IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE BEND HOTEL DEVELOPMENT COMPANY, LLC	)	
Plaintiff,	)	
v.	)	Case No. 1:20-cv-4636
THE CINCINNATI INSURANCE COMPANY,	)	
Defendant.	)	

DEFENDANT THE CINCINNATI INSURANCE COMPANY'S
MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS

Plaintiff's Complaint (ECF Doc. #1) (the "Complaint") should be dismissed because it does not allege direct physical loss or damage to property and there is thus no coverage here. The insurance policy at issue (the "Policy") indemnifies against loss or damage to property, such as in the case of a fire or storm. The Coronavirus ("SARS-CoV-2") and the infectious disease that it causes (COVID-19) do not damage property; they hurt people. The Business Income, Extra Expense, and Civil Authority coverages are part of a property insurance policy, applying only to income losses tied to physical damage to property, not economic losses caused by protecting the public from disease. Absent direct physical loss or damage to property, coverage is unavailable.

Plaintiff bears the initial burden of showing actual direct physical loss or damage to property. This is always necessary to make a *prima facie* case for property insurance coverage. Here, however, Plaintiff asks this Court to find the Policy applies to cover purely financial losses sustained as a result of COVID-19-related orders requiring non-essential businesses to cease or limit in-person operations. Because direct physical loss is a fundamental prerequisite to coverage under the Policy, Plaintiff's attempt to create coverage from whole cloth should not be permitted.

STATEMENT OF FACTS

I. Allegations of the Complaint

The Complaint includes the following allegations (summarized in pertinent part):[1]

- Plaintiff is a Hotel in East Moline, Illinois. (Complaint at ¶ 1).
- Plaintiff has been forced, by recent orders issued by the State of Illinois, to cease the majority of its operations — through no fault of its own — as part of the State's efforts to slow the spread of the COVID-19 pandemic. (Complaint at ¶ 2)
- On March 15, 2020 …, Illinois Governor Pritzker issued an order first closing all restaurants, bars, and movie theaters to the public in an effort to address the ongoing COVID-19 pandemic. … [O]n March 20, 2020, Governor Pritzker ordered all "non-essential businesses" to close. The March 15 and March 20 orders are hereinafter collectively referred to as the "Closure Orders." As a result of the Closure Orders,

[1] Cincinnati describes certain allegations of the Complaint here for the purposes of its Motion to Dismiss. Cincinnati does not concede the accuracy, sufficiency or relevance of Plaintiff's allegations.

Plaintiff has been forced to halt ordinary operations, resulting in substantial lost revenues. (Complaint at ¶ 6)

- The Policy is an "all risk" policy that provides broad coverage for losses caused by any cause unless expressly excluded. The Defendant Policies [sic] do not exclude losses from viruses or pandemics. Thus, the all-risk Policies [sic] purchased by the Plaintiff cover losses caused by viruses, such as COVID-19. (Complaint at ¶ 22)
- The continuous presence of the coronavirus on or around Plaintiff premises has rendered the premises unsafe and unfit for its intended use and therefore caused physical property damage or loss under the Policies [sic]. (Complaint at ¶ 26)
- Executive Order 2020-07 was issued in direct response to these dangerous physical conditions, and prohibited the public from accessing Plaintiff's restaurants, thereby causing the necessary suspension of its operations and triggering the Civil Authority coverage under the Policies [sic]. Executive Order 2020-07 specifically states, "the Illinois Department of Public Health recommends Illinois residents avoid group dining in public settings, such as in bars and restaurants, which usually involves prolonged close social contact contrary to recommended practice for social distancing," and that "frequently used surfaces in public settings, including bars and restaurants, if not cleaned and disinfected frequently and properly, also pose a risk of exposure." (Complaint at ¶ 27)
- Governor Pritzker's March 20, 2020 Closure Order … closing all "non-essential" businesses in Illinois, including restaurants, movie theaters and many hotel operations, likewise was made in direct response to the continued and increasing presence of the coronavirus on property or around Plaintiff's premises. (Complaint at ¶ 28)
- [T]he March 20, 2020 Order prohibited the public from accessing Plaintiff's services, thereby causing the necessary suspension of its operations and triggering the Civil Authority coverage under the Policies [sic]. (Complaint at ¶ 29)
- As a result of the Closure Orders, the Plaintiff ha[s] suffered substantial Business Income losses and incurred Extra Expense. The covered losses incurred by Plaintiff and owed under the Policies [sic] is increasing every day, but are expected to exceed $250,000.00. (Complaint at ¶ 30).

