IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION - CINCINNATI

TROY STACY ENTERPRISES INC., SWEARINGEN SMILES LLC, ELEISHA J. NICKOLES DDS, REEDS JEWELERS OF NIAGARA FALLS, INC., BURNING BROTHERS BREWING LLC, CHICAGO MAGIC LOUNGE LLC, AND CDC CATERING, INC. T/A BROOKSIDE MANOR, individually and on behalf of all others similarly situated,	:	Master Case No. 1:20-cv-312 (Consolidated)
Plaintiffs,	:	Judge Matthew W. McFarland
v.	:	**Oral Argument Requested**
THE CINCINNATI INSURANCE COMPANY, THE CINCINNATI CASUALTY COMPANY, THE CINCINNATI INDEMNITY COMPANY, AND CINCINNATI FINANCIAL CORPORATION,	:	
Defendants.	:	
This Document Relates to: All Actions	:	

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

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SUMMARY OF ARGUMENT

Plaintiffs bring their proposed class actions seeking recovery of losses caused by COVID-19 and resulting civil closure orders. All plaintiffs were or are insured by defendant Cincinnati Insurance Company under a standard-form property insurance policy that provides coverage for business interruption losses.

Because Cincinnati's Motion to Dismiss is under consideration, the allegations of the Consolidated Amended Complaint ("CAC") must be taken as true and construed in the light most favorable to the Plaintiffs, and the motion should be denied if Plaintiffs, as they do here, raise a right to relief beyond the speculative level. Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Ultimately, this contractual dispute is governed by the intent of the parties as manifested in the language of the insurance policy. *See, e.g.*, *Liberty Mut. Ins. Co. v. Fairbanks Co.*, 170 F. Supp. 3d 634, 642 (S.D.N.Y. 2016). This Court follows the choice of law rules of Ohio in this diversity action. Because insured property is located in several states, the law of several states apply in this case. *Jamhour v. Scottsdale Ins. Co.*, 211 F. Supp. 2d 941, 949 (S.D. Ohio 2002) (applying the Restatement (Second) of Law of Conflicts, which favors the law of where the insured premises is located in a property insurance dispute). The law of some of those states allow ambiguity to be shown at the outset of the case through extrinsic evidence. *See, e.g.*, *Cincinnati Ins. Co. v. River City Constr. Co.*, 757 N.E.2d 676, 681 (Ill. Ct. App. 2001), *overruled on other grounds by Home Ins. Co. v. Cincinnati Ins. Co.*, 821 N.E. 269 (Ill. 2004); *Ins. Adjustment Bureau, Inc. v. Allstate Ins. Co.*, 905 A.2d 462, 468 (Pa. 2006); *Kopf v. Lacey*, 540 S.E.2d 170, 175 (W. Va. 2000). Thus, in some of the states, dismissal at the motion to dismiss stage is wholly inappropriate because the initial inquiry in the case is not limited to the complaint and the insurance

policy.

In any event, dismissal is unwarranted. Standard rules of policy interpretation in all the states instruct that this Court construe undefined terms according to their plain language as understood by ordinary lay people. *E.g.*, *Wehrle v. Cincinnati Ins. Co.*, 719 F.3d 840, 843 (7th Cir. 2013); *U.S. Specialty Ins. Co. v. Drake Aerial Enters., LLC*, 328 F. Supp. 3d 781, 784 (N.D. Ohio 2018).

Here, this case turns on two undefined phrases: "direct physical loss of or damage to property," which is required for most of the Cincinnati policy's coverage to apply, and "prohibited access," which is required for the Civil Authority coverage of Cincinnati's policy to apply.

Cincinnati's motion on the "direct physical loss of or damage" issue should be denied for seven reasons:

(1) The plain and ordinary meaning of "direct physical loss" reasonably includes loss of functionality of the insured premises like that caused by COVID-19 here. *In re Soc'y Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.* ("*Society*"), 2021 WL 679109, *9 (N.D. Ill. Feb. 22, 2021); *Henderson Road Rest. Sys., Inc. v. Zurich Am. Ins. Co.*, 2021 WL 168422, *12–13 (N.D. Ohio Jan. 19, 2021).

