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 REPLY MEMORANDUM IN SUPPORT OF ITS RULE 12(B)(6) MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT**

Based on the facts alleged, the language of the insurance policies, and the pertinent case law, dismissal of this case is warranted pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure because the Plaintiffs fail to state a claim on which relief may be granted. Plaintiffs purchased commercial property insurance policies from The Cincinnati Insurance Company ("Cincinnati")[1]. The purpose of a commercial

[1] The Cincinnati Insurance Company did not issue the Giorgios Hospitality Group policy. Plaintiffs have filed a motion for leave to file a Second Amended Complaint, to which counsel for Cincinnati has consented. Because the Court has not yet ruled on Plaintiffs' motion, the parties' respective briefing in this matter treats the Amended Complaint as the operative complaint. But should the Second Amended Complaint become the operative complaint, the parties jointly stipulate that all briefing submitted to the Court to date remains

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

Plaintiffs do not assert that there has been any physical alteration to property. In fact, Plaintiffs do not allege that the Coronavirus was even in their buildings. Therefore, even assuming *arguendo* that physical alteration is not necessary, the virus could not have caused any direct physical loss to Plaintiffs' buildings. This fact alone requires dismissal of Plaintiffs' Complaint. Instead of proving its buildings have been physically altered, Plaintiffs argue that the "loss of use" of their buildings means they have suffered a direct physical loss to their properties. To reach this conclusion, Plaintiffs ask the Court to violate a principle canon of insurance contract law. This canon requires the Court to read the terms of an insurance policy as a whole and to give meaning to them in the context of the policy as a whole. When read in this way, the meaning and intent of the coverage is established – physical alteration to property is required. To reach a contrary conclusion, Plaintiffs ask the Court to read the terms in isolation without reference to the other terms or portions of the Policies. This includes an invitation to ignore the word

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.

"physical" in the phrase direct physical loss or damage or, alternatively, to torture its plain meaning in an effort to manufacture coverage. The Court must refuse this invitation and consider all the terms of the policies together, including the foundational requirement of direct physical loss to property. When read as a whole, the meaning is clear and inescapable. There must be physical alterations to the buildings to implicate any coverage. By failing to identify any, Plaintiffs surely admit that there is none.

Finally, even if the Court believes that loss of use qualifies as direct physical loss to property and that Plaintiffs' can be said to have stated such claim, Plaintiffs' Complaint should still be dismissed. There are several exclusions that apply including those for loss caused by enforcement of Ordinance or Law. In addition, the facts establish that Plaintiffs continued to use their buildings even after the governmental orders were issued.

I. The Unambiguous Language Of The Policies Should Be Read As A Whole

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

If the meaning of words or the effect of provisions is uncertain or capable of several reasonable interpretations, the doubts will be resolved against the insurance company and in favor of the policyholder. *Woods*, 295 N.C. at 506, 246 S.E.2d at 777. Whereas,

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

Plaintiffs have not met and cannot meet their burden to establish that their claims satisfy the core requirement of direct physical loss to property. The alleged loss of use of Plaintiffs' businesses is not direct physical loss to property because it does not involve any physical alteration to property. The fact that Cincinnati and Plaintiffs have opposing positions on that issue does not, as Plaintiffs' contend, mean that the language of the Policies is ambiguous. Moreover, even if the Policies' direct physical loss requirements were satisfied by Plaintiffs' "loss of use" argument, that argument causes Plaintiffs' claim to fall within the scope of exclusions precluding coverage for claims of that type.

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

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. 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).[2] 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 Business Income, Extra Expense and Civil Authority coverages and the Extended Business Income coverage. (Cincinnati Memo, 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. (Cincinnati Memo, Ex E, p. 19 of 40; Ex. F, p. 2 of 9).

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.

It remains true that no case in North Carolina has held that presence of a virus constitutes direct physical loss to property. The trend nationally is to find that it does not. In addition to the *Rose's 1*, *Gavrilides*, *Diesel Barbershop*, *Inns by the Sea*, and *Social Life* cases cited in Cincinnati's opening memorandum[3], another court recently reached a

[2] (See Ex. E and Ex. F respectively to Cincinnati's Memorandum of Law in Support of Its Rule 12(B)(6) Motion to Dismiss Plaintiffs' Amended Complaint ("Cincinnati Memo")..

