STATE OF NORTH CAROLINA COUNTY OF DURHAM		IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 20 CVS 002569
NORTH STATE DELI, LLC d/b/a MATEO BAR DE TAPAS, SAINT JAMES SEAFOOD, MOTHERS & SONS TRATTORIA, and LUCKY'S DELICATESSEN; GIORGIOS HOSPITALITY GROUP, INC. d/b/a PARIZADE, VIN ROUGH, BIN 54, CITY KITCHEN, VILLAGE BURGER, KALAMAKI, NASDHER CAFE, LOCAL22, KIPOS, and GOLDEN FLEECE, KIPOS ROSE GARDEN CLUB LLC d/b/a ROSEWATER; and GIRA SOLE, INC. d/b/a FARM TABLE and GATEHOUSE TAVERN, Plaintiffs, v. THE CINCINNATI INSURANCE COMPANY; MORRIS INSURANCE AGENCY INC.; and DOES 1 THROUGH 20, INCLUSIVE, Defendants.	)	**DEFENDANT THE CINCINNATI INSURANCE COMPANY'S MEMORANDUM OF LAW IN SUPPORT OF ITS RULE 12(B)(6) MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT**

Pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, The Cincinnati Insurance Company ("Cincinnati") moves to dismiss this case because the Plaintiffs fail to state a claim on which relief may be granted. Based on the allegations of the Amended Complaint and the language of the pertinent insurance policies, Plaintiffs cannot prove their claim.

Plaintiffs' insurance policies supply property insurance coverage. They are designed to indemnify loss or damage to property, such as in the case of a fire or storm. Coronavirus does not damage property; it hurts people. Plaintiffs demand the Policies'

business income and civil authority insurance coverage. But, because they are part of property insurance policies, these coverages protect Plaintiffs only for income losses tied to physical damage to property, not for economic loss caused by governmental or other efforts to protect the public from disease. These coverages do not apply in the absence of direct physical loss to property.

In addition to the requirement that there be direct physical loss to property, the extension of coverage for Interruption by Civil Authority requires an order from a civil authority that denies an insured access to its covered locations because of loss or damage to property other than at the covered locations. The orders Plaintiffs cite do not do this. Rather, those orders are directed to the need to keep people apart by keeping them at home.

For all of these reasons, and for the other reasons established below, Plaintiffs' Amended Complaint should be dismissed.

Statement of Facts

I. Allegations of the Amended Complaint

The Amended Complaint includes, among others, the following allegations:[1]

- Plaintiffs are multiple restaurant groups operating sixteen highly-acclaimed restaurants in Durham and across North Carolina. (Amended Complaint ¶ 2).

- The parent companies bringing this action 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, and Saint James Shellfish LLC d/b/a Saint James Seafood (collectively, "North State Plaintiffs"); Calamari Enterprises, Inc. d/b/a Parizade, Bin 54, LLC d/b/a Bin 54, Arya, Inc. d/b/a City Kitchen and Village Burger, Grasshopper LLC d/b/a Nasher Cafe, Verde Cafe Incorporated d/b/a Local 22, Floga, Inc. d/b/a Kipos Greek Taverna, Kuzina, LLC d/b/a Golden Fleece, and

[1] Cincinnati includes certain allegation here for the purposes of its Motion to Dismiss. Cincinnati does not otherwise concede the accuracy, sufficiency or relevance of Plaintiffs' allegations.

Vin Rouge, Inc. d/b/a Vin Rouge (collectively, "Giorgios Hospitality Group"); Kipos Rose Garden Club LLC d/b/a Rosewater; and Gira Sole, Inc. d/b/a Farm Table and Gatehouse Tavern. (Amended Complaint ¶ 3).

- All sixteen restaurants have been forced to close. These shutdowns were ordered by state and local governments which required Plaintiffs and their employees, customers, suppliers, and others to "shelter in place" and abide by strict "social distancing" guidelines. The mandated closures resulted in the immediate loss of income for Plaintiffs, forcing them to furlough and lay off their employees. Plaintiffs even face the prospect of permanent closures. (Amended Complaint ¶ 5).

- Cincinnati's interpretation of the policy contracts is wrong, and its denial for losses caused by limitations on the physical use and access to Plaintiffs' property breached the contracts. (Amended Complaint ¶ 12).

- In mid-March 2020, Plaintiffs were forced to close all but two of their restaurants (Parizade and Local 22 continued operating at minimal capacity, providing limited takeout services only; however, even these two restaurants were also eventually forced to cease all operations: Local 22 as of May 2, 2020. and Parizade as of May 10, 2020). 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, cease all non-essential activities, and abide by strict affirmative operational standards for enumerated essential activities like routine disinfecting cleanings of business premises.' (Amended Complaint ¶ 44).

- Plaintiffs' mounting expenses and revenue losses, however, limit their ability to continue these and other activities in support of their businesses and employees, and absent reversal of the governmental orders and a financial payout from Cincinnati, Plaintiffs may be forced to terminate their businesses altogether. (Amended Complaint ¶ 46).

- COVID-19 is an infectious disease caused by a recently discovered novel coronavirus known as SARS-CoV-2 ("COVID-19"). (Amended Complaint ¶ 49).