(2) Cincinnati's Motion improperly eschews a text-based analysis of the phrase in favor of a scorecard of judicial decision wins and losses. *Henderson Road*, 2021 WL 168422 at *12. A text-based analysis of the phrase "direct physical loss of or damage" points to coverage. None of the terms "direct," "physical," "loss," or "damage" require the structural alteration of property that Cincinnati contends. Merriam-Webster Online Dictionary.

(3) The Cincinnati policy's Period of Restoration provision does not strengthen Cincinnati's argument that COVID-19 does not cause "direct physical loss or damage" because the purpose of the provision is to encourage mitigation efforts—not to determine whether a fortuity results in a covered loss. And, in any event, that provision is fully consistent with "direct physical loss" reasonably including the loss of functionality of insured property. *Society*, 2021 WL 679109 at *9.

(4) In addition, Plaintiffs have pled that COVID-19 was present on and structurally altered the surfaces of the property at their insured premises, the property itself, and the ambient air at those premises. Those allegations suffice for coverage even if structural alteration of property is required for there to be direct physical loss or damage. *See*,

e.g., *Goodwill Indus. Of Orange Cnty. Cal. v. Phila. Indem. Ins. Co.*, 2021 WL 476268, *3 (Super. Ct. Cal. Orange Cty. Jan. 28, 2021); *cf. Michael Cetta, Inc. v. Admiral Indem. Co.*, 2020 WL 7321405, at *10 (S.D.N.Y. Dec. 11, 2020).

(5) Cincinnati's factual disagreement with Plaintiffs about whether COVID-19 causes structural alteration of property or simply can be wiped away is not a dispute that can be resolved at the motion to dismiss stage. *See Barnes v. Winchell*, 105 F.3d 1111, 1114 (6th Cir. 1997).

(6) The case law Cincinnati contends supports its position is inapposite.

(7) Even if Cincinnati's interpretation of direct physical loss of or damage were reasonable, so is Plaintiffs', resulting in an ambiguity that should be construed in Plaintiffs' favor. *Henderson Road*, 2021 WL 168422 at *12.

Cincinnati's motion with respect to Civil Authority coverage should be denied for seven reasons as well:

(1) Plaintiffs have pled the prerequisite of Civil Authority coverage—damage to property other than insured property. *See S. Dental Birmingham LLC v. Cincinnati Ins. Co.*, 2021 WL 1217327, at *6 (N.D. Ala. Mar. 19, 2021).

(2) Cincinnati's policy merely requires that an action of civil authority prohibit access, not that the action completely and totally bars access. *Ungarean, DMD v. CAN*, 2021 WL 1164836, *10 (Pa. Ct. Com. Pl. Mar. 25, 2021). It is sufficient, as happened here, that the civil authority orders forbid customers and employees from using Insured Premises for their intended purposes.

(3) Nothing in the Civil Authority provision suggests that every single individual must be explicitly and physically unable to enter the premises of a closed business to trigger coverage.

(4) The Civil Authority provision promises to pay "Extra Expense," *i.e.*, the costs incurred to avoid or minimize the "slowdown or cessation" of business operations. Cincinnati's construction effectively reads out this portion of Civil Authority coverage by requiring the closure order to completely preclude entry to the insured business premises such that the business cannot operate on the premises *at all*.

(5) Plaintiffs' construction is supported by other COVID-19 BI insurance decisions. *See, e.g., Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 488 F. Supp. 3d 867, 879 (W.D. Mo. 2020); *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 803–04 (W.D. Mo. 2020); *Dino Palmieri Salons, Inc. v. State Auto. Mut. Ins. Co.*, 2020 WL 7258114, *5 (Ohio Ct. Com. Pl. Nov. 17, 2020).

(6) Cincinnati's authorities are inapposite.