[3] *Rose's 1, LLC v. Erie Ins. Exch*., No. 2020 CA 002424 B, 2020 WL 4589206 at *5 (D.C. Super. Aug. 06, 2020); *Gavrilides Mgmt. Co. LLC v. Mich. Ins. Co*., Case No. 20-000258-CB (Ingham County, Mich., Jul. 1, 2020); *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305, *5 (W.D. Tex. Aug. 13, 2020); *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); *Social Life Magazine, Inc. v. Sentinel Ins. Co., Ltd.*, 1:20-cv-03311-VEC (S.D. N.Y.).

similar decision regarding the lack of coverage for Coronavirus-related loss of business income in *10E, LLC v. Travelers Indemnity Co. of Connecticut*, No. 2:20-cv-04418-SVW-AS, 2020 WL 5359653, at *4 (C.D. Cal. Sept. 2, 2020). In *10E, LLC* a restaurant alleged that physical loss or damage occurred at and near its restaurant; that restrictions prohibited access to its restaurant; and that restrictions caused physical damage by labeling the property as non-essential and preventing its ordinary, intended use. *Id.* at *1-*2. The court dismissed the complaint because the insured had not alleged direct physical loss of or damage to property. *Id*. at *4. Noting "[a]n insured cannot recover by attempting to artfully plead temporary impairment to economically valuable use of property as physical loss or damage," the court rejected substituting temporary impaired use or diminished value for physical loss or damage. *Id*. at *5. While restrictions might interfere with property, the insured could not allege that restrictions caused direct physical loss or damage to insured property or other locations. *Id*. at *5-*6.

Plaintiffs cite *Studio 417, Inc., et al. v. The Cincinnati Ins. Co.,* No. 20-cv-03127-SRB (W.D. Mo. Aug. 12, 2020) and *K.C. Hopps, Ltd. v. The Cincinnati Ins. Co.,* No. 20-cv-00437-SRB (W.D. Mo. Aug. 12, 2020) (collectively, *Studio 417*)[4] in their opposition brief[5]. Though Cincinnati's motions to dismiss were denied, apart from being issued under Missouri law, a review of those rulings shows that they were both wrongly decided and are distinguishable for additional reasons. The *Studio 417* court erroneously accepted legal conclusions and other unsupported conclusions. *Id*. at *2, *6-*8. It also overlooked the absence of an allegation that the virus was on plaintiffs' premises. *Id*. at *6. In this

[4] The opinion in *Studio 417* was adopted in *K.C. Hopps*.
[5] Plaintiffs Memorandum of Law in Opposition to Defendant The Cincinnati Insurance Company's Rule 12(b)(6) Motion to Dismiss Plaintiffs' Amended Complaint ("Pl. Memo.") at pp. 24-25.

case Plaintiffs fail to allege the Coronavirus is present on their premises at all, in *Studio 417* plaintiff alleged only that the premises was "likely" infected. *Id*. at *2. In addition, *Studio 417* erroneously interprets Missouri law and relies on poorly reasoned non-Missouri cases. The Missouri law cases are *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.,* 787 F.2d 349 (8th Cir. 1986) and *Mehl v. The Travelers Home & Marine Ins. Co.,* Case No. 16-CV-1325-CDP (E.D. Mo. May 2, 2018). In *Hampton Foods* there was a physical alteration to property and thus the direct physical loss requirement was met. *Hampton Foods,* 787 F.2d at 349. In *Mehl* the policy expressly supplied coverage for a "loss of use" of property.[6] The Policies here do not state that they cover loss of use. *Studio 417* also impermissibly deconstructs the policy's direct physical loss requirement. It relies on the fact that the virus has a physical aspect to it. *Studio 417,* 2020 WL 4692385 at *4. But, under the plain language of the Policies, it is the alleged loss or damage itself, not the damage-causing agent, that must be physical. Finally, *Studio 417* contradicts the growing wave of decisions holding that there is no coverage on facts like those here.

Plaintiffs' reliance on *Great Am. Ins. Co. v. Mesh Cafe, Inc.,* No. COA02-840, 158 N.C.App. 312, 580 S.E.2d 431 (June 3, 2003) is similarly of no avail as it is based on different facts and different policy language. (Pl. Memo at p. 26). In *Mesh Café*, the claim involved alleged business income loss arising from the loss of electrical power and water supply to the property. The pertinent policy language required that the subject interruption of service causing the lost business income "result from direct physical loss or damage by a Covered Cause of Loss to the property below, if the property is located outside of a covered building described in the Declarations…" The Court found that a "reasonable

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

person could understand 'direct physical loss' to be an alternative to 'damage by a Covered Cause of Loss' because of the conjunction 'or.'" On that basis, the court concluded that "direct physical loss" must be read as an alternative to "damage by a Covered Cause of Loss", resulting in a finding that "direct physical loss" would be covered regardless of the cause. The language of the Policies here is not susceptible to that interpretation. Here, there can be no doubt that the alleged "loss" (defined as "accidental physical loss or accidental physical damage." (Cincinnati Memo, Ex. E, p. 18, 38 of 40, Ex. F, p. 1 of 9) must in every circumstance be caused by or result from a Covered Cause of Loss. Thus, *Mesh Café* provides no support for Plaintiffs.

