IN THE COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-11-046-AA

GILREATH FAMILY & COSMETIC DENTISTRY, INC.
d/b/a GILREATH DENTAL ASSOCIATES,
on behalf of themselves and all others similarly situated,

Plaintiff-Appellant,

v.

THE CINCINNATI INSURANCE COMPANY,

Defendant-Appellee.

On appeal from the United States District Court for the
Northern District of Georgia
No. 1:20-cv-02248-JPB

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

Under Rule 26.1 of the Federal Rules of Appellate Procedure and Local Rule 26.1-1, Appellant Gilreath Family & Cosmetic Dentistry, Inc. files this Certificate of Interested Persons and Corporate Disclosure Statement. The following is a list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party.

1. Boulee, Hon. J. P.
2. Gilreath Family & Cosmetic Dentistry, Inc. d/b/a Gilreath Dental Associates
3. Gilreath IV, Paul
4. Hall & Lampros, LLP
5. Hall Esq., Christopher Baker
6. Hannon Esq., Patrick J.
7. Lampros Esq., Peter Andrew
8. Litchfield Cavo LLP
9. Orlando Esq., Roger W.
10. Spillers Esq., Janis H.

11. The Cincinnati Insurance Company

12. The Orlando Firm, P.C.

13. Van Remmen II Esq., Gordon

14. Other persons who practice dentistry and/or dental practice groups in Georgia insured by Cincinnati Insurance Company (currently unknown) who were denied claims for Business Income, Civil Authority, and/or Extra Expense coverage during the COVID-19 pandemic.

STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant does not request oral argument.

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STATEMENT OF JURISDICTION

This is an appeal from an order (Doc. 33) and final judgment (Doc. 34) of the United States District Court for the Northern District of Georgia, Atlanta Division, entered on March 1, 2021. The order and judgment granted Defendant-Appellee's Motion to Dismiss Plaintiff-Appellant's Amended Complaint (Doc. 14) for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The District Court had subject-matter jurisdiction under 28 U.S.C. §§ 1332(d). Appellant filed a timely notice of appeal on March 29, 2021. (Doc. 35). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court erred in interpreting the words "Loss" in the phrase "accidental physical loss or accidental physical damage" to require some "actual, physical damage to Gilreath's premises," thus rendering either the word "Loss" or the word "damage" surplusage, contrary to Georgia law on insurance policy interpretation.

2. Whether the district court erred in finding that the governmental COVID-19 shut down orders did not prohibit access to Gilreath's premises as required for civil authority coverage under the subject policy.

STATEMENT OF THE CASE

Appellant Gilreath Family & Cosmetic Dentistry, Inc. ("Appellant" or "Gilreath") filed its Complaint against The Cincinnati Insurance Company ("Appellee" or "Cincinnati") for Cincinnati's denial of insurance coverage for losses Gilreath sustained as a result of the COVID-19 pandemic. (Doc. 1). The Complaint, filed on May 26, 2020, was brought on behalf of Gilreath individually, and as a putative class action on behalf of other similarly situated dental practices who were denied claims for Business Income, Civil Authority, and/or Extra Expense coverage during the COVID-19 pandemic. (Doc. 1).

On July 6, 2020, Cincinnati moved to dismiss for failure to state a claim. (Doc. 7). On July 20, 2020, Gilreath filed a First Amended Complaint as a matter of right. (Doc. 11). The pending Motion to Dismiss was denied as moot. (Doc. 13).

In the Amended Complaint, Gilreath alleged the following. That it purchased an all-risk insurance policy ("the Policy") from Cincinnati (Doc. 11, ¶¶ 16-19).[1] The Policy included "Business Income" coverage which promised to pay for loss due to the necessary suspension of operations following a loss. (Doc. 11, ¶ 22). The Policy also included "Civil Authority" coverage which promised to pay for loss caused by the action of a civil authority that prohibits access to the covered property. (Doc. 11,

[1] Because this appeal is from an Order granting Cincinnati's Motion to Dismiss the Amended Complaint, the relevant facts are those allegations in the First Amended Compliant (Doc. 11), including the relevant insurance Policy. (Doc. 11-1).

¶ 23).

Gilreath suffered significant losses because it was unable to operate its business due to the COVID-19 pandemic and the related government orders and guidance. (Doc. 11, pp. 8-13). Specifically, the Governor of Georgia declared a public health state of emergency and issued shut-down orders which affected Gilreath. (Id.). Moreover, the Centers for Disease Control and Prevention ("CDC") and other government entities placed numerous restrictions limiting Gilreath's operations. (Id.). The effect of the Governor's orders and the other government restrictions forced Gilreath to close its property and business for general use. This accidental physical loss to the property prevented access to and use of its property and caused Gilreath to lose significant business income. (Id.).

Gilreath attached the Policy to the amended complaint. (Doc. 11-1). The relevant portions of the Policy for purposes of this Appeal are FM 101 05 16 (Building and Personal Property Coverage Form) (Doc. 11-1, pp. 23-62) and FA 213 05 16 (Business Income (and Extra Expense) Coverage Form) (Doc. 11-1, pp. 106-14). The Policy provides in pertinent part:

> 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. 11-1, p. 106). The Policy provides a definition for "Loss" as follows:

> "Loss" means accidental physical loss or accidental physical damage.

(Doc. 11-1, p. 60). As for the defined phrase "Covered Causes of Loss", the Policy provides:

> "Covered Causes of Loss" means direct "Loss" unless the "Loss" is excluded or limited in this Coverage Part.

(Doc. 11-1, p. 27).

The exclusions and limitations for the Policy are set forth in the paragraphs and pages directly following "Covered Causes of Loss". There is no "virus exclusion" or "virus limitation" contained therein. (Doc. 11-1, pp. 27-33 (Exclusions); Doc. 11-1, pp. 33-35 (Limitations)).

Regarding Civil Authority coverage, the Policy provides the following:

> 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:
>
> 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.

(Doc. 11-1, p. 41).

On August 3, 2020, Cincinnati moved to dismiss the First Amended Complaint. (Doc. 14). First, Cincinnati argued that the Amended Complaint failed to state a claim because the Policy required a showing of "direct physical loss" to the Gilreath's property before the business income coverage is triggered. (Doc. 14, pp. 5-9). Second, Cincinnati argued that Gilreath failed to show the COVID-19 shut down orders prohibited access to Gilreath's premises such that the Civil Authority coverage would apply. (Doc. 14, pp. 9-11).[2]

Gilreath responded that contamination of its premises by COVID-19 constituted direct physical loss and business income coverage applies. (Doc. 17, pp. 8-12). Gilreath argued that courts have found "physical loss" does not require a visible or tangible alteration in order for a policy to provide coverage, and that an unseen airborne contaminate can constitute a direct physical loss. (Doc. 17, pp. 9-11). Further, Gilreath argued that the Policy provides coverage if the civil authority prohibits access to the insured premises; the policy does not define that the civil authority must prohibit all or complete access to the premises. (Doc. 17, pp. 15-24). Civil authority prohibited access to Gilreath's premises, forced Gilreath to suspend or reduce business operations, and prohibited people from seeking routine and

[2] Cincinnati's motion practice attempts to incorporate its mooted Motion to Dismiss (Doc. 7) by reference into its Motion to Dismiss Gilreath's Amended Complaint (Doc. 14). Such motion practice would circumvent NDGA Local Rule 7.1(D). The district court (and this Court) should disregard Cincinnati's prior Motion to Dismiss which the district court mooted on July 21, 2020. (Doc. 13).

elective dental procedures at Gilreath's facility which is a substantial portion of Gilreath's business. (Doc. 17, pp. 21-23).