The Complaint contains three causes of action. Count I seeks a declaratory judgment regarding coverage. Count II seeks damages for the alleged breach of contractual obligations. Count III seeks damages under Section 155 of the Illinois Insurance Code.

II. Plaintiff's Policy

Cincinnati issued Policy No. ETD 051 52 30 to Bend Hotel Development Company, LLC for the policy period of December 12, 2018 to December 12, 2021 (the "Policy").[2] The relevant

[2] The Complaint alternates between references to a "Policy" or to "Policies" and fails to attach any policy as an exhibit. The single insurance policy issued by Cincinnati to Plaintiff is attached as Exhibit A.

forms of the Policy are the Building and Personal Property Coverage Form (FM 101 05 16), the Business Income (and Extra Expense) Coverage Form (FA 213 IL 05 16), and the Hotel Commercial Property Endorsement (Form FA 268 05 16). (Exhibit A at CIC0021-60, CIC0123-131, and CIC0068-90 respectively). The Building and Personal Property Coverage Form is the main property coverage form. The Business Income (and Extra Expense) Coverage Form 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. (Exhibit A at CIC0038-39; CIC0123-124). Both forms also contain the Civil Authority coverage (Exhibit A at CIC0039; CIC0124). As pertinent to this matter, the Hotel Commercial Property Endorsement replaces the Civil Authority coverage in the Building and Personal Property Coverage Form, restating it with the same language regarding coverage requirements, but changing the time period during which it might apply if available. (Exhibit A at CIC0077).

The requirement of direct physical loss is a core element in property insurance policies like the Policy at issue. The requirement is present in multiple parts of the Policy. For example, direct physical loss to the Plaintiff's 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 a "premises" caused by or resulting from any Covered Cause of Loss. (Exhibit A at CIC0038).
>
> We will pay for the actual loss of "Business Income" you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct "loss" to property at "premises" which are described in the Declarations and for which a "Business Income" Limit of Insurance is shown in the Declarations. The "loss" must be caused by or result from a Covered Cause of Loss. (Exhibit A at CIC0123).

References to specific Policy provisions refer to the "CIC" page numbers inserted on the bottom-right of Exhibit A. This Court is permitted to take notice of that policy without converting this motion into a summary judgment motion. *Venture Assoc. Corp. v. Zenith Data Sys. Corp.*, 987 F.2d 429, 431 (7th Cir.1993) ("Documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim.").

"Loss" means "accidental physical loss or accidental physical damage." (Exhibit A at CIC0058). Thus, Business Income coverage requires direct physical loss to property or direct physical damage to property.

Covered Causes of Loss is defined as direct "loss" unless the "loss" is excluded or limited in this Coverage Part. (Exhibit A at CIC0025). Therefore, the requirement of direct physical loss or damage to property applies to any coverage requiring a Covered Cause of Loss. Because it is an element of Covered Causes of Loss, direct physical loss or damage is an integral part of all the claimed coverages, including the Extra Expense and Civil Authority coverages. (Exhibit A at CIC0039; CIC0123-124; CIC0077). In addition to the direct physical loss requirement to meet the Covered Causes of Loss definition, Civil Authority coverage also requires prohibition of access to the insured's premises by the civil authority order. (Exhibit A at CIC0077; CIC0124). Civil Authority coverage thus requires both direct physical loss to property other than insured property and prohibition of access to the insured's property as a result of that direct physical loss.

ARGUMENT

I. Federal Rule 12(b)(6) Motion To Dismiss Standard

A motion to dismiss for failure to state a claim should be granted if, after the complaint's allegations are taken as true and all reasonable inferences are made in favor of the nonmoving party, it appears beyond a reasonable doubt that the non-moving party cannot prove facts supporting his claim. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Manistee Apartments, LLC v. City of Chicago*, 844 F.3d 630, 633 (7th Cir. 2016) (affirming grant of motion to dismiss). Statements of law and other unsupported conclusions in the complaint may not be considered on a motion to dismiss. *See Yeftich v. Navistar, Inc.*, 722 F.3d 911, 915 (7th Cir. 2013). Both *Iqbal* and *Twombly* make clear

that the principle requiring that a court must accept as true all allegations contained in a complaint is inapplicable to legal conclusions. *Iqbal*, 556 U.S. at 678; *Twombly*, 550 U.S. at 555.

