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

1501 WASHINGTON ST. LOUIS, LLC; LAST HOTEL MASTER TENANT, LLC,	)	
Plaintiffs,	)	Case No. 1:20-cv-5922
v.	)	Judge John J. Tharp
THE CINCINNATI INSURANCE COMPANY, ROBERTSON RYAN AND ASSOCIATES, INC.,	)	Magistrate Heather K. McShain
Defendants.	)	**Oral Argument Requested**

CINCINNATI'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS

Plaintiffs' Complaint (Doc. #1-1, PageID #8-27) (the "Complaint") should be dismissed pursuant to Rule 12(b)(6) because Plaintiffs sued the wrong company. Plaintiffs filed suit against The Cincinnati Insurance Company, but Plaintiffs' Policy was issued by a separate entity: The Cincinnati Casualty Company (Doc. #1-1, PageID #36). Thus, Plaintiffs have failed to name the only other Party with which it is in privity on its insurance contract, necessitating dismissal of this lawsuit.

However, even if Plaintiffs' had filed suit against The Cincinnati Casualty Company, the Complaint should still be dismissed. The insurance policy (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.

Plaintiffs bear the initial burden of showing actual direct physical loss to property. This is always necessary to make a *prima facie* case for property insurance coverage. Here, however, Plaintiffs ask 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 to property is a fundamental prerequisite to coverage under the Policy, Plaintiffs 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:[1]

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

- Plaintiffs own and operate a hotel in St. Louis, Missouri comprised of 142 guest rooms, restaurants, bars, and a gym. (Doc. #1-1 at ¶ 17).
- COVID-19 is a disease caused by the SARS-CoV-2 virus, which is a human pathogen that can live outside the human body in viral fluid particles that exist on and can be transmitted through physical surfaces for an extended period of time. The presence of viral particles or people who have contracted COVID-19 renders items of physical property and/or a premises unsafe, impairs its value, usefulness and/or normal function, and causes direct physical or loss to property. (Doc. #1-1 at ¶¶ 41-42; 48-50).
- SARS-CoV-2 has been transmitted by human-to-human contact and interaction; by airborne viral particles; by human-to-human contact and interaction at gyms, hotels, bars, and restaurants; and by human contact with surfaces and items of physical property where the virus is present at premises in Missouri. (Doc. #1-1at ¶¶ 43-47).
- In response to the COVID-19 crisis, Missouri's Governor and the City of St. Louis took measures to restrict or otherwise suspend businesses like Plaintiffs'. (Doc. #1-1at ¶¶ 3-4).
- In March 2020, the City of St. Louis issued an order barring gatherings of 50 or more people and barring bars and restaurants to serve customers on-premises in order to slow the spread of COVID-19. (Doc. #1-1at ¶¶ 57-58).
- On April 3, 2020, at the Governor's direction, the Missouri Department of Health and Senior Services issued a Stay at Home Order requiring residents to stay home except for essential activities. The April 3 order also reduced allowable public and private gathering sizes to 10 people and prohibited Plaintiffs from serving food and beverages for on-site consumption. (Doc. #1-1at ¶¶ 59-60).
- "It is likely that" SARS-CoV-2 particles and people carrying SARS-CoV-2 particles have been physically present at Plaintiffs' premises. (Doc. #1-1 at ¶¶ 71-74).

II. Plaintiffs' Policy

The Cincinnati Casualty Company issued Policy No. ETD 054 52 50 to 1501 Washington St. Louis LLC; Last Hotel Master Tenant LLC for the policy period of July 12, 2019 to July 12, 2020.[2] The relevant forms of the Policy here are the Building and Personal Property Coverage Form (FM 101 05 16), the Business Income (and Extra Expense) Coverage Form (FA 213 05 16), and the Hotel Commercial Property Endorsement (FA 268 05 16). (Doc. #1-1, PageID #63, PageID

[2] The Policy is attached to Plaintiffs' Complaint as Exhibit 1 (Doc. #1-1, PageID #28, et seq.). 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.").