On March 1, 2021, the district court granted Cincinnati's Motion to Dismiss. (Doc. 33). After quoting the insuring agreement and definition of "Loss" in the Policy, the district court construed the policy to require actual physical damage to the physical premises of Gilreath's dental office:

> Notably, there is no allegation that Gilreath had a confirmed case of the virus in its offices. These facts fall far short of alleging actual, physical damage to Gilreath's premises. Contrary to Gilreath's contention, it does not follow that its premises have been or will be physically damaged by the mere existence and proliferation of the COVID-19 virus in the community.

(Doc. 33, p. 16).

STANDARD OF REVIEW

This Court reviews *de novo* the dismissal of a complaint for failure to state a claim. *Blevins v. Aksut*, 849 F.3d 1016, 1018–19 (11th Cir. 2017); *see also Sergeeva v. Tripleton Int'l Ltd.*, 834 F.3d 1194, 1199 (11th Cir. 2016) (questions of statutory interpretation are reviewed *de novo*). Upon review, the Court "must accept all factual allegations in the complaint as true and construe them in the light most favorable to Plaintiffs." *Blevins*, 849 F.3d at 1019 (citing *Henderson v. Washington Nat. Ins. Co.*, 454 F.3d 1278, 1281 (11th Cir. 2006)).

This Court has stated:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. ….
>
> A complaint need not contain detailed factual allegations but must include enough facts to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact). Moreover, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.

Boyd v. Warden, Holman Corr. Facility, 856 F.3d 853, 864 (11th Cir. 2017) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

SUMMARY OF THE ARGUMENT

Gilreath, a Cobb County dental office, suffered significant business income loss due to the interruption and restriction of its business at its premises because of the COVID-19 pandemic. The COVID-19 pandemic included the spread of the virus in Georgia (and specifically in Cobb County where Gilreath's business is located) and resulted in orders and restrictions from the Governor of Georgia and other government authorities. Gilreath filed suit for breach of contract and other claims against its all-risk insurer, Cincinnati, for denying Gilreath's claim for lost business income. The district court's order granting Cincinnati's Motion to Dismiss was based on an erroneous interpretation of the Cincinnati Policy. This Court reviews that decision *de novo* and should reverse for two primary reasons.

First, Gilreath's Policy with Cincinnati provides coverage because the term "Loss" is separately and broadly defined in the Policy. The Policy's definition of "Loss" is unlike many other industry business interruption policies that do not define the term "loss." The Policy's definition of "Loss" at a minimum is ambiguous, and at most, provides clear coverage for Gilreath's claim.

Second, the Policy's Civil Authority provision requires Cincinnati to cover Gilreath's business income losses. Property immediately surrounding Gilreath was damaged by the spread of COVID-19 (a dangerous physical condition), which led to the issuance of the Governor's Executive Orders limiting access to Gilreath's

business premises. These the civil authority measures prohibited access to and the core functions of Gilreath's business resulting in a claim for lost business income coverage.

ARGUMENT AND CITATIONS OF AUTHORITY

I. The District Court Erred in Interpreting the Word "Loss" in the Phrase "Accidental Physical Loss or Accidental Physical Damage" to Require "Actual, Physical Damage to Gilreath's Premises" thus Rendering Either the Word "Loss" or the Word "Damage" Surplusage, Contrary to Georgia Law on Insurance Policy Interpretation.

Cincinnati argued that the relevant portions of the Policy, read together, require "direct physical loss" for Business Income coverage. Cincinnati then focused is argument on the phrase "direct physical loss" and on various decisions interpreting that phrase. The district court apparently found that argument persuasive in concluding that the Policy required "actual, physical damage to Gilreath's premises." (Doc. 33, p. 16). But the Policy contains no such language.

"In Georgia, the interpretation of an insurance policy is a 'question of law,' to which the court applies the 'ordinary rules of contract construction.'" *Lyons v. Allstate Ins. Co.*, 996 F. Supp. 2d 1316, 1319 (N.D. Ga. 2014) (citing *Boardman Petroleum, Inc. v. Federated Mut. Ins. Co.,* 269 Ga. 326, 498 S.E.2d 492, 494 (1998)). "Courts interpreting insurance policies under Georgia law should ascertain the parties' intention by examining the contract as a whole." *Id.* (citing *Ryan v. State*

Farm Mut. Auto. Ins. Co., 261 Ga. 869, 413 S.E.2d 705, 707 (1992)).[3]

When analyzing an insurance contract:

> Georgia law directs courts interpreting insurance policies to ascertain the intention of the parties by examining the contract as a whole. A court must first consider the ordinary and legal meaning of the words employed in the insurance contract. An insurance policy should be read as a layman would read it. Parties to the contract of insurance are bound by its plain and unambiguous terms. If the terms of the contract are plain and unambiguous, the contract must be enforced as written.
>
> An ambiguity exists, however, when the plain words of a contract are fairly susceptible of more than one meaning. Georgia law teaches that an ambiguity is duplicity, indistinctness, an uncertainty of meaning or expression. When a term in a contract is ambiguous, Georgia courts apply the rules of contract construction to resolve the ambiguity.
>
> Pursuant to Georgia's rules of contract construction, the construction which will uphold a contract in whole and in every part is to be preferred, and the whole contract should be looked to in arriving at the construction of any part. Further, ambiguities are construed against the drafter of the contract (i.e., the insurer), and in favor of the insured.... If the ambiguity remains after the court applies the rules of construction,

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[3] *see also, AEGIS Elec. & Gas Int'l Servs. Ltd. v. ECI Mgmt. LLC*, 967 F.3d 1216, 1224 (11th Cir. 2020) (quoting *Great Am. All. Ins. Co. v. Anderson*, 847 F.3d 1327, 1331–32 (11th Cir. 2017)) ("Under Georgia law, however, exclusions from coverage sought to be invoked must be strictly construed, and all ambiguities as to policy exclusions are interpreted in favor of coverage because the insurer, having affirmatively expressed coverage through broad promises, assumes a duty to define any limitations on that coverage in clear and explicit terms.") (internal quotations omitted); *Bituminous Cas. Corp. v. Advanced Adhesive Tech., Inc.*, 73 F.3d 335, 338–39 (11th Cir. 1996) ("Under Georgia law, any exclusion sought to be invoked by the insurer is to be liberally construed against the insurer unless it is clear and unequivocal.") (internal citations omitted); s*ee also Alley v. Great Am. Ins. Co.*, 160 Ga.App. 597, 287 S.E.2d 613, 616 (1981) ("Exclusions to insuring agreements require a narrow construction on the theory that the insurer, having affirmatively expressed coverage through broad promises, assumes a duty to define any limitations on that coverage in clear and explicit terms.") (internal citations omitted).

