earned a nomination for Outstanding Restauranteur from the James Beard Foundation for his North Carolina restaurants. *Id.*

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 ¶ 39. After launching Durham-based Vin Rouge in 2002, Mr. Bakatsias promoted then-chef and Raleigh native Matt Kelly to equity ownership in 2007. *Id.* 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. *Id.* 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). *Id.* at ¶ 40.

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[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* Amended Complaint at ¶ 3.

Mr. Bakatsias also supported Jay Mehdian, manager of Mr. Bakatsias' earliest restaurants and co-visionary in launching Vin Rouge, as Mr. Mehdian launched City Kitchen in 2001 and Village Burger in 2011. *Id.* at ¶ 41. Both have become highly-recognized and frequently-visited dining establishments in Chapel Hill, North Carolina. *Id.*

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). *Id.* at ¶¶ 44, 76, 79. 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.* at ¶ 44. 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. *Id.* at ¶ 79.[2] Order 118 required restaurants to "limit the sale of food and

[2] All executive orders entered by Governor Cooper and Secretary Mandy Cohen and referenced herein can be found online at the State of North Carolina's website. *See* "COVID-19 Orders," *available at* https://www.nc.gov/covid-19/covid-19-orders (last accessed Sept. 10, 2020). Moreover, for convenience and to avoid duplication, true and correct copies of *all* applicable Government Orders referenced herein (whether statewide or local) are attached to the Declaration of Gagan Gupta, which comprises part of Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment (dated August 17, 2020 and filed concurrently herewith). The parties agree that the Court may take judicial notice of Order 118 and any other relevant Government Order in ruling on Cincinnati's Motion to Dismiss. *See* Motion to Dismiss at 20, n. 9.

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." *See* Order 118 (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. *See* Amended Complaint at ¶ 79. 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* Order of Abatement of Imminent Hazard ("NCDHHS Order").[3] 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,

[3] The NCDHHS Order is available at https://23fw321trq9c3wwiyfy66giv-wpengine.netdna-ssl.com/wp-content/uploads/2020/03/Abatement-Order-Final-3-17-19.pdf (last accessed Sept. 16, 2020).

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 found "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* Amended Complaint at ¶ 80. 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. *Id.* at ¶ 81. 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. *See* Order 121 (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. *See* Amended Complaint at ¶ 82. 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* Amended Complaint at ¶ 83. 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. *See* Order 131.

Local and municipal governments across North Carolina entered their own orders mandating that residents shelter in place and that businesses curtail or cease operations. *See* Amended Complaint at ¶ 84. Often these local orders mandated more stringent restrictions on the movement of people and the use or access to goods, services, and facilities. *Id.* 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. *Id.* Chatham County called for adherence to the statewide orders. *Id.*

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. *Id.* at ¶ 85 ("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* Durham County Stay at Home Order.[4] 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"); *see also* Durham City Stay at Home Order (restrictions entered to protect against "widespread or severe damage, injury, or loss of life or property").[5]

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.[6] The Wake County orders were entered

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[4] The Durham County Stay at Home Order is available at https://www.dconc.gov/home/showdocument?id=30686 (last accessed Sept. 9, 2020).

[5] 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* Durham County Stay at Home Order – Third Amendment, *available at* https://durhamnc.gov/DocumentCenter/View/30339/Third-Amendment-to-Durham-Stay-at-Home-Order-4-17-20---Scannable (last accessed Sept. 10, 2020); Durham County Stay at Home Order – Fourth Amendment, *available at* https://www.dconc.gov/Home/ShowDocument?id=31872 (last accessed Sept. 10, 2020).

[6] The applicable Wake County orders can be found online at https://covid19.wakegov.com/ (last accessed Sept. 10, 2020). These orders include the Proclamation of a State of Emergency (entered Mar. 13, 2020); the Proclamation of Emergency Restrictions (entered Mar. 22, 2020); the Proclamation of Emergency Restrictions (entered Mar. 26, 2020); the First Amendment to Proclamation of Emergency Restrictions (entered Apr. 15, 2020); and the Second Amendment to Proclamation of Emergency Restrictions (entered Apr. 18, 2020). The applicable Orange County orders can be found online at https://www.orangecountync.gov/2416/Stay-at-Home (last accessed Sept. 10, 2020). These orders include the Declaration of an Orange County State of

in part for the "protection of lives, safety and property during this emergency," and because "the spread of the disease poses an imminent threat to property in the County." *See, e.g.*, Proclamation of a State of Emergency (entered Mar. 13, 2020), *available at* https://covid19.wakegov.com/ (last accessed Sept. 10, 2020). The Orange County prohibitions on restaurants were entered in part "due to the virus's propensity to physically impact surfaces and personal property." *See* Declaration of an Orange County State of Emergency to Order the Public to Stay at Home in Order to Slow the Further Spread of COVID-19 (entered Mar. 26, 2020), *available at* https://www.orangecountync.gov/2416/Stay-at-Home (last accessed Sept. 10, 2020).

The forgoing orders are referred to collectively herein 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* Amended Complaint at ¶¶ 5, 44-46, 76-86, 145. The orders—by their express terms—prohibited access to property at Plaintiffs' restaurant facilities, including but not

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Emergency to Order the Public to Stay at Home in Order to Slow the Further Spread of COVID-19 (entered Mar. 26, 2020); the Extension of the March 13, 2020 Declaration of State of Emergency in Orange County (entered Apr. 23, 2020); and the Extension of the March 13, 2020 Declaration of State of Emergency in Orange County (entered May 6, 2020). Finally, the applicable Buncombe County orders can be found online at https://www.buncombecounty.org/covid-19/default.aspx (last accessed Sept. 10, 2020). These orders include the Declaration of a Local State of Emergency (entered Mar. 12, 2020); the Supplemental Declaration of a Local State of Emergency (entered Mar. 19, 2020); the Supplemental Declaration of a Local State of Emergency (entered Mar. 26, 2020); and the Superseding Declaration of a Local State of Emergency (entered May 1, 2020).

limited to the restaurants' indoor and outdoor dining areas, bar areas, and seating areas. *Id.* at ¶¶ 76-86; *see also* Part I.B, *supra*. 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. *Id.* at ¶¶ 5, 44-46, 76-86, 145. 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. *Id.* at ¶¶ 44, 145. 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.*

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. *Id.* at ¶ 47. Indeed, Mr. Kelly even negotiated to ensure that Plaintiffs' Policies would *include coverage for losses due to viruses*, and specifically negotiated for no virus exclusion. *Id.* at ¶¶ 9, 48, 87, 182. Mr. Kelly made this request based in part on his prior knowledge of a norovirus outbreak in the restaurant industry. *Id.*

Plaintiffs were covered by these insurance Policies at all times during the COVID-19 pandemic and the entry of the Government Orders described herein.[7] The Policies provide

[7] 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

coverage for the suspension of business operations caused by government orders. Plaintiffs' Policies are the same in all material respects and are herein referred to and described collectively as "Policy" or "Policies." Any citations to policy language refer specifically to the North State Policy as an exemplar as the language in the Policies is identical.[8]

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.[9] *See* Policy at 55-56, Sections A.5.b(1) ("Business Income"); A.5.b(2) ("Extra Expense"); A.5.b(3) ("Civil Authority").