In Illinois, insurance policy construction is a question of law properly answered by the Court. *Roman Catholic Diocese of Springfield in Ill. v. Maryland Cas. Co.*, 139 F.3d 561, 565 (7th Cir. 1998); *Phillips v. Prudential Ins. Co. of America*, 714 F.3d 1017, 1023-24 (7th Cir. 2013).[3]

II. There Is No Direct Physical Loss Or Damage To Property And Therefore No Coverage

Coverage applies only if there has been a direct physical loss or damage to property. The Complaint does not "raise a right to relief" or "state a plausible claim for relief" as required by *Twombly* and *Iqbal* because it is devoid of any factually supported, non-conclusory allegations of direct physical loss or damage to property. Plaintiff makes speculative, conclusory allegations that it has sustained physical loss to property based not on facts about the Coronavirus and the premises, but instead on the basis that Coronavirus exists in our world and that civil authority orders have been issued (Complaint at ¶¶ 24-29). There is no allegation that the presence of the virus resulted in direct physical loss to property, only that its presence "on or around" Plaintiff's premises allegedly made the premises unsafe and unfit for its intended purpose. Accordingly, Plaintiff cannot possibly prove its claim as a matter of law.

Moreover, even if Plaintiff had affirmatively alleged that the virus was actually present on its 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* Centers for Disease Control and Prevention ("CDC") *Reopening Guidance for*

[3] Plaintiff is an Illinois corporation with its principal place of business in Glenview, Illinois. (Complaint at ¶ 3). Based on the location of the insured and the insured property upon which Plaintiff's claims are based, Cincinnati submits that the Policy should be interpreted in accord with Illinois law.

Cleaning and Disinfecting Public Spaces, Workplaces, Businesses, Schools, and Homes (attached as Exhibit B)[4]; *see also* CDC, *Cleaning and Disinfection for Households* (attached as Exhibit D). Thus, even where the Coronavirus is present, there is no direct physical loss to property because the virus either dies naturally in days, or it can be wiped away.[5]

A. There Is No Direct Physical Loss Or Damage To Property Because There Are No Facts Alleging Plaintiff's Property Was Physically Altered

Plaintiff does not allege any distinct, demonstrable, physical alteration of property at its premises. Instead, Plaintiff's claim derives from allegations that Governor Pritzker's orders forced it to alter its ordinary operations. (Complaint at ¶¶ 27-30).

There is no Illinois decision holding that the presence of a virus constitutes direct physical loss to property. However, numerous decisions, including decisions from both state and federal courts in Illinois, agree with Cincinnati's position. This Court recently held that an insured failed to state a claim for lost business income resulting from the Coronavirus and civil authority orders. *Sandy Point Dental, PC v. The Cincinnati Ins. Co.*, 2020 WL 5630465 (N.D. Ill. September 21, 2020). The court rejected the insured's arguments that it suffered direct physical loss. Instead the court held that "the critical policy language here—'direct physical loss'—unambiguously requires some form of actual, physical damage to the insured premises to trigger coverage. *Id*. at *2. Thus, as the Coronavirus does not physically alter property, the plaintiff failed to plead a direct physical loss—a prerequisite for coverage. *Id.* at *3. This required dismissal of the insured's claims for

[4] *See also* EPA online publication, "*How does EPA know that the products on List N work on SARS- CoV-2?*" identifying 486 products that may be used to remove Coronavirus, attached as Exhibit C. This Court may take judicial notice of EPA and CDC reports and other matters of public record without converting a Rule 12(b) (6) motion into a Rule 56 motion. FED. R. EVID. 201(b); *Laborers' Pension Fund v. Murphy Paving and Sealcoating, Inc.*, --- F.Supp.3d ----, 2020 WL 1515708, *3 (N.D. Ill. March 30, 2020).

[5] The CDC has stated that surfaces are not "thought to be the main way the virus spreads." *CDC updates COVID-19 transmission webpage to clarify information about types of spread,* https://www.cdc.gov/media/releases/2020/s0522-cdc-updates-covid-transmission.html

business income coverage and civil authority coverage. *Id.*

The *Sandy Point* decision was cited favorably by an Illinois state court in its decision granting the insurer's motion to dismiss with prejudice in *It's Nice, Inc. v. State Farm Fire and Casualty, Co.*, Case No. 2020 L 000517 (18th Judicial Circuit (DuPage County) September 29, 2020).[6] In *It's Nice*, the court found, just as in *Sandy Point*, that the plaintiff could not show any loss as a result of either inability to access its own office or from physical alteration or structural degradation of the property, which is required to trigger coverage under the all risks policy at issue. Exhibit E at pp. 28-29, 36 of the transcript. The *It's Nice* court also favorably cited many of the other cases cited here by Cincinnati as being consistent with Illinois courts' treatment of physical damage language in insurance policies. Id. at pp. 29-30 of the transcript.