> the issue of what the ambiguous language means and what the parties intended must be resolved by the finder of fact.

St. Paul Mercury Ins. Co. v. F.D.I.C., 774 F.3d 702, 708 (11th Cir. 2014) (citing *Duckworth v. Allianz Life Ins. Co. of N. Am.*, 706 F.3d 1338, 1342 (11th Cir. 2013)).

a. The Policy definition of "Loss" is ambiguous.

The Policy defines "Loss" as "accidental physical loss or accidental physical damage." That the Policy defines "Loss" by using the word "Loss" is confusing, unclear, and a feature not present in the cases on which Cincinnati relies. Because Cincinnati has defined loss to include "accidental physical loss" *or* "accidental physical damage," the definition is disjunctive. *See Allstate Ins. Co. v. Florio*, No. 1:19-CV-1174-TWT, 2020 WL 4529618, at *5 (N.D. Ga. Jan. 23, 2020) (citing *Brown v. Budget Rent–A–Car Systems, Inc.*, 119 F.3d 922, 924 (11th Cir. 1997)) ("The Eleventh Circuit further noted that paragraphs 1 and 2 are separated by the disjunctive or. … As a general rule, the use of a disjunctive in a statute indicates alternatives and requires that those alternatives be treated separately. Hence, language in a clause following a disjunctive is considered inapplicable to the subject matter of the preceding clause.").

If Cincinnati had wanted the term "Loss" to mean only "actual physical damage" to property, it could have so defined the term. Instead, Cincinnati chose to define "Loss" in the disjunctive—as meaning "accidental physical loss" or

"accidental physical damage." *See Brown,* 119 F.3d at 924 (phrases/provisions where the word "or" is between two phrases/provisions are disjunctive with separate and distinct meanings).

Cincinnati attempts to read "accidental physical loss" and "accidental physical damage" as synonymous—in other words, taking the position that "accidental physical loss" means "accidental physical damage." But if the two terms are synonymous, why would Cincinnati have defined "Loss" to mean one or the other?

Rather, under a plain reading of the Policy, the terms logically must have two different meanings. The term "accidental physical damage" is clear enough, but the term "accidental physical loss" is not. This is particularly true because the definition of loss itself uses the term loss. In addition, "accidental physical loss" logically must be broader than "accidental physical damage." Otherwise, there would be no need to include the term "accidental physical loss" in the definition.

Merriam Webster defines "loss" as "the act of losing possession"; "the harm or privation resulting from loss or separation; or "instance of losing". "Loss", Merriam Webster, (https://www.merriamwebster.com/dictionary/loss) (last visited May 14, 2021). In the insurance context, Merriam Webster defines "loss" as "the amount of an insured's financial detriment by death or damage that the insurer is liable for." Id. In this case, Gilreath suffered an "accidental physical loss" when it lost income due to the inability to access the dental office due to the COVID-19

pandemic. Further, accidental physical loss contemplates the harm in lost business income resulting from Gilreath's inability to use its business premises.

The ambiguity in the Policy's definition of "Loss" more evident when the definition of loss is inserted into the insuring clause. With that insertion, the Policy provides:

> 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 ["accidental physical loss or accidental physical damage"] to property at a "premises" caused by or resulting from any Covered Cause of Loss.

(Doc. 11-1 p. 40). By defining "Loss" with the full definition bracketed above, Cincinnati set forth "Loss" and "damage" as *two* distinct causes of suspension of business operations that would trigger Business Interruption coverage.

Thus, a plain reading of the definition of "Loss" shows that the Policy was drafted to create expansive coverage – i.e., physical loss and physical damage are two separate forms of "Loss" covered by the Policy with separate, independent meanings. At a minimum, the Policy's definition of "Loss" is ambiguous, and that ambiguity must, according to Georgia law, be resolved in favor of the insured. *See AEGIS Elec.*, 967 F.3d at 1224 ("ambiguities as to policy exclusions are interpreted in favor of coverage"). The construction most favorable to the insured in the all-risk policy arena is one of coverage, absent explicit exclusions – of which there are none

in the case.[4]

b. The cases specifically addressing the definition of "Loss" in Cincinnati's policies hold that coverage exists for COVID-19 business losses.

Appellant's research has revealed four cases addressing the definition of "Loss" found in the Policy.[5] All four cases involve a Cincinnati policy or a policy of one of its affiliates or subsidiaries. The first case is not relevant because it addressed only whether the fire that caused the loss was accidental. *See Cincinnati Ins. Co. v. Banks*, 610 Fed. Appx. 453 (6th Cir. 2015) (addressing whether the fire that gave rise to a claim was accidentally or intentionally started but not considering whether "accidental physical loss or accidental physical damage" means "direct physical loss"). The other three cases support Gilreath's interpretation of the Policy.

The most instructive is *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794 (W.D. Mo. 2020). In *Studio 417*, the court denied Cincinnati's Motion to Dismiss, for many of the same reasons presented by Gilreath in this litigation.

The plaintiffs in *Studio 417* owned salons and dining restaurants in the Kansas

[4] It is undisputed that the Policy does not contain a "virus exclusion" that is commonly found and included in form insurance policies like the one in this case.
[5] *Cincinnati Ins. Co. v. Banks*, 610 Fed. Appx. 453 (6th Cir. 2015); *K.C. Hopps,Ltd. v. The Cincinnati Insurance Company, Inc.*, No. 20-cv-00437-SRB, 2020 WL 6483108 (W. Dist. Mo., Western, August 12, 2020); *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794 (W.D. Mo. 2020); and *North State Deli, LLC v. Cincinnati Insurance Co.*, No. 20-cvs-02569 (N.C. Super. Ct. Oct. 9, 2020) (unpublished decision) (attached as Exhibit 1).

City metropolitan area and, like Gilreath, purchased all-risk policies from Cincinnati. The plaintiffs sought coverage for losses caused when they were forced to suspend or reduce their business because of the COVID-19 pandemic. The policies contained the same policy language and definition of the term "Loss" as Cincinnati's Policy issued to Gilreath. *Id.*, at 797. The court noted that neither "physical loss" nor "physical damage" was defined and that those were key phrases in the policies since they were found in the definition of "loss." *Id.*, at 800-01. The court ultimately concluded that the plain meaning supported the plaintiff-policyholders' position that they had sufficiently pled a "Loss" under the policy and thus denied Cincinnati's motion to dismiss. *Id.*, at 805.