1, 2019 through March 1, 2022. *See id.* at ¶¶ 18-21. 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. *Id.* at ¶¶ 22-26. 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. *Id.* at ¶¶ 26-30. Gira Sole, Inc. paid $8,417 for the coverage period of March 5, 2018 through March 5, 2021. *Id.* at ¶¶ 31-34.

[8] For convenience and to avoid duplication, any references or citations to "Policy" or "Policies" refers to the North State Policy attached to the Affidavit of Matthew Raymond Kelly (Attachment 1), which comprises part of Plaintiffs' Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment (dated August 17, 2020 and filed concurrently herewith). For further 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.

[9] 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.

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

> (1) **Business Income**
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> 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.

Id. Under the Policies, "loss" means "accidental physical loss or accidental physical damage." *See* Policy at 75, Section G.8. Therefore, absent an exclusion or limitation, the Policies provide coverage under these provisions where the policyholder shows a (i) direct "physical loss" to property (ii) caused by or resulting from any "Covered Cause of Loss."[10]

The Policies also provide an independent basis of coverage for Business Income and Extra Expense when access to covered premises is prohibited by civil authority. *See* Policy at 56 ("Civil Authority"). Specifically, under the same subsection extending coverage, the Policies provide:

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[10] Cincinnati does not dispute that Plaintiffs' businesses 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"). Nor does Cincinnati dispute that Plaintiffs' physical loss was "accidental," as the undefined term is used in the Policies. *Id.* at 75, Section G(8) ("Loss").

> "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 . . . ."

Id. With respect to Civil Authority coverage, Cincinnati challenges only whether Plaintiffs suffered a direct physical loss, and whether the Government Orders "prohibit access," a phrase that is undefined by the Policies. *See* Motion to Dismiss at 19-23.[11]

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* Amended Complaint at ¶ 102, n. 33. Following unsuccessful negotiations with Cincinnati, Plaintiffs filed an Amended Complaint seeking declaratory relief against Cincinnati under N.C. Gen. Stat. § 1-253 *et seq.*, ascertaining entitlement to business interruption coverage under the Policies. *Id.* at ¶¶ 110-66. Plaintiffs filed their original 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

[11] 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 A.5.b (Civil Authority); Section F (Definitions). Plaintiffs reserve the right to rely on these and any other amendments and endorsements as appropriate.

filed their Amended Complaint on July 8, 2020, and served it on Cincinnati, through counsel, the same day.[12]

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 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. *Id.* at ¶¶ 110-46. Under the Second Claim for Relief, Plaintiffs seek a declaration that it violates North Carolina state law and the Plaintiffs' insurance contracts to deny coverage based on the Policies' Civil Authority coverage provisions. *Id.* at ¶¶ 147-66. Under the Third Claim for Relief, Plaintiffs seek damages for breach of contract given Cincinnati's failure to provide benefits due under the insurance policy contracts as described in the first and second claims for relief. *Id.* at ¶¶ 167-78.

On August 17, 2020, the parties exchanged cross motions: Cincinnati moved to dismiss all three claims alleged against it in the Amended Complaint, and Plaintiffs moved for partial summary judgment on the first claim for declaratory relief only. By this briefing, Plaintiffs oppose Cincinnati's Motion to Dismiss in full. The forced closures have caused Plaintiffs to suffer considerable financial losses while incurring ongoing expenses. *Id.* at ¶¶ 5, 45-46. Absent reversal of the Government Orders and a financial payout from Cincinnati, Plaintiffs may be

[12] 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.

forced to close their restaurants permanently. *Id.* Plaintiffs have already been forced to permanently close one restaurant: Lucky's Delicatessen.

II. LEGAL STANDARDS GOVERNING RULE 12(b)(6) MOTIONS TO DISMISS

The North Carolina Supreme Court has long recognized that "[t]he only purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the pleading against which it is directed." *White v. White*, 296 N.C. 661, 667, 252 S.E.2d 698, 702 (1979). Dismissal under Rule 12(b)(6) is therefore appropriate only if the complaint fails to state a claim upon which relief can be granted. N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). "[A] complaint fails in this manner when: '(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.'" *Krawiec v. Manly*, 370 N.C. 602, 606, 811 S.E.2d 542, 546 (2018) (quoting *Wood v. Guilford Cty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002)). In ruling on a 12(b)(6) motion, the court must accept the facts as true, *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 479, 334 S.E.2d 751, 753 (1985), and view the facts and permissible inferences in the light most favorable to the plaintiff. *Ford v. Peaches Entm't Corp.*, 83 N.C. App. 155, 156, 349 S.E.2d 82, 83 (1986).

III. STANDARDS OF INTERPRETATION FOR INSURANCE POLICIES

In North Carolina, the standards governing the interpretation of insurance contracts favor policyholders. "[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)).

While the meaning of an insurance policy is a question of law, *Accardi v. Hartford Underwriters Ins. Co.*, 373 N.C. 292, 295, 838 S.E.2d 454, 456 (2020), it is black-letter law that an undefined policy term is to be given 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)).

IV. ARGUMENT

Not once does Cincinnati apply the forgoing standards governing the interpretation of insurance contracts. Here, because Cincinnati could have, but did not, define the terms "direct physical loss" or "direct physical damage," North Carolina's interpretive principles become central to resolving this case. Cincinnati argues that the relevant terms require structural alteration of insured property. *See* Motion to Dismiss at 10-18. But Cincinnati points to *nothing* in the Policies that unambiguously requires alteration for coverage to apply. Rather, Cincinnati relies on a lengthy list of summarized cases, as it must in order to avoid the ordinary meaning of the disputed terms. But the cited cases *interpret different policy language* based on *out-of-state law*. Cincinnati's opening brief also repeatedly argues that Plaintiffs' Amended Complaint does not allege virus contamination. But this argument fails to address Plaintiffs' central claim.

