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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA

SERENDIPITOUS, LLC/MELT; MELT FOOD TRUCK, LLC d/b/a MELT; and FANCY'S ON FIFTH, LLC, d/b/a/ FANCY'S ON FIFTH, Plaintiffs, v. THE CINCINNATI INSURANCE COMPANY, Defendant.	Case No.: 2:20-cv-00873

DEFENDANT THE CINCINNATI INSURANCE COMPANY'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS THE SECOND AMENDED AND SUPPLEMENTAL COMPLAINT PURSUANT TO RULE 12(b)(6)

Defendant, The Cincinnati Insurance Company ("Cincinnati"), submits herewith its Brief In Support Of Its Motion To Dismiss The Second Amended and Supplemental Complaint ("Second Amended Complaint") [Dkt. No. 15] Pursuant to Rule12(b)(6), Fed. R. Civ. Pro., on the basis that the Plaintiffs fail to state a claim upon which relief may be granted.

INTRODUCTION AND SUMMARY OF ARGUMENTS

The Policies at issue supply property insurance coverage. They are designed to indemnify loss or damage to property, such as in the case of a fire or storm. Coronavirus (or "COVID-19") does not damage property; it hurts people. Plaintiffs demand the Policies' Business Income, Extra Expense and Civil Authority coverages. But, because they are part of a property insurance policy, these coverages protect Plaintiffs only for income losses tied to physical damage to property, not for economic loss caused by governmental or other efforts to protect the public from disease. *See Whitaker v. Nationwide Mut. Fire Ins. Co.*, 115 F. Supp. 2d 612, 617 (E.D. Va. 1999) (the "direct physical loss" language in the policy provides a further limitation on the types of loss covered). *See, infra, Mama Jo's, Inc. v. Sparta Ins. Co.*, Case No. 18-12887, 2020 WL 4782369 (11th Cir. August 18, 2020) (Proctor, J., sitting by designation); *Diesel Barbershop, LLC v. State Farm Lloyds*, Case No. 5:20-cv-00461 (W.D. Tex. August 13, 2020); and *Mastellone v. Lightning Rod Mut. Ins. Co.*, 175 Ohio App. 3d 23, 2008-Ohio-311, 884 N.E.2d 1130, ¶ 68 (8th Dist.) (Stewart, J.).

The Plaintiffs' allegations establish that they have not sustained any losses attributable to direct physical loss to property. Instead, Plaintiffs allege that the Coronavirus pandemic spreads COVID-19 among humans. Moreover, the same

direct physical loss requirement applies to all the coverages for which Plaintiffs sue, including the Civil Authority coverage as well as the Business Income coverage.

Plaintiffs do not sufficiently plead their claims. They merely state labels and conclusions about direct physical loss. But, there must be factual allegations showing direct physical loss and there are none. At bottom, Plaintiffs bear the initial burden of showing actual direct physical loss to property. This is always necessary to make a *prima facia* case for property insurance coverage. Because Plaintiffs fail to allege direct physical loss, Plaintiffs' Second Amended Complaint should be dismissed.

ARGUMENT

I. BACKGROUND FACTS AND GENERAL INSURANCE LAW PRINCIPLES.

A. Allegations Of The Second Amended Complaint.

The Second Amended Complaint includes the following allegations:

- Plaintiffs are a collection of limited liability company restaurants operating in and with the principal places of business in Jefferson County, Alabama [Compl.[1]; Dkt. No. 15, ¶¶ 1, 8]

- Plaintiffs purchased a policy of insurance from Cincinnati providing Business Income Coverage, Civil Authority Coverage and Extra Expense coverage. [Compl.; Dkt. No. 15, ¶¶ 4, 21-22]

- "The global pandemic created by COVID-19 and the orders issued from the City of Birmingham, Jefferson County and the State of Alabama

[1] The term "Compl." refers to the Second Amended Complaint, Dkt. No. 15, filed on July 13, 2020.

governments *aimed at slowing the spread of the pandemic* have caused Plaintiffs to cease or substantially limit their business operations, resulting in substantial lost revenues." [Compl., Dkt. No. 15, ¶3] [emphasis added]

- COVID-19, while invisible to the naked eye, also exists in droplets in the air and on surfaces." [Compl.; Dkt. No. 15, ¶18]

- "Additionally, the research emerging in March showed that COVID-19 could stay alive on surfaces for up to 17 days." [Compl.; Dkt. No. 15, ¶ 19]

- "The presence or *likely presence* of COVID-19 constitutes tangible, physical property damage. When COVID-19 is present or *likely present* it renders property dangerous and unusable." [Compl., Dkt. No. 15, ¶ 20] [emphasis added]

- "The presence of COVID-19 in the U.S., the state of Alabama, and Jefferson County was severe enough for governmental authorities to determine that the operation of businesses such as Plaintiffs' restaurants were so *likely* to have a presence of the COVID-19 virus that their operations needed to be restricted to prevent the further spread of the virus." [Compl., Dkt. No. 15, ¶ 54] [emphasis added]

- "The coverage provided under the Policy broadly covers any loss that is not expressly excluded. Specifically, the Policy provides coverage for physical damage, including but not limited to, loss of use of property . . ." [Compl.; Dkt. No. 15, ¶22]

- "Although insurers can, and usually do, include virus exclusions in their commercial property insurance policies, Plaintiffs' Policy does not contain a virus exclusion." [Compl.; Dkt. No. 15, ¶ 23]

- "Because the Policy covers all losses "unless the 'loss' is excluded or limited" by the policy, and the Policy does not have a "virus exclusion" or exclusion for losses due to government shutdowns/restrictions, the losses claimed by Plaintiffs are covered by the Policy." [Compl.; Dkt. No. 15, ¶ 28]

- "The COVID-19 pandemic has required Plaintiffs to take physical action to guard against the dangers of COVID-19, including closure, limited seating, requiring employees to wear masks and substantially increasing efforts to clean and disinfect their properties. Recently, Plaintiffs initiated additional professional cleaning and disinfecting to help curtail the spread of COVID-19." [Compl.; Dkt. No. 15, ¶ 27]

