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.

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

N.C. R. Civ. P. 56

The response in opposition to Plaintiffs' Motion for Partial Summary Judgment submitted by Defendant The Cincinnati Insurance Company ("Cincinnati") attempts to obscure the central issue before the Court—whether a reasonable insured could understand that the loss of use or access to Plaintiffs' restaurant property imposed by Government Order constitutes a

"direct physical loss." If so, the Policies are at minimum ambiguous, and must therefore be construed in favor of coverage. *Accardi v. Hartford Underwriters Ins. Co.*, 373 N.C. 292, 295, 838 S.E.2d 454, 456 (2020).

In attempting to show the Policies *unambiguously* require structural alteration to property before coverage applies, Cincinnati does not point to a single dictionary definition or ordinary meaning of the dispute terms, as it must. Unable to make the required showing, Cincinnati instead attempts to distract with a series of clearly inapplicable exclusions. Notably, Cincinnati also focuses its opposition brief on Plaintiffs' loss of *use*, while ignoring Plaintiffs' undisputed loss of *access*. Nothing about Cincinnati's opposition changes the fact that the Policies unambiguously provide coverage, or are at best ambiguous. In either event, Plaintiffs' Motion for Partial Summary Judgment should be granted.

I. ARGUMENT

A. Cincinnati fails to show that the Policies unambiguously preclude coverage

Cincinnati begins by arguing that Plaintiffs did not define the word "direct," thereby evidencing "a purposeful attempt to take words out of context by disassociating them from each other," rather than interpreting the words "as a phrase, not . . . in isolation." *See* Cincinnati's Opposition Brief at 21. Notably, Plaintiffs *did* define "direct." *See* Plaintiffs' Memorandum of Law in Opposition to Defendant The Cincinnati Insurance Company's Rule 12(b)(6) Motion to Dismiss Plaintiffs' Amended Complaint at 21. Further, notwithstanding that it is *Cincinnati's* duty as sole drafter of the Policies to define relevant policy language, it is black-letter law that where Cincinnati fails to do so, the undefined terms are to be given their ordinary meaning. *Allstate Ins. Co. v. Chatterton*, 135 N.C. App. 92, 95, 518 S.E.2d 814, 817 (N.C. Ct. App. 1999). Not *once* does Cincinnati provide even a single dictionary definition for the undefined terms, the

meanings of which Cincinnati now argues is obvious. Instead, Cincinnati repeatedly points to disputed policy terms and asserts conclusively, with no definitions or interpretation or construction, that the terms require "physical alteration to the buildings to implicate any coverage." *See* Cincinnati Opposition Brief at 2.[1]

As Plaintiffs have shown, however, the plain, ordinary meaning of the disputed phrase "direct physical loss" describes the scenario where businessowners and their employees, 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 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. This loss unambiguously falls into the Policies' coverage grant.

Moreover, nothing in Cincinnati's opposition briefing changes the inescapable conclusion that the Policies are, at minimum, ambiguous as to the meaning of the phrase "direct physical loss," and must therefore be construed in favor of coverage. Cincinnati principally relies on cases from out-of-state jurisdictions interpreting wholly different policy terms, arguing that those cases "universally confirm" the "inescapable conclusion" that "direct physical loss" requires structural alteration to property. *See* Cincinnati's Opposition Brief at 21-22. This purported consensus is far from universal. At minimum, Cincinnati provides no substantive distinction of the only

[1] Cincinnati also suggests that Plaintiffs analyze words "in isolation, apart from the phrase that contains them." *Id.* at 22. Plaintiffs do provide dictionary definitions of individual words, one-at-a-time, as this is how dictionary definitions operate. But thereafter, Plaintiffs provide a comprehensive analysis of the ordinary meanings of these terms when read together, as well as when read in the context of the Policies as a whole. Cincinnati's repeated assertion that Plaintiffs "recit[e] [the] Policies' provisions in isolation" is simply unfounded. *Id.* While "most English words have more than one dictionary definition," *id.* at 23, Cincinnati does not point to a single one of those definitions that supports its position.