- According to the World Health Organization ("WHO"): "People can catch COVID-19 from others who have the virus. The disease can spread from person to person through small droplets from the nose or mouth which are spread when a person with COVID-19 coughs or exhales. These droplets land on objects and surfaces around the person. Other people then catch COVID-19 by touching these objects or surfaces, then touching their eyes, nose or mouth. (Amended Complaint ¶ 50).

- For these reasons, "[p]ublic health experts and elected officials have emphasized again and again that social distancing is the best tool . . . to slow the coronavirus outbreak.'" (Amended Complaint ¶ 52).

- Although COVID-19 droplets are smaller and less visible than rust, mold, or paint, they are physical objects which can travel to other objects and cause harm. (Amended Complaint ¶ 53).

- Recent scientific evidence shows that COVID-19 can survive and remain virulent on stainless steel and plastic for three to six days; on glass and banknotes for three days; and on wood and cloth for 24 hours. These materials are prevalent and unavoidable throughout Plaintiffs' facilities. (Amended Complaint ¶ 56).

- Further, 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. (Amended Complaint ¶ 66).

- It was when North Carolina's state and local governments entered civil authority orders beginning in March 2020 that Plaintiffs were forced to close or curtail their business operations. (Amended Complaint ¶ 76).

- Local and municipal governments across North Carolina entered their own orders mandating that residents shelter in place and that businesses limit or cease operations. Often these local orders mandated more stringent restrictions on the movement of people and the use or access to goods, services, and facilities. Such orders have been entered by government entities in Durham, Wake, Orange, and Buncombe Counties. Chatham County called for adherence to the statewide orders. (Amended Complaint ¶ 84).

- Under each successive order. Plaintiffs' businesses and covered premises were limited to essential activities, minimum necessary operations, or required closure. The governmental actions also prohibited, via stay-at-home orders or travel restrictions, all nonessential movement by all residents. These governmental orders resulted in losing physical use of, physical access to, and physical enjoyment of Plaintiffs' property by its owners, customers, vendors, employees, and others. (Amended Complaint ¶ 86).

- Plaintiffs followed the requirements and guidance of the governmental orders described herein, resulting in the complete closure of all sixteen restaurants (except for minimal maintenance activities). Two restaurants—Parizade and Local 22—remained open for the limited purpose of takeout only. At these two restaurants, Plaintiffs closed off the dining areas and other areas traditionally open to the public, provided gloves and masks to all employees, and routinely disinfected all high-touch surfaces with strong chemicals designed to rid those surfaces of the COVID-19 virus. Local 22 then closed on May 2. 2020, and Parizade closed on May 10, 2020. (Amended Complaint ¶ 107).

- At the closed restaurant premises, and to the extent those premises were used for minimal maintenance activities, Plaintiffs ensured all social distancing protocols were met. Plaintiffs also disinfected all high-touch surfaces routinely, using strong disinfectant chemical solutions designed to rid surfaces of the COVID-19 virus. Plaintiffs further ensured face masks and gloves were provided to all individuals at the premises, and that disinfectant chemical solutions, wipes, hand sanitizers, or other hygiene materials were made available throughout the premises. Plaintiffs further barricaded or cordoned off the entirety of the closed restaurants, making known to the public that the restaurants had been closed in full. (Amended Complaint ¶ 108).

- Cincinnati's repudiation of the insurance contracts that Plaintiffs' purchased to protect their restaurants and employees is unlawful. The governmental actions affecting Plaintiffs' property have caused a loss of income and an increase in expense. This risk—of governmental action—is nowhere limited or excluded in the Policies. (Amended Complaint ¶ 109).

Plaintiffs' Amended Complaint contains three causes of action stated against Cincinnati: First Claim for Relief (Declaratory Judgment Against Cincinnati); Second Claim for Relief (Declaratory Judgment Against Cincinnati); Third Claim for Relief (Breach of Contract Against Cincinnati). Through these causes of action, Plaintiffs seek a judgment declaring that, pursuant to the Policies, Defendant Cincinnati, as a matter of law, must provide coverage for Plaintiffs' claim. Plaintiffs also seek damages based on Cincinnati's alleged breach of contract in failing to provide coverage for their claims.

II. Plaintiffs' Policies

The claims stated in the Amended Complaint against Cincinnati seek a declaration of the parties' rights and damages allegedly owed in connection with four insurance policies issued by Cincinnati (collectively the "Policies") [2]:

[2] North Carolina law provides that consideration of a contract which is the subject matter of an action does not expand the scope of a Rule 12(b)(6) hearing and does not create justifiable surprise in the nonmoving party. *See Coley v. Bank*, 41 N.C.App. 121, 126, 254 S.E.2d 217, 220 (1979); *Oberlin Capital, L.P. v. Slavin*, 147 N.C.App. 52, 60–61, 554 S.E.2d 840, 847 (2001). Accordingly, Cincinnati attaches copies of the subject insurance policies and the pertinent coverage forms contained therein to its Memorandum for the Court's consideration.