- "Additionally, in response to the spread of COVID-19 throughout the United States, the State of Alabama, Jefferson County, Alabama and the City of Birmingham began issuing orders in March 2020 (the "COVID-19 Orders" or "Civil Authority Orders") which required restaurants and other businesses to close to the public or operate under specific, significant restraints." [Compl.; Dkt. No. 15, ¶ 30]

- "[P]ursuant to the COVID-19 Orders initially entered in March and April of 2020, Plaintiffs' restaurants were open only for 'curbside' pick-up." [Compl.; Dkt. No. 15, ¶ 32]

- "At some point, Plaintiffs' restaurants were able to re-open for dine-in service, but only in a limited capacity." [Compl.; Dkt. No. 15, ¶ 33]

- "Shortly after Cincinnati's denial letter was issued, in June 2020, seven of Plaintiffs' employees tested positive for COVID-19, and Plaintiffs' restaurants were forced to close completely for additional cleaning and disinfecting." [Compl.; Dkt. No. 15, ¶ 41]

- "The facts stated herein constitute physical loss or damage to Plaintiffs' covered properties. [Compl.; Dkt. No. 15, ¶ 42]

The Second Amended Complaint seeks recovery under theories of declaratory judgment (Count I), breach of contract (Count II) and bad faith (Count II).

B. The Cincinnati Policy.

1. The Policy And The Coverage.

Cincinnati issued a policy of insurance to Serendipitous LLC/Melt, Melt Food Truck, LLC, d/b/a/ Melt, Fancy's On Fifth, LLC, d/b/a Fancy's On Fifth, Policy No.

ECP 040 06 93/EBA 040 06 93, effective from June 17, 2019 to June 17, 2022 ("the Policy" or "the Cincinnati Policy"). For present purposes, the pertinent parts of the Policy are form FM 101 05 16 (electronic page Nos. 21-60), and form FA 213 05 16 (electronic page No. 103-111).[2] Form FM 101 05 16 is the main property coverage form. Form FA 213 05 16 extended Business Income coverage. Using the same language, each form supplies Business Income coverage, Civil Authority coverage, and Extra Expense coverage.

2. The Direct Physical Loss Requirement.

The requirement of "direct physical loss" is a core element in property insurance policies like Plaintiffs'. The requirement appears in multiple places. For example, direct physical loss to the Plaintiffs' property is required for Business Income coverage:

> We will pay for the actual loss of "Business Income" you sustain due to the necessary "suspension" of your "operations" during the "period of restoration." The suspension must be caused by direct "loss" to property at "premises" which are described in the Declarations and for which a "Business Income" Limit of Insurance is shown on the Declarations. The "loss" must be caused by or result from a Covered Cause of Loss.

[2] A certified copy of the Policy is attached hereto as Exhibit A. A court can consider insurance policies attached to or referenced in the complaint when ruling on a Rule 12(b)(6) motion. *Valley Creek Land & Timber v. Colonial Pipeline Co.*, 432 F. Supp. 3d 1360, 1363 (11th Cir. 2020). *See* Section III., *infra*. The portions of the Policy can be most easily located by the pdf page number, so relevant policy language is cited accordingly.

[electronic page No. 103] The term "loss" is defined to mean ***physical*** loss or damage. [electronic page 58, 111] [emphasis added] Accordingly, direct physical loss is required for Business Income coverage. This requirement is plainly stated throughout the policy and these words are not ambiguous.

3. The Requirement That There Be A Covered Cause Of Loss.

The requirement of direct physical loss additionally appears in the Covered Cause of Loss threshold requirement for any coverage:

> SECTION A. COVERAGE
> We will pay for direct "loss" to Covered Property at the "premises" caused by or resulting from any Covered Cause of Loss.

[electronic page No. 23]

Covered Cause of Loss is defined as "direct 'loss' unless the 'loss' is excluded or limited in this Coverage Part." [electronic page No. 25] As stated, "loss" is defined, in relevant part, as physical loss or damage. [electronic page Nos. 58, 111]. Accordingly, direct physical loss is a necessary element of Covered Cause of Loss. As discussed in more detail below, Civil Authority coverage applies when a "Covered Cause of Loss causes damage to property other than Covered Property at a 'premises'." Therefore, because direct physical loss is an element of Covered Cause of Loss, the Plaintiffs must establish direct physical loss in order to meet their burden of establishing that the Civil Authority coverage applies. The same applies

to the Extra Expense coverage, because it too requires physical loss for the coverage to apply. [electronic page No. 39,103]

In the absence of statutory provisions to the contrary, insurance companies have the right to limit their liability and write policies with narrow coverage. *United States Fidelity & Guaranty Co. v. Bonitz Insulation Co. of Alabama*, 424 So. 2d 569, 573 (Ala. 1982). Cincinnati accordingly has the right to limit the coverage with the direct physical loss requirement. Alabama law unequivocally provides that the insured ultimately bears the burden of establishing that coverage exists under its insurance policy. *Employers Mut. Cas. Co. v. Mallard*, 309 F.3d 1305, 1307 (11th Cir. 2002).

4. The Presence Or Absence Of Exclusions Is Irrelevant Unless Plaintiffs First Establish That The Loss Falls Within The Terms Of The Coverage.