Advance Cable Co., LLC v. Cincinnati Ins. Co. , No. 13-cv-229-wrnc, 2014 WL 975580 (W.D. Wis. Mar. 12, 2014) is similarly distinguishable. (Pl. Memo at pp. 25-26). The issue in that case concerned coverage for direct physical loss caused by hail damage. The policy defined "loss" as "accidental loss or damage." The district court found coverage after determining that there was no meaningful dispute that a physical alteration to the property had occurred and the concept of accidental loss or damage encompassed all hail denting—both dents that diminish the functionality of the roof and dents that may be only cosmetic. Thus, in *Advance Cable*, unlike here, coverage was found based on actual physical damage and not any alleged loss of use as Plaintiffs suggest.

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

In an attempt to by-pass the physical alteration requirement, Plaintiffs argue that "loss of use" in the absence of any physical impact to the building qualifies as "direct physical loss." (Pl. Memo at pp. 25-30) To support this argument, Plaintiffs engage in

convoluted interpretation that violates a cardinal canon of policy construction: reading the document as a whole. *See North Carolina Farm Bureau Mut. Ins. Co., Inc. v. Martin by and through Martin*, 833 S.E.2d 183, 186-87 (N.C. Ct. App. 2019); *Harleysville*, 364 N.C. at 9-10, 692 S.E.2d at 612.

As noted in Cincinnati's opening memorandum, North Carolina law holds that the loss of use of a property without structural alteration is not direct physical loss. *Harry's Cadillac-Pontiac-GMC Truck Co. v. Motors Ins. Corp.*, 126 N.C.App. 698, 486 S.E.2d 249 (1997). In *Harry's Cadillac*, the insured argued that its inability to gain access to the dealership due to the snowstorm rendered the business as lost to plaintiff as it would have been "had the storm leveled the premises," and that this loss triggered coverage. The insurer disagreed, contending that, except for the damage to plaintiff's roof, which was covered by the policy and did not result in any interruption to the business, there was no "direct physical loss or damage" that resulted in a loss of business income. The court found for the insurer, holding that the insured "neither alleged nor offered proof that its lost business income was due to damage to or the destruction of the property, rather all the evidence shows that the loss was proximately caused by plaintiff's inability to access the dealership due to the snowstorm." *Id*. at 702, 251-252. The terms of the pertinent coverage in *Harry's Cadillac* read as follows (emphasis added):

> BUSINESS INCOME COVERAGE FORM (AND EXTRA EXPENSE)
>
> A. 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 physical loss of or damage to property at the premises** described in the Declarations,

> including personal property in the open (or in a vehicle) within 100 feet, **caused by or resulting from any Covered Cause of Loss.**

The pertinent language from the Policies issued to Plaintiffs here provides as follows (emphasis added):

> 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.**

The language is substantively the same. Therefore, just as the alleged loss of use or access did not result in a covered business income claim in *Harry's Cadillac* in the absence of damage to or the destruction of the property, the alleged loss of use or access to Plaintiffs restaurants may not, in the absence of damage to property, result in a covered business income claim here.

The loss of use argument was also analyzed and soundly rejected in an analogous case, *Roundabout Theatre Co. v. Cont'l Cas. Co.,* 302 A.D.2d 1 (N.Y. App. Div. 2002). A theater company ("Roundabout") lost all access to its premises due to a municipal order that closed the street on which the theater was located. *Id.* at *3 The order was issued as a result of a construction accident on a nearby property, but the theatre sustained only minor damage to its roof and air conditioning system, which was repaired within one day. *Id.* The street, however, was closed for nearly a month "because of the substantial damage to the area and the danger from the partially collapsed scaffold. . . ." *Id.* As a result, the theater was completely inaccessible to the public and Roundabout was forced to cancel all performances during that time. *Id.* Roundabout sought business interruption coverage for monetary losses in the form of ticket and production-related sales as well as

additional expenses incurred in reopening the production under an insurance policy which stated in relevant part: "'This coverage insures against all risks of direct physical loss or damage to the property described in Paragraph I [i.e., the theatre building or facilities] . . ., except as hereinafter excluded.'" *Id.* The Appellate Division of the Supreme Court of New York held there was no "direct physical loss or damage" under the policy, rejected the argument that "loss" should be read as including "loss of use," and held the policy unambiguously required direct physical damage to the theater itself for coverage. *Id.* at 7; *see also Newman Myers Kreines Gross Harris, P.C. v. Great Northern Ins. Co.,* 17 F. Supp. 3d 323, 331 (S.D.N.Y. 2014) ("The critical policy language here—'direct physical loss or damage'—similarly, and unambiguously, requires some form of actual, physical damage to the insured premises to trigger loss of business income and extra expense coverage. Newman Myers simply cannot show any such loss or damage to the 40 Wall Street Building as a result of either (1) its inability to access its office from October 29 to November 3, 2012, or (2) Con Ed's decision to shut off the power to the Bowling Green network. The words 'direct' and 'physical,' which modify the phrase 'loss or damage,' ordinarily connote actual, demonstrable harm of some form to the premises itself, **rather than forced closure of the premises for reasons exogenous to the premises themselves, or the adverse business consequences that flow from such closure.")** (emphasis added).