(7) Even if Cincinnati's interpretation of the prohibit-access provision were reasonable, so is Plaintiffs', resulting in an ambiguity that should be construed in Plaintiffs' favor. *Henderson Road*, 2021 WL 168422 at *12.

For these reasons, as discussed in more detail below, the Motion to Dismiss should be denied.

I. FACTUAL BACKGROUND

The Consolidated Amended Class Action Complaint ("CAC") describes Plaintiffs' businesses and the impact of COVID-19 on their insured properties ("Insured Premises"). The CAC alleges the presence of COVID-19 at Insured Premises, the physical loss or damage Insured Premises have suffered, the structural alteration to Insured Premises' surfaces and ambient air caused by COVID-19, and the loss and diminishment of the functional space of Insured Premises caused by COVID-19.

Plaintiff Troy Stacy Enterprises Inc. ("Troy Stacy") owns and operates a joint craft beer pub, vinyl record shop, and live music venue in Ohio. CAC ¶ 3. Plaintiff Swearingen Smiles LLC ("Swearingen") owns and operates a dentistry practice in Ohio. *Id.* ¶ 4. Plaintiff Eleisha J. Nickoles DDS ("Nickoles") is a dentist practicing in West Virginia. *Id.* ¶ 5. Plaintiff Reeds Jewelers of Niagara Falls, Inc. ("Reeds") owns and operates seven jewelry and watch retail outlets in New York. *Id.* ¶ 6. Plaintiff Burning Brothers Brewing LLC ("Burning Brothers") owns and operates a microbrewery in Minnesota. *Id.* ¶ 7. Plaintiff Chicago Magic Lounge owns and operates a bar and theatre in Illinois. *Id.* ¶ 8. Plaintiff CDC Catering, Inc. T/A Brookside Manor ("Brookside Manor") owns and operates an event and catering space in Pennsylvania. *Id.* ¶ 9. To protect their businesses when they suddenly had to suspend operations, or if they had to act in order to prevent further property damage, Plaintiffs purchased property insurance coverage from Defendants (collectively, "Cincinnati"), including business-interruption ("BI") coverage, as set forth in Cincinnati's standardized Building and Personal Property Coverage and Business Income (and Extra Expense) Coverage Forms. *Id.* ¶¶ 25-29.

Plaintiffs allege COVID-19 spreads and physically damages and alters property, including the property's ambient air, and how it has harmfully infested Plaintiffs' Insured Premises and the

property of others. *Id.* ¶¶ 178, 199. Plaintiffs also allege numerous people who tested positive, along with persons who were pre-symptomatic or asymptomatic and unknowingly carrying the coronavirus, were present at Insured Premises, and that Insured Premises have been and continue to be infested by the virus. *Id.*¶¶ 179-81, 193-99, 204.

Consequently, Plaintiffs were forced to suspend or reduce business at Insured Premises due to COVID-19 and the resultant government closure orders ("Closure Orders"). *Id.* ¶ 31. Cincinnati has refused on a wide scale and uniform basis to pay its insureds, including Plaintiffs, under their property insurance policies (the "Policies") for losses suffered due to COVID-19 and related Closure Orders and costs incurred to prevent further property damage or to minimize the suspension of business and continue operations. *Id.* ¶¶ 32, 185, 212-16.

II. LEGAL STANDARD

A motion to dismiss must be denied when the complaint's factual allegations, taken as true, "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). At this stage of the proceedings, the pleadings must be taken as true, "even if doubtful in fact," and construed in the light most favorable to the plaintiff. *Id.*; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (explaining "the plausibility standard is not akin to a 'probability requirement'"). The purpose of a motion under Rule 12(b)(6) "is to test the formal sufficiency of the statement of the claim for relief; the motion is not a procedure for resolving a contest between the parties about the facts or the substantive merits of the plaintiff's case." WRIGHT & MILLER, 5B FEDERAL PRACTICE & PROCEDURE § 1356 & n.1 (3d ed. Oct. 2020) (collecting Sixth Circuit and Southern District of Ohio cases). Where the plaintiff's allegations "state a claim to relief that is plausible on its face," *i.e.*, when there is "more than a sheer possibility that a defendant has acted unlawfully," the motion should be denied. *Ashcroft*, 556 U.S. at 678.