While the definition of Covered Cause of Loss refers to exclusions, exclusions do not come into play unless there is first direct physical loss to property. Insureds have the ultimate burden to establish that their claim is one that is covered by the terms of the policy. *American Safety Indem. Co. v. T.H. Taylor, Inc*., 513 Fed. App'x 807, 813 (11th Cir. Mar. 14, 2013); *Belt Auto. Indem. Ass'n v. Ensley Transfer & Supply Co*., 99 So. 787, 790 (Ala. 1924); *McConnell-White-Terry Realty & Ins. Co. v. Fidelity & Deposit Co. of Md*., 102 So. 617, 619 (Ala. 1925). If there is no direct physical loss to property, then the exclusions need not be consulted because there is

no coverage in the first instance. *See, e.g.*, *Mastellone*, 175 Ohio App.3d 23, 2008-Ohio-311, 884 N.E.2d 1130, at ¶¶ 61-69; *Zinser v. Auto-Owners Ins. Co.*, 12th Dist. Butler No. CA2016-08-144, 2017-Ohio-5668, ¶ 33 (Powell, J., concurring and dissenting in part) ("[S]ince I would find the AC units are not covered property under the policy, any further analysis of the policy's exclusions and limitations is unnecessary."). Moreover, 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).

5. The Requirements Of The Civil Authority Coverage.

In addition to the direct physical loss requirement, Civil Authority coverage requires that an insured suffer actual loss of Business Income caused by the specific actions of a civil authority. This coverage is only provided if both of the following apply:

(a) A ***Covered Cause of Loss*** caused damage to property other than Covered Property at the insured premises;

(b) ***Access*** to the insured premises ***is prohibited*** by civil authority;

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

(d) 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.

[electronic page No. 104] [emphasis added] Accordingly, Civil Authority coverage requires both direct physical loss to property other than the insured's property and prohibition of access to the insured's property as a result of that direct physical loss.

II. MOTION TO DISMISS STANDARD.

Dismissal is an appropriate mechanism here because this motion presents a pure question of law and contract interpretation. A motion to dismiss for failure to state a claim should prevail if, after the complaint's allegations are taken as true and all reasonable inferences are made in favor of the nonmoving party, the nonmoving party cannot prove facts supporting his claim. *Financial Sec. Assur, Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1282 (11th Cir. 2007) (citing and quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Stated another way, the factual allegations in a complaint must "possess enough heft" to set forth "a plausible entitlement to relief." *Stephens*, 500 F.3d at 1282 (citing and quoting *Twombly*, 550 U.S. at 557. Importantly, legal conclusions and other unsupported conclusions stated in the complaint may not be considered in determining a motion to dismiss. *Stephens*, *supra*. In order for the plaintiff to satisfy his "obligation to provide the grounds of his entitlement to relief," he must allege more than "labels and conclusions". *Id*.

Ordinarily, a court does not consider anything beyond the face of the complaint and documents attached thereto when analyzing a motion to dismiss. *Stephens*, 500 F.3d at 1284. There is an exception, however, in cases in which a

plaintiff refers to a document in its complaint, the document is central to its claim, its contents are not in dispute, and the defendant attaches the document to its motion to dismiss. *Id*. Considering documents that are central to the complaint does not change a motion to dismiss into a motion for summary judgment when the documents are undisputed in their authenticity. *Valley Creek Land & Timber v. Colonial Pipeline Co.*, 432 F. Supp. 3d 1360, 1363 (11th Cir. 2020). Specifically, the court can consider insurance policies attached to or referenced in the complaint when ruling on a Rule 12(b)(6) motion. *Id.*; *see also M5 Management Services Inc. v. Yanac*, 428 F. Supp. 3d 1282, 1288 (M.D. Ala. 2019) (quoting *Brooks v. Blue Cross and Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997) ("where the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff's claim, then the Court may consider the documents part of the pleadings for purposes of Rule 12(b)(6) dismissal, and the defendant's attaching such documents to the motion to dismiss will not require conversion of the motion into a motion for summary judgment"); and *Lewis v. Governor of Alabama*, 944 F.3d 1287, 1298, n.7 (11th Cir. 2019) ("when a complaint quotes part of a document . . . the full text is incorporated into the amended complaint by reference and is thus properly considered in deciding a Rule 12 motion")).

In this case, therefore, the court can and should consider the Civil Authority Orders (hereinafter "Closure Orders") referenced in the Complaint and the certified

copy of the Policy included with this brief and referenced in the Second Amended Complaint, because these documents are central to the Second Amended Complaint and their contents and authenticity are not in dispute.

Where the complaint's allegations conflict with the terms of the Policy and the Closure Orders, the terms of the Policy and the Closure Orders control. *See, e.g.*, 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1327 & n. 22 (4th ed.) (Wright & Miller) ("It appears to be well settled that when a disparity exists between the written instrument annexed to the pleadings and the allegations in the pleadings, the terms of the written instrument will control, particularly when it is the instrument being relied upon by the party who made it an exhibit.").

A motion to dismiss pursuant to Fed. R. Civ. P. Rule 12(b)(6) tests the legal sufficiency of the complaint. *Citigroup Global Mkts. Realty Group v. City of Montgomery*, No. 2:09-CV-784-WKW, 2009 WL 4021803, at *1 (M.D. Ala. Nov. 19, 2009). *Twombly*, *supra*, holds that:

> Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." While a complaint attacked by a Rule 12(b) (6) motion to dismiss does not need detailed factual allegations, *a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level*.

Twombly, 550 U.S. at 555. [internal citations omitted] [emphasis added]

Twombly emphasizes that a plaintiff must present "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. [emphasis added] As discussed below, Plaintiffs have not adequately alleged the direct physical loss requirement to satisfy *Twombly*.

To the same effect is *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–50 (2009). *Iqbal* reiterates that a claim is not sufficiently pled if it offers only "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 557). [internal quotations omitted] "The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id*. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*.

In deciding a 12(b)(6) motion, courts have said that they accept the truth of "facts," "material facts," "well-pleaded facts," and "well-pleaded allegations," but they do not accept "legal conclusions," "unsupported conclusions" or "sweeping legal conclusions cast in the form of factual allegations." 5A WRIGHT & MILLER, supra note 3, § 1357, at 311-318. As explained below, Plaintiffs gloss over the necessary issue of direct physical loss by pleading unsupported, sweeping conclusions. These conclusions don't "move the needle" and should be ignored.

III. THE SECOND AMENDED COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED BECAUSE IT DOES NOT ALLEGE DIRECT PHYSICAL LOSS.