A. Plaintiffs' Interpretation Is Facially Unreasonable

Plaintiffs' interpretation is unreasonable given the plain language of the Policies and the law governing the interpretation of insurance policies. In reciting Policies' provisions in isolation or out of context, Plaintiffs strive to manufacture an ambiguity to

create coverage where no coverage exists. But an ambiguity does not exist because the parties disagree over the meaning of the policy. *Accardi, 373 N.C. at 295, 838 S.E.2d at 457*. Instead, both parties must offer reasonable interpretations to create an ambiguity. Here, Plaintiffs' notion of direct physical loss to property as the inability to operate their restaurants to their financial satisfaction is a strained and unreasonable interpretation of the Policies.

Moreover, the cases cited by Cincinnati establish that when the words direct physical loss to property are read together, they convey the inescapable conclusion that there must be some physical alteration to property. *Mama Jo's Inc. v. Sparta Ins. Co.*, 2020 WL 4782369, *8; *Diesel Barbershop*, No. 5:20-CV-461-DAE, 2020 WL 4724305, *5; *Rose's 1*, No. 2020 CA 002424 B, 2020 WL 4589206, at *2-*5; *Gavrilides*, 2020 WL 4561979, *1 & Ex. A; *Social Life*, Ex. B. *AFLAC Inc. v. Chubb & Sons, Inc.* 581 S.E. 2d 317, 319 (Ga. App. Ct. 2003) (holding that "loss of" and "damage to" policy language require a change in the property resulting from an external event). This is not satisfied by mere "loss of use."

"A court may not rewrite an insurance contract." *Woods*, 295 N.C. at 506, 246 S.E.2d at 777. Also, as noted in *North Carolina Farm Bureau*, "the Supreme Court of North Carolina has also warned against result-orientated outcomes, instructing that 'if a policy is not ambiguous, then the court must enforce the policy as written and may not remake the policy under the guise of interpreting an ambiguous provision.'" *North Carolina Farm Bureau*, 833 S.E.2d at 187. Plaintiffs improperly ask the Court to violate these rules of construction and rewrite the Policies by analyzing words in isolation, apart from the phrase that contains them. For example, Plaintiffs list multiple dictionary definitions for

the word "physical." (Pls.' Mot. Sum. J. at 20.) Yet at no point do Plaintiffs interpret these definitions based on all of the other relevant words in the phrase including the word loss.[7] This is contrary to North Carolina rules of construction. If the parties have defined a term in the agreement, then we must ascribe to the term the meaning the parties intended. *Woods*, 295 N.C. 500, 505-506, 246 S.E.2d at 777.

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

B. Plaintiffs' Interpretation Conflicts With Other Portions Of The Policies

Plaintiffs' cite multiple orders issued by various civil authorities. Plaintiffs assert that they closed their restaurants in response to one or more of these orders. (Pl. Memo at pp. 6-13). The Policies contains a Civil Authority coverage as part of the "Business Income" coverage. That provision states as follows:

> When a Covered Cause of Loss causes damage to property other than Covered Property at a "premises", we will pay for the actual loss of "Business Income" and necessary Extra Expense you sustain caused by action of civil authority that prohibits access to the "premises", provided that both of the following apply:

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

(a) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage; and

(b) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property. . . .

(Cincinnati Memo, Ex. E, p. 19 of 40; Ex. F, p. 2 of 9)

Plaintiffs are unable to satisfy the requirements of this coverage. It requires direct physical loss to property other than property at Plaintiffs' premises. This requirement is part of the requirement for a Covered Cause of Loss to other property. Moreover, civil authority actions must be "as a result of the damage" to other property. Plaintiffs have not alleged any actual damage to any property. Indeed, they are not able to do so. The absence of Civil Authority coverage here further highlights the unreasonableness of Plaintiffs' interpretation of "loss of use" as "direct physical loss." Plaintiffs argue they are entitled to lost "Business Income" following multiple restrictions by civil authorities, yet the portion of the Policies that specifically addresses Civil Authority coverage does not apply. This argument is only possible because of Plaintiffs' mistaken argument that "loss of use" qualifies as "direct physical loss."