Here, the district court considered *Studio 417* but ultimately decided that its holding did not apply because it was not based on Georgia law. (Doc. 33, at p. 15). Of course, the interpretation principles in *Studio 417* were governed by Missouri law, but the district court did not identify any relevant difference in Missouri and Georgia law of insurance contract interpretation. (Id.) However, the guiding principles of insurance contract interpretation in Missouri are similar, if not the same, as those in Georgia. *Compare Vogt v. State Farm Life Ins. Co.*, 963 F.3d 753, 763 (8th Cir. 2020) (applying Missouri law) and *Macheca Transp. v. Philadelphia Indem. Ins. Co.*, 649 F.3d 661, 669 (8th Cir. 2011) (applying Missouri law), with *Nat'l Cas. Co. v. Georgia Sch. Boards Ass'n-Risk Mgmt. Fund*, 304 Ga. 224, 228–

29 (2018) (applying Georgia law).

The second COVID-19 case to address Cincinnati's policies' unique definition of "Loss" is *North State Deli, et. al v. The Cincinnati Insurance Company, et. al*, Case No. 20-CVS-02569 (N.C. Sup. Ct. Durham Cty., Oct. 9, 2020). (attached as Ex. 1). There, the parties disputed the meaning of the phrase "direct physical loss" and the policy language at issue was exactly the same as in this case. *Id.* at 3-4, 6. The court explained that the phrase was ambiguous because Cincinnati opted to define "Loss" but left a number of other phrases and terms in the definition of "Loss" undefined, including "physical loss" and "physical damage." The court in *North State Deli*, applying contract interpretation principles identical to Georgia's, noted that "any ambiguity or uncertainty as to the words used in the policy should be construed against the insurance company and in favor of the policyholder or beneficiary" and undertook a deconstructive analysis of the policy terms and phrases involving the dictionary definitions of the same. *Id.* Ultimately, the court concluded:

> Under Cincinnati's argument, however, if "physical loss" also requires structural alteration to property, then the term "physical damage" would be rendered meaningless. But the Court must give meaning to both terms.
>
> Finally, nothing in the Policies excludes coverage for Plaintiffs' losses. Notably, it is undisputed that the Policies do not exclude virus-related causes of loss.
> . . .
>
> For these primary reasons, the Court concludes that the Policies provide coverage for Business Income and Extra Expenses for Plaintiffs' loss

> of use and access to covered property mandated by the Government Orders as a matter of law.

Id. at 7. Therefore, the court granted a partial motion for summary judgment in favor of the plaintiff-insureds.

Finally, the third COVID-19 case applying Cincinnati's definition of "Loss" is *K.C. Hopps,Ltd. v. The Cincinnati Insurance Company, Inc.*, No. 20-cv-00437-SRB, 2020 WL 6483108 (W. Dist. Mo., Western, August 12, 2020). This case was decided by the same court as *Studio 417* and, for the same reasons, concluded that the insured's claims could proceed against Cincinnati.

Thus, this Policy, like the policies analyzed in *Studio 417* and *North State Deli*, contains ambiguous terms. This ambiguity requires the Court to construe the undefined relevant policy term using dictionary definitions and to apply contract interpretation principles widely used by courts to give meaning to all terms and phrases in the Policy. The definition of "Loss" in the Policy includes two phrases that constituted distinct possibilities as to how coverage could be triggered under the Business Income and Extra Expense portion of the Policy: a loss of any sort involving the insured's property *or* a loss that involves damage to physical property. Cincinnati attempts to read into the Policy an undefined phrase – "direct physical loss" – in an attempt to re-write the insuring agreement of the Policy so that it can argue coverage is not triggered in this case. Like in *Studio 417*, Cincinnati conflates "Loss" and "damage" but this Court must give meaning to both terms.

Gilreath was unable to perform its business operations at the property because of the community spread of the virus, which amounted to an "accidental physical loss" of property and resultant loss of business income during the time period that restrictions were in place as recommended by the CDC and as ordered by the Governor.

c. Mastellone, and the other cases cited and relied upon by Cincinnati, are distinguishable.

Cincinnati relied heavily on an Ohio Court of Appeals case, *Mastellone v. Lightning Rod Mutual Insurance Co.*, 884 N.E.2d 1130 (Ohio Ct. App. 2008), in arguing that coverage under the Business Income policy is like that of the claim for mold damage in a homeowner's policy. *Id.* at 1144. Cincinnati stated that "[t]he relevant policy language in *Mastellone* was the same as that in the Cincinnati Policy." (Doc. 7 at p. 12). Upon a review of that case, the homeowners' policy is different from the language at issue here. *Mastellone*, 884 N.E.2d at 1143.

In fact, the core of the inquiry as to the policy interpretation issue in *Mastellone* focused on the undefined term "physical injury." *Id.* There is no such term in the relevant Policy provisions in this case, and this Court should reject Cincinnati's argument that the two phrases are comparable.

Georgia appellate courts have interpreted insurance policies that include the phrase "direct physical loss of or damage to" covered property, but the policies at

issue in those cases did not have Cincinnati's disjunctive definition of "Loss" or the addition of the word "of" to the insuring clause.[6] The language "direct physical loss *of*, or damage to" covered property connotes that the "loss of" the property must be complete loss of the property whereas, "accidental physical loss" to covered property implies the property suffered a loss of some type—that need not be a total loss of the property itself.

Gilreath sustained an accidental physical loss to property directly caused by the COVID-19 pandemic. The resulting Orders from the Governor also caused loss by ordering Gilreath's continued loss of use of property and constituted a loss of significant business income. Loss, as defined by the Policy, is either ambiguous if interpreted as Cincinnati argues, or expansive all-risk coverage as interpreted by Gilreath (without any applicable virus exclusion). For these reasons, the district court erred in granting Cincinnati's Motion to Dismiss.

d. The Policy does not require physical damage or alteration to the premises itself.

Gilreath need not show alteration to the structural or physical integrity of the

[6] *See e.g., AFLAC, Inc. v. Chubb & Sons, Inc.,* 260 Ga. App. 306, 308-09 (2003) (interpreting policy with "direct physical loss of, or damage to" phrase in the policy but ultimately deciding that plaintiffs were not entitled to coverage for "a maintenance and renovation expense in the nature of the cost of upgrading its computer systems and software upon a known design limitation."); *Northeast Georgia Heart Center, P.C. v. Phoenix Insurance Company*, 2014 WL 12480022 (N.D.Ga. May 2014) (interpreting "direct physical loss of or damage to" in the policy but deciding that plaintiff did not suffer a loss of business due to a defective product).

property. In *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, No. 20-CV- 00383-SRB, 2020 WL 5637963 (W.D. Mo. Sep. 21, 2020), two dental companies brought an action, like Gilreath, to enforce a policy with defendant after a statewide and local orders in response to the COVID-19 pandemic interrupted their business practices. *Id.*, at **1-3. The policy covered "direct physical loss of or damage to" property. *Id.*, at *2. "Physical loss" was not defined, and there were no exclusions for "pandemics" or "communicable disease." *Id.*, at *4. The court reasoned that plaintiffs adequately alleged a direct physical loss because it is plausible that airborne "COVID-19 physically occupied, contaminated . . . [and] attached itself to their dental clinics, thereby depriving them of possession and use." *Id.*, at *6*. The court found the plain meaning did not indicate suspension had to be total or complete suspension of business activities for coverage to be triggered. Ultimately, as it pertains in relevant part to this case, the court concluded:

> Taking Plaintiffs' fact allegations as true, as the Court must at this stage, and after drawing reasonable inferences from those facts in their favor, Plaintiffs plausibly allege that COVID-19 physically attached itself to their dental clinics, thereby depriving them of the possession and use of those insured properties. Taken as a whole, Plaintiffs tender more than mere "naked assertions devoid of further factual enhancement" in their complaint.