As explained below, the Government Orders—not the virus itself—were the "direct" cause of Plaintiffs' loss of the physical use of and access to property at their sixteen restaurants. This unambiguously constitutes a "direct physical loss." Plaintiffs' interpretation is reasonable from the perspective of the insured, *see Joyner*, 46 N.C. App. at 809, 266 S.E.2d at 31, and the Court therefore need not construe the Policies. But even if Cincinnati's interpretation were also reasonable, the Policies are at best ambiguous, and must therefore be construed in favor of coverage.

Simply put, dismissal is warranted only if Cincinnati can show that the Policies *unambiguously* require alteration to property. Cincinnati cannot.[13] Accordingly, Plaintiffs state a claim upon which relief can be granted, and Cincinnati's Motion to Dismiss should be denied.

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[13] Cincinnati somersaults to avoid this inescapable conclusion. For example, even the first case cited by Cincinnati goes on to explain that "[t]he fact that a dispute has arisen between the parties as to the meaning of a term contained in a policy is some evidence that a term is

A. Plaintiffs Sufficiently Allege that Their Restaurant Premises Sustained Direct Physical Loss

1. The Policies unambiguously provide coverage

Although Cincinnati argues that the Policies require a "distinct, demonstrable, physical *alteration* of property on the premises" for there to be "direct physical loss," *see* Motion to Dismiss at 11 (emphasis added), Cincinnati is unable to point to any language in the Policies unambiguously requiring alteration for coverage to apply. Cincinnati skips past the analytical steps required by North Carolina courts when interpreting insurance contracts, ignoring the ordinary meaning of the relevant policy terms and relying instead on distinguishable, non-binding authority. But dictionary definitions make clear that there is nothing ambiguous about the terms "direct physical loss" or their use in the Policies. This Court should therefore avoid judicial construction and instead look to the ordinary meaning of the terms as provided in standard dictionaries.

Merriam-Webster defines "direct," when used as an adjective, as "characterized by close logical, causal, or consequential relationship," as "stemming immediately from a source," or as "proceeding from one point to another in time or space without deviation or interruption." *Direct*, Merriam-Webster (Online ed. 2020).

Merriam-Webster defines "physical" as relating to "material things" that are "perceptible especially through the senses." *Physical*, Merriam-Webster (Online ed. 2020). The term 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

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ambiguous, . . . as is the fact that courts in various jurisdictions have a difference of opinion regarding what definition to give a policy term." *Guyther v. Nationwide Mut. Fire Ins. Co.*, 109 N.C. App. 506, 512, 428 S.E.2d 238, 241 (1993) (internal citations omitted). Both are true here.

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).

Finally, "loss" is defined as "the act of losing possession," "the harm of privation resulting from loss or separation," or the "failure to gain, win, obtain, or utilize." *Loss*, Merriam-Webster (Online ed. 2020). Another dictionary defines the concept as "the state of being deprived of or of being without something that one has had." *Loss*, Random House Unabridged Dictionary (Online ed. 2020). These dictionary definitions reveal that the ordinary and standard use of the key policy terms is synonymous with the inability to utilize or possess something in the real, material, or bodily world, resulting from a given cause without the intervention of other conditions.

In the context of Plaintiffs' Policies, therefore, the phrase "direct physical loss" unambiguously provides coverage for loss sustained due to limitations—resulting from government mandates without any intervening cause—on the real, material, or bodily use of or access to covered property. Nothing about the ordinary meaning of the terms requires alteration to the insured property. Nor do the terms require a total loss. Rather, the ordinary meaning of the words in the phrase "direct physical loss" describes the scenario where businessowners and their customers, vendors, suppliers, and others lose the full range of rights and advantages of using or accessing business property. This is especially true where the value insured derives from the very physical use or access now prohibited. Plaintiffs allege they were expressly forbidden by government decree from accessing and putting their property to use for the income-generating purposes for which the property was insured. *See, e.g.*, Amended Complaint at ¶¶ 44, 76-86,

107-09, 110-46. These decrees resulted in the immediate loss of use and access to Plaintiffs' restaurants without any intervening conditions. *Id.* In common parlance, this is unambiguously a "direct physical loss," and the Court must therefore find that Plaintiffs allegations are sufficient to state a claim for coverage.

2. Even if the policy language at issue is ambiguous, any ambiguity must be construed in favor of coverage

Even if this Court considers the undefined phrase "direct 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. Again, Cincinnati fails to apply or even acknowledge this governing principle. Cincinnati's argument stems from the premise that "direct physical loss" and "direct physical damage" require *alteration* to insured property, despite pointing to no language unambiguously mandating this conclusion. Even granting that Cincinnati's interpretation is reasonable, however, it remains true that Plaintiffs' interpretation is *also* reasonable, and the Policies are therefore at best ambiguous. *See, e.g.*, *Guyther v.*

Nationwide Mut. Fire Ins. Co., 109 N.C. App. 506, 512, 428 S.E.2d 238, 241 (1993) ("The fact that a dispute has arisen between the parties as to the meaning of a term contained in a policy is some evidence that a term is ambiguous, . . . as is the fact that courts in various jurisdictions have a difference of opinion regarding what definition to give a policy term.") (internal citations omitted).

In construing the language of an ambiguous insurance policy, "[t]he test . . . 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 altered, 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, *see* 10 Couch on Insurance § 148:46 (3d ed. 1998), 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 "physical loss" and "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).[14] Of the COVID-19-related insurance coverage decisions issued by any court to date, *Studio 417* and *K.C. Hopps* are the *only* opinions to rule on *Cincinnati* policies with the *same exact language at issue here*. Yet remarkably, despite that the same law firm representing Cincinnati in these twin Missouri cases also represents Cincinnati here, the Motion to Dismiss fails to mention either case.

Studio 417 and *K.C. Hopps* rendered judgment on first-party property policies sold by Cincinnati for losses alleged by restaurants and a hair salon due to COVID-19-related shutdown orders. The Court, relying on the same principles governing interpretation of insurance contracts as operate in North Carolina, rejected Cincinnati's carbon-copy brief which argued 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

[14] Judge Stephen Bough's thoughtful opinion in *Studio 417* is attached hereto as **Exhibit A**, and the opinion in *K.C. Hopps* is attached hereto as **Exhibit B**.