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

Plaintiffs also completely ignore other critical language in the Policies. The direct physical loss must be **to** Covered Property. (Cincinnati Memo, Ex. E, p. 18 of 40; Ex. F, p. 1 of 9). Many of the cases Plaintiffs rely on to support their interpretation involved policies that insured either direct "physical loss ***of***" property, or specifically defined "loss" or "damage" to include "loss of use." *See e.g., Motorists Mut. Ins. Co. v. Hardinger,* 131

F. App'x 823, 826 (3d Cir. 2005) (policy defined "property damage" to include "loss of use of tangible property"). Plaintiffs' Policies do not contain this language.

Several courts have addressed the difference between policies covering loss "of" property, as opposed to those covering loss "to" property. Some cases hold that coverage for loss "of" property may include "loss of use of property," while coverage for physical loss "to" property does not. Also, physical loss "to" property does not include purely financial loss where property has not sustained actual, tangible, injury or damage, *i.e.*, physical or structural alteration of property. This is made clear in *Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, No. CV 17-04908 AB (KSX), 2018 WL 3829767 (C.D. Cal. July 11, 2018).[8]

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

> [Insurer] points to *MRI Healthcare Center of Glendale, Inc. v. State Farm General Ins. Co*., 187 Cal.App.4th 766 (2010) and *Newman Myers Kreines Gross Harris, P.C. v. Great Northern Ins. Co.*, 17 F.Supp.3d 323 (S.D.N.Y. 2014) as holding that "direct physical loss" requires some damage or alteration to the property. In *MRI*, the operative language was "direct

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

> physical loss ***to*** business personal property," and in *Newman*, the operative language was "direct physical loss or damage." But again, those phrases omit the preposition "**of**" present in the Coverage term here. Thus, contrary to [Insurer]'s argument, *MRI* and *Newman* did not construe the coverage term "physical loss **of**" that is in issue here. In fact, *MRI* and *Newman* cut against [Insurer]: because the clauses in those cases differ from the Coverage clause here, it stands to reason that they also differ in meaning, such that "direct physical loss ***of***" should be construed differently from "direct physical loss ***to***" or "direct physical loss." . . . [T]he phrase "loss of" includes the permanent dispossession of something.

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

Like *Total Intermodal*, *Gregory Packaging* also construed a policy that expressly insured covered loss "of" property. *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:12-CV-04418 WHW, 2014 WL 6675934, at *1 (D.N.J. Nov. 25, 2014) (policy covered "direct physical loss of or damage to Covered Property caused by or resulting from a Covered Cause of Loss.").[9]

Source Food specifically addressed the "loss of" versus "loss to" distinction. There, as here, the policy required "direct physical loss ***to*** property." Source Food Tech., Inc. v. U.S. Fid. & Guar. Co., 465 F.3d 834, 838 (8th Cir. 2006) (emphasis added). *Source Food* holds "to characterize Source Food's inability to transport its truckload of beef product across the border and sell the beef product in the United States as direct physical loss to property would render the word 'physical' meaningless." *Id*. Further:

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

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

> property" further undermines Source Food's argument that a border closing triggers insurance coverage under this policy.

Id. (emphasis in original). This Court should enforce the Policies as written, giving meaning to each phrase as found therein.

D. Loss Or Damage Both Require Physical Alteration

In the Policies' definition of "loss," the word "or" separates "accidental physical loss" from "accidental physical damage". (Cincinnati Memo, Ex. E, p. 38 of 40). Plaintiffs assert that a requirement of physical alteration is not reasonable because "loss" being separated from "damage" by the word "or" has to mean something other than "damage." (Pl. Memo at p. 24). This argument does not change the fact that the Policies require direct accidental ***physical*** loss **to property** or direct accidental **physical** damage ***to property***. Thus, here again, Plaintiffs divorce words from the phrase that contains them in an effort to torture the plain meaning of the phrase.

Moreover, Plaintiffs are wrong that the only possible meaning of the word "or" is one or the other, not both. The word "or" can mean another in a series, as with a list of synonyms. This is well-established in the law. *See e.g. Indiana Ins. Co. v. N. Vermillion Cmty. Sch. Corp.*, 665 N.E.2d 630, 635 (Ind. Ct. App. 1996) ("The use of the disjunctive "or" before "disparaging" suggests that something different though similar and additional to "defamatory" is intended.") (emphasis added); *see also AFLAC*, 581 S.E.2d at 319 (discussing the use of "or" as a coordinating conjunction, instead of disjunctive: "Moreover, the words "loss of" in the International Policy and the words "damage to" used in both policies, make it clear that coverage is predicated upon a change in the insured property resulting from an external event rendering the insured property, initially in a satisfactory condition, unsatisfactory."); *Bethel Vill. Condo. Assn. v. Republic-Franklin Ins.*