Id., at *4 (citing *Iqbal*, 556 U.S. at 662). The same should have been concluded here: after careful review of the Policy in question, Gilreath has satisfied the pleading standard, and as such, the district court's Order granting Cincinnati's Motion to

Dismiss for failure to state a claim should be reversed.

Numerous other courts have held that "direct physical loss of or damage to property"[7], or similar policy language, provides coverage not only for actual physical damage but also for lost operations or inability to use the business.[8]

A condition that renders property unsuitable for its intended use constitutes a direct physical loss even if some use and utility remain and a property's structural integrity is not affected. *Cook v. Allstate Ins. Co.*, No. 48D02-0611-PL-01156, slip. Op. at 6-8 (Indiana Super. 2007).

Cases across the country have supported insurance coverage upon loss of use,

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[7] It should be noted that this phrase is not found in the Policy at issue, but Cincinnati's argument centers around cases that have analyzed this phrase and specifically the "direct physical loss" portion of the phrase. Gilreath does not agree that this phrase is equal to the phrasing of the Policy in question, which includes "Loss" as a defined term. Gilreath argues that even if Cincinnati convinces the Court to read in or re-write the insuring agreement and the definition of loss to consider a similar provision that focuses on "direct physical loss", courts have still found that the "loss of use" of a property can qualify as "direct physical loss" of property.

[8] *See TRAVCO Ins. Co. v. Ward*, 715 F.Supp.2d 699, 2010 WL 22222, **8-9 (E.D. Va. 2010); *Essex v. BloomSouth Flooring Corp.*, 562 F.3d 399, 40 (1st Cir. 2009); *Motorists Mutual Ins. Co. v. Hardinger*, 131 Fed. Appx. 823, 825–27 (3d Cir. 2005) (applying Pennsylvania law and finding that bacteria contamination of well water would constitute direct physical loss to house if it rendered it unusable); *Western Fire Ins. Co. v. First Presbyterian Church*, 165 Colo. 34, 437 P.2d 52, 55 (1968) (en banc) (gasoline fumes which rendered church building unusable constituted physical loss); *Farmers Ins. Co. of Oregon v. Trutanich*, 123 Or. App. 6, 858 P.2d 1332, 1336 (1993) (cost of removing odor from methamphetamine lab constituted a direct physical loss); *Murray v. State Farm Fire & Cas. Co.*, 203 W.Va. 477, 509 S.E.2d 1, 17 (1998) (home rendered unusable by increased risk of rockslide suffered direct physical loss even in the absence of structural damage).

utility, access, or function. In *Port Authority of New York & New Jersey v. Affiliated FM Insurance Co*., 311 F.3d 226, 231 (3rd. Cir. 2002), an insured sought coverage for asbestos abatement in buildings. There, the court held that coverage for physical loss or damage would apply if asbestos were released in the building "such that its function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable, or if there existed an imminent threat of the release of a quantity of asbestos fibers that would cause such loss of utility." *Id.* at 236.[9] Like *Port Authority*, Gilreath has been unable to perform the functions of its business; a loss which Gilreath sought and was provided insurance to guard against.

II. Access to Gilreath's Premises and the Area Immediately Surrounding Gilreath's Property was Prohibited by Civil Authority as a Result of COVID-19.

Civil authority prohibited access to Gilreath's premises, prohibited Gilreath from practicing dentistry, forced Gilreath to suspend or reduce business operations,

[9] See also, *Gregory Packing, Inc. v. Travelers Property Casualty Co. of American*, 2014 WL 6675934, *2 (D.N.J. Nov. 25, 2014) (holding that ammonia being released into a facility such that it was not fit for its intended use was covered under business interruption insurance); *Am. Guarantee & Liab Ins. Co. v. Ingram Micro, Inc.*, 2000 WL 726789, *2 (D. Ariz. 2014) (loss of access to insured property triggered coverage); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968) (church building rendered uninhabitable due to contamination of church building and covered under direct physical loss); *Oregon Shakespeare Fest. Assn. v. Great American Ins.*, 2016 WL 3267247 (D. Or 2016) (vacated by stipulation 2017 WL1034203 (D. Or. 2017) (smoke that infiltrates and renders premises unusable triggered insurance coverage).

and prohibited people from seeking routine and elective dental procedures at Gilreath's facility which is a substantial portion of Gilreath's business. Further, Gilreath satisfied the remaining subparts of the Policy, (1) the area immediately surrounding was prohibited by civil authority, and (2) the action of civil authority was taken in response to dangerous physical conditions. Importantly, Cincinnati failed to cite *any* authority for its argument that civil authority did not prohibit access to Gilreath's premises.

The Policy provides coverage if the civil authority *prohibits access*; the Policy does not define that it must prohibit *all* or *complete* access to the premises. (Doc. 11-1, at p. 107). If a term is ambiguous it must be construed in favor of Gilreath. *Comes v. United States*, 918 F. Supp. 382, 384 (M.D. Ga. 1996); *see also*, *Studio 417*, 478 F. Supp. At 804 (denying defendant's motion to dismiss where the policy only required access to the premises be prohibited by an order of Civil Authority, but did not require "all access" or "any access" be prohibited).

The Policy specifically requires an *action* of civil authority. It does not require formal order, written order, or an order at all. *See*, *Narricot Indus., Inc. v. Fireman's Fund Ins. Co.*, 2002 WL 31247972, at *4 (E.D. Pa. Sept. 30, 2002) (reasoning the defendant insurer's civil authority clause only required an action of civil authority and did not require a formal or written order, or even require an order at all).

On April 2, 2020, Georgia's Governor issued a stay-at-home order. (Doc. 11-

5). Moreover, the Governor's April 3, 2020 Order (Doc. 11-6) gave sheriffs and their deputies authority to "enforce the closure of businesses, establishments, corporations, non-profit corporations, or organizations in accordance with Executive Order 04.02.20.01" and was an action of civil authority.

Courts have found that access is prohibited where a civil authority requires the insured's premises to close. *See*, *Assurance I,* 265 Ga.App. 35 (2003) (evacuation order made plaintiff's restaurants unable to operate).[10] Here, the stay-at-home Order enforced a continuous shelter in place and guidelines to suspend operations. Moreover, the April 3 Order gave sheriffs the authority to enforce business closures. Additionally, the CDC issued guidelines which recommended all dental facilities, including Gilreath, postpone elective procedures, surgeries, and non-urgent dental visits for the foreseeable future and to limit treatment only to emergency care. These non-emergency visits were the vast majority of Gilreath's dentistry practice.