A. The Second Amended Complaint Does Not Allege Direct Physical Loss To Plaintiffs' Premises.

1. *Mama Jo's* and *Mastellone* Establish That An Organic Or Inorganic Substance That Can Be Cleaned From A Surface Does Not Constitute Direct Physical Loss.

Plaintiffs do not allege facts showing any direct physical loss to property. Contrary to the pleading requirements articulated in *Twombly* and *Iqbal*, the Second Amended Complaint alleges only "threadbare recitals" and "formulaic recitations." In contrast, the alleged facts do not show direct physical loss. There are no allegations of a physical or structural alteration of Plaintiff's property. This point is underscored by a recent Eleventh Circuit decision affirming the Southern District of Florida's decision holding that where, as here, a surface can be cleaned, there is no physical loss or damage. *See Mama Jo's, Inc. v. Sparta Ins. Co.*, 2018 WL 3412974, at *9 (S.D. Fla. June 11, 2018) ("[w]ith regards to Plaintiff's initial claim for cleaning, cleaning is not considered direct physical loss."), *aff'd*, 2020 WL 4782369 (11th Cir. August 18, 2020) (Proctor, J., sitting by designation) ("under Florida law, an item or structure that merely needs to be cleaned has not suffered a 'loss' which

is both 'direct' and 'physical.'")[3]; *Universal Image Prods., Inc. v. Chubb Corp*., 703 F. Supp. 2d 705, 710 (E.D. Mich. 2010) (a complete cleaning of a ventilation system was not a direct physical loss), *aff'd*, 475 Fed. Appx. 569 (6th Cir. 2012).

In Mama Jo's, the insured, Mama Jo's, Inc., d/b/a Berries ("Berries") submitted a claim to its insurer, Sparta Insurance Company ("Sparta"), to recover business losses from dust and debris generated by construction that migrated into Berries' restaurant. Berries undertook daily cleaning using normal cleaning methods with over-the-counter cleaning products. Customer traffic decreased during the construction. Berries' claim was for the cost of cleaning and business income loss.

Similar to the Cincinnati Policy in the instant case, the Building and Personal Property Coverage Form in the policy at issue in *Mama Jo's* covered "direct physical loss of or damage to Covered Property . . . caused by or resulting from any Covered Cause of Loss." [Case No. 18-12887, p. 3] Also like the Cincinnati Policy here, the policy in *Mama Joe's* defined "Covered Causes of Loss" as "Risks of Direct Physical Loss unless the loss is" excluded or limited. *Id*. The policy's Business Income Coverage Form provided that the insurer would pay for "the actual loss of Business Income you sustain due to the necessary 'suspension' of your 'operations' during the 'period of restoration.'" [Case No. 18-12887, p. 4] As with the Cincinnati

[3] A copy of the 11th Circuit decision in *Mama Jo's*, authored by the Honorable R. David Proctor, United States District Judge for the Northern District of Alabama, is submitted herewith as Exhibit B.

Policy here, the policy at issue in *Mama Jo's* required that the 'suspension' must be caused by direct physical loss or damage to covered property. *Id*.

Applying Florida law, the Eleventh Circuit held that Berries failed to establish that the migrant dust caused direct physical loss because traditional cleaning solved the problem and nothing in the restaurant had to be removed and replaced.

> With regard to the cleaning claim, Berries's public adjuster, Inguanzo, testified that "cleaning and painting" was all that was required. (Doc. 76-1 at 35-36). He also testified that there was no need for removal or replacement of items at that time. (Id. at 36). Based on this testimony, the district court held that Berries had failed to establish that it had suffered a "direct physical loss" as that term is defined under Florida law. (Doc. 146 at 18-19). We conclude that the district court correctly granted summary judgment on Berries' cleaning claim because, under Florida law, an item or structure that merely needs to be cleaned has not suffered a "loss" which is both "direct" and "physical." *See* [*Homeowners Choice Prop. & Cas. v. Maspons*, 211 So. 3d 1067, 1069 (Fla. 3d DCA 2017)] (recognizing that "damage [must] be actual"); [*Vazquez v. Citizens Prop. Ins. Corp.*, 2020 WL 1950831, at *3 (Fla. 3d DCA 2020)] (same). *See also Universal Image Prods., Inc. v. Fed. Ins. Co.*, 475 F. App'x 569, 573 (6th Cir. 2012) ("[C[leaning . . . expenses . . . are not tangible, physical losses, but economic losses."); *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779, 115 Cal. Rptr. 3d 27, 37 (2010) ("A direct physical loss 'contemplates an actual change in insured property."); *AFLAC Inc. v. Chubb & Sons, Inc*. (2003) 260 Ga.App. 306, 581 S.E.2d 317, 319 (same).

Mama Jo's, Case No. 18-12887, pp. 22-23.

Similarly, in *Mastellone*, the court held that mold on the surface of a building did not constitute direct physical loss because it could be wiped away. The relevant policy language in *Mastellone* was the same as that in the Cincinnati Policy. It too

required "direct physical loss," also referred to in *Mastellone* as physical injury to property. *Id.* at ¶¶ 61-62. *Mastellone* held that mold on building siding did not constitute physical injury because it did not adversely affect the building's structural integrity. In this context, *Mastellone* rejected the argument that dark staining on the siding was physical injury, because the staining was "only temporary and did not affect the structure of the wood." The mold could be removed via cleaning, and its presence "did not alter or otherwise affect the structural integrity of the siding." *Id.* at ¶¶ 61-69. *Mastellone* relied on a leading insurance treatise: "[t]he 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". 10A *Couch on Ins.* § 148:46 (3d Ed.1998). Accordingly, the *Mastellone* court found there was no coverage.

2. Like The Dust In *Mama Jo's* And The Mold In *Mastellone*, Plaintiffs Admit In This Case That The Coronavirus Does Not Cause Direct Physical Loss Because It Can Be Cleaned.