III. CHOICE OF LAW AND RULES OF INSURANCE POLICY INTERPRETATION

Cincinnati raises a choice-of-law question, asserting "the laws of Ohio, West Virginia, New York, Minnesota, Illinois and Pennsylvania potentially apply to the Policies," but argues mostly Ohio law throughout its motion ("MTD") because, according to Cincinnati, the "majority view" of these states' laws "demonstrates no conflict" in insurance policy interpretation principles. MTD 8 (Dkt. 63).[1] Plaintiffs do not dispute for purposes of this motion that the relevant state jurisdictions generally follow a similar approach to insurance policy interpretation, under which traditional principles of contract construction apply.[2] *See Westfield Ins. Co. v. Vandenberg*, 796 F.3d 773, 777 (7th Cir. 2015); *St. Marys Foundry, Inc. v. Emps. Ins. of Wausau*, 332 F.3d 989, 992 (6th Cir. 2003); *Phil. Indem. Ins. Co. v. Indian Harbor Ins. Co.*, 434 F. Supp. 3d 4, 11 (E.D.N.Y. 2020); *Scottsdale Ins. Co. v. RiverBank*, 815 F. supp. 2d 1074, 1080 (D. Minn. 2011); *Gallagher v. GEICO Indem. Co.*, 201 A.3d 131, 137 (Pa. 2019); *W. Va. Fire & Cas. Co. v. Stanley*, 602 S.E.2d 483, 489–90 (W. Va. 2004).

The goal of insurance policy interpretation under the relevant states' laws is to give effect to the parties' intent as expressed by the words in the contract. *E.g.*, *Liberty Mut. Ins. Co. v. Fairbanks Co.*, 170 F. Supp. 3d 634, 642 (S.D.N.Y. 2016). Accordingly, where the policy provisions are clear and unambiguous, they will be given their plain and ordinary meaning. *E.g.*, *Wehrle v. Cincinnati Ins. Co.*, 719 F.3d 840, 843 (7th Cir. 2013). Courts frequently turn to dictionaries to determine such meaning of undefined policy terms. *E.g.*, *U.S. Specialty Ins. Co. v. Drake Aerial Enters., LLC*, 328 F. Supp. 3d 781, 784 (N.D. Ohio 2018). When policy language is susceptible to more than one reasonable interpretation, the provision is ambiguous. *E.g.*, *The Ltd.*,

[1] Unless otherwise indicated, page citations refer to the PDF pagination of the document as filed on the CM/ECF system in the master docket, No. 1:20-cv-312.

[2] For this reason, Plaintiffs cite Illinois, Minnesota, New York, Ohio, Pennsylvania, and West Virginia state law interchangeably except where it is specifically noted.

Inc. v. Cigna Ins. Co., 228 F. Supp. 2d 574, 579 (E.D. Pa. 2001). Where an ambiguity persists, the insurer faces an uphill battle because it must show that its preferred interpretation is "the *only* construction that fairly could be placed on the policy," *Haber v. St. Paul Guardian Ins. Co.*, 137 F.3d 691, 698 (2d Cir. 1998), and Rule 12(b)(6) dismissal is inappropriate, *e.g.*, *Knouse v. PrimeCare Med. Of W. Va.*, 2019 WL 454599, at *2 (W. Va. Feb. 5, 2019). "It is axiomatic that an insurance policy prepared by the insurer must be liberally construed in favor of the insured." *Essex House v. St. Paul Fire & Marine Ins. Co.*, 404 F. Supp. 978, 987 (S.D. Ohio 1975) (quoting *Yeager v. Pacific Mut. Life Ins. Co.*, 139 N.E.2d 48 (Ohio 1956)).