Civil authority prohibited access to Gilreath's premises, forced Gilreath to suspend or reduce business operations, and prohibited people from seeking routine

[10] *See also*, *Narricot Indus., Inc. v. Fireman's Fund Ins. Co.*, 2002 WL 31247972 (E.D. Pa. Sept. 30, 2002) (where hurricane caused water system to fail and plaintiff's facility operations were prohibited by town order, state of emergency, and actions of law enforcement blocking the road where the facility was located); *Southlanes Bowl, Inc. v. Lumbermen's Mut. Ins. Co.*, 208 N.W.2d 569, 570 (1973) (holding insured liable to pay business loss interruption under the policy's civil authority provision where a civil authority order mandated a curfew causing plaintiff insureds to close their businesses); *Sloan v. Phoenix of Hartford Ins. Co.*, 207 N.W.2d 434, 437 (1973) (same).

and elective dental procedures at Gilreath's facility which is a substantial portion of Gilreath's business. These civil authority measures prohibited access to and the core functions of Gilreath's business resulting in a valid claim for lost business income coverage under the Policy.

CONCLUSION

The factual allegations asserted in the First Amended Complaint considered under the ambiguous definition of "Loss" in the Policy create a valid claim for relief. Alternatively, Gilreath has sufficiently pled facts that would entitle it to relief even if the "direct physical loss" phrase is allowed to be read into the Policy by Cincinnati as Gilreath has alleged that the premises and property were damaged by COVID-19 or resultant orders/restrictions. Therefore, Gilreath has alleged a claim for which it is entitled to relief. For all of the reasons set forth herein, the Order granting Cincinnati's Motion to Dismiss should be reversed.

Respectfully submitted this May 14, 2021.

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CERTICATE OF COMPLIANCE

I hereby certify that the foregoing complies with the typeface requirements set forth in Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because this document has been prepared in a proportionally-spaced typeface using Microsoft Office Word in fourteen-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on this May 14, 2021, the foregoing **BREIF OF APPELLANTS** was filed electronically through the CM/ECF system, which will automatically send a copy of the filing to the following attorneys of record for Defendant:

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Exhibit 1 to Brief of Appellant

STATE OF NORTH CAROLINA

COUNTY OF DURHAM

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CASE NO. 20-CVS-02569

2020 OCT -9 P 3:14

..., C.S.C.

NORTH STATE DELI, LLC d/b/a LUCKY'S DELICATESSEN, MOTHERS & SONS, LLC d/b/a MOTHERS & SONS TRATTORIA, MATEO TAPAS, L.L.C. d/b/a MATEO BAR DE TAPAS, SAINT JAMES SHELLFISH LLC d/b/a SAINT JAMES SEAFOOD, CALAMARI ENTERPRISES, INC. d/b/a PARIZADE, BIN 54, LLC d/b/a BIN 54, ARYA, INC. d/b/a CITY KITCHEN and VILLAGE BURGER, GRASSHOPPER LLC d/b/a NASHER CAFE, VERDE CAFE INCORPORATED d/b/a LOCAL 22, FLOGA, INC. d/b/a KIPOS GREEK TAVERNA, KUZINA, LLC d/b/a GOLDEN FLEECE, VIN ROUGE, INC. d/b/a VIN ROUGE, KIPOS ROSE GARDEN CLUB LLC d/b/a ROSEWATER, and GIRA SOLE, INC. d/b/a FARM TABLE and GATEHOUSE TAVERN,

Plaintiffs,

v.

THE CINCINNATI INSURANCE COMPANY; THE CINCINNATI CASUALTY COMPANY; MORRIS INSURANCE AGENCY INC.; and DOES 1 THROUGH 20, INCLUSIVE,

Defendants.

ORDER GRANTING PLAINTIFFS' RULE 56 MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS MATTER was heard on September 23, 2020, before Senior Resident Superior Court Judge Orlando F. Hudson, Jr., with Gagan Gupta appearing for the plaintiff-restaurants (including Vin Rouge, Parizade, Mateo Bar de Tapas, Rosewater, Mothers & Sons Trattoria, Saint James Seafood, Lucky's Delicatessen, Bin 54, City Kitchen, Village Burger, Nasher Cafe,

Local 22, Kipos Greek Taverna, Golden Fleece, Farm Table, and Gatehouse Tavern[1]), and Brian Reid and Drew Vanore appearing for defendant-insurers The Cincinnati Insurance Company and The Cincinnati Casualty Company (collectively, "Cincinnati"). Plaintiffs brought a Motion for Partial Summary Judgment ("Motion") with respect to Count I of their Second Amended Complaint, seeking a declaratory judgment that Cincinnati must replace Plaintiffs' lost business income and extra expenses under insurance policy contracts entered into between the parties.[2]

THE COURT, having considered the pleadings, the Motion, the briefs filed in support of and in opposition to the Motion, the oral arguments of counsel at the hearing on the Motion, the declaration of Gagan Gupta, the affidavit testimony of the Plaintiffs and their supporting affidavits of Giorgios Nikolaos Bakatsias, Matthew Raymond Kelly, and Djafar "Jay" Mehdian, the applicable law, and other appropriate matters of record, GRANTS Plaintiffs' Motion.

Upon a review of the entire record, the Court holds there are no genuine issues as to any material fact and Plaintiffs are entitled to partial summary judgment against Cincinnati as a matter of law on the issue of liability under Count I of the Second Amended Complaint. To that end, the Court sets forth its primary reasoning herein.

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[1] The parent companies of these restaurants, and the entities bringing this lawsuit, are Vin Rouge, Inc. d/b/a Vin Rouge; Calamari Enterprises, Inc. d/b/a Parizade; Mateo Tapas, L.L.C. d/b/a Mateo Bar de Tapas; Kipos Rose Garden Club LLC d/b/a Rosewater; Mothers & Sons, LLC d/b/a Mothers & Sons Trattoria; Saint James Shellfish LLC d/b/a Saint James Seafood; North State Deli, LLC d/b/a Lucky's Delicatessen; Bin 54, LLC d/b/a Bin 54; Arya, Inc. d/b/a City Kitchen and Village Burger; Grasshopper LLC d/b/a Nasher Cafe; Verde Cafe Incorporated d/b/a Local 22; Floga, Inc. d/b/a Kipos Greek Taverna; Kuzina, LLC d/b/a Golden Fleece; and Gira Sole, Inc. d/b/a Farm Table and Gatehouse Tavern (collectively, "Plaintiffs").

[2] The operative pleading to which this Order applies is the Second Amended Complaint.

I. BACKGROUND[3]

Plaintiffs, which operate sixteen restaurants in the North Carolina counties of Durham, Wake, Orange, Chatham, and Buncombe, purchased "all risk" property insurance policies ("Policies") from Cincinnati to cover their restaurants. All risk policies cover all risks of loss unless those risks are expressly excluded or limited. Plaintiffs' Policies were effective during all relevant time periods and contain the same relevant language.

The Policies include a Building and Personal Property Coverage Form and a Business Income (and Extra Expense) Coverage Form. These forms provide that Cincinnati will pay for business interruption coverage as follows:

> (1) **Business Income**
> 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.
>
> . . .
>
> (2) **Extra Expense**
> We will pay Extra Expense you sustain during the "period of restoration". Extra Expense means necessary expenses you sustain . . . during the "period of restoration" that you would not have sustained if there had been no direct "loss" to property caused by or resulting from a Covered Cause of Loss.