'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* 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."[15] *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.'").[16]

[15] The opinion in *Fountain Powerboat* is attached hereto as **Exhibit C.**
[16] The opinion in *Great Am. Ins. Co.* is attached hereto as **Exhibit D.**

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 *9-10 (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."). This conclusion makes sense because:

> "To accept [the insurer's] interpretation of its policy would be to conclude that a building which has been overturned or which has been placed in such a position as to overhang a steep cliff has not been 'damaged' so long as its paint remains intact and its walls still adhere to one another. Despite the fact that a 'dwelling building' might be rendered completely useless to its owners, [the insurer] would deny that any loss or damage had occurred unless some tangible injury to the physical structure itself could be detected. *Common sense requires that a policy should not be so interpreted in the absence of a provision specifically limiting coverage in this manner.*"

Hughes v. Potomac Ins. Co., 199 Cal. App. 2d 239, 248-49 (1962) (emphasis added).

Simply put, a reasonable person could understand the disputed policy language not to require any alteration to property for coverage to apply. This is especially true given *Studio 417*, *K.C. Hopps*, *Fountain Powerboat*, and *Great Am. Ins. Co.*, which render judgment on *the same Cincinnati policy language at issue here* or represent *applicable North Carolina precedent*. But even if Cincinnati's requirement of a structural coverage trigger is also reasonable (which it is not), it remains true that the Policies are reasonably susceptible to more than one interpretation, and coverage still applies. In either event, Plaintiffs' Amended Complaint sufficiently states a claim for relief and Cincinnati's Motion to Dismiss should be denied.

3. Cincinnati fails to show that the Policies unambiguously require physical alteration for coverage to apply

Dismissal is warranted only if Cincinnati can show the Policies *unambiguously* require alteration to property for business interruption coverage to apply. In making this argument—which, in Cincinnati's briefing, is vague, at best—Cincinnati fails to follow the analytical steps mandated by North Carolina courts when interpreting insurance policies. For example, Cincinnati altogether fails to supply or evaluate any dictionary definitions of the disputed terms. Because Cincinnati can identify nothing in the Policies to support its interpretation, Cincinnati relies instead on a lengthy list of summarized cases that are either distinguishable or non-binding. None of these cases change the fact that in Plaintiffs' Policies, the disputed language "direct physical loss" is at best ambiguous and must therefore be construed in favor of coverage.

The only North Carolina case cited by Cincinnati is *Harry's Cadillac-Pontiac-GMC Truck Co. v. Motors Ins. Corp.*, 126 N.C. App. 698, 486 S.E.2d 249 (1997) and it is clearly distinguishable. In *Harry's*, the underlying insurance policy defined the "period of restoration" as ending "on the date when the property at the described premises should be repaired, rebuilt or replaced . . . ." *Id.* at 702. The North Carolina Court of Appeals interpreted this indemnity period as governing the scope of coverage, holding that the policy "does not cover all business interruption losses, but only those losses requiring repair, rebuilding, or replacement." *Id.* Unlike in *Harry's*, however, Plaintiffs' Policies contemplate *three* distinct indemnity periods. The "Actual Loss Sustained Business Income Endorsement" provides that the indemnity period ends upon either (i) the premises being repaired, rebuilt, or replaced, (ii) "[t]he date when business is resumed at a new permanent location," *or* (iii) "12 consecutive months after the date of direct 'loss.'" *See* Policy at 87. The conjunctive "or" means the indemnity period lasts until any of three distinct endpoints. The third endpoint provides coverage up to 12 consecutive months after

the date of "direct 'loss,'" irrespective of whether the property was ever "repaired, rebuilt, or replaced." Thus, unlike in *Harry's*, the central issue here remains whether Plaintiffs suffered a direct "loss." Nothing in Plaintiffs' Policies limits the scope of business interruption coverage to losses requiring "repair, rebuilding, or replacement," rendering *Harry's* inapposite. As explained, Cincinnati cannot point to any unambiguous requirement of "alteration" *in the Policies issued specifically to Plaintiffs*.[17]

The COVID-19-era insurance cases on which Cincinnati relies do not change this conclusion. As explained in Part IV.A.2 above, the only COVID-19-era cases to rule on a Cincinnati policy with the same operative terms are *Studio 417* and *K.C. Hopps*. Both denied Cincinnati's carbon copy motion to dismiss. The remaining cases, however, are readily distinguishable: they involve different procedural postures, different state-specific insurance law, different state-specific shutdown orders, and most importantly, different underlying policy language. These cases provide no guidance. *See Accardi*, 373 N.C. at 296, 838 S.E.2d at 457 ("Decisions from other jurisdictions . . . provide little guidance to this Court because the policy language in each case differs meaningfully, as do the insurance laws of each state.").

[17] It is worth noting that if *Harry's* were to apply here, it would render numerous provisions in Plaintiffs' Policies illusory. For example, Plaintiffs' Policies cover losses due to "the partial or complete failure of utility services to the 'premises.'" *See* Policy at 86 (emphasis added). The Policies define "utility services" to include multiple types of offsite infrastructure, such as utility generating plants and pumping stations. The upshot is that the Policies provide coverage where offsite utility generating plants suffer a "loss," with no requirement that the covered premises experience any structural alteration. If *Harry's* reasoning were to apply to Plaintiffs' Policies, this utility coverage would be rendered illusory. In *Harry's*, the indemnity period ends "when the property at *the 'premises'* should be repaired, rebuilt, or replaced." But where an offsite utility plant is damaged with no physical alteration at the covered premises, the elements of this indemnity period could never be satisfied, even after the offsite utility plant itself is brought back online.

For example, Cincinnati points to *Gavrilides Mgt. Co. v. Michigan Ins. Co.*, No. 20-258-CB-C30 (Ingham County, Mich. July 1, 2020), in which a Michigan trial court, without issuing a written decision, rejected a policyholder's claim for business interruption coverage. Not only did the government orders at issue in *Gavrilides* not prohibit access to the policyholder's property, but the underlying policy contained a virus exclusion. *See* Motion to Dismiss, Ex. J (*Gavrilides* hearing transcript). Moreover, the *Gavrilides* decision turned on preexisting Michigan law interpreting "physical loss" as requiring structural alteration. *Id.* (referencing *Universal Image Prods. v. Chubb Corp.*, 703 F. Supp. 2d 705 (E.D. Mich. 2010)). As set forth herein, however, North Carolina courts and many others adopt a broader definition of what may constitute physical loss, meaning *Gavrilides* has no relevance here.

Cincinnati's reliance on *Diesel Barbership, LLC et al. v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020) suffers from many of the same pitfalls. Notably, the underlying policy insured against "direct physical loss" with no mention of "damage" whatsoever. *Id.* at *2. In Plaintiffs' Policies, the conjunctive *or* connecting "physical loss *or* . . . physical damage" raises the unavoidable specter of ambiguity, given that "loss" must mean something different than "damage." This central point goes unaddressed in *Diesel Barbershop*. Additionally, the applicable Texas shutdown orders not only failed to limit *access* to retail facilities (instead merely offering that individuals "avoid eating or drinking at bars, restaurants, and food courts"), but the underlying policy contained a broad virus exclusion. *Id.* at *2, 6. *Diesel Barbershop* is far from "on point." Motion to Dismiss at 13.