#178, PageID #120, respectively).[3] The Building and Personal Property Coverage Form is the main property coverage form. Using similar language, both forms supply Business Income and Extra Expense coverage, but only if the necessary elements for coverage are satisfied. (Doc. #1-1, PageID #80-81; PageID #178-79). Both forms also contain Civil Authority coverage (Doc. #1-1, PageID #81; PageID #179). As pertinent to this matter, the Hotel Commercial Property Endorsement amends the Civil Authority coverage contained in the Building and Personal Property Coverage Form, but changes only the language concerning the time period during which it might apply. (Doc. #1-1, PageID #129).

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 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 a "premises" caused by or resulting from any Covered Cause of Loss. (Doc. #1-1, PageID #80).
>
> 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. (Doc. #1-1, PageID #178).

"Loss" means "accidental physical loss or accidental physical damage." (Doc. #1-1, PageID #100; PageID #186). Thus, Business Income coverage requires direct physical loss or direct physical

[3] Plaintiffs' refer to, but do not plead a claim for coverage under, a separate Crisis Event Coverage. Accordingly, this Coverage is not addressed in more detail in this Brief. However, there is no Crisis Event Coverage here because, among other reasons, there is no "covered crisis event". The definition of "covered communicable diseases" in the Policy specifically excludes any "loss" directly or indirectly caused by "Severe Acute Respiratory Syndrome". (Doc. #1-1, PageID #s 145, 149-51). SARS-CoV-2 is an acronym that stands for "Severe Acute Respiratory Syndrome Coronavirus 2". Accordingly, it and COVID-19 are excluded from "covered communicable diseases", thereby barring coverage for Plaintiffs' claimed losses.

damage to property.

Covered Causes of Loss is defined as direct "loss" unless the "loss" is excluded or limited in this Coverage Part. (Doc. #1-1, PageID #67). 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 to property is an integral part of all the claimed coverages, including the Extra Expense and Civil Authority coverages and the Extended Business Income coverage. (Doc. #1-1, PageID #80-81; PageID #178-79; PageID #129). 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. (Doc. #1-1, PageID #81; PageID #179; PageID #129). 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).

II. Choice of Law

In the absence of a conflict of laws, the law of the forum state, Illinois, applies. *French v. Beatrice Foods Co*., 854 F.2d 964, 966 (7th Cir.1988) (citing *Klaxon Co. v. Stentor Electric Mfg. Co*., 313 U.S. 487, 496, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941)). Under the most significant contacts analysis employed under Illinois law, insurance policy provisions are generally "governed by the location of the subject matter, the place of delivery of the contract, the domicile of the insured or of the insurer, the place of the last act giving rise to the contract, the place of performance, or other place bearing a rational relationship to the general contract." *Lapham–Hickey Steel Corp. v. Protection Mutual Insurance Co*., 166 Ill.2d 520, 526–27, 655 N.E.2d 842, 845 (Ill. 1995). Here, Illinois has the most significant contacts. Plaintiffs are Minnesota and Illinois citizens. (Doc. #1 at ¶¶ 7-8). 1501 Washington has corporate offices in Chicago, Illinois. (Doc. #1-1, ¶11). The insured premises are located in St. Louis, Missouri. (Doc. #1-1, PageID #41). The Policy was placed through an agency located in Milwaukee, Wisconsin. (Doc. #1-1, PageID #36). The Cincinnati Casualty Company is an Ohio Corporation with its principal place of business in Fairfield, Ohio. Based on the citizenship and corporate office location of the insureds and the apparent absence of conflict among the laws of the jurisdictions with contacts to this dispute, Cincinnati submits that the Policy issued to Plaintiffs should be interpreted under Illinois law.