- The North State Plaintiffs seek coverage under Policy No. ECP 042 94 72, effective for the policy period of March 1, 2019 through March 1, 2022. A copy of Policy No. ECP 042 94 72 is attached hereto as Exhibit A.
- The Giorgios Hospitality Group Plaintiffs seek coverage under Policy No. ECP 027 19 15, effective for the policy period of July 25, 2019 through July 25, 2020. A copy of Policy No. ECP 042 94 72 is attached hereto as Exhibit B.
- Plaintiff Kipos Rose Garden Club LLC d/b/a Rosewater seeks coverage under with Policy No. ECP 055 57 70, effective for the policy period of October 10, 2019 through October 10, 2020. A copy of Policy No. ECP 042 94 72 is attached hereto as Exhibit C.
- Plaintiffs Gira Sole, Inc. d/b/a Farm Table and Gatehouse Tavern seek coverage under Policy No. ECP 031 16 48, effective for the policy period of March 5, 2018 through March 5, 2021. A copy of Policy No. ECP 042 94 72 is attached hereto as Exhibit D.

For present purposes, the pertinent forms found in each of the Policies are the Building and Personal Property Coverage Form (FM 101 05 16) and the Business Income (and Extra Expense) Coverage Form (FA 213 05 16). (See Ex. E and Ex. F respectively).

The Building and Personal Property Coverage Form (FM 101 05 16) is the main property coverage form. The Business Income (and Extra Expense) Coverage Form (FA 213 05 16) focuses on business income and extra expense coverage. Using similar language, both forms supply Business Income and Extra Expense coverage, but only if the necessary elements for coverage are satisfied. (Ex. E, pp. 18-19 of 40, and Ex. F, pp. 1-2 of 9, respectively). Both forms also contain the Civil Authority coverage (Ex. E, p. 19 of 40, and Ex. F, p. 2 of 9, respectively) at issue.

The requirement of direct physical loss is a core element in property insurance policies like the Policies at issue. The requirement is present in multiple parts of the Policies. For example, direct physical loss to the Plaintiffs' property is a requirement for Business Income coverage:

> We will pay for the actual loss of "Business Income"…you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct "loss" to property at "premises" caused by or resulting from any Covered Cause of Loss. (Ex. E, p. 18 of 40).
>
> We will pay for the actual loss of "Business Income" you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct "loss" to property at "premises" which is described in the Declarations and for which a "Business Income" Limit of Insurance is shown in the Declarations. The "loss" must be caused by or result from a Covered Cause of Loss. (Ex. F, p. 1 of 9).

"Loss" is defined to mean "accidental physical loss or accidental physical damage." (Ex. E, p. 38 of 40). Thus, the Business Income coverage requires direct physical loss or damage.

Covered Causes of Loss means direct "loss" unless the "loss" is excluded or limited by the Policy. (Ex. E, p. 5 of 40). Therefore, the requirement of direct physical loss applies to any coverage requiring a Covered Cause of Loss. Because it is an element of Covered Causes of Loss, direct physical loss is an integral part of all the claimed coverages, including the Extra Expense and Civil Authority coverages and the Extended Business Income coverage. (Ex. E, pp. 18-21 of 40; Ex. F, pp. 1-3 of 9).

In addition to the direct physical loss requirement that forms part of the Covered Causes of Loss definition, Civil Authority coverage also requires a prohibition of access to the insured's premises by the civil authority order. (Ex. E, p. 19 of 40; Ex. F, p. 2 of 9). Accordingly, Civil Authority coverage requires both direct physical loss to property other than the insured's property and prohibition of access to the insured's property as a result of that direct physical loss, among other things.

Argument

I. Motion to Dismiss Standard

Dismissal of an action under Rule 12(b)(6) is appropriate when the complaint "fail[s] to state a claim upon which relief can be granted." N.C.G.S. § 1A–1, Rule 12(b)(6) (2013). "[T]he well-pleaded material allegations of the complaint are taken as true; but conclusions of law or unwarranted deductions of fact are not admitted." *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970) (quoting 2A James Wm. Moore et al., Moore's Federal Practice ¶ 12.08 (2d ed.1968)). When the complaint on its face reveals that no law supports the claim, reveals an absence of facts sufficient to make a valid claim, or discloses facts that necessarily defeat the claim, dismissal is proper. *Wood v. Guilford County*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted).

North Carolina law provides that consideration of a contract which is the subject matter of an action does not expand the scope of a Rule 12(b)(6) hearing and does not create justifiable surprise in the nonmoving party. *See Coley v. Bank*, 41 N.C.App. 121, 126, 254 S.E.2d 217, 220 (1979); *Oberlin Capital, L.P. v. Slavin*, 147 N.C.App. 52, 60–61, 554 S.E.2d 840, 847 (2001). Further, when ruling on a Rule 12(b)(6) motion, a court may properly consider documents which are the subject of a plaintiff's complaint and to which the complaint specifically refers even though they are presented by the defendant. *See Robertson v. Boyd*, 88 N.C.App. 437, 441, 363 S.E.2d 672, 675 (1988).

As a result, the Court may take judicial notice of the underlying insurance policies and the forms contained therein, which are referenced in the Amended Complaint and are central to Plaintiffs' claims.