Under the Policies, "Covered Cause of Loss" means "direct 'loss' unless the 'loss' is excluded or limited" therein. The Policies define "loss" to mean "accidental physical loss or accidental physical damage." Therefore, absent an exclusion or limitation, the Policies provide

[3] The Court has not resolved any disputed issues of fact, as findings of fact are unnecessary for adjudicating Plaintiffs' Motion for Partial Summary Judgment. Rather, the Court offers an overview of key undisputed facts underlying the ultimate disposition.

coverage under these provisions where the policyholder shows (i) direct "accidental physical loss" to property, ***or*** (ii) direct "accidental physical damage" to property. The Policies do not define "direct," "accidental," "physical loss," or "physical damage."

Plaintiffs seek coverage under the Policies for losses arising out of the response to the SARS-CoV-2 ("COVID-19") pandemic. Beginning in March 2020, governmental authorities across North Carolina entered civil authority orders mandating the suspension of business operations at various establishments, including Plaintiffs' restaurants (hereafter, "Government Orders"). The orders also prohibited, via stay-at-home mandates and travel restrictions, all non-essential movement by all residents.

On August 3, 2020, Plaintiffs filed their Motion for Partial Summary Judgment ("Motion"), seeking a declaratory judgment against Cincinnati under Count I that the Government Orders constitute covered perils under the Policies that caused "direct 'loss' to property" at the described premises, and that therefore Cincinnati must pay for the resulting lost Business Income and Extra Expenses as defined by the Policies. Plaintiffs' primary contention is that the Government Orders forced Plaintiffs to lose the physical use of and access to their restaurant property and premises, which constitutes a non-excluded "direct physical loss."

II. STANDARDS OF INTERPRETATION FOR INSURANCE POLICIES

The meaning of an insurance policy is a question of law, *Accardi v. Hartford Underwriters Ins. Co.*, 373 N.C. 292, 295, 838 S.E.2d 454, 456 (2020), and it is black-letter law that an undefined policy term is to be given its "ordinary meaning"; in doing so, North Carolina courts have determined that it is "appropriate to consult a standard dictionary." *Allstate Ins. Co. v. Chatterton*, 135 N.C. App. 92, 94-95, 518 S.E.2d 814, 817 (N.C. Ct. App. 1999). If the term is nevertheless "reasonably susceptible to more than one interpretation," then it is ambiguous and

only then is the contract subject to judicial construction. *Id.*; *see also Joyner v. Nationwide Ins.*, 46 N.C. App. 807, 809, 266 S.E.2d 30, 31 (1980) ("[I]n deciding whether the language is plain or ambiguous, the test is what a reasonable person in the position of the insured would have understood it to mean, and not what the insurer intended."). "[A]ny ambiguity or uncertainty as to the words used in the policy should be construed against the insurance company and in favor of the policyholder or beneficiary." *Accardi*, 373 N.C. at 295, 838 S.E.2d at 456.

III. DISCUSSION

As an initial matter, the Policies do not define the terms "direct," "physical loss," or "physical damage."[4] The Court must therefore turn first to the ordinary meaning of those terms. Merriam-Webster defines "direct," when used as an adjective, as "characterized by close logical, causal, or consequential relationship," as "stemming immediately from a source," or as "proceeding from one point to another in time or space without deviation or interruption." *Direct*, Merriam-Webster (Online ed. 2020). Merriam-Webster defines "physical" as relating to "material things" that are "perceptible especially through the senses." *Physical*, Merriam-Webster (Online ed. 2020). The term is also defined in a way that is tied to the body: "of or relating to the body." *Id.* Webster's Third New International Dictionary defines physical as "of or relating to natural or material things as opposed to things mental, moral, spiritual, or imaginary." *Physical*, Webster's Third New International Dictionary (2020). The definition from Black's Law Dictionary comports: "Of, relating to, or involving material things; pertaining to real, tangible objects." *Physical*, Black's Law Dictionary (11th ed. 2019). Finally, "loss" is defined as "the act of losing possession," "the harm of privation resulting from loss or separation," or the "failure to gain, win, obtain, or utilize." *Loss*, Merriam-Webster (Online ed.

[4] Cincinnati does not contest whether Plaintiffs' losses were "accidental."

2020). Another dictionary defines the term as "the state of being deprived of or of being without something that one has had." *Loss*, Random House Unabridged Dictionary (Online ed. 2020).

Applying these definitions reveals that the ordinary meaning of the phrase "direct physical loss" includes the inability to utilize or possess something in the real, material, or bodily world, resulting from a given cause without the intervention of other conditions. In the context of the Policies, therefore, "direct physical loss" describes the scenario where businessowners and their employees, customers, vendors, suppliers, and others lose the full range of rights and advantages of using or accessing their business property. This is precisely the loss caused by the Government Orders. Plaintiffs were expressly forbidden by government decree from accessing and putting their property to use for the income-generating purposes for which the property was insured. These decrees resulted in the immediate loss of use and access without any intervening conditions. In ordinary terms, this loss is unambiguously a "direct physical loss," and the Policies afford coverage.

The parties sharply dispute the meaning of the phrase "direct physical loss." Cincinnati argues that "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 property." Even if Cincinnati's proffered ordinary meaning is reasonable, the ordinary meaning set forth above is also reasonable, rendering the Policies at least ambiguous. Accordingly, in giving the ambiguous terms the reasonable definition which favors coverage, the phrase "direct physical loss" includes the loss of use or access to covered property even where that property has not been structurally altered. *See Accardi*, 373 N.C. at 295, 838 S.E.2d at 456 ("[A]ny ambiguity or uncertainty as to the words used in the policy should be construed against the insurance company and in favor of the policyholder or beneficiary.").

Moreover, it is well-accepted that "[t]he various terms of the policy are to be harmoniously construed, and if possible, every word and every provision is to be given effect." *See C. D. Spangler Constr. Co. v. Industrial Crankshaft & Engineering Co.*, 326 N.C. 133, 142, 388 S.E.2d 557, 563 (1990). Here, the Policies provide coverage for "accidental physical loss ***or*** accidental physical damage." Cincinnati's argument that the Policies require physical alteration conflates "physical loss" and "physical damage." The use of the conjunction "or" means—at the very least—that a reasonable insured could understand the terms "physical loss" and "physical damage" to have distinct and separate meanings. The term "physical damage" reasonably requires alteration to property. *See Damage*, Merriam-Webster (Online ed. 2020) ("loss or harm resulting from injury to person, property, or reputation"). Under Cincinnati's argument, however, if "physical loss" also requires structural alteration to property, then the term "physical damage" would be rendered meaningless. But the Court must give meaning to both terms.