III. Plaintiffs Name The Wrong Cincinnati Entity, Requiring Dismissal

The Policy is a contract between Plaintiffs and The Cincinnati Casualty Company. The

Cincinnati Insurance Company is not a party to that agreement. The Policy is part of Plaintiffs' complaint and demonstrates the source of the insurance coverage at issue here. No cause of action can lie against an entity that did not issue the Policy. *See Levy v. Chubb Corp.*, No. 00-C-5698, 2001 WL 204793, *3 (N.D. Ill. March 1, 2001). The Policy's declarations pages (Doc. #1-1, PageID #s 36, 62) make clear that The Cincinnati Casualty Company issued the Policy. No other Cincinnati entity is listed in the Policy declarations. As the named defendant, The Cincinnati Insurance Company, is not a party to the Policy, it is not involved in the dispute with Plaintiffs and this Complaint should be dismissed. *Int'l Equip. Trading, Ltd. v. Illumina, Inc*., 312 F. Supp. 3d 725, 736 (N.D. Ill. 2018) ("to survive a motion to dismiss, a complaint seeking declaratory relief must allege facts establishing an actual controversy").

IV. There Is No Direct Physical Loss To Property And Therefore No Coverage

Nevertheless, even if Plaintiffs' had named the correct defendant, there is no coverage available for its claimed loss. Coverage applies only if there has been a direct physical loss 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. Plaintiffs make speculative and conclusory allegations that its property and vehicles have "likely" been exposed to SARS-CoV-2 and/or people with COVID-19. (Doc. #1-1 at ¶¶ 71-74). The presence of the virus does not result in direct physical loss to property. Accordingly, Plaintiffs cannot possibly prove their claim.

Moreover, even if the virus was actually 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 Public Spaces, Workplaces, Businesses, Schools, and Homes (attached as Exhibit A)[4]; *see also* CDC, *Cleaning and Disinfection for Households*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cleaning-disinfection.html (last accessed Oct. 12, 2020). 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 Because There Are No Facts Alleging Plaintiffs' Property Was Physically Altered

Plaintiffs do not allege any distinct, demonstrable, physical alteration of property at its premises. Instead, Plaintiffs' claim is that directives from various state and local authorities and the "likely" presence of the virus on its premises caused its operations to be suspended and damaged its property. (Doc. #1-1 at ¶¶ 70-77).

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.*, 1:20-cv-02160, 2020 WL 5630465 (N.D. Ill. Sept. 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

[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 B. 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 (last accessed Oct. 12, 2020)

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 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 Cas., Co*., Case No. 2020 L 000517 (18th Judicial Circuit (DuPage County) Sept. 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. Ex. C 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 Ins. Co.*, Case No. 4-0-CV-222-CRW-SBJ, 2020 WL 5820552 (S.D. Iowa Sept. 29, 2020). 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. *Id*. at *1. The court further held that the few contrary cases cited by the insured were distinguishable on their facts and not as well reasoned 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

[6] A copy of the court's Order and the transcript of the argument are attached as Exhibit C.

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 use, the insured could not allege that restrictions caused direct physical loss or damage to insured property or other locations. *Id*. at *5-*6; *accord Diesel Barbershop, LLC, et al. v. State Farm Lloyds*, No. 5:20-cv-461-DAE, 2020 WL 4724305, *5 (W.D. Tex. Aug. 13, 2020) (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.'").[7]

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. 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

[7] 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 D); *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 E.

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.[8]

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, Plaintiffs seek insurance for financial losses sustained as a result of the closure orders. Plaintiffs do 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 Plaintiffs describe was caused by the presence of the virus in the world and – possibly – at or near their premises, not by any physical damage or effect on Plaintiffs' building or property. Indeed, 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 only speculate that the Coronavirus was present at their premises.

---

[8] *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).

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

Additionally, *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); *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); *Social Life*, Ex. E at pp. 5 & 15 (the Coronavirus damages lungs; not printing presses.)

The Coronavirus does not physically alter the appearance, shape, color or in 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 Plaintiffs' premises, the Coronavirus would not affect the structural integrity of the building or other property that would be in Plaintiffs' premises, such as drywall, counters, tables, chairs, utensils, and dispensers. As shown, 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. 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.