Finally, Cincinnati relies on *Rose's 1, LLC v. Erie Ins. Exch.*, 2020 D.C. Super. LEXIS 10 (D.C. Sup. Ct. Aug. 6, 2020) and *Social Life Magazine, Inc. v. Sentinel Ins. Co.*, Ltd., 1:20-cv-03311-VEC (S.D.N.Y. 2020) for the proposition that "alleged and unproven contamination

[is] not direct physical loss to insured property as a matter of law." *See* Motion to Dismiss at 12-13. But Cincinnati once again reveals its failure to understand Plaintiffs' central theory: that the Government Orders (not the virus) were the direct cause of Plaintiffs losing the use and access of their property, which constitutes a "direct physical loss." Moreover, these cases were decided within different procedural contexts with different standards of review and under different state-specific insurance laws. *Rose's* granted an insurer's motion for summary judgment under District of Columbia law, which makes clear that ambiguities are for the fact-finder to resolve, a very different standard than North Carolina's default interpretive rule. *See* Motion to Dismiss, Ex. I at 4. The Court in *Social Life Magazine*, in an oral hearing with no accompanying written opinion, denied a motion for preliminary injunction under New York law, where the policyholder's sole argument was that COVID-19 itself constitutes "physical damage," with no argument made as to "physical loss." *See* Motion to Dismiss, Ex. K.[18]

Likewise, Cincinnati attempts to cast doubt on the natural interpretation of the Policies by pointing to several out-of-state decisions issued prior to the COVID-19 pandemic. These cases similarly do nothing to prove that the Policies unambiguously require alteration to property for coverage to apply.

Cincinnati principally relies on *Source Food Tech., Inc. v. United States Fid. & Guar. Co.*, 465 F.3d 834 (8th Cir. 2006). But *Source Food* is distinguishable both factually and legally. For starters, the case applied Minnesota—not North Carolina—law. Further, and contrary to the Cincinnati Policies here, the policy language at issue was limited to "just 'direct physical loss'"

[18] Nor can anything be taken from *The Inns by the Sea v. California Mutual Insurance Company*, Superior Court of the State of California, No. 20-CV-001274 (Cal. Sup. Ct., Monterey County Aug. 4, 2020), given that the half-page order provided by Cincinnati provides no reasoning whatsoever. *See* Motion to Dismiss, Ex. M.

and did not cover "all loss or *damage*." *Id.* at 837 (emphasis added). Indeed, the Court in *Source Food* highlighted this difference to distinguish the case from an earlier Minnesota Court of Appeals decision that held "direct physical loss" can exist *without* actual destruction of property or structural damage to property. *Id.* (citing *Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. Ct. App. 2001)).[19] As the Court in *Studio 417* explained, "*Source Food* recognized (under Minnesota law) that physical loss could be found without structure damage." *Studio 417*, No. 20-cv-03127-SRB, ECF No. 40, at *11. *Source Food*—which shares essentially no similarities with the case before this Court—cannot credibly be interpreted to hold that the Policies require a "distinct, demonstrable, physical alteration of property on the premises" for there to be "direct physical loss," as Cincinnati claims. *See* Motion to Dismiss at 11.

Cincinnati also relies on *Pentair, Inc. v. Am. Guarantee & Liab. Ins. Co.*, 400 F.3d 613 (8th Cir. 2005). Not only was *Pentair* decided under Minnesota law, but the principal issue in that case was whether the claimed physical loss or damage was sufficiently "direct." *Id.* at 617-18. In that case, an earthquake damaged an electrical substation supplying power to Taiwanese factories that, in turn, supplied products to the insured, Pentair. *Id.* at 614. The district court concluded that earthquake damage to the non-insured electrical substation was too far removed

[19] In *General Mills*, the Minnesota Court of Appeals found that there was direct physical loss where cereal was unable to be sold because of FDA regulations. 622 N.W.2d at 152. The court found that "direct physical loss can exist without actual destruction of property or structural damage to property," as direct physical loss can also be shown where the function of property is seriously impaired. *Id.* The court explained that "the function of the food products [at issue] was not only to be sold, but to be sold with an assurance that they meet certain regulatory standards." *Id.* When a food distributor "is unable to lawfully distribute its products because of FDA regulations, that function is seriously impaired." *Id.* The court thus held that because the food product at issue could not be legally used in the food distributor's business, there was an impairment of function and value constituting "direct physical loss or damage." *Id.* Importantly, the court did not rely on whether the food product had been contaminated; rather, the holding turned on the imposition of government regulations that rendered the product unsellable. *Id.*

to be covered under the policy's "direct physical loss or damage" provision. *Id.* at 615. Affirming, the Eighth Circuit explained, "[i]t is one thing to insure all risk of power outage losses at known, identified Pentair facilities caused by covered damage to off-premises power suppliers," but "[e]xtending that coverage to Pentair losses resulting from power outages at unknown third party supplier premises, which may be located all over the world, insures a different and presumably more substantial risk." *Id.* at 617-18. The Eighth Circuit thus concluded that the contingent business interruption in question was not sufficiently "direct." *Id.* Cincinnati makes no such scope argument here.[20]

Finally, Cincinnati appears to suggest that because COVID-19 might be removed by cleaning, and therefore "removed" in theory, there can be no "physical loss." *See* Motion to Dismiss at 10, 16. At best, Cincinnati fails to understand that Plaintiffs allege the Government Orders (not the virus) were the "direct" cause of their "physical loss" (but in reality, this passage appears to be copied and pasted wholesale from Cincinnati's prior briefing in other cases, despite having no relevance here). Moreover, coverage under the Policies is nowhere dependent on the degree of effort required to remediate the covered premises. Nor is the basic point supported by North Carolina authority. Cincinnati risks converting its Motion to Dismiss into one for summary judgment, given that proper remediation of covered property—and the attendant reliance on extensive and potentially inadmissible sources outside the scope of the Amended Complaint—

[20] The same is true of Cincinnati's reliance on *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 778-82, 115 Cal. Rptr. 3d 27, 36-40 (2010), where the Court, based on California law, held that the failure of an MRI machine to turn on after being deliberately turned off "was not directly attributable" to a rainstorm that had occurred a year prior, and was therefore neither "direct" nor "accidental." Moreover, the *MRI Healthcare* dicta quoted by Cincinnati arises in the context of an underlying policy covering "accidental direct physical loss" only, with no mention of damage. Cincinnati again ignores the ambiguity that necessarily arises from use of the conjunctive "or" in Plaintiffs' Policies (loss *or* damage). *MRI Healthcare* has little if anything to do with the case at hand.

present obvious factual issues improper at this stage.[21] Simply put, the suggestion that "there is no direct physical loss to property because the virus can be wiped away" would not be legally relevant even it made factual sense.