II. North Carolina Law on Contract Interpretation

Under North Carolina law, the meaning of language used in an insurance policy is a question of law for the court. *Guyther v. Nationwide Mut. Fire Ins. Co.*, 109 N.C.App. 506, 512, 428 S.E.2d 238, 241 (1993). An insurance policy is a contract and "the goal of construction is to arrive at the intent of the parties when the policy was issued." *Woods v. Nationwide Mut. Ins. Co*., 295 N.C. 500, 505, 246 S.E.2d 773, 777 (1978). Because the intent of the parties is derived from the language in the policy, the language of the policy necessarily controls the interpretation of the policy. *See Nationwide Mut. Ins. Co. v. Mabe*, 115 N.C.App. 193, 198, 444 S.E.2d 664, 667 (1994), *aff'd*, 342 N.C. 482, 467 S.E.2d 34 (1996); *see also Kruger v. State Farm Mut. Auto. Ins. Co*., 102 N.C.App. 788, 789, 403 S.E.2d 571, 572 (1991).

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

III. There Is No Direct Physical Loss To Plaintiff's Premises and Thus No Income Coverage

As shown, the Policies only provide coverage for direct physical loss. But, Plaintiffs' Amended Complaint does not allege facts showing any direct physical loss. Rather, Plaintiffs claim that the orders of civil authority interrupted their businesses. (Amended

Complaint ¶ 5, 44, 46, 76, 86, 107). Plaintiffs assert 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." (Amended Complaint ¶ 66). Although the presence of the virus is not direct physical loss to property, there is no allegation that Coronavirus was present at Plaintiffs' properties in any event. Accordingly, Plaintiffs cannot possibly prove their claim.

Moreover, even if one assumes that the virus was present on Plaintiffs' premises, it naturally disappears and can be removed by cleaning. "The virus that causes COVID-19 can be killed if you use the right products. EPA has compiled a list of disinfectant products that can be used against COVID-19, including ready-to-use sprays, concentrates, and wipes." (*See* CDC Reopening Guidance for Cleaning and Disinfecting; *see also* CDC, Cleaning and Disinfection for Households, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cleaning-disinfection.html (accessed July 31, 2020), attached as Ex. G).[3] Thus, even if there is actual presence of the Coronavirus, there is no direct physical loss to property because the virus either dies naturally in days, or it can be wiped away.

Furthermore, to the extent that Plaintiffs argue that they have lost the use of their properties, the loss of use of a property where it was not structurally altered is not direct physical loss. That is the holding in *Harry's Cadillac-Pontiac-GMC Truck Co. v. Motors*

[3] *See also* EPA online publication, "How does EPA know that the products on List N work on SARS- CoV-2?" (last accessed July 21, 2020) identifying 433 products that may be used to remove Coronavirus, attached as Exhibit H. Judicial notice/consideration of CDC or EPA materials by this Court does not convert this 12(b)(6) Motion to a Rule 56 Motion. "A court may consider publicly noticeable documents without converting a motion to dismiss to a motion for summary judgment." *Brinkley-Caldwell v. Britthaven, Inc*., 264 N.C.App. 637, 825 S.E.2d 1, 2 (2019)(citing *Woods v. J.P. Stevens & Co*., 297 636, 641, 256 S.E.2d 692, 696 (1979)("[I]t is clear that judicial notice can be used in rulings on . . . motions to dismiss for failure to state a claim.").

Ins. Corp., 126 N.C.App. 698, 702, 486 S.E.2d 249, 251 (1997). In *Harry's Cadillac*, the plaintiff auto dealership claimed it lost profits because customers could not access its property due to a snowstorm. However, the dealership did not lose any business because of direct physical loss or damage. Rather, it lost business because its customers did not materialize. The Court held that there could be no business interruption coverage where the loss of income was not caused by direct physical loss. *Harry's Cadillac*, 126 N.C.App. at 702, 486 S.E.2d at 252. *Harry's Cadillac* involved actual physical damage to the dealership's roof. But, the roof damage did not cause the business interruption. *Harry's Cadillac*, 126 N.C.App. at 702, 486 S.E.2d at 251. Unlike Harry's Cadillac dealership, Plaintiffs present no claim of physical damage whatsoever. Accordingly, a finding of no coverage is warranted.

The Polices only provide coverage where there is direct physical loss to property and the Amended Complaint does not allege facts showing any direct physical loss to property. The mere presence of the virus at a premises does not constitute direct physical loss to property. Even assuming it did, Plaintiffs do not even allege the virus was present at the insured premises. Accordingly, Plaintiffs cannot possibly prove their claim.

A. There Is No Direct Physical Loss Because There Are No Facts Alleging Plaintiffs' Property Was Physically Altered

Plaintiffs do not allege that there was any distinct, demonstrable, physical alteration of property on the premises. Instead, Plaintiffs allege that North Carolina Governor Roy Cooper began to issue orders on March 14, 2020 directed to limiting the size of gatherings, closure of certain non-essential businesses, and limiting the operation of restaurants to the preparation of food for off-premises consumption only, assuming social distancing requirements could be met.