There are differences, however, in how Illinois, Minnesota, New York, Ohio, Pennsylvania, and West Virginia courts determine and resolve ambiguities in insurance policies and defer to the reasonable expectations of the insured. For example, contract interpretation rules of Illinois, Pennsylvania, and West Virginia permit the court to look beyond the four corners of the insurance policy at the outset to determine whether a latent ambiguity exists. *See, e.g.*, *Cincinnati Ins. Co. v. River City Constr. Co.*, 757 N.E.2d 676, 681 (Ill. Ct. App. 2001), *overruled on other grounds by Home Ins. Co. v. Cincinnati Ins. Co.*, 821 N.E. 269 (Ill. 2004); *Ins. Adjustment Bureau, Inc. v. Allstate Ins. Co.*, 905 A.2d 462, 468 (Pa. 2006); *Kopf v. Lacey*, 540 S.E.2d 170, 175 (W. Va. 2000). Accordingly, it is inappropriate to dismiss Plaintiffs' claims before they have the opportunity to conduct discovery, particularly where extrinsic evidence regarding the scope of Cincinnati's intended coverage may uncover a latent ambiguity in how it conceives policy terms.

In addition, ambiguities in an insurance policy are strictly construed against the drafter under Ohio law, while West Virginia courts construe insurance ambiguities against the drafter in connection with an evaluation of extrinsic evidence. *E.g., Blake v. State Farm Mut. Auto. Ins. Co.*, 685 S.E.2d 895,901 (W. Va. 2009); *King v. Nationwide Ins. Co.*, 519 N.E.2d 1380, 1383 (Ohio

1988). And under Illinois, Minnesota, New York, and Pennsylvania state law, *contra preferentem* is a secondary doctrine of interpretation, after consideration of other extrinsic evidence. *See Albany Savings Bank, FSB v. Halpin*, 117 F.3d 669, 674 (2d Cir. 1997) (applying New York law); *Alberto-Culver co. v. Aon Corp.*, 812 N.E.2d 369, 377–78 (Ill. Ct. App. 2004); *Staffing Specifix, Inc. v. TempWorks Mgmt. Servs., Inc.*, 913 N.W.2d 687, 694 (Minn. 2018); *Burns Mfg. Co. v. Boehm*, 356 A.2d 763, 766 n.3 (Pa. 1976). In addition, unlike Ohio, courts applying West Virginia and Pennsylvania law follow the reasonable expectations doctrine when interpreting insurance contracts. *Compare Wallace v. Balint*, 761 N.E.2d 598, 606 (Ohio 2002) ("While [plaintiffs] raise compelling arguments, there is not yet a majority on this court willing to accept the reasonable-expectations doctrine."), *with, e.g., Humans Res. LLC v. Firstline Nat'l Ins.*, 2021 WL 75775, at *9–10 (E.D. Pa. Jan. 8, 2021) ("Although in most cases, the language of the insurance policy will provide the best indication of the content of the parties' reasonable expectations, the courts must nevertheless examine the totality of the insurance transaction involved to ascertain the reasonable expectations of the insured…. This principle applies even when the expectations are in direct conflict with the unambiguous terms of the policy and regardless of Plaintiff's status as a sophisticated purchaser of insurance." (cleaned up)), *and, e.g., Luikart v. Valley Brook Concrete & Supply, Inc.*, 613 S.E.2d 896, 903 (W. Va. 2005) ("With respect to insurance contracts, the doctrine of reasonable expectations is that the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.").

Because application of these doctrines could result in different coverage determinations, a choice-of-law analysis is appropriate. *See Hayslip v. Genuine Parts Co.*, 420 F. Supp. 3d 666, 675 (S.D. Ohio 2019). Ohio's choice of law principles, which follow the Restatement (Second) of Law

of Conflicts, apply to determine the governing state law. *See, e.g., Jamhour v. Scottsdale Ins. Co.*, 211 F. Supp. 2d 941, 949 (S.D. Ohio 2002). Section 188 of the Restatement governs the choice-of-law analysis applicable to Plaintiffs' declaratory and breach claims, under which the law of the state that "has the most significant relationship to the transaction and the parties" will apply. *Id.* (quoting Restatement § 188(2)) (listing § 188 factors). "In insurance cases, this focus will often correspond with the Restatement's view that the rights created by an insurance contract should be determined 'by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy'" absent another state's superior interest. *Ohayon v. Safeco Ins. Co. of Ill.*, 747 N.E.2d 206, 211 (Ohio 2001) (quoting Restatement § 193).