COVID-19-era business interruption insurance cases to rule on *the exact same policy language at issue here* under *the same Cincinnati policy*. *See Studio 41 7, Inc. et al. v. Cincinnati Ins. Co.*, No. 20-cv-03127-SRB (W.D. Mo. Aug. 12, 2020), ECF No. 40; *KC Hopps v. Cincinnati Ins. Co.*, No. 20-cv-00437-SRB, 2020 U.S. Dist. LEXIS 144285 (W.D. Mo. Aug. 12, 2020). Cincinnati instead attempts to dismiss *Studio 417* and *KC Hopps* by arguing they "were wrongly decided." *See* Cincinnati's Opposition Brief at 33-34. But the lack of consensus on the meaning of "direct physical loss" alone evidences that this key disputed language is 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).

Nor does Cincinnati dispute that if "direct physical loss" requires structural alteration to property, then coverage for "direct physical damage" is rendered duplicative and meaningless. *See* Cincinnati Opposition Brief at 31. Cincinnati appears to acknowledge the salience of this point—as it must. But rather than address this insurmountable problem of construction, Cincinnati simply skips past it, supplying a single rebuttal sentence: "[Plaintiffs'] argument does not change the fact that the Policies require 'direct ***physical*** loss or damage ***to property***.'" *Id.* (emphasis in original). But Plaintiffs agree. The phrase "to property" only clarifies that the Policies provide coverage under the current circumstances.

The full coverage grant provides coverage for "direct physical loss or damage to property at a premises."[2] Although owners can continue to access their "premises" for very narrow purposes, it remains undisputed that access *to property* at those premises is limited or prohibited. The Policies define "property" in part as "Business Personal Property," which includes "the following property located in or on the building or structure described in the Declarations or in the open . . . . (1) [f]urniture; (2) [m]achinery and equipment; (3) '[s]tock'; [and] (4) [a]ll other personal property owned by you and used in your business." *See* Policy at 40. In common parlance, Plaintiffs' owners, employees, customers, vendors, suppliers, and others are prohibited from gaining access *to property* at the sixteen restaurants due to the Government Orders. Bartenders, for example, cannot access or operate beer or wine taps; customers cannot access silverware or bathroom facilities; and owners cannot access dining tables or other furniture to serve food. *See* Gupta Declaration at ¶¶ 2-21 ("Government Orders"). Cincinnati's continued attempt to distract from the ordinary meaning of the Policies' terms does nothing to show that coverage is *unambiguously* precluded under the Policies.

B. No Exclusions Preclude Coverage

Cincinnati identifies three exclusions that are purportedly relevant to Plaintiffs' claims. *See* Cincinnati Opposition Brief at 36-38. In making this argument, Cincinnati repeats its modus operandi: ignoring the plain language of the terms *chosen by Cincinnati*, but that Cincinnati also *chose not to define*.

For starters, in just a handful of sentences, Cincinnati sets forth the language of the "Ordinance or Law" exclusion and then asserts—with no analysis or definitions whatsoever—

[2]"[P]remises" is a rare defined term under the Policies, defined to mean "the Locations and Buildings described in the Declarations." *See* Policy at 76.

that the Government Orders are unambiguously excluded under this provision. *Id.* at 36-37. This is not true. "Ordinance" is defined as "[a] piece of legislation enacted by a municipal authority." *Ordinance*, Oxford English Dictionary (Online ed. 2020). Laws, on the other hand, are ordinarily understood to be passed by legislative bodies. The Government Orders are neither legislative acts, nor were they passed by legislative bodies. The Government Orders themselves make clear they are neither "ordinances" nor "laws." Governor Cooper entered "Executive Orders," *see* Gupta Declaration at ¶¶ 2, 4-6; Dr. Cohen entered an "Order of Abatement," *id.* at ¶ 3; the City and County of Durham and the Counties of Orange and Buncombe entered "Declarations," *id.* at ¶¶ 7-10, 16-17, 18-21; and the County of Wake entered "Proclamations," *id.* at ¶¶ 11-15. Cincinnati's assertion that the Government Orders are ordinances or laws is unreasoned and strained, at best.

Even if Cincinnati's thinly-reasoned interpretation is reasonable, however, Plaintiffs' interpretation is also reasonable, and the terms are at a minimum ambiguous. In construing the terms, Cincinnati fails to recognize that the Policies also exclude certain "Governmental Action," insofar as the government action orders the seizure or destruction of property (which is not the case here). *See* Policy at 43. Because terms must be harmoniously construed, "Government Action" must mean something different from "ordinance" or "law." The Government Orders are more naturally understood as a form of "government action" rather than an "ordinance" or "law."