Co., 2007–Ohio–546, 2007 WL 416693, ¶¶ 17-18 (Ohio App. Ct.) (holding that insured's interpretation of disjunctive "or" was unreasonable). Thus, the terms "loss" and "damage" should be read together and given a similar meaning. This is supported by cases analyzing commercial property policies. The terms "physical loss" is commonly used to refer to the complete destruction of property, whereas "physical damage" is construed as less than complete destruction, but still involving some physical alteration to the property. *See e.g. Gellman v. The Cincinnati Ins. Co*., 602 F.Supp.2d 705 (W.D.N.C.2009) aff'd, 357 Fed.Appx. 512 (4th Cir. 2009)(coverage dispute concerning the proper measure of determining the covered loss under a property policy as between the value of the repairs for the physical damage caused to building versus the amount owed if the building was a total loss).

E. Even If "Loss" Is Construed To Mean "Loss of Use" Or "Loss Of Access" As Plaintiffs Suggest, That Does Not Change The Result Here

Plaintiffs were not physically/tangibly deprived of their premises. Although Plaintiffs' use of the buildings was regulated by the Government Orders that restricted the use to providing food for off-site consumption, the Orders did not dispossess or deprive Plaintiffs of their buildings. Plaintiffs were free to continue to operate out of the restaurants so long as they followed the restrictions. Indeed, Plaintiffs admit they made the decision to close based on a cost-benefit analysis; not on an inability to serve customers. (Pl. Memo at p. 13). At most, Plaintiffs lost or were temporarily deprived of the intangible, economic value derived from the buildings when they host customers there. Moreover, to the extent that "loss" requires or means loss of possession or tangible deprivation that did not happen here. Again, Plaintiffs were not dispossessed or physically deprived of their properties. In any event, as established, Plaintiffs must prove "physical damage" to their

buildings. *Harry's Cadillac*, 126 N.C.App. at 702, 486 S.E.2d at 251. They have not done so.

E. Plaintiffs' Cases Are Distinguishable And Do Not Support Their Interpretation

The cases cited by Plaintiffs in seeking to twist "direct physical loss to property" into "loss of use of property" are inapposite. None of them are controlling North Carolina law. Also, none of them address the pure economic impact caused by a virus or pandemic as addressed in the well-reasoned cases cited by Cincinnati, namely *10E, LLC*; *Diesel Barbershop*; *Rose's 1*; *Gavrilides Mgmt.*, *Inns by the Sea*; and *Social Life*. In addition, the facts of the cases cited by Plaintiffs demonstrate that the property at issue in those cases had suffered some direct physical impact, that the cases involved different policy language or both. The additional cases cited by Plaintiffs, based on policies that expressly insured "loss of use" or that covered loss "of" property, unlike the Policies here, include the following:

- *Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co*., 311 F.3d 226, 236 (3d Cir. 2002) (affirming that "unless asbestos in a building was of such quantity and condition as to make the structure unusable, the expense of correcting the situation was not within the scope of a first party insurance policy covering 'physical loss or damage.'");
- *Fountain Powerboat Indus. v. Reliance Ins. Co*., 119 F. Supp. 2d 552 (E.D.N.C. 2000)(coverage found under policy's ingress/egress coverage provision which applied to loss resulting from the necessary interruption or reduction of business operations conducted by the insured and caused by loss, damage, or destruction by any peril not excluded);
- *Oregon Shakespeare Festival Ass'n (OSF) v. Great Am. Ins. Co.*, No. 1:15-CV-01932-CL, 2016 WL 3267247, at *4 (D. Or. June 7, 2016), *vacated*, No. 1:15-CV-01932-CL, 2017 WL 1034203 (D. Or. Mar. 6, 2017).[10] (analysis performed on issue

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

providing coverage for "direct physical loss ***of*** or damage to covered property" and coverage granted on a claim involving both damage caused by particulate matter and lost use of a theater while the smoke was allowed to dissipate);