Moreover, even if present on Plaintiff's premises, the Second Amended Complaint admits that, like the dust in *Mama Jo's* and mold in *Mastellone*, the Coronavirus can be removed by cleaning. Plaintiffs admit, for example, that "[t]he COVID-19 pandemic has required Plaintiffs to take physical action to guard against

the dangers of COVID-19, including . . . substantially increasing efforts *to clean and disinfect their properties*. [Compl.; Dkt. No. 15, ¶ 27] [emphasis added] Plaintiffs further admit that the cleaning and disinfecting is not to remedy physical injury to their properties, but instead is to prevent the spread of the virus. "Plaintiffs initiated additional professional cleaning and disinfecting," they assert, "*to help curtail the spread of COVID-19*." *Id*. [emphasis added] This admission is consistent with recommendations contained in publications of the Centers for Disease Control and Prevention (CDC), which expressly recognize that the Coronavirus can be wiped off surfaces by cleaning. "The virus that causes COVID-19 can be killed if you use the right products. EPA has compiled a list of disinfectant products that can be used against COVID-19, including ready-to-use sprays, concentrates, and wipes." *See* CDC Reopening Guidance for Cleaning and Disinfecting (4/28/2020), attached as Exhibit C; *See also* CDC, *Cleaning and Disinfection for Households*, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cleaning-disinfection.html (accessed May 28, 2020).[4]

Thus, as in *Mama Jo's* and *Mastellone*, even if Plaintiffs had alleged there is actual presence of the Coronavirus on the surfaces of Plaintiffs' restaurants, the

[4] A court may take judicial notice of the contents of public records, such as state court proceedings, without converting a motion to dismiss into a summary judgment motion. *Johnson v Spencer*, 950 F.3d 680, 705 (11th Cir. 2020); *Collier v. Buckner*, 303 F. Supp. 3d 1232, 1258, n.24 (M.D. Ala. 2018) (citing *Horne v. Potter*, 392 Fed. Appx. 800, 802 (11th Cir. 2010)). The public records would include the orders referenced in the Complaint and in the CDC Publications referenced in this brief.

Second Amended Complaint fails to allege direct physical loss to property, because the Second Amended Complaint admits the virus either dies naturally in days or it can be wiped away. "COVID-19," Plaintiffs assert, "while invisible to the naked eye, also exists in droplets in the air and on surfaces." [Compl.; Dkt. No. 15, ¶18] They then admit that COVID-19 dies naturally, because it can only "stay alive on surfaces for up to 17 days." [Compl.; Dkt. No. 15, ¶ 19] In other words, the allegations of the Second Amended Complaint fall squarely within *Mama Jo's* and *Mastellone* holdings that a substance on a surface is not direct physical loss as a matter of law when it dies naturally in days or can be wiped away. Stated differently, the Second Amended Complaint makes "threadbare recitals" and "formulaic recitations" of direct physical loss *in violation of* the pleading requirements articulated in *Twombly* and *Iqbal*, but it fails to allege facts that "raise a right to relief" and "state a plausible claim for relief" *as required by Twombly* and *Iqbal*, because the Second Amended Complaint seeks recovery for a substance that *Mama Jo's* and *Mastellone* held is not direct physical loss as a matter of law.

Here, Plaintiffs do not plead that the supposed presence of the Coronavirus affected the structural integrity of the property. The loss Plaintiffs allege is caused by the presence of the virus in our world, not by any physical damage or effect on Plaintiffs' building or someone else's property. Indeed, the Second Amended Complaint admits that premises where the virus has been confirmed to be present,

such as hospitals and nursing homes, have remained open "for certain compassionate care situations such as maternity and end-of-life".[5] They also remain open for regular medical procedures unless the procedures "[w]ould unacceptably reduce access to personal protective equipment or other resources necessary to diagnose and treat COVID-19."[6] These properties remain open because, like Plaintiffs' premises in this case, they are themselves undamaged.

3. The Second Amended Complaint Fails To State A Claim Because Plaintiffs Do Not Even Allege The Coronavirus Was On Their Property.

Moreover, even if Coronavirus could cause direct physical loss to the premises, which it cannot, Plaintiffs do not even allege that the Coronavirus was ever present on the premises. On the contrary, Plaintiffs admit in their pleadings that the Closure Orders alleged in the Second Amended Complaint were "aimed at slowing the spread of the pandemic" and "to prevent the spread of the virus", not to protect the public from direct physical loss to Plaintiffs' properties. [Compl., Dkt. No. 31-1, ¶¶ 3, 54] Indeed, the Preamble to the March 19, 2020 Closure Order referenced in the Second Amended Complaint expressly states that "social distancing measures are necessary to be implemented on a statewide basis to prevent

[5] *See* ¶5, p. 2 of the ORDER OF THE STATE HEALTH OFFICER SUSPENDING CERTAIN PUBLIC GATHERINGS DUE TO RISK OF INFECTION BY COVID-19 (APPLICABLE STATEWIDE), March 19, 2020, attached hereto as Exhibit D.

[6] *See* ¶12, p. 7 of the ORDER OF THE STATE HEALTH OFFICER SUSPENDING CERTAIN PUBLIC GATHERINGS DUE TO RISK OF INFECTION BY COVID-19, April 28, 2020, attached hereto as Exhibit E.

the spread of COVID-19."[7] It does not state the public needs protection from direct physical loss that exists on plaintiffs' properties. In addition, Plaintiffs never definitively and unequivocally allege that COVID-19 is actually on their premises, but instead they equivocate by admitting that COVID-19 "likely" present. "The presence or *likely presence* of COVID-19", Plaintiffs assert, "constitutes tangible, physical property damage. When COVID-19 is present or *likely present* it renders property dangerous and unusable." [Compl., Dkt. No. 15, ¶ 20] [emphasis added] Likewise, Plaintiffs assert the presence of COVID-19 in Alabama and Jefferson County "was severe enough for governmental authorities to determine that the operation of businesses such as Plaintiffs' restaurants were . . . *likely* to have a presence of the COVID-19 virus . . ." [Compl., Dkt. No. 15, ¶ 54] [emphasis added]