Cincinnati next argues the "Acts or Decisions" exclusion operates to preclude coverage. *See* Cincinnati Opposition Brief at 37. Cincinnati again provides no definitions or analysis. Black's Law Dictionary defines "act" as "[s]omething done or performed, esp. voluntarily; a deed." *Act*, Black's Law Dictionary (11th ed. 2019). The same dictionary defines "decision" as "[a] judicial or agency determination after consideration of the facts and the law; esp., a ruling,

order, or judgment pronounced by a court when considering or disposing of a case." *Decision*, Black's Law Dictionary (11th ed. 2019). Plaintiffs neither acted nor decided to close their restaurants under the dictionary definitions of these terms—they were *forced* to do so by Government Order. There was nothing "voluntary" about Plaintiffs' closures. *See, e.g.*, Affidavit of Matthew Raymond Kelly at ¶ 9 ("[T]he Government Orders and the accompanying loss of use and access to the restaurants' property made it financially impossible for any of the four restaurants to remain open for the narrow purpose of preparing and selling food for offsite consumption. Between operating at a financial loss or closing my restaurants entirely, I had no choice but to cease operations and to close all four restaurants in full."); *see also* Affidavit of Giorgios Nikolaos Bakatsias at ¶ 9; Affidavit of Djafar "Jay" Mehdian at ¶ 6. Nor were Plaintiffs closures due to a judicial order.[3]

Even if the Government Orders themselves could be said to be "acts or decisions," thereby falling into the scope of the exclusion, it is widely-understood that in the context of first-party property policies, this exclusion is overbroad and may not be applied. North Carolina courts do not appear to have ruled on the question, but numerous courts around the country have rejected application of the exclusion given that it is "overly broad, ambiguous, and irreconcilable with other policy provisions and the very concept of an all-risk insurance policy." *Mettler v. Safeco Ins. Co. of Am.*, No. C12-5163 RJB, 2013 U.S. Dist. LEXIS 8622, at *16 (W.D. Wash. Jan. 22, 2013). As the Court in *Mettler* explained:

[3] Contrary to Cincinnati's assertion, Plaintiffs did not "elect[] to close the Restaurants completely although the Government Orders expressly allowed them to remain open" for delivery or takeout. *See* Cincinnati Opposition Brief at 7. Plaintiffs were *forced* to close due to the Government Orders. Cincinnati's characterization suggests that if a fire had incinerated half a restaurant while leaving the other half untouched, any subsequent closure would have been a *choice* on the restaurant's part. This is clearly an untenable position. Nor does Cincinnati point to anything in the Policies requiring a total loss for coverage to apply.

> "The acts or decisions exclusion, taken literally, would exclude coverage from all acts and decisions of any character of all persons, or entities. Such an interpretation would leave the policy practically worthless. Under [the insurer's] application of this exclusion . . ., any time a human or an organization of humans had any role in a loss, no matter how tangential, the policy would exclude coverage. Presumably, the 'any act or decision' exclusion, under this analysis, would still provide coverage for an act of God, such as a fire caused by a bolt of lightning. However, even in those circumstances it could be argued that a fire caused by lightening should be excluded if the fire department failed to act or respond appropriately when alerted to the fire. Given the amorphous and expansive language in the provision, . . . the Court finds that it does not speak with the clarity required for the Court to rule as a matter of law that it excludes coverage."

Id. (internal quotation marks and citations omitted); *see also Jussim v. Mass. Bay Ins. Co.*, 33 Mass. App. Ct. 235, 238-39, 597 N.E.2d 1379, 1382 (1992) ("The [acts or decisions] clause . . . cannot be taken literally. If it were to be so taken, it would exclude coverage from all acts and decisions of any character of all persons, groups, or entities. Such an interpretation would leave the insurance policy practically worthless.").