To win dismissal, Cincinnati must show that the Policies unambiguously require structural alteration for coverage to apply—a high bar. Although Cincinnati boldly states that "the instant case cannot be distinguished from Cincinnati's authorities that uniformly require actual, tangible, permanent, physical alteration of property," *see* Motion to Dismiss at 16, the cited cases have little to do with the case at hand. Moreover, Cincinnati ignores both the ordinary meanings of the disputed terms and the applicable case law evaluating *Cincinnati* policies, construing the precise "loss *or* damage" language at issue here, and applying *North Carolina* law. Even considering cases from outside North Carolina, the majority of courts to analyze the issue have held that *no* structural alteration is required. *See* Part IV.A.2, *supra*. Nothing offered by Cincinnati changes the basic conclusion that the interpretations proffered by both parties are at minimum reasonable. Thus, the Motion to Dismiss must be denied.

4. Even *Threatened* Contamination of COVID-19 Can Constitute "Physical Loss"

Even if the phrase "physical loss" requires some form of structural alteration or impact, the Policies would still cover Plaintiffs' business interruptions. Multiple federal appellate courts have made clear that an imminent external threat of contamination or other physical damage that renders covered property too dangerous to use constitutes a "physical loss," even if the threat

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[21] Even the case that Cincinnati relies upon defines the scope of judicial notice as requiring that the noticed fact be "either so notoriously true as not to be the subject of reasonable dispute or capable of demonstration by resort to readily accessible sources of indisputable accuracy." *See Wood v. J. P. Stevens & Co.*, 297 N.C. 636, 641, 256 S.E.2d 692, 696 (1979). Hardly anything thought to be known about COVID-19 can be described as indisputably accurate.

never materializes. Here, Plaintiffs were forced to close their restaurants due to the grave and imminent threat posed by COVID-19.

For example, in *Port Auth. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002), the sole question on appeal was whether the imminent threat of asbestos release constituted "physical loss or damage" to an insured building. The Court adopted the district court's reasoning that physical loss or damage occurs in either of two scenarios: where there is an *actual* release of asbestos that renders the function of the property nearly eliminated or destroyed, "or if there exists an *imminent threat* of the release of a quantity of asbestos fibers that would cause such loss of utility." *Id.* (emphasis added). This standard is both "reasonable and realistic for identifying physical loss or damage": it ensures coverage where the threatened release of asbestos is sufficiently immediate and grave to force a policyholder to limit the use of its property, but precludes coverage for the mere presence of asbestos (which is not harmful), or even the general threat of future damage from that presence (which is speculative). *Id.*

While the policyholder in *Port Authority* failed to satisfy this standard, the grave and imminent threat of COVID-19 to Plaintiffs' property cannot be disputed. Secretary Cohen found "that the use of seating areas of restaurants and bars constitutes an imminent hazard for the spread of COVID-19," where "imminent hazard" is defined by statue 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." *See* NCDHHS Order; *see also* Proclamation of a State of Emergency (entered Mar. 13, 2020), *available at* https://covid19.wakegov.com/ (last accessed Sept. 10, 2020) (Wake County order acknowledging that "the spread of [COVID-19] poses an imminent threat to property in the County."). This grave and imminent threat limited the utility of Plaintiffs'

restaurants, even if COVID-19 was never actually present on the restaurant premises. As Dr. Cohen made clear, the continued full use of Plaintiffs' seating and bar areas would almost certainly have resulted in contamination of the premises by COVID-19, which in turn would have contributed to transmission of the deadly virus. Because the grave and imminent threat of COVID-19 contamination forced Plaintiffs to limit their business operations, the persuasive reasoning in *Port Authority* instructs that the ensuing business interruptions fall within the Policies' coverage grant.

The Eighth Circuit granted summary judgment to a policyholder on this same basis in *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, 352 (8th Cir. 1986). The Court examined language in a first-party property policy insuring a grocery store (Hampton Foods) against "'loss of or damage to the property insured.'" *Id.* at 351. The building in which Hampton Foods operated began evidencing "signs that it was in imminent danger of collapse," and both the building owner and the City Building Commission asked Hampton Foods to evacuate. *Id.* The district court granted coverage to Hampton Foods due to the evacuation, finding that "the commonsense meaning of [the business interruption provision] is that any loss or damage due to the *danger* of direct physical loss is covered. Hampton's inventory suffered a loss because of a *danger* of direct physical loss." *Id.* at 351-52 (emphasis added). The Eighth Circuit affirmed, upholding the district court's finding that the language of the policy was ambiguous and must be construed in favor of the insured. *Id.* at 352.

The analysis adopted in *Port Authority* and *Hampton Foods* is consistent with numerous other courts finding that an imminent threat of a covered cause of loss can constitute a "physical loss" for purposes of business interruption coverage, even if that threat never materializes. *See, e.g.*, *Murray v. State Farm Fire & Cas. Co.*, 203 W. Va. 477, 493, 509 S.E.2d 1, 17 (1998)

(policyholders suffered "direct physical loss" when their homes were rendered uninhabitable due to threat of rockfall); *Manpower Inc. v. Ins. Co.*, No. 08C0085, 2009 U.S. Dist. LEXIS 108626, at *12 (E.D. Wis. Nov. 3, 2009) (insured suffered a "direct physical loss" covered by all-risk insurance policy when it was forced to evacuate insured premises for safety reasons, even though the premises themselves were not physically damaged). These cases supply a well-reasoned and independent basis for finding coverage in the instant case, where the imminent threat and danger posed by COVID-19 forced Plaintiffs to limit their business operations, a clear "physical loss" to property.