No case in North Carolina has held that presence of a virus constitutes direct physical loss to property. In addition, numerous courts nationwide agree that to have direct physical loss, there must be a distinct, demonstrable, physical alteration of the property.[4]

The requirement that direct physical loss involves tangible change in property was recently confirmed in multiple directly applicable decisions. *Roses 1, LLC v. Erie Insurance Exchange*, awarded summary judgment to an insurer on a Coronavirus claim, ruling that alleged and unproven contamination was not direct physical loss to insured property as a matter of law. No. 2020 CA 002424 B (D.C. Super Ct. August 6, 2020) (a copy of the *Roses 1* decision is attached as Exhibit I). Because plaintiffs could not show direct physical loss to property, their claim for business income and civil authority coverage failed. *Roses I* at 9. Additionally, *Gavrilides Mgmt. Co. LLC v. Mich. Ins. Co*., reached the same conclusion. Case No. 20-000258-CB (Ingham County, Mich., Jul. 1, 2020) (copy of the transcript of the decision is attached as Exhibit J). *Gavrilides* involves

[4] *See, e.g.*, *Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.,* 465 F.3d 834 (8th Cir. 2006); *Pentair, Inc. v. Am. Guarantee & Liab. Ins. Co*., 400 F.3d 613 (8th Cir. 2005); *Phila. Parking Auth. v. Fed. Ins. Co.,* 385 F.Supp. 2d 280, 289 (S.D.N.Y.2005) (finding no direct physical loss at airport parking facility that had to close following the September 11, 2001 terrorist attacks); *N.E. Georgia Heart Ctr., P.C. v. Phoenix Ins. Co.*, No. 2:12-CV-00245-WCO, 2014 WL 12480022, at *5 (N.D. Ga. May 23, 2014) (same); *Whitaker v. Nationwide Mut. Fire Ins. Co.*, 115 F. Supp. 2d 612, 616 (E.D. Va. 1999) (same); *Mastellone v. Lightning Rod Mut. Ins. Co.,* 884 N.E.2d 1130 (Ohio App. Ct. Jan. 31, 2008); *Wolstein v. Yorkshire Ins. Co.*, 97 Wash. App. 201, 212–13 (1999) (same); *N. Am. Shipbuilding, Inc. v. S. Marine & Aviation Underwriting, Inc.*, 930 S.W.2d 829, 833–34 (Tex. App. 1996) (same); *see also Social Life* (Ex. K at p. 15); *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766 (2010); *Ward Gen. Ins. Servs., Inc. v. Employers Fire Ins. Co.*, 114 Cal. App. 4th 548, 556–57 (2003), *as modified on denial of reh'g* (Jan. 7, 2004) (holding that loss of electronically stored data, "with its consequent economic loss, but with no loss of or damage to tangible property" did not constitute direct physical loss); *Gavrilides* (Ex. J); See also 10A *Couch on Ins.* § 148:46 ("The requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property").

a claim for business income loss related to the Coronavirus and resulting government orders. The *Gavrilides* Court stated:

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

(*See* Exhibit J at pp. 18-20) (emphasis added).

Social Life Magazine, Inc. v. Sentinel Ins. Co., Ltd. also considered whether the Coronavirus causes direct physical loss and held that it did not. 1:20-cv-03311-VEC (S.D.N.Y.), ECF No. 24-1 at p. 15. (Although there was no written opinion in *Social Life*, a copy of the hearing transcript is available and attached as Exhibit K). The Court in *Social Life* denied a motion for preliminary injunction. The basis for that denial is the absence of direct physical loss; direct physical loss is not caused by a virus. As the judge stated during arguments, the virus damages lungs; not printing presses. *Id.* at p. 5. The judge ruled, "New York law is clear that this kind of business interruption needs some damage to the property to prohibit you from going." *Id.* at p. 15.

The recent decision in *Diesel Barbershop* is in line with these decisions. In *Diesel Barbershop*, the Western District of Texas issued an on-point decision holding that there is no coverage for a Covid-19 business income property coverage claim because there has been no direct physical loss:

> The Court finds that the line of cases requiring tangible injury to property are more persuasive here and that the other cases are distinguishable . . . . Thus, the Court finds that Plaintiffs fail to plead a direct physical loss.

Diesel Barbershop, LLC v. State Farm Lloyds, No. 5:20-CV-461-DAE, 2020 WL 4724305, *5 (W.D. Tex. Aug. 13, 2020) (copy attached hereto as Exhibit L). See also, *The Inns by the Sea v. California Mutual Insurance Company*, Superior Court of the State of California, County of Monterey, Case No. 20CV001274 (August 4, 2020) granting a demurrer to plaintiff's complaint asserting claims for business interruption.[5]

Source Food is a seminal case concerning the direct physical loss requirement. The insured, Source Food, was a U.S.-based supplier of beef products that sourced its beef production to a single supplier in Canada. 465 F.3d at 835. The government imposed an embargo prohibiting importation of Canadian beef and beef product after a cow in Canada tested positive for mad cow disease. *Id*. Source Food lost a truckload of beef product, which was not itself contaminated, when its Canadian supplier's truck could not cross the border into the United States. *Id*. As a result, Source Food could not obtain the beef product required to fill its orders and lost its most valuable customer when it was unable to deliver the required one to two truckloads of beef product per week. *Id.*

Source Food claimed lost business income under its insurance policy, arguing that "the closing of the border caused direct physical loss to its beef product because the beef product was treated as though it were physically contaminated by mad cow disease and lost its function." *Id.* at 836. Thus, it could not be imported and sold. *Source Food* rejects this argument: "To characterize Source Food's inability to transport its truckload of beef product across the border and sell the beef product in the United States as direct physical

[5] A copy of the demurrer order and plaintiff's complaint are attached as Exhibit M.

loss to property would render the word 'physical' meaningless." *Id.* at 838. The claimed loss was an economic loss, not a physical loss to property.