The Second Amended Complaint, for example, "dances around" the direct physical loss issue not by asserting damage to the structural integrity of the property as required by *Mama Jo's* and *Mastellone*. "The presence or *likely presence* of COVID-19" Plaintiffs assert, "constitutes tangible, physical property damage." [Compl., Dkt. No. 15, ¶ 20] "When COVID-19 is present or likely present," Plaintiffs further allege, "it renders property dangerous and unusable." *Id*. Finally, Plaintiffs contend that "[t]he facts stated herein constitute physical loss or damage to Plaintiffs' covered properties. [Compl.; Dkt. No. 15, ¶ 42] These circular and

[7] Preamble, p. 1, Exhibit D attached hereto.

vague assertions constitute mere "threadbare recitals" and" formulaic recitations" in violation of *Twombly* and *Iqbal*, because they do not explain how the virus physically damaged the properties, assuming it was on the properties at all.

The "facts" that Plaintiffs contend "constitute physical loss or damage to Plaintiffs' covered properties" include the following.

- COVID-19 exists in droplets on surfaces and "could" stay on surfaces for up to 17 days. [Compl., Dkt. No. 15, ¶¶ 18-19]
- Plaintiffs operations needed to be restricted to prevent the spread of the virus. [Compl., Dkt. No. 15, ¶ 54]
- Plaintiffs had to employ increased efforts to clean and disinfect their properties. [Compl., Dkt. No. 15, ¶ 27]
- The Closure Orders required Plaintiffs to close, restrict their activities and limit their food service to curbside pick-up. [Compl., Dkt. No. 15, ¶¶ 30-33]

Per *Mama Jo's*, *Mastellone* and the additional cases cited below, lack of access or physical occupancy, restricted activities, cleaning and disinfecting, *etc*., does not constitute direct physical loss as a matter of law. There must be some physically identifiable physical injury. Plaintiffs do not allege a direct physical loss that would "raise a right to relief" and "state a plausible claim for relief" as required by *Twombly* and *Iqbal*. Direct physical loss is not, as a matter of law, established by a substance or a Closure Order that allegedly denies access to the property, prevents customers from physically occupying the property, causes the property to be physically uninhabitable by customers, or causes its function to be nearly eliminated

or destroyed. *Mama* Jo's and *Mastellone, supra*. In the final analysis, the Second Amended Complaint does not allege direct physical loss to property, and consequently there is no Business Income Coverage.

4. Construing the Policy Language as a Whole Further Confirms that "Physical" Loss or Damage Requires a Demonstrable Alteration of the Property.

The Court should construe the policy as a whole and give meaning to each provision. *Equitable Life Assur. Soc. of U.S. v. Hall*, 69 S.W.2d 977, 979 (1934). The Business Income and Extra Expense coverage is limited by its own terms to the Period of Restoration. (*See* Exhibit A at pages 43-44: FM 101 04 04 at page 16-17 of 35). The definition of "Period of Restoration" provides context to the meaning of the phrase direct physical loss. "Period of Restoration" means the period of time that: a. Begins at the time of direct physical "loss" and b. Ends on the earlier of: (1) The date when the property at the "premises" should be repaired, rebuilt or replaced with reasonable speed and similar quality; or (2) The date when business is resumed at a new permanent location. (*See* Exhibit A at page 61: FM 101 04 04 at page 34 of 35). Thus, the Business Income and Extra Expense coverage sets the end of the coverage period at either (1) the date when the physical damage is repaired, rebuilt or replaced, or (2) the date when business is resumed at a new permanent location.

Read together, the phrase direct physical loss refers to a loss that requires physical repair, rebuilding, or replacement of property that has been actually,

tangibly, permanently, and physically altered. *See*, *e.g.*, *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323, 332 (S.D.N.Y. 2014) (explaining that "repair" and "replace" in period of restoration clause "contemplate physical damage to the insured premises as opposed to loss of use of it"); *Roundabout Theatre Co. v. Cont'l Cas. Co.*, 751 N.Y.S.2d 4, 8 (2002) (explaining that, absent a physical damage requirement, a provision limiting coverage to the time necessary to "rebuild, repair, or replace" would "be meaningless").

Here, there can be no "Period of Restoration" because the Coronavirus does not constitute direct physical loss to property requiring any physical repair, rebuilding or replacement. Indeed, the Cabinet Order states that Plaintiffs could continue to operate at the same location on a carry-out, delivery, and drive-through basis. (*See* Exhibit A at page 9: the Cabinet Order at ¶¶ 1 and 3).

The inapplicability of the "Period of Restoration" element to Plaintiff's alleged loss further demonstrates that there is no direct physical loss to property. This serves as a strong additional indication that property damage coverages are not designed to cover purely economic losses that were not occasioned by direct physical loss to property. As such, absent direct physical loss resulting in the physical alteration of property, there is no Business Income and Extra Expense coverage.

B. Emerging Decisions Conclusively Establish That The Presence Of COVID-19 On Property Does Not Constitute Direct Physical Loss.

In *Diesel Barbershop* the court squarely and unequivocally held that the allegation that the Coronavirus was on plaintiffs' barbershop properties did not satisfy the direct physical loss requirement.[8] Relying on a series of cases that require a demonstrable physical alteration of the property to satisfy the direct physical loss requirement, the court held that "the line of cases requiring tangible injury to property are more persuasive here and that the other cases [the plaintiffs cite] are distinguishable." [*Diesel*, p. 13] "COVID-19", the *Diesel* court held, "does not produce a noxious odor that makes a business uninhabitable. It appears that within our Circuit, the loss needs to have been a 'distinct, demonstrable physical alteration of the property.'" [*Diesel*, p. 14 (quoting and citing *Hartford Ins. Co. of Midwest v. Mississippi Valley Gas Co.*, 181 F. App'x 465, 470 (5th Cir. 2006) ("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." (citation omitted)); and *Ross v. Hartford Lloyd Ins. Co.*, 2019 WL 2929761, at *6–7 (N.D. Tex. July 4, 2019) ("direct physical loss" requires

[8] A copy of the *Diesel Barbershop* decision is submitted herewith as Exhibit F.