5. Cincinnati Knew Its Policies Provide Coverage Where Physical Loss Occurs Without Structural Alteration

If Cincinnati wanted to exclude virus-related losses from coverage, it could have drafted the Policies to exclude such coverage. As alleged in the Amended Complaint, Cincinnati and the insurance industry were well-aware that viruses can cause physical loss or damage, evidenced by the creation of a virus-related endorsement following the 2002 SARS epidemic. *See* Amended Complaint at ¶¶ 150-57. The endorsement, entitled "Exclusion of Loss Due to Virus or Bacteria," was drafted by the Insurance Services Office ("ISO"), an organization that drafts standard policy language for use in insurance contracts and upon which Cincinnati relied in drafting Plaintiffs' Policies. *Id.* The endorsement provides that the insurer "will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness, or disease." *Id.* at ¶ 154. This endorsement, which other insurance providers have since incorporated in policies, acknowledges that claims for business interruption losses could be filed under existing policy language for "physical loss" or "physical damage" resulting from pandemics or the presence of disease-causing agents. While inserting the so-called "virus exclusion" in a policy does not necessarily preclude coverage,

Cincinnati's choice *not* to include the readily-available and widely-used virus exclusion here undermines Cincinnati's attempt to re-write the existing Policies, post-loss, to deny Plaintiffs' claims.

Cincinnati insists that "[t]he alleged absence of an applicable exclusion is irrelevant." *See* Motion to Dismiss at 18. Not so. The absence is relevant in *construing* the Policies. If it is unreasonable for a policyholder to understand that a virus can cause "physical loss," the ISO's amendatory endorsement is rendered meaningless and Cincinnati would not have included it in its other policies. *See* Amended Complaint at ¶ 100. In other words, not only did the industry recognize that property policies cover "physical loss" due to viruses and viral pandemics, it offered insurers an endorsement to amend certain policies to avoid liability. Cincinnati did not amend Plaintiffs' Policies. A reasonable insured could therefore understand the Policies to cover losses related to COVID-19.[22]

B. Plaintiffs State a Sufficient Claim for Civil Authority Coverage

Cincinnati raises two challenges to Plaintiffs' claim for coverage based on the Policies' Civil Authority provisions. *See* Motion to Dismiss at 19-23. But as with its other arguments, Cincinnati fails to follow the mandated analytical steps for interpreting and construing insurance policies in North Carolina, relying instead on wholly irrelevant caselaw.

First, Cincinnati notes that Civil Authority coverage "only applies if there is a Covered Cause of Loss, meaning direct physical loss to property other than the Plaintiffs' property." *Id.* at 19. Notwithstanding that Covered Cause of Loss can also mean physical *damage*, Cincinnati essentially repeats its earlier argument, contending that "[j]ust as the Coronavirus did not cause

[22] In fact, as the Amended Complaint makes clear, Plaintiffs *did* understand the Policies to cover virus-related causes of loss, given that Mr. Kelly expressly negotiated for virus coverage. *See* Amended Complaint at ¶¶ 9, 48, 87.

direct physical loss to Plaintiffs' premises, it did not cause direct physical loss to other property." *Id.* at 20. The Court should reject Cincinnati's first challenge for the same reasons as set forth above. *See* Part IV.A, *supra*; *see also Studio 417*, No. 20-cv-03127-SRB, ECF No. 40, at *13 ("Plaintiffs adequately allege that they suffered a physical loss, and such loss is applicable to other property. Additionally, Plaintiffs allege that civil authorities issued closure and stay at home orders throughout Missouri and Kansas, which includes properties other than Plaintiffs' premises.").[23]

Second, Cincinnati argues "Civil Authority coverage requires that access to Plaintiffs' premises be prohibited by an order of Civil Authority." *See* Motion to Dismiss at 20. Cincinnati then asserts that "no government order issued in North Carolina prohibits access to Plaintiffs' premises." *Id.* This is wrong in several respects.

To start, Cincinnati's statement ignores—or worse, grossly mischaracterizes—Plaintiffs' allegations in the Amended Complaint. Paragraph 79 of the Amended Complaint clearly states that the *very first* applicable statewide orders expressly prohibited *access* to Plaintiffs' restaurants. *See* Amended Complaint at ¶ 79 ("[U]nder Order 118, the State Health Director, acting under the 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.'"). Moreover, Cincinnati ignores allegations that the Government Orders "prohibited travel except for . . . essential activities," which was defined to exclude restaurants

[23] Moreover, there is nothing "vague" about Plaintiffs' allegations regarding the presence of COVID-19 at other properties. *See* Motion to Dismiss at 20. The Amended Complaint clearly alleges that "COVID-19 . . . has been found present or within property other than Plaintiffs' covered premises, damaging those properties." *See* Amended Complaint at ¶ 158; *see also id.* at ¶ 66 ("[M]ultiple structures in the vicinity of Plaintiffs' covered premises reported COVID-19 infections or outbreaks, and were in fact physically impacted by the presence of the COVID-19 virus on or around the surfaces of these structures.").

"except for the narrow purpose of preparing food for off-premises consumption only, assuming social distancing requirements could be met." *Id.* at ¶ 81. Secretary Cohen further found that "the use of seating areas of restaurants and bars constitutes an imminent hazard for the spread of COVID-19," and therefore ordered the full and immediate closure of all such areas. *See* NCDHHS Order. In tandem, these directives plainly "resulted in losing physical use of, physical access to, and physical enjoyment of Plaintiffs' property by its owners, customers, vendors, employees, and others." *See* Amended Complaint at ¶ 86.

Cincinnati ignores these denials of access and instead attempts to re-write the policy language. But this attempt only demonstrates that the undefined phrase "prohibits access" is at best ambiguous. *See* Policy at 56. Cincinnati appears to treat the Policies as providing coverage only when *all* or *complete* access to the premises is prohibited by Civil Authority. *See* Motion to Dismiss at 22. The specific policy language, however, imposes no such limitation. Cincinnati could have, but chose not to, use modifying terms such as "prohibits all access" or "prohibits any access." Nor do the Policies define *whose* access must be prohibited. *See, e.g.*, *Narricot Indus. v. Fireman's Fund Ins. Co.*, No. 01-4679, 2002 U.S. Dist. LEXIS 19074, at *15 (E.D. Pa. Sep. 30, 2002) (granting civil authority coverage despite government order allowing emergency personnel to continue accessing covered premises). Black's Law Dictionary defines "prohibit" as "restraining a certain action by a certain party, normally by the order of a legitimate legal authority." *Prohibit*, Black's Law Dictionary (11th ed. 2019). Here, the Government Orders clearly restrained multiple actions of multiple parties, including forbidding customers from entering Plaintiffs' restaurants, and forbidding the restaurants' owners and others from putting the indoor and outdoor dining, bar, and seating areas to their income-generating use. These

prohibitions are sufficient to state a claim for relief under the Policies' Civil Authority provisions.