The direct physical loss to property requirement was also recently upheld in *Oral Surgeons, P.C. v. The Cincinnati Insurance Company*, Case No. 4-0-CV-222-CRW-SBJ (S.D. Iowa September 29, 2020).[7] In its decision granting Cincinnati's motion to dismiss with prejudice, the court found that the insured's claim consisted of economic loss caused by the Coronavirus and government orders and not by physical loss or damage. Exhibit E at p. 2. The court further held that the few contrary cases cited by the insured were distinguishable on their facts and not as well analyzed as the many authorities cited by Cincinnati. Id.

10E, LLC v. Travelers Indemnity Co. of Connecticut, No. 2:20-cv-04418-SVW-AS, 2020 WL 5359653 (C.D. Cal. Sept. 2, 2020) is to the same effect. 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

[6] A copy of the court's Order and the transcript of the argument are attached as Exhibit E.
[7] See Exhibit F, a copy of the court's Order of September 29, 2020.

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 use, the insured could not allege that restrictions caused direct physical loss or damage to insured property or other locations. *Id*. at *5-*6.

The decision in *Diesel Barbershop, LLC, et al. v. State Farm Lloyds,* No. 5:20-cv-461-DAE, 2020 WL 4724305 (W.D. Tex. August 13, 2020) is also instructive. There, a series of executive orders were issued on a county and state level in Texas in response to the Coronavirus pandemic. These orders required the closure of "non-essential" businesses to help prevent the human-to-human spread of Coronavirus. The plaintiffs argued that as a result of these orders, they suffered and continue to suffer significant economic losses, which they alleged were covered under their insurance policy issued by State Farm Lloyds. The court disagreed, holding that Coronavirus did not cause a direct physical loss, as "the loss needs to have been a 'distinct, demonstrable physical alteration of the property.'" *See id*. at *5.[8]

By confirming the policy requires physical alteration to property, the courts in the above-cited matters echoed other rulings enforcing the requirement that direct physical loss involve tangible change in property. For example, the Eleventh Circuit Court of Appeals recently held that there must be an actual change in property in order for there to be a direct physical loss.

[8] These cases are part of the growing trend nationally of Coronavirus coverage decisions holding that direct physical loss requires actual, tangible, permanent, physical alteration of property. *See, e.g., 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 Mgm't Co., LLC v. Mich. Ins. Co*., No. 20-258-CB-C30, 2020 WL 4561979 (Mich. Cir. Ct. July 21, 2020)(a copy of the court's July 21, 2020 written order and the transcript of the July 1, 2020 hearing (which is incorporated by the order) is attached hereto as Exhibit G); *Social Life Magazine, Inc. v. Sentinel Ins. Co., Ltd*., 1:20-cv-03311-VEC (S.D. N.Y.)(a file-stamped copy of the transcript reflecting the Court's ruling and rationale is attached hereto as Exhibit H.

Specifically, in *Mama Jo's Inc. v. Sparta Ins. Co.*, No. 18-12887, 2020 WL 4782369 (11th Cir. Aug. 18, 2020), the insured alleged that dust and debris from a construction project was causing its customers to avoid the insured's restaurant, thus resulting in a loss of income. But, the insured identified no actual physical change to the structure. Instead, the insured alleged that the property required additional cleaning. These allegations failed to demonstrate any actual, direct physical loss and the insurer was granted summary judgment, which the Eleventh Circuit affirmed.[9]

Like the policies in *Sandy Point, It's Nice, Oral Surgeons, 10E, LLC, Diesel Barbershop, Mama Jo's, Mastellone, Philadelphia Parking Authority, Source Food, Pentair, MRI Healthcare*, and other cases cited herein, the plain, unambiguous language of the Policy requires a physical alteration to property. But, Plaintiff seeks insurance for financial losses sustained as a result of the closure orders. Plaintiff does not plead facts showing physical alteration or structural degradation of property. On this fundamental issue, this case cannot be distinguished from the cases that require actual, tangible, permanent, physical alteration of property.