Under the Restatement's framework, the choice-of-law analysis weighs in favor of applying the law of the state where Plaintiffs reside and where their respective Insured Premises are located—*i.e.*, Ohio for Plaintiffs Troy Stacy and Swearingen, West Virginia for Nickoles, New York for Reeds, Minnesota for Burning Brothers, Illinois for Chicago Magic Lounge, and Pennsylvania for Brookside Manor. CAC ¶¶ 3–9, 49–53. This result satisfies the § 193 inquiry because the principal location of the insured risk during the Policies' terms are the states where the "Covered Property" at the insured "premises" is located. *See, e.g.*, Dkt. 61-1 at 38, 74, 53–54 (focusing on insured "premises" as defined in Policies' declarations).

Evaluation of the § 188 factors also brings about this result. Factors (a) and (b), concerning the place of contracting and negotiation, weigh in favor of Plaintiffs' states of residence because each Plaintiff contracted and negotiated from their respective home state with a local insurance agent located in the same state. *See* Dkt. 61-1 at 14, 61-2 at 3, 61-3 at 2, 61-4 at CIC 1, 61-5 at 2, 61-6 at 2, 61-7 at 2. Factor (c), place of performance, is determined by where the insurance benefit payments are sent—here, Illinois, Minnesota, New York, Ohio, Pennsylvania, and West Virginia,

as set forth in the Policies. *See Allstate Fire & Cas. Ins. Co. v. Moore*, 993 N.E.2d 429, 436 (Ohio Ct. App. 2013); Dkt. 61-1–61-7 (indicating the address of the insured in the Common Policy Declarations). Factor (d), the location of the subject-matter of the contract, is "significant," Restatement § 188 cmt. e, and weighs "heavily in favor" of the states where the insured property is located because the Policies all concern a specific property, *Jamhour*, 211 F. Supp. 2d at 951 (weighing this factor "heavily in favor" of the state of the insured goods). The final factor, location of the contracting parties, is inconclusive for Plaintiffs Chicago Magic Lounge, Burning Brothers, Reeds, Brookside Manor, and Nickoles because they are residents of Illinois, Minnesota, New York, Pennsylvania, and West Virginia, respectively, whereas the Cincinnati Defendants are headquartered or have their principal place of business in Ohio; for Plaintiffs Troy Stacy and Swearingen, this factor weighs in favor of Ohio. CAC ¶¶ 37–46. In sum, however, this multi-factor analysis points in favor of the application of each Plaintiffs' state of residence.

IV. PLAINTIFFS HAVE SUFFICIENTLY ALLEGED DIRECT PHYSICAL LOSS OR DAMAGE TO PROPERTY

Plaintiffs have sufficiently alleged Business Income, Extra Expense, and Civil Authority coverage under the Policies because the CAC's factual allegations are sufficient to show direct accidental physical loss or accidental physical damage to property at Insured Premises under the Policies. Cincinnati's motion misapplies governing law, misconstrues Plaintiffs' allegations, and turns the motion-to-dismiss standard on its head, and it must be denied for seven reasons.