Moreover, the "acts or decisions" exclusion is in direct conflict with other provisions in the Policies. Most notably, although the exclusion states that the acts of "any person" may qualify, the Policy later provides that "[a]ny act or neglect of any person other than you beyond your direction or control will not affect this insurance." *See* Policy at 101. Thus, as the Ninth Circuit insightfully recognized when interpreting the same exclusion and subsequent provision, "the 'acts or decisions' exclusion may apply only if the act or decision at issue was by 'the Insured' or under the Insured's direction or control." *Sentience Studio, LLC v. Travelers Ins. Co.*, 102 F. App'x 77, 81 (9th Cir. 2004). As already explained, it cannot be disputed that the closure of Plaintiffs' restaurants was well beyond their control. Similarly, *the entire concept* of Civil Authority coverage—which covers "*action* of civil authority," *see* Policy at 56—would also be

rendered illusory were this exclusion to apply. The "acts or decisions" exclusion is widely understood to be unenforceable and in contravention of numerous other first-party property provisions, and does not apply. Indeed, even Cincinnati's own adjusters did not cite the exclusion in their letters to Plaintiffs denying their business interruption claims. *See, e.g.*, Affidavit of Matthew Raymond Kelly at ¶, Attachment 2 (denial letter).

Finally, neither does the provision excluding "[d]elay, loss of use or loss of market" preclude coverage. The provision reads in full:

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

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

Put differently, the exclusion for "loss of use" applies only to losses that are consequential. Consequential losses, or consequential damages, are special or indirect damages: "[l]osses that do not flow directly and immediately from an injurious act but that result indirectly from the act. — Also termed *indirect damages*." *Consequential Damages*, Black's Law Dictionary (11th ed. 2019) (emphasis in original). The plain language of the exclusion clause speaks of excluding consequential losses only. *See, e.g.*, *Ashland Hosp. Corp. v. Affiliated FM Ins. Co.*, No. 11-16-DLB-EBA, 2013 U.S. Dist. LEXIS 114730, at *31-32 (E.D. Ky. Aug. 14, 2013) (holding that a "loss of use" exclusion "cannot be so broad as to encompass *all* loss of use of insured property," instead reading the exclusion "as barring certain *consequential damages*

resulting from physical loss or damage." (emphases in original)); *Schneider Equip., Inc. v. Travelers Indem. Co. of Ill.*, No. CV 04-1482-HA, 2005 U.S. Dist. LEXIS 50185, at *21 (D. Or. June 29, 2005) ("The provision's use of the terms 'delay' and 'loss of market' in the same phrase as 'loss of use' indicates that the exclusion covers intangible economic losses, not the type of tangible, direct damages resulting from direct physical loss at issue here.").

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

II. CONCLUSION

For the forgoing reasons, Plaintiffs hereby respectfully request partial summary judgment for declaratory relief under the Amended Complaint's First Claim for Relief against Cincinnati.

This the 21st day of September, 2020.

THE PAYNTER LAW FIRM, PLLC

Stuart M. Paynter (NCSB #: 42379)
Email: stuart@paynterlaw.com
Gagan Gupta (NCSB #: 53119)
Email: ggupta@paynterlaw.com
THE PAYNTER LAW FIRM, PLLC
106 South Churton Street, Suite 200
Hillsborough, North Carolina 27278
Telephone: (919) 245-3116
Facsimile: (866) 734-0622

Counsel for 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 Green 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

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:

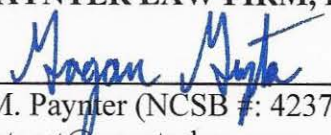
Drew Vanore
BROWN, CRUMP, VANORE & TIERNEY, LLP
P.O. Box 1729
Raleigh, NC 27602
Email: dvanore@bcvtlaw.com
Counsel for Defendant The Cincinnati Insurance Company

Josh Dixon
GORDON & REES, LLP
40 Calhoun Street, Suite 350
Charleston, SC 29401
Email: jdixon@grsm.com
Counsel for Defendant Morris Insurance Agency, Inc.

The undersigned attorney certifies under penalty of perjury that the forgoing is true and correct.

This the 21st day of September, 2020.

THE PAYNTER LAW FIRM, PLLC



Stuart M. Paynter (NCSB #: 42379)
Email: stuart@paynterlaw.com
Gagan Gupta (NCSB #: 53119)
Email: ggupta@paynterlaw.com
THE PAYNTER LAW FIRM, PLLC
106 South Churton Street, Suite 200
Hillsborough, North Carolina 27278
Telephone: (919) 245-3116
Facsimile: (866) 734-0622

Counsel for 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 Green 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