- *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am*., No. 2:12-CV-04418 WHW, 2014 WL 6675934, at *1 (D.N.J. Nov. 25, 2014) (policy covered ammonia discharge claim based on language affording coverage for "direct physical loss of or damage to Covered Property caused by or resulting from a Covered Cause of Loss");
- *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co*., 968 A.2d 724, 728, 734 (N.J. App. Div. 2009) (interpreting coverage extension applicable to "consequential loss or damage resulting from an interruption of electrical power" and holding that electrical grid was "physically damaged" due to a physical incident or series of incidents and that undisputed evidence showed some damaged equipment had to be replaced);
- *Motorists Mut. Ins. Co. v. Hardinger,* 131 F. App'x 823, 826 (3d Cir. 2005) (holding that policy defining "property damage" to include "loss of use of tangible property" might apply where testing had confirmed e-coli contamination in drinking well after owners sickened and had to move out);
- *Three Palms Pointe, Inc. v. State Farm Fire & Cas. Co.*, 250 F. Supp. 2d 1357 (M.D. Fla. 2003) (property's collapse was covered and caused an "accidental direct physical loss" to the property leading to determination that repair costs may include more than costs to repair the structure of a building, including relocation expenses directly related and were made necessary by the reconstruction of the units);
- *Matzner v. Seaco Ins. Co*., No. CIV. A. 96-0498-B, 1998 WL 566658, at *3 (Mass. Super. Aug. 12, 1998) (holding "carbon-monoxide contamination constitutes 'direct physical loss of or damage to' property" where parties did not dispute that the fire department measured a high-level of carbon monoxide at the insured premises);
- *Sentinel Mgmt. Co. v. N.H. Ins. Co*., 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (holding that insured could recover for release of asbestos fibers and resultant contamination inside building, but "not for the mere presence of [asbestos] in the buildings . . . .");
- *Western Fire Insurance Co. v. First Presbyterian Church*, 437 P.2d 52, 54-55 (Co. 1968) ("loss of use" of the church premises, standing alone, did not in and of itself constitute a "direct physical loss," but coverage was found based on parties' stipulation that gasoline had infiltrated "the soil under and around the building, which gasoline and vapors thereof *infiltrated and contaminated* the foundation and halls and rooms of the church building")(emphasis added);
- *Hughes v. Potomac Ins. Co*., 18 Cal. Rptr. 650, 655 (Cal. Ct. App. 1962), abrogated on other grounds (holding that landslide taking ground beneath home resulted in direct physical loss to dwelling, which included the lost ground of its curtilage);
- *Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799, 803, 805 (N.H. 2015) (holding that presence of pervasive cat urine odor inside of condo from neighboring cats might constitute *physical* loss because the odor could be perceived by the sense of smell only if changes perceived by smell were "distinct and demonstrable");

- *Nautilus Grp., Inc. v. Allianz Glob. Risks US*, No. C 11-528 lBHS, 2012 WL 760940 (W.D. Wash. Mar. 8, 2012) (policy provision providing coverage for "all risks of direct physical loss or damage to Insured Property" found to support coverage for theft of covered personal property as "physical loss");
- *Gen. Mills, Inc. v. Gold Medal Ins. Co*., 622 N.W.2d 147, 150–52 (Minn. Ct. App. 2001) (holding that application of unapproved pesticide permeated oats and could not be removed, which "supported a finding of physical damage");
- *Prudential Prop. & Cas. Co. v. Lillard-Roberts*, No. CV-01-1362-ST, 2002 WL 31495830, at *8 (D. Or. June 18, 2002) (holding that water damage and resulting mold physically altered the property).

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

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

As argued by Plaintiffs in response to Cincinnati's motion, they shut their restaurants down based on the issuance of the Government Orders. The Policies excludes from coverage "loss" caused directly or indirectly by "Ordinance or Law". "Ordinance or Law" is defined to include, "the enforcement of or compliance with any ordinance or law . . . [r]egulating the . . . use . . . of any building or structure. . . This exclusion applies whether "loss" results from: . . . An ordinance or law that is enforced even if the building or structure has not been damaged . . . ." (Cincinnati Memo, Ex. E, p. 5 of 40).

Here, Plaintiffs did not close the restaurants until after the Government Orders began to be issued and their operations were impacted. (Pl. Memo at pp. 12-13). In fact, Plaintiffs specifically allege that "the Government Orders resulted in the complete closure of all sixteen restaurants." (Id.). Thus, Plaintiffs' closure of the restaurants and alleged loss of use of their premises was caused by the enforcement of an ordinance or law.

Accordingly, the unambiguous language of the Ordinance or Law exclusion precludes coverage for Plaintiffs' loss of use of the premises. *Woods*, 295 N.C. at 506, 246 S.E.2d at 777.

Similar to the Ordinance or Law exclusion, the Acts or Decisions exclusion precludes coverage for acts or decisions of a governmental body. The exclusion precludes coverage "for 'loss' caused by or resulting from . . . Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body." (Cincinnati Memo, Ex. E, p. 10 of 40). The record demonstrates that Plaintiffs' alleged loss of use of their buildings was caused by or resulted from the Government Orders. If this Court finds that the Government Orders were not an ordinance or law for purposes of the Ordinance or Law exclusion, then they must nevertheless be acts or decisions of a governmental body. The Acts or Decisions exclusion would apply equally to "loss" resulting from the decision by Plaintiffs' management to cease operating altogether. Accordingly, coverage for Plaintiffs' claim is excluded under the Policies.