"a distinct, demonstrable, physical alteration of the property" (citing 10A Couch on Ins. § 148:46 (3d ed. 2010)).)] Based upon this well-reasoned precedent, the *Diesel* court found that "Plaintiffs fail to plead a direct physical loss," and the court granted the insurer's motion to dismiss accordingly. [*Diesel*, p. 15] (*But see Studio 417, Inc. v. The Cincinnati Ins. Co.*, Case No. 20-cv-03127, Dkt. No. 40 (W.D. Mo. August 12, 2020); and *K.C. Hopps, Ltd. v. The Cincinnati Ins. Co.*, 20-cv-00437, Dkt. No. 29 (W.D. Mo. August 12, 2020) (decided under Missouri law, and distinguishable and wrongly decided for multiple reasons).

Likewise, in *Rose's 1, LLC. v. Erie Ins. Exchange*, Civil Case No. 2020 CA 002424 B (August 6, 2020) the insured/restaurant chain sued its insurer under a property policy that is comparable to the Cincinnati Policy in this case.[9] As in the instant case, the insured in *Rose's 1* sought recovery for lost business income as the result of closure orders issued by the D.C. Mayor and other local authorities. The orders at issue in *Rose's 1* were similar to the Closure Orders Plaintiffs rely on here. The policy at issue in *Rose's 1* defined the term "loss" as "direct and accidental loss of or damage to covered property." The comparable definition in the Cincinnati Policy here similarly defines the term "loss" as "accidental physical loss or accidental physical damage". [Exhibit A, electronic pages 58, 111]

[9] A copy of the *Rose's 1* decision is attached hereto as Exhibit G.

Relying on *Brothers, Inc. v. Liberty Mut. Fire Ins. Co.*, 268 A.2d 611 (D.C. 1970), the court *in Rose's 1* held that "in the context of property insurance, the term 'direct loss' implies some form of direct physical change to the insured property." *Rose's 1*, at p. 9. The court accordingly granted summary judgment in favor of the insurer. Likewise, in another recent decision where a restaurant sued its property insurer to recover lost income from Coronavirus Closure Orders in Michigan, the court held "[d]irect physical loss of or damage to the property has to be something with material existence. Something that is tangible. *Something . . . that alters the physical integrity of property*." [emphasis added] *Gavrilides Management Company et al. vs. Michigan Insurance Company*, Case No. 20-258-CB-C30, July 1, 2020 Hearing Tr. at 18:24 – 19:5 (Circuit Court for the County of Ingham, Michigan). [emphasis added] *See* also *Social Life Magazine, Inc. v. Sentinel Ins. Co., Ltd.*, 1:20-cv-03311-VEC (S.D.N.Y.), ECF No. 24-1 at pp. 5 & 15 (the Coronavirus damages lungs; not printing presses),[10] and *Inns By The Sea v. Cal. Mut Ins. Co.*, Case No. 20CV001274 (Superior Ct., State Of Cal., County of Monterrey, Aug. 6, 2020)

[10] No written opinions have been issued in *Gavrilides Management Company* and *Social Life* at the time of filing this brief. A transcript of the *Gavrilides* hearing is submitted herewith as Exhibit H. The quote is on p. 18, l. 24-25; p. 19, l. 1-5. A copy of the July 21, 2020 order in *Gavrilides* that adopts the transcript is submitted herewith as Exhibit I. A copy of the hearing transcript in *Social Life* is available through the Federal Court's filing system, PACER, and is submitted herewith for the Court's convenience as Exhibit J.

(court granted insurer's motion to dismiss on the basis that a Coronavirus complaint similar to that in this case failed to state a cause of action).[11]

C. American Case Law Is Overwhelmingly Consistent With Cincinnati's Position Here.

No case in Alabama has held that a virus constitutes direct physical loss to property. By contrast, *Mama Jo's* and *Mastellone* are not alone in holding that direct physical loss requires actual, tangible, permanent, physical alteration of property. *See, e.g.*, 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." [Emphasis added])

Reaching the same conclusion as *Mama Jo's* and *Mastellone* is *Source Food Technology, Inc. v. U.S. Fidelity & Guarantee Co.*, 465 F.3d 834, 838 (8th Cir. 2006) (Minn.). There, the U.S. government imposed an embargo on the import of Canadian beef following the detection of Mad Cow Disease in Canadian cattle. Despite no evidence that *its* beef was contaminated, Source Food could not import it into the U.S. because of the embargo. It claimed lost business income under its insurance

[11] A copy of the complaint in *Inns By The Sea* is submitted herewith as Exhibit K, and a copy of the court's August 6, 2020 order is attached hereto as Exhibit L.

policy, which, like the policy here, provided coverage if the suspension of business operations was "caused by ***direct physical loss to Property***". *Id.* at 835. "To characterize Source Food's inability to transport its truckload of beef product across the border and sell the beef product in the United States as direct physical loss to property," the court held, "would render the word 'physical' meaningless." *Id.* at 838. In essence, the loss of the opportunity to use property does not render the property itself damaged, broken, dysfunctional or incapable of being used.

Similarly, *Philadelphia Parking Authority v. Federal Insurance Co.*, 385 F. Supp. 2d 280, 289 (S.D.N.Y. 2005), holds that there was no direct physical loss to an airport parking facility that had to close on September 11, 2001 due to the terrorist attacks. *See also 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).

D. Alabama Law Is Consistent With *Mama Jo's*, *Mastellone*, *Diesel Barbershop*, *Rose's 1*, *Gavilrides* And Other Cases Nationally.