First, Cincinnati's contention that "direct physical loss or damage"[3] "unambiguously require[s] tangible alteration to property" to trigger BI coverage under the Policies is made up of

[3] Cincinnati seeks dismissal of Plaintiffs' claims for their purported failure to sufficiently allege "direct physical loss or damage to property." *E.g.*, MTD 10. Notably, however, the Policies actually require "direct accidental physical loss or accidental physical damage." *See, e.g.*, Dkt. 61-1 at 53, 73.

whole cloth. MTD 14. Many courts, including those applying relevant state law and evaluating Cincinnati policies, have found that "direct physical loss" reasonably includes loss of use or functionality of Insured Premises. *See, e.g.*, *Ungarean, DMD v. CAN*, 2021 WL 1164836, *8 (Pa. Ct. Com. Pl. Mar. 25, 2021) (finding "reasonable" plaintiff's interpretation of direct physical loss that "encompass[es] the loss of use of Plaintiff's property due to the spread of COVID-19 absent any actual damage to property"); *Williams PLLC v. Cincinnati Ins. Co*., 2021 WL 767617 (N.D. Ill. Feb. 28, 2021) ("[T]he term 'physical loss' is broad enough to cover … a deprivation of the use of [policyholder's] business premises."); *Salon XL Color & Design Grp., LLC v. W. Bend Mut. Ins. Co.*, 2021 WL 391418, *2 (E.D. Mi. Feb. 4, 2021) (holding plaintiffs "plausibly alleged that the COVID-19 particles have infected their property, exposed their staff and patrons, and therefore Salon XL 'has been unable to use its property for its intended purpose,'" which satisfied direct-physical-loss requirements at the pleading stage); *Henderson Road Rest. Sys. v. Zurich Am. Ins. Co.*, 2021 WL 168422, *12–13 (N.D. Ohio Jan. 19, 2021) (finding "Plaintiffs have shown that their business operations were suspended by direct physical loss of or damage to property at the premises" where "Plaintiffs closed their premises on various dates in response to" closure orders); *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, 2020 WL 7249624, *10 (E.D. Va. Dec.9, 2020) ("[W]hile the [insured property] was not structurally damaged, it is plausible that Plaintiff experienced a direct physical loss when the property was deemed uninhabitable, inaccessible, and dangerous to use by the Executive Orders…."); *Perry Street Brewing Co., LLC v. Mut. Of Enumclaw Ins. Co.*, 2020 WL 7258116, *3 (Wash. Super. Ct. Nov. 23, 2020) (concluding insured suffered a direct physical loss because their covered property "could not physically be used for its intended purpose, i.e., [the insured] suffered a loss of its property because it was deprived from using it").

The court overseeing the first of two multidistrict COVID-19 BI insurance litigations recently emphasized that a plaintiff alleging a loss of functional space or functionality of property has, in fact, alleged a direct physical loss—and not merely economic impact—because of the physical limit imposed by Closure Orders:

> [V]iewed in the light most favorable to the Plaintiffs, the pandemic-caused shutdown orders do impose a *physical* limit: the restaurants are limited from using much of their physical space. It is not as if the shutdown the orders imposed a *financial* limit on the restaurants by, for example, capping the dollar-amount of daily sales that each restaurant could make. No, instead the Plaintiffs cannot use (or cannot fully use) the physical space. *Id.*

In re Soc'y Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig. ("*Society*"), 2021 WL 679109, *9 (N.D. Ill. Feb. 22, 2021). The same is true here, and Plaintiffs plausibly state a claim for which relief can be granted.

This interpretation is consistent with the meaning long given the key term in decisions outside of the COVID-19 BI context, in which courts routinely held that properties sustain "direct physical loss or damage" when they lost habitability or functionality, including commercial functionality. For example, in *Murray v. State Farm Fire & Casualty Co.*, 509 S.E.2d 1 (W. Va. 1998), the policyholder sought coverage for "direct physical loss to the property" when the policyholder's home was rendered uninhabitable by the threat of falling rocks. The court rejected the insurance companies' argument that structural alteration was required:

> The policies in question provide coverage against "sudden and accidental loss" and "accidental direct physical loss" to property. "'Direct physical loss' provisions require only that a covered property be injured, not destroyed. *Direct physical loss also may exist in the absence of structural damage to the insured property.*"
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> * * *
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> We therefore hold that an insurance policy provision providing coverage for a "sudden and accidental" loss or an "accidental direct physical loss" to insured property requires only that the property be damages, not destroyed. *Losses covered by the policy, including those rendering the