According to Plaintiffs argument, the actual cause of the loss of income is the loss of use, which implicates the Policies' "Delay or Loss of Use" exclusion. That exclusion states that Cincinnati "will not pay for 'loss' caused by or resulting from . . . delay, *loss of use* or loss of market." (Cincinnati Memo, Ex. E, p. 8 of 40) (emphasis added). Because Plaintiffs' actual damage is lost income and because the sole cause of that lost income is the loss of the use of its building, the Delay or Loss of Use exclusion bars coverage.

III. Lack Of A Virus Exclusion Is Irrelevant As There Is No Direct Physical Loss

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).

Plaintiffs suggest that there must be coverage because the Policies do not contain a virus exclusion. (Pl. Memo at p. 38). That assertion is legally incorrect. While the definition of Covered Cause of Loss refers to exclusions, exclusions do not come into play unless and until there is first a covered 'loss', i.e. a direct physical loss. Thus, if an insured demonstrates direct physical loss is present, then exclusions may nevertheless apply. *Defeat The Beat, Inc. v. Underwriters At Lloyd's London*, 194 N.C.App. 108, 115, 669 S.E.2d 48, 52 (2008). If there is no direct physical loss, then the exclusions need not be consulted because there is no coverage to begin with. *Hobson Constr. Co. v. Great American Ins. Co.*, 71 N.C.App. 586, 590, 322 S.E.2d 632, 635 (1984), disc. review denied, 313 N.C. 329, 327 S.E.2d 890 (1985) (where the loss was not within the insuring language, there was no need to reach the issue of whether the injury was excepted from coverage by an exclusion); *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.,* 17 F. Supp. 3d 323, 333 (S.D.N.Y. 2014) (office closure due to a power loss was not a direct physical loss, obviating exclusion analysis); *Ward Gen. Ins. Svcs., Inc. v. Emp'rs Fire Ins. Co*., 114 Cal. App. 4th 548, 555 n.5 (2003) (database crash was not direct physical loss, so no need to analyze the various exclusions). The absence of an exclusion cannot create coverage where none exists. *Advance Watch Co. v. Kemper Nat. Ins. Co.*, 99 F.3d 795, 805 (6th Cir. 1996).

Plaintiffs raise an Insurance Services Office (ISO) filing regarding the 2006 Virus Exclusion. (Pl. Memo at pp. 38-40; Amended Complaint ¶¶ 150-157). Because, the

Policy's direct physical loss language is clear and unambiguous, that ISO Circular is unneeded extrinsic evidence, irrelevant and should not be considered. The Policy language controls the coverage determination, not the ISO Circular. The Policy language controls the coverage determination, not the ISO exclusion. Nonetheless, the ISO Circular strongly supports Cincinnati here. In it, ISO specifically mentioned SARS and the risk of the spread of disease by the presence of disease-causing agents on interior building surfaces.[11] (Exhibit B, pp. 5-6 ("Introduction" and "Current Concerns")). ISO stated that there was no coverage in the absence of a virus exclusion: "While property policies have not been a source of recovery for losses involving contamination by disease-causing agents . . . ." (*Id.* at p. 6). Indeed, ISO foresaw that policyholders might try to do exactly what Plaintiff is attempting here--to assert coverage where there is none: "the specter of pandemic . . . raises the concern that insurers employing such policies may face claims in which there are ***efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent***. (*Id.* at p. 6) (emphasis added). In filing the virus exclusion, ISO recognized that a virus was not covered to begin with. But, it presented the virus exclusion as a "belt and suspenders" approach to rebut arguments like Plaintiffs'. This stated intent is the exact opposite of Plaintiffs' interpretation of the role of the virus exclusion in commercial property policies. In sum,

[11] Judicial notice/consideration of ISO Circular, raised by Plaintiffs in the Amended Complaint and again in response to Cincinnati's motion to dismiss 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."). See Exhibit B, a copy of the 2006 ISO Circular cited by Plaintiffs. See Complaint ¶ 156, fn 38)..

there is no coverage here because there is no direct physical loss. For that reason, no exclusion is needed.

IV. There Is No Civil Authority Coverage

A. There Is No Direct Physical Loss To Other Property

The Policies require that there be direct physical loss to property other than property at Plaintiffs' premises 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). 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. 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.[12] Based on the lack of such a prohibition here,

[12] 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.

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. 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 limit access by the public based on efforts to curtail the spread of the Coronavirus amongst the populace.

Plaintiffs were expressly allowed to continue to operate from their premises to provide food for off-site consumption. But, as explained in Cincinnati's Memo, access to premises must be prohibited, not just limited. *See e.g. 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). 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: September 21, 2020.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **DEFENDANT THE CINCINNATI INSURANCE COMPANY'S REPLY 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 21st day of September, 2020.

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