Finally, nothing in the Policies excludes coverage for Plaintiffs' losses. Notably, it is undisputed that the Policies do not exclude virus-related causes of loss. Cincinnati instead contends that three other exclusions apply: the "Ordinance or Law" exclusion, the "Acts or Decisions" exclusion, and the "Delay or Loss of Use" exclusion. Upon a review of the entire record, the Court concludes that these exclusions, based on their terms and the undisputed facts, do not apply to Plaintiffs' losses as a matter of law.

For these primary reasons, the Court concludes that the Policies provide coverage for Business Income and Extra Expenses for Plaintiffs' loss of use and access to covered property mandated by the Government Orders as a matter of law.

IV. CONCLUSION

Accordingly, Plaintiffs' Motion for Partial Summary Judgment is GRANTED. This Court certifies, pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, that this Order represents a final judgment as to Count I of the Second Amended Complaint and is immediately appealable as there is no just reason for delay of any such appeal. **IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS**: That partial summary judgment is hereby granted in favor of Plaintiffs and against Cincinnati, jointly and severally, on Count I (Declaratory Judgment).

This the 7th day of October, 2020.

ORLANDO F. HUDSON, JR.
SENIOR RESIDENT SUPERIOR COURT JUDGE

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing Order in the above captioned action on all parties by depositing a copy hereof in a postpaid wrapper in a post office depository under the exclusive care and custody of the United Postal Service, addressed as follows:

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This the 9th day of October, 2020.

Sina B. Mack
ASSISTANT CLERK OF COURT
DURHAM COUNTY

STATE OF NORTH CAROLINA

COUNTY OF DURHAM

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CASE NO. 20-CVS-02569

2020 OCT -9 P 3:15

C.S.C.

NORTH STATE DELI, LLC d/b/a LUCKY'S DELICATESSEN, MOTHERS & SONS, LLC d/b/a MOTHERS & SONS TRATTORIA, MATEO TAPAS, L.L.C. d/b/a MATEO BAR DE TAPAS, SAINT JAMES SHELLFISH LLC d/b/a SAINT JAMES SEAFOOD, CALAMARI ENTERPRISES, INC. d/b/a PARIZADE, BIN 54, LLC d/b/a BIN 54, ARYA, INC. d/b/a CITY KITCHEN and VILLAGE BURGER, GRASSHOPPER LLC d/b/a NASHER CAFE, VERDE CAFE INCORPORATED d/b/a LOCAL 22, FLOGA, INC. d/b/a KIPOS GREEK TAVERNA, KUZINA, LLC d/b/a GOLDEN FLEECE, VIN ROUGE, INC. d/b/a VIN ROUGE, KIPOS ROSE GARDEN CLUB LLC d/b/a ROSEWATER, and GIRA SOLE, INC. d/b/a FARM TABLE and GATEHOUSE TAVERN,

Plaintiffs,

v.

THE CINCINNATI INSURANCE COMPANY; THE CINCINNATI CASUALTY COMPANY; MORRIS INSURANCE AGENCY INC.; and DOES 1 THROUGH 20, INCLUSIVE,

Defendants.

ORDER DENYING THE RULE 12(b)(6) MOTION TO DISMISS THE SECOND AMENDED COMPLAINT FILED BY DEFENDANTS THE CINCINNATI INSURANCE COMPANY AND THE CINCINNATI CASUALTY COMPANY

THIS MATTER was heard on September 23, 2020, before Senior Resident Superior Court Judge Orlando F. Hudson, Jr., with Gagan Gupta appearing for the plaintiff-restaurants (including North State Deli, LLC d/b/a Lucky's Delicatessen; Mothers & Sons, LLC d/b/a Mothers & Sons Trattoria; Mateo Tapas, L.L.C. d/b/a Mateo Bar de Tapas; Saint James Shellfish

LLC d/b/a Saint James Seafood; Calamari Enterprises, Inc. d/b/a Parizade; Bin 54, LLC d/b/a Bin 54; Arya, Inc. d/b/a City Kitchen and Village Burger; Grasshopper LLC d/b/a Nasher Cafe; Verde Cafe Incorporated d/b/a Local 22; Floga, Inc. d/b/a Kipos Greek Taverna; Kuzina, LLC d/b/a Golden Fleece; Vin Rouge, Inc. d/b/a Vin Rouge; Kipos Rose Garden Club LLC d/b/a Rosewater; and Gira Sole, Inc. d/b/a Farm Table and Gatehouse Tavern (collectively, "Plaintiffs")), and Brian Reid and Drew Vanore appearing for defendant-insurers The Cincinnati Insurance Company and The Cincinnati Casualty Company (collectively, "Defendants"). Defendants brought a Rule 12(b)(6) Motion to Dismiss in Lieu of Answer to Plaintiffs' Complaint ("Motion") with respect to Count I (Declaratory Judgment), Count II (Declaratory Judgment), and Count III (Breach of Contract).[1]

THE COURT, having considered the pleadings, the Motion, the briefs filed in support of and in opposition to the Motion, the oral arguments of counsel at the hearing on the Motion, the applicable law, and other appropriate matters of record, DENIES Defendants' Motion.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

(1) Plaintiffs state a viable claim for relief under Count I of the Second Amended Complaint, seeking a declaratory judgment against Defendants pursuant to N.C. Gen.

[1] The operative pleading to which this Order applies is the Second Amended Complaint. For background, the Motion was filed by defendant The Cincinnati Insurance Company on August 7, 2020. After Plaintiffs and The Cincinnati Insurance Company exchanged full briefing on the Motion, the Court granted a Consent Motion for Leave to File Second Amended Complaint, consented to by all the parties captioned herein. The sole amendment made by the Second Amended Complaint was the addition of another defendant-insurer, The Cincinnati Casualty Company. Because Plaintiffs and Defendants jointly stipulated that the Second Amended Complaint resulted in no substantive changes to the Motion or the related briefings and arguments, and that the Motion and related briefings and arguments applied with equal force to the newly-added defendant entity, this Order is entered with respect to Counts I-III as those counts are alleged against both The Cincinnati Insurance Company and The Cincinnati Casualty Company in the Second Amended Complaint.

Stat. § 1-253 *et seq*., ascertaining entitlement to coverage under insurance policy contracts entered into between Plaintiffs and Defendants.

(2) Plaintiffs state a viable claim for relief under Count II of the Second Amended Complaint, seeking a declaratory judgment against Defendants pursuant to N.C. Gen. Stat. § 1-253 *et seq*., ascertaining entitlement to coverage under insurance policy contracts entered into between Plaintiffs and Defendants.

(3) Plaintiffs state a viable claim for relief under Count III of the Second Amended Complaint, seeking damages and other relief for breach of contract against Defendants pursuant to their failure to provide benefits due under the insurance policy contracts as described in Counts I and II.

This the 17th day of October, 2020.

ORLANDO F. HUDSON, JR.
SENIOR RESIDENT SUPERIOR COURT JUDGE

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing Order in the above captioned action on all parties by depositing a copy hereof in a postpaid wrapper in a post office depository under the exclusive care and custody of the United Postal Service, addressed as follows:

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This the 9th day of October, 2020.

Sara B. Mack
ASSISTANT CLERK OF COURT
DURHAM COUNTY