Even if the Complaint could be read to allege direct physical loss, which Cincinnati does not concede, the loss Plaintiff describes was caused by the presence of the virus in the world, not by any physical damage or effect on Plaintiff's building or property. Indeed, premises where the virus has been confirmed to be present, such as hospitals, nursing homes, and grocery stores, have

[9] *See also Mastellone v. Lightning Rod Mut. Ins. Co.*, 884 N.E.2d 1130 (Ohio App. Ct. Jan. 31, 2008); *Phila. Parking Auth. v. Fed. Ins. Co.*, 385 F. Supp. 2d 280, 287-88 (S.D.N.Y. 2005); *Source Food Tech., Inc. v. USF&G Co.*, 465 F.3d 834, 838 (8th Cir. 2006); *Crestview Country Club, Inc. v. St. Paul Guard. Ins. Co.*, 321 F. Supp. 2d 260, 264 (D. Mass. 2004); *Pentair, Inc. v. Am. Guar. & Liab. Ins. Co.*, 400 F.3d 613, 616 (8th Cir. 2005); *City of Burlington v. Indem. Ins. Co. of N. Am.*, 332 F.3d 38, 44 (2d Cir. 2003); *N.E. Ga. Heart Ctr., P.C. v. Phoenix Ins. Co.*, 2014 WL 12480022, at *7 (N.D. Ga. May 23, 2014); *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 780 (2010); 10A *Couch on Ins.* § 148:46 ("The requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property."); *But see Studio 417, Inc. v. Cincinnati Ins. Co.*, No. 20-CV-03127-SRB, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020) (applying Missouri law incorrectly in concluding that the insured presented a plausible cause of action).

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, Plaintiff only speculates that the Coronavirus was present at its premises.

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

Mama Jo's and *Mastellone* echo the majority view that if property can be cleaned, it is not physically damaged. *See, e.g.*, *Mama Jo's Inc.*, No. 18-12887, 2020 WL 4782369 at *8 ("[A]n item or structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical.'"); *Mastellone*, 884 N.E.2d at 1144 (finding no direct physical damage because mold can be removed and cleaned).[10] The Coronavirus does not physically alter the appearance, shape, color or any other material dimension of property. Cases across the country confirm that the mere presence of a virus in the community does not constitute direct physical loss *to property*.

Even if present on Plaintiff's premises, the Coronavirus would not affect the structural integrity of the building or other property such as drywall, counters, tables, chairs, and utensils. The CDC has instructed that the Coronavirus can be wiped off surfaces by cleaning and the EPA has compiled a list of disinfectant products that kill COVID-19.[11] Thus, as in *Mastellone*, *Mama Jo's* and *Universal Image*, even if the Coronavirus was present, there is no direct physical loss to property because it can be wiped away. Because there has been no direct physical loss to property, there is no Business Income or Extra Expense coverage.

Plaintiff's Complaint cites *Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Int'l Ins. Co.*, 720 N.E.2d 622, 625–26 (Ill. Ct. App. 1999), as modified on denial of rehearing (Dec. 3, 1999).

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[10] *See also Universal Image Prods., Inc. v. Chubb Corp.*, 703 F. Supp. 2d 705, 710 (E.D. Mich. 2010) (cleaning of a ventilation system was not a direct physical loss), *aff'd*, 475 Fed. App'x 569 (6th Cir. 2012); *MRI Healthcare Ctr.*, 187 Cal. App. 4th at 779 ("A direct physical loss 'contemplates an actual change in insured property."); *AFLAC Inc. v. Chubb & Sons, Inc*. 581 S.E. 2d 317, 319 (Ga. App. Ct. 2003) (same).

[11] *See e.g.* Exhibit B; Exhibit C.