To the same effect is *Pentair*. *Pentair* rejected the contention that a Taiwanese suppliers' inability to function after a loss of power constituted direct physical loss. 400 F.3d at 616. *Pentair* holds that loss of use or function could potentially be relevant to determining the amount of loss, but only after an insured first establishes direct physical loss. *Id*. In rejecting the plaintiff's argument, *Pentair* states that "Pentair's argument, if adopted, would mean that direct physical loss is established whenever property cannot be used for its intended purpose." *Id*.

Similarly, *MRI Healthcare* supports Cincinnati. There, MRI Healthcare's landlord was required to repair a storm-damaged roof over the room where an MRI machine was located. 187 Cal. App. 4th at 770. To make these repairs, the MRI machine needed to be turned off or "ramped down." *Id.* When the machine failed to ramp back up, MRI Healthcare submitted claims for property damage and resulting loss of business income. *Id. MRI Healthcare* holds that "detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property" is widely held to be uncovered in the policies requiring direct physical loss. *Id.* at 779 (internal quotations omitted). "A direct physical loss contemplates an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so." *Id.* (internal quotations omitted). With no physical change in the condition of the property, *MRI Healthcare* holds that no direct physical loss had occurred.

Here, similar to *Roses I*, *Gavrilides, Social Life*, *Diesel Barbershop*, *Source Food*,

Pentair, and *MRI Healthcare*, and Cincinnati's other authorities, the plain, unambiguous language of the Policies requires direct physical loss to property. Plaintiffs seek insurance coverage for financial losses they sustained as a result of the closure order. However, Plaintiffs do not plead facts showing there has been any physical alteration or structural degradation of property. On this fundamental issue, the instant case cannot be distinguished from Cincinnati's authorities that uniformly require actual, tangible, permanent, physical alteration of property. This is fatal to the Plaintiffs claims.

Even if the Amended Complaint could be read to allege direct physical loss, which Cincinnati does not concede, the loss Plaintiffs describe was caused by the presence of the virus in the world, not by any physical damage or effect on Plaintiffs' building or property. Indeed, many premises where the virus has been confirmed to be present, such as hospitals, nursing homes, and grocery stores, have remained open. This is because those properties are themselves undamaged. This same conclusion is warranted here. Moreover, even if Coronavirus could cause direct physical loss to the premises, which it cannot, Plaintiffs do not allege that the Coronavirus was ever present at their premises.

B. Coronavirus Does Not Physically Alter Property Because It Can Be Removed by Cleaning

Additionally, there is no direct physical loss to property in situations where a contaminant or substance can be cleaned. *See*, *e.g.*, *Mastellone*, 2008-Ohio-311, ¶ 68; *Mama Jo's, Inc. v. Sparta Ins. Co.,* 2018 WL 3412974, at *9 (S.D. Fla. June 11, 2018) ("[W]ith regards to Plaintiff's initial claim for cleaning, cleaning is not considered direct physical loss."); *Universal Image Prods., Inc. v. Chubb Corp*., 703 F.Supp.2d 705, 710 (E.D. Mich. 2010) (a complete cleaning of a ventilation system was not a direct physical loss), *aff'd*, 475 Fed.Appx. 569 (6th Cir. 2012).

Mastellone in particular, is very close, factually, to the present case. The relevant policy language in *Mastellone* was similar to that in the Policies here. It required "direct physical loss," also referred to in *Mastellone* as physical injury to property. *Id.* at ¶¶ 61-62. *Mastellone* holds that mold on building siding did not constitute physical injury because it did not adversely affect the building's structural integrity. In this context, *Mastellone* rejects the argument that dark staining on the siding was physical injury, because the staining was "only temporary and did not affect the structure of the wood." *Id.* at ¶ 63. The mold could be removed via cleaning, and its presence "did not alter or otherwise affect the structural integrity of the siding." *Id.* at ¶¶ 61-69, *citing* 10A *Couch on Ins.* § 148:46 (3d Ed.1998).

While the Amended Complaint does not even allege that the Coronavirus was present on Plaintiffs' premises, the virus would not affect the structural integrity of the building even if it were present. Indeed, the CDC has instructed that the Coronavirus can be wiped off surfaces by cleaning: "The virus that causes COVID-19 can be killed if you use the right products. EPA has compiled a list of disinfectant products that can be used against COVID-19, including ready-to-use sprays, concentrates, and wipes."[6] Significantly, the Centers for Disease Control and Prevention ("CDC") has instructed that the Coronavirus can be wiped off surfaces by cleaning.[7] Thus, as in *Mastellone, Mama Jo's* and *Universal Image*, even if there was actual presence of the Coronavirus, there is no direct physical loss to property because the virus can be wiped away.

[6] See Ex. G; Ex. H.
[7] CDC Reopening Guidance for Cleaning and Disinfecting (5/7/2020), https://www.cdc.gov/coronavirus/2019-ncov/community/reopen-guidance.html (accessed on July 31, 2020).