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

Plaintiffs suggest that there must be coverage because the Policy does not contain a virus

exclusion. (Doc. #1-1 at ¶90). That assertion is legally incorrect and irrelevant to this motion.[9] 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 presence of a virus exclusion is irrelevant. *See e.g. Continental Cas. Co. v. Donald T. Bertucci, Ltd.*, 399 Ill. App. 3d 775, 780, 926 N.E.2d 833, 839 (1st Dist. 2010) (finding no coverage where the insured did not prove the insuring agreement was satisfied); *Ward Gen. Ins. Services., Inc. v. Employers Fire Ins. Co*., 114 Cal. App. 4th 548, 555 (2003) (without a direct physical loss when a computer database crashed, 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).

V. There Is No Civil Authority Coverage

The Policy's 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 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. (Doc. #1-1, PageID #80-81; PageID #178-79; PageID #129) (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.*

[9] 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.

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 Plaintiffs' premises is necessary for Civil Authority coverage. Courts nationwide have upheld that requirement. *See United Air Lines, Inc. v. Ins. Co. of State of PA*, 439 F.3d 128, 131 (2d Cir. 2006); *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). Just as the Coronavirus did not cause direct physical loss to Plaintiffs' premises or property, it did not cause direct physical loss to other property. Plaintiffs do not allege facts showing otherwise. In fact, no facts are alleged that show physical change or alteration of any physical property, whether Plaintiffs' property or someone else's, caused by the Coronavirus. Without 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. While orders have imposed social distancing requirements which alter Plaintiffs' operations, no order issued in Missouri prohibits access to Plaintiffs premises.[10] Plaintiffs' business were not ordered to close, but rather they were prohibited from offering on-premises dining. Moreover, as explained in *Rose's 1*, a governmental order, standing alone, does

[10] To the extent the content of the orders cited by Plaintiffs 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).

not constitute a direct physical loss under an insurance policy. *Rose's 1*, 2020 WL 4589206, at *3; *10E, LLC*, Ex. 5 at pp. 8-9.

Courts nationwide have rejected the argument Plaintiffs make for Civil Authority coverage. 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 Missouri. Further, 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).[11]

The civil authority orders cited by Plaintiffs do not prohibit access to the insured premises because of alleged damage to other property, or to Plaintiffs' premises. Rather, the orders only restrict access so as to curtail the spread of the Coronavirus amongst the populace. Plaintiffs have not alleged otherwise. That will not suffice—the question is solely whether any individuals were legally permitted to enter the Property. If anyone was permitted to access the Property, there was not a prohibition of access. Without a prohibition of access, there is no Civil Authority coverage.

VI. Plaintiffs' Bad Faith Claim Fails

Plaintiffs' claim for "bad faith" under Section 155 of the Illinois Insurance Code (215 ILCS 5/155) fails as a matter of law and can be disposed of by dispositive motion.[12] *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)

[11] *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).

[12] 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).

(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 Complaint should be dismissed because it names as the sole defendant, a party that has is a stranger to the Policy at issue. But, even if Plaintiffs had named The Cincinnati Casualty Company, dismissal is the appropriate result here. For Business Income and Civil Authority coverage, the Policy and the law require structural damage to property. This is the majority view nationally, including in decisions pertaining specifically to Coronavirus-related claims. As Plaintiffs do not allege (other than unrecognized legal conclusions) that the virus has caused structural damage, there can be no coverage as a matter of law. This warrants dismissal of the Complaint for failure to state a claim upon which relief can be granted.

Dated: October 12, 2020

Respectfully submitted,

/s/ Michael P. Baniak

Brian M. Reid
Michael P. Baniak
Litchfield Cavo, LLP
303 W. Madison, Suite 300
Chicago, IL 60606
Tel.: (312) 781-6617 (Reid)
Tel.: (312) 781-6596 (Baniak)
Fax.: (312) 781-6630
Reid@LitchfieldCavo.com
Baniak@LitchfieldCavo.com

Attorneys for Defendant The Cincinnati Insurance Company

CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2020, I caused the foregoing to be served on all counsel of record via the Court's CM/ECF electronic filing system.

/s/ Michael P. Baniak