(Complaint at ¶ 8). Of course, the citation of a case in a complaint is a classic example of an inappropriate allegation of a legal conclusion. Under *Iqbal* and *Twombly*, this legal conclusion couched as a factual allegation need not be accepted as true by this Court in deciding this motion. Moreover, that decision provides Plaintiff no support. In *School Dist. No. 211*, the insured sought coverage under its property policy for costs incurred in removing asbestos-containing building materials ("ACBMs") from school buildings as required by the Asbestos Abatement Act (105 ILCS 105/1 et seq. (West 1994)). *Id*. at 623. The court determined that the policies at issue lacked language limiting their coverage to "direct loss or damage" to plaintiff's buildings and based on that denied the insurer's summary judgment motion. *Id*. at 624-26. In contrast to *School Dist. No. 211*, the Policy at issue here *does* require direct physical loss to covered property. Further, Plaintiff has not alleged that it has been required by law to remove or repair any aspect of its property. As recognized by the court in *Sandy Point* in distinguishing *School Dist. No. 211*, unlike the insured's need to alter a premises to remove ACBMs there, the plaintiff in *Sandy Point* and the Plaintiff here "need not make any repairs or change any part of the building to continue its business." *Sandy Point*, 2020 WL 5630465 at *2. Rather, Plaintiff need only use a disinfectant to remedy the issue if it ever learned that the virus was, in fact, present at its premises. *School Dist. No. 211* is therefore of no import to the analysis or the present action.

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

Plaintiff suggests that there must be coverage because the Policy does not contain a virus exclusion. (Complaint at ¶¶ 9-11, 22). That assertion is legally incorrect and irrelevant to this motion.[12] The Covered Cause of Loss provision requires direct physical loss that is neither excluded nor limited. If there is no direct physical loss in the first place, the existence or absence

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

of a virus exclusion is irrelevant. *Sandy Point*, 2020 WL 5630465 at *3, fn 3; s*ee also Continental Cas. Co. v. Donald T. Bertucci, Ltd.*, 399 Ill. App. 3d 775, 780, 926 N.E.2d 833, 839 (Ill. App. Ct. 2010) (finding no coverage where the insured did not prove the insuring agreement was satisfied); *Ward General Insurance Services., Inc. v. Employers Fire Insurance Co.*, 114 Cal. App. 4th 548, 555 (2003)(without a direct physical loss involved in a computer database crash, it was "unnecessary to analyze the various exclusions and their application to this case." *Id*. at fn 5; *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 outage was not a direct physical loss, obviating analysis of whether a flood exclusion also applied). 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).

III. There Is No Civil Authority Coverage

Plaintiff claims that the Closure Orders trigger the Policy's Civil Authority coverage. (Complaint at ¶ 27). However, the Policy's Civil Authority coverage only applies if there is a Covered Cause of Loss to property other than the Plaintiff's property. That means that there must be direct physical loss or damage to property other than the Plaintiff's property. Even then, there is no coverage unless 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. (Exhibit A at CIC0077; CIC0124) (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

Direct physical loss to property other than property at Plaintiff's 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 Plaintiff's premises or property, it did not cause direct physical loss to other property. Plaintiff does not allege facts showing otherwise. In fact, no facts are alleged that show physical change or alteration of any physical property, whether Plaintiff's property or someone else's, caused by the Coronavirus. Without direct physical loss to any property, the Civil Authority coverage does not apply. *Sandy Point*, 2020 WL 5630465 at *3.

B. The Requisite Prohibition Of Access Is Lacking

The Civil Authority coverage requires that access to Plaintiff's premises be ***prohibited*** by an order of Civil Authority. While orders have imposed social distancing requirements which alter Plaintiff's operations or prevent Plaintiff from hosting customers in its restaurant, no order issued in Illinois prohibits access to Plaintiff's premises.[13] Plaintiff's Complaint does not allege any facts to the contrary. Moreover, as explained in *Rose's 1* and *10E, LLC*, a governmental order, standing alone, does not constitute a direct physical loss under an insurance policy. *Rose's 1*, 2020 WL

[13] To the extent the content of the orders cited by Plaintiff 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. *Laborers' Pension Fund*, 2020 WL 1515708; FED. R. EVID. 201(b).

4589206, at *3; *10E, LLC*, 2020 WL 5359653 at *5-*6.

Courts nationwide have rejected arguments Plaintiff might make for Civil Authority coverage under the facts at hand. For example, there is no Civil Authority coverage when a government order keeps people confined to their homes. *See Syufy Enters. v. Home Ins. Co. of Ind.*, 1995 WL 129229, at *2 (N.D. Cal. Mar. 21, 1995); *Brothers, Inc. v. Liberty Mut. Fire Ins. Co.*, 268 A.2d 611, 614 (D.C. 1970). The curfew orders in *Syufy* and *Brothers, Inc.* are analogous to the "shelter in place" orders issued in Illinois. Furthermore, access to premises must be prohibited, not just limited. *See Schultz Furriers, Inc. v Travelers Cas. Ins. Co. of Am.*, 2015 WL 13547667, at *6 (N.J. Super. L. July 24, 2015).[14]