North Carolina courts do not appear to have ruled on the issue raised by Cincinnati's second challenge. But the case law in general, *including the cases cited by Cincinnati*, supports denying the Motion to Dismiss due to a purported lack of a prohibition on access. For example, Cincinnati cites *Southern Hospitality, Inc. v. Zurich Am. Ins. Co.*, 393 F.3d 1137, 1141 (10th Cir. 2004). The plaintiffs in *Southern Hospitality* operated hotels, but the Civil Authority action at issue was a Federal Aviation Administration order that "stopped airplanes from flying; it did not close hotels." *Id.* at 1141. The Tenth Circuit contrasted those facts with cases that "found that access was prohibited where the order of civil authority required *the insured's premises* to close, thereby invoking coverage for business losses." *Id.* (emphasis added). The Tenth Circuit therefore denied coverage "because the FAA's order grounding flights did not itself prevent, bar, or hinder access to Southern Hospitality's hotels in a manner contemplated by the policies." *Id.* Here, however, Plaintiffs allege that the Government Orders themselves *did* require Plaintiffs' restaurants to close, which *Southern Hospitality* recognized as sufficient to "invok[e] coverage for business losses" under Civil Authority coverage. *See* Amended Complaint at ¶¶ 76-86. Unlike in *Southern Hospitality*, there is a direct nexus between the Government Orders and the closure of Plaintiffs' restaurants.

The reasoning in *Ski Shawnee, Inc. v. Commonwealth Ins. Co.*, No. 3:09-CV-02391, 2010 U.S. Dist. LEXIS 67092 (M.D. Pa. July 6, 2010) similarly supports Plaintiffs. In *Ski Shawnee*, a bridge collapsed along a primary route of ingress to a ski resort, and governmental authorities thereafter closed the route to the public while the bridge was repaired. *Id.* at *1. The ski resort sought Civil Authority coverage, arguing that its customers were prohibited from accessing its

premises. *Id.* at *3-5. Cincinnati fails to mention that the Court denied coverage because "at least some of Ski Shawnee's customers were able to access the ski resort via alternate routes on the dates in question." *Id.* at *11. As the Court explained, "[e]ven though some of the customers . . . were hindered or dissuaded from frequenting [p]laintiff's resort on the weekend that the bridge was being repaired, that does not mean that they were prohibited from accessing the premises. Without a complete inability to access the premises, or a forced closing by a civil authority, the coverage at issue here is not applicable." *Id.* at *11-12. Here, unlike in *Ski Shawnee*, Plaintiffs' allege that their customers were indeed *completely forbidden* from accessing or entering the restaurant premises. *See* Amended Complaint at ¶¶ 76-86. Civil Authority coverage indemnifies this prohibition of access.

Cincinnati's other cases also miss the mark, as their facts involve circumstances where the Civil Authority action at issue merely made it more difficult for customers to access certain businesses, but did not *expressly prohibit* access. *See, e.g., Syufy Enters. v. Home Ins. Co.*, No. 94-0756 FMS, 1995 U.S. Dist. LEXIS 3771, at *5 (N.D. Cal. Mar. 20, 1995) ("Under the clear terms of the policy, a civil authority must specifically deny access to a Syufy theater. Here, no civil authority ever *specifically* prohibited any individual from entering a theater." (emphasis in original)); *Bros., Inc. v. Liberty Mut. Fire Ins. Co.*, 268 A.2d 611, 614 (D.C. 1970) ("[T]hough the loss alleged resulted from the curfew and municipal regulations, these did not prohibit access to the premises . . . ."); *Borah, Goldstein, Altschuler, Nahins & Goidel, P.C. v. Trumbull Ins. Co.*, 2016 NY Slip Op 32736(U), ¶ 28 (Sup. Ct.) ("[P]laintiff fails to point to any type of order specifically prohibiting it from its premises. Plaintiff's mere difficulty in accessing the premises is not sufficient to constitute a prohibition."); *TMC Stores, Inc. v. Federated Mut. Ins. Co.*, No. A04-1963, 2005 Minn. App. LEXIS 585, at *11 (Ct. App. June 7, 2005) (denying Civil

Authority coverage "[b]ecause [customers'] access remained and the level of business was not dramatically decreased.").

The situation here is different. Indeed, Cincinnati acknowledges—as it must—that access to Plaintiffs' restaurants was prohibited by Government Order. *See* Motion to Dismiss at 21 ("the orders . . . restrict access"). But Cincinnati attempts to characterize the orders as insufficient, asserting that "the orders only restrict access based on efforts to curtail the spread of the Coronavirus amongst the populace." *Id.* at 21. It is for this very reason, however, that the orders are sufficient. The proper inquiry for Civil Authority coverage is whether the Government Orders were entered in response to dangerous physical conditions. *See* Policy at 56. Cincinnati does not and cannot challenge that as alleged, and by their own terms, the Government Orders were entered in response to the COVID-19 pandemic, which presents conditions that are indisputably dangerous and physical. *See, e.g.*, Amended Complaint at ¶¶ 76-86, 162-63.[24] It is immaterial if the Government Orders were also entered for unrelated *additional* reasons.

The only case directly on point is *Studio 417, Inc. et al. v. Cincinnati Ins. Co.*, No. 20-cv-03127-SRB (W.D. Mo. Aug. 12, 2020), ECF No. 40, a COVID-19-era insurance case which ruled on the precise challenge raised by Cincinnati, under the exact same Cincinnati policy language, and on near-carbon copy briefing drafted by the same law firm representing Cincinnati here. In *Studio 417*, the complaint alleged the same civil authority limitations on restaurants and

[24] For example, Paragraph 66 of the Amended Complaint, which must be taken as true in ruling on a Motion to Dismiss, alleges that "multiple structures in the vicinity of Plaintiffs' covered premises reported COVID-19 infections or outbreaks, and were in fact physically impacted by the presence of the COVID-19 virus on or around the surfaces of these structures." *See* Amended Complaint at ¶ 66; *see also id.* at ¶¶ 67-74 (setting forth numerous specific examples of COVID-19 physically impacting premises in the North Carolina counties in which Plaintiffs operate).

residents as imposed in North Carolina, but notably, the applicable civil authority orders did not use the term "access." *Id.* at 13-14. Even so, the Court held:

> "At the motion to dismiss stage, these allegations plausibly allege that access was prohibited to such a degree as to trigger the civil authority coverage. . . . This is particularly true insofar as the [p]olicies require that the 'civil authority prohibits access,' but does not specify 'all access' or 'any access' to the premises. For these reasons, [p]laintiffs have adequately stated a claim for civil authority coverage.'"

Id. The same is true here and Cincinnati's Motion to Dismiss should be denied.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Cincinnati's Motion to Dismiss in its entirety.

This the 17th day of September, 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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The undersigned attorney certifies under penalty of perjury that the forgoing is true and correct.

This the 17th day of September, 2020.

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