Alabama cases are consistent with the law nationally discussed in this brief. *See Nixon v. Nationwide Mut. Ins. Co*., 244 F. Supp. 3d 1245 (N.D. Ala. 2017). In *Nixon*, the policy provided coverage for "direct physical loss by or from flood." Flood was defined as "loss or damage to insured property, directly caused by a flood"

that has resulted in "physical changes to the property." Nationwide argued that work done to stabilize a river bank was a temporary solution to prevent the land from getting worse, rather than a repair of "direct physical loss by or from flood." *Nixon* held that there was no coverage. "This work is limited to the land and includes no repairs to Plaintiff's home. Therefore, summary judgment is due to be granted in favor of Nationwide with respect to the land damages."

Nixon also granted summary judgment to Nationwide for "relocation damages." It held that the costs to prepare a home site and to disassemble, relocate, and reassemble the structure "do not qualify as a direct physical loss with evidence of physical changes from flood." Similarly, the costs to construct a home pad and move the home to a new site were not covered. Summary judgment in favor of Nationwide with respect to the relocation costs was also proper.

E. The Lack of a Virus Exclusion Is Irrelevant Because There Is No Direct Physical Loss.

Plaintiffs claim coverage exists because the Policies do not contain a virus exclusion. That assertion is legally incorrect. An exclusion can become relevant only if Plaintiffs first meet their burden of showing there is direct physical loss. As established, Plaintiffs cannot do so. Thus, Plaintiffs cannot fulfill the threshold requirement for a Covered Cause of Loss. Covered Cause of Loss means all risks of direct physical loss that are neither excluded nor limited. Thus, if there is no direct physical loss, the existence of a virus exclusion is irrelevant. *See T.H. Taylor, Ensley*

Transfer & Supply, McConnell-White-Terry, *Mastellone,* and *Zinser*, *supra*. Moreover, 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).

"Upon a finding that McClurg's death was not a loss covered by the policy, it is unnecessary for the court to determine whether the intoxication exclusion applies to exclude coverage." *Hartford Life & Acc. Ins. Co.*, 2006 WL 2801878, *13 (M.D. Fla. 2006) (citing *Buce v. Allianz Life. Ins. Co.*, 247 F. 3d 1133, 1149, n.7 (11th Cir. 2001). Likewise, in *Ward Gen. Ins. Servs., Inc. v. Employers Fire Ins. Co*., 114 Cal. App. 4th 548, 555, n.5, 7 Cal. Rptr. 3d 844, 850 (2003), there was a database crash. There was no direct physical loss. Therefore, it was "unnecessary to analyze the various exclusions and their application to this case." Similarly, in *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.,* 17 F. Supp. 3d 323, 333 (S.D.N.Y. 2014), *citing Roundabout Theatre Co. v. Cont'l Cas. Co*., 302 A.D.2d 1, 9, 751 N.Y.S.2d 4, 10 (2002), a law firm closed because of a power outage. The power loss was not a direct physical loss. Because there was no direct physical loss, it was unnecessary to decide whether a flood exclusion applied. *See also Zinser v. Auto-Owners Ins. Co.,* 2017-Ohio-5668, ¶ 33 (Ohio App.).

In sum, there is no coverage here because there is no direct physical loss to property. Because there is no coverage to begin with, no exclusion is needed.

IV. THERE IS NO CIVIL AUTHORITY COVERAGE.

A. There Is No Direct Physical Loss To Other Property.

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

Just as COVID-19 is not causing direct physical loss to Plaintiffs' premises, it is not causing direct physical loss to other property. The Second Amended Complaint fails to identify any distinct, demonstrable, physical alteration of property, anywhere. Rather, it alleges COVID-19 and related Closure Orders have required its business to cease or reduce operations. No facts are alleged that demonstrate that these things happened because of direct physical loss to anybody's property. This fails to meet the standard set in *D'Ambrosio*, *Twombly* and *Iqbal*.

There are no alleged facts showing any direct physical loss. There are no alleged facts showing any change or alteration of anybody's physical property by the Coronavirus. There are, however, as admitted in the Amended Second , facts showing that the Coronavirus can be removed via cleaning. As established, this is

the marker of something that is ***not*** direct physical loss. Accordingly, there is no direct physical loss to any other property as is required for Civil Authority coverage.

B. The Second Amended Complaint Fails To Allege The Requisite Prohibition of Access Necessary For The Civil Authority Coverage To Apply.

The Civil Authority coverage requires that access to Plaintiffs' premises be ***prohibited*** by an order of Civil Authority. But, none of the government orders attached to Plaintiffs' Second Amended Complaint ***prohibits*** access to its premises. In fact, Plaintiffs admit in their Second Amended Complaint that the civil authorities and the terms of the Closure Orders allowed them to stay open for carry out food and beverage service and only prohibited on premises dining and drinking. Thus, everyone in the world was permitted access to Plaintiffs' restaurants. Based on the lack of a prohibition of access, there is no Civil Authority coverage.

This position is established both by the plain language of the insurance contract and by the law nationally. There is no Civil Authority coverage when the 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). In *Syufy*, there was a curfew to prevent rioting. Still, there was no civil authority coverage because access to the insured premises, a movie theater, was not prohibited. In *Brothers*, a curfew was ordered because of riots. However, although the curfew prevented a restaurant's

customers from being out and about, it did not prohibit access to the restaurant's premises. The curfew orders in *Syufy* and *Brothers, Inc.* are analogous to the stay at home order issued in Alabama.

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

CONCLUSION

In summary, the Policy requires direct physical loss to property. For both Business Income and Civil Authority coverage, the law in Alabama and in the Eleventh Circuit provides a roadmap and requires structural damage. This represents the majority view nationally, including a host of recent decisions pertaining specifically to Coronavirus-related claims. Plaintiffs do not allege (other than unrecognized legal conclusions) that the virus has caused structural damage. Accordingly, there can be no coverage as a matter of law. Therefore, Cincinnati respectfully requests that its Motion to Dismiss be granted.

Dated this 26 day of August, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of August, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all the CM/ECF participant counsel of record.

/s/ Augusta S. Dowd
OF COUNSEL