The cited civil authority orders do not prohibit access to the insured premises because of alleged damage to other property, or to Plaintiff's premises. Rather, the orders only restrict access so as to curtail the spread of the Coronavirus amongst the populace. Plaintiff has not alleged otherwise, alleging only that it has suffered a decreased level of business. That does not suffice to trigger property insurance coverage. If anyone was permitted to access the Property, there was not a prohibition of access. The language of the orders cited by Plaintiff does not prohibit Plaintiff's employees from access to the Property. As such, there was no prohibition of access and the Civil Authority coverage does not apply. *Sandy Point*, 2020 WL 5630465 at *3.

V. Plaintiff's Section 155 Claim Fails

Plaintiff's claim under Section 155 of the Illinois Insurance Code (215 ILCS 5/155), based on Cincinnati's coverage position, fails as a matter of law and can be disposed of by dispositive

[14] *See also Ski Shawnee, Inc. v. Commonwealth Ins. Co.*, 2010 WL 2696782, at *4 (M.D. Pa. July 6, 2010); *Goldstein v Trumbull Ins. Co.*, 2016 WL 1324197, at *12 (N.Y. Sup. Ct. Apr. 05, 2016); *TMC Stores, Inc. v. Fed. Mut. Ins. Co.*, 2005 WL 1331700, at *4 (Minn. Ct. App. June 7, 2005).

motion.[15] *See, e.g., Uhlich Children's Adv. Network v. Nat'l Union Fire Ins. Co.*, 929 N.E.2d 531, 543 (Ill. App. Ct. 2010) (affirming the dismissal of a Section 155 bad faith claim on a motion to dismiss).. Where, as here, there is no coverage, there can be no finding of vexatious and unreasonable conduct warranting an award of fees under Section 155. *See, e.g., Ill. State Bar Ass'n Mut. Ins. Co. v. Cavenagh*, 983 N.E.2d 468, 479 (Ill. App. Ct. 2012). Where the policy does not apply to the claimed losses, a claim under Section 155 should be dismissed on a dispositive motion. *See Golden Rule Insurance Co. v. Schwartz*, 203 Ill.2d 456, 469 (Ill. 2003); *Cavenagh*, 983 N.E. 2d at 479. Even in the event of coverage, if there is a bona fide dispute regarding coverage, sanctions under Section 155 are not appropriate. *Phillips*, 714 F.3d at 1023-24; *Baxter Int'l, Inc. v. Am. Guarantee and Liab. Ins. Co.*, 861 N.E. 2d 263, 272 (Ill. App. Ct. 2006). As demonstrated herein, there is no coverage. At a minimum, however, a bona fide dispute exists, making the section 155 claim untenable and subject to dismissal. *Medical Protective v. Kim*, 507 F.3d 1076, 1086-87 (7th Cir. 2007) (vacating Section 155 award where insurer's arguments were "presented with reasonable support"); *Goldstein v. Fidelity and Guaranty Ins. Underwriters, Inc.*, No. 94-C-3581, 1995 WL 423530 (N.D. Ill. July 17, 1995), *affirmed*, 86 F.3d 749 (7th Cir. 1996).

CONCLUSION

The Policy requires direct physical loss to property which, according to the law, requires structural damage. This represents the majority view nationally, including *Sandy Point* and a host of other recent decisions pertaining specifically to Coronavirus-related claims. Plaintiff does not allege that the virus has caused structural damage. Accordingly, there can be no coverage as a matter of law. Therefore, Cincinnati respectfully requests that its Motion to Dismiss be granted.

[15] Courts strictly construe allegations under Section 155 of the Illinois Insurance Code because it is penal in nature and in derogation of the common law. *Citizens First Nat. Bank of Princeton v. Cincinnati Ins. Co.*, 200 F.3d 1102, 1110 (7th Cir. 2000); *Morris v. Auto-Owners Ins. Co.*, 239 Ill.App.3d 500, 509, 606 N.E. 2d 1299 (Ill. App. Ct. 1993).

Respectfully submitted by:

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Certificate of Service

I hereby certify that on October 9, 2020, I caused the foregoing to be filed with the Clerk of the Court using the CM/ECF system, which will send notification and via email of such filing to all counsel of record.

/s/ Brian M. Reid_____