At bottom, the Coronavirus does not physically alter the appearance, shape, color or in other material dimension of property. This includes the type of property that would be in Plaintiffs' premises, such as drywall, furniture, or counters. Even if it could, however, Plaintiffs do not allege in the Amended Complaint that the virus physically altered the structure of the property. Accordingly, there was no direct physical loss to property, and thus no Business Income or Extra Expense coverage.

C. Allegations Regarding Policy Exclusions Are Irrelevant Since There Is No Direct Physical Loss

Plaintiffs appear to allege that there is coverage because their Policies do not contain virus exclusions or because the exclusions set forth in the Building and Personal Property Coverage Form do not apply. (Amended Complaint at ¶¶ 9, 10, 96, 97, 98). That assertion is legally incorrect and also beside the point for purposes of the instant motion.[8] An exclusion is relevant only if it is first determined that there is a covered loss. The Covered Cause of Loss provision requires direct physical loss that is neither excluded nor limited. For example, in *Ward General Insurance Services., Inc. v. Employers Fire Insurance Co*., 114 Cal. App. 4th 548, 555 (2003), a computer database crashed. Without a direct physical loss, it was "unnecessary to analyze the various exclusions and their application to this case." See also, *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.,* 17 F. Supp. 3d 323, 333 (S.D.N.Y. 2014) (closure of an office because of a power outage was not a direct physical loss and, therefore, it was unnecessary to decide whether a flood exclusion might also apply). In sum, there is no coverage because there is no direct physical loss. The alleged absence of an applicable exclusion is irrelevant.

[8] Cincinnati does not rely on policy exclusions for purposes of this motion. Cincinnati reserves its rights to assert any potentially applicable exclusions under the Policies should the Court deny this motion.

III. There Is No Civil Authority Coverage

As established, the Policies' Civil Authority coverage only applies if there is a Covered Cause of Loss, meaning direct physical loss to property other than the Plaintiffs' property. Even then, there is only coverage if the civil authority orders: (1) ***prohibit*** access to the "premises" due to (2) ***direct physical "loss"*** to property, other than at the "premises" caused by or resulting from any Covered Cause of Loss. (Ex. A, CIC0023) (emphasis added). "[L]osses due to curfew and other such restrictions are not generally recoverable. . . . If a policy provides for business interruption coverage where access to an insured's property is denied by order of civil authority, access to the property must actually be specifically prohibited by civil order, not just made more difficult or less desirable." 11A *Couch on Ins.* § 167:15; *Syufy Enters. v. Home Ins. Co. of Ind.*, 1995 WL 129229, at *2 (N.D. Cal. Mar. 21, 1995) (riot-related curfew prevented insured's customers from being outside, it did not prohibit access to the insured's premises); *Bros., Inc. v. Liberty Mut. Fire Ins. Co.,* 268 A.2d 611, 614 (D.C. 1970) (same).

A. There Is No Direct Physical Loss To Other Property

As demonstrated, direct physical loss to property other than property at Plaintiffs' premises is necessary for Civil Authority coverage. Courts nationwide have upheld that requirement. *See Kelaher, Connell & Conner, P.C. v. Auto-Owners Ins. Co.,* 2020 WL 886120, 8 (D.S.C. Feb. 24, 2020); *Not Home Alone, Inc. v. Philadelphia Indem. Ins. Co.,* 2011 WL 13214381, 6 (E.D. Tex. Mar. 30, 2011); *S. Texas Med. Clinics, P.A. v. CNA Fin. Corp.,* 2008 WL 450012, 10 (S.D. Tex. Feb. 15, 2008); *United Air Lines, Inc. v. Ins. Co. of State of PA*, 439 F.3d 128, 131 (2d Cir. 2006).

Just as the Coronavirus did not cause direct physical loss to Plaintiffs' premises, it did not cause direct physical loss to other property. The Amended Complaint does not allege facts showing any direct physical loss to any property at all. At most, Plaintiffs vaguely allege that Coronavirus was present at other premises because people infected by the virus had been present there. However, no facts are alleged that show any physical change or alteration of any physical property caused by the Coronavirus. Because there was no direct physical loss to any property, the Civil Authority coverage does not apply.

B. The Requisite Prohibition of Access Is Lacking

The Civil Authority coverage requires that access to Plaintiffs' premises be prohibited by an order of Civil Authority. But, while orders may have been issued concerning social distancing requirements, no government order issued in North Carolina prohibits access to Plaintiffs' premises.[9] Based on the lack of such a prohibition here, there is no Civil Authority coverage.

This position is established by the law nationwide. *See Not Home Alone, Inc.,* 2011 WL 13214381, at *6; *S. Tex. Med. Clinics,* 2008 WL 450012, at *10; *United*, 439 F.3d at 131; *Kelaher, Connell & Conner,* 2020 WL 886120, at *8. There is no Civil Authority coverage unless there is an order prohibiting access to the insured's premises. For example, in *Southern Hospitality, Inc. v. Zurich Am. Ins. Co.*, 393 F.3d 1137 (10th Cir. 2004), the plaintiff managed a number of hotels. *S. Hosp., Inc.*, 393 F.3d at 1138. Its

[9] Plaintiffs did not attach to the Amended Complaint any orders of civil authority alleged to impact their businesses. To the extent the content of these orders would assist the Court in ruling on this motion to dismiss, the Court may take judicial notice of them as public records. Doing so would not convert the motion to one for summary judgment. *Brinkley-Caldwell*, 264 N.C.App. at 637, 825 S.E.2d at 2.

revenues and profits plummeted when the FAA grounded all flights in the United States following 9/11. *Id*. *Southern Hospitality* holds that there was no civil authority coverage because the orders prohibited flights, not access to hotels. Likewise, in *Ski Shawnee, Inc. v. Commonwealth Ins. Co.,* 2010 WL 2696782, 4 (M.D. Pa. July 6, 2010), a bridge repair that hindered or dissuaded the majority of customers from visiting a ski resort did not constitute prohibition of access to the premises. *See also Syufy*, 1995 WL 129229, at *2; *Bros., Inc.,* 268 A.2d at 614; *Schultz Furriers, Inc. v Travelers Cas. Ins. Co. of America*, 2015 WL 13547667, 6 (N.J. Super. L. July 24, 2015) (traffic issues in NYC following Superstorm Sandy did not completely prohibit access to the insured store); *Goldstein v Trumbull Ins. Co*., 2016 WL 1324197, 12 (N.Y. Sup. Ct. Apr. 05, 2016).

The Governor's orders and other orders cited by Plaintiffs do not preclude access to the insured premises because of any alleged damage to other property, or to Plaintiffs' premises. Rather, the orders only restrict access based on efforts to curtail the spread of the Coronavirus amongst the populace.

There is also no coverage when civil action is taken due to fear of future harm, rather than prior actual physical damage. Thus, when construing similar policy language, courts have rejected civil authority coverage where businesses had losses due to preventive governmental measures, such as pre-hurricane evacuations or the threat of terrorist attacks, before any physical damage occurred. *See Dickie Brennan*, 636 F.3d at 686–87; *S. Tex. Med. Clinics*, 2008 WL 450012, at *10; *Not Home Alone, Inc.*, 2011 WL 13214381, at *6-7; *United Air Lines*, 439 F.3d at 134-35; *Jones, Walker, Waechter, Poitevent, Carrere & Denegre, LLP v. Chubb Corp.*, 2010 WL 4026375, at *3 (E.D. La. Oct. 12, 2010). Here, because the orders cited by Plaintiffs were issued

due to the threat to people's health arising from COVID-19, and not because of prior actual physical damage, Plaintiffs' business interruption losses are not covered by the Policies. See e.g., *S. Tex. Med. Clinics*, 2008 WL 450012, at 10.

This position is supported by the law nationally. There is no Civil Authority coverage when the government order keeps people confined to their homes. *See Syufy Enterprises v. Home Ins. Co. of Indiana*, 1995 WL 129229, at *2 (N.D. Cal. Mar. 21, 1995); *Brothers, Inc. v. Liberty Mutual Fire Insurance Co.,* 268 A.2d 611, 614 (D.C. 1970). In *Syufy*, there was a curfew to prevent rioting. Still, there was no civil authority coverage because access to the insured movie theater was not prohibited. In *Brothers*, a curfew was ordered because of riots. Although the curfew prevented a restaurant's customers from being out and about, it did not prohibit access to the premises.

Furthermore, access to premises must be prohibited, not just limited. *See Schultz Furriers, Inc. v Travelers Casualty Insurance Co. of America*, 2015 WL 13547667, at *6 (N.J. Super. L. July 24, 2015); *Ski Shawnee, Inc. v. Commonwealth Ins. Co.,* 2010 WL 2696782, at *4 (M.D. Pa. July 6, 2010). In *Schultz*, there were serious traffic issues in lower Manhattan following Superstorm Sandy. Nevertheless, there was no civil authority coverage because it was not completely impossible for the public to access the insured store. In *Ski Shawnee*, a bridge repair hindered or dissuaded the majority of customers from visiting a ski resort. *Ski Shawnee* holds that did not constitute prohibition of access to the premises. *See also Goldstein v Trumbull Ins. Co*., 2016 WL 1324197, at *12 (N.Y. Sup. Ct. Apr. 05, 2016); *TMC Stores, Inc. v. Federated Mut. Ins. Co*., 2005 WL 1331700, at *4 (Minn. Ct. App. June 7, 2005).

The orders cited by Plaintiffs' do not prohibit access to the insured premises, rather they impose limitations on the operations of Plaintiffs' businesses. Because access was not, in fact, prohibited, the Civil Authority coverage does not apply.

CONCLUSION

There is no possible coverage under the Policies because the Coronavirus does not cause direct physical loss and Plaintiffs do not allege otherwise. Plaintiffs have not alleged a claim on which relief can be granted. Accordingly, Cincinnati's Motion to Dismiss should be granted.

Dated: August 17, 2020.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **DEFENDANT THE CINCINNATI INSURANCE COMPANY'S MEMORANDUM OF LAW IN SUPPORT OF ITS RULE 12(B)(6) MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT** was served upon counsel for all parties by electronic mail addressed as follows:

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This the 17th day of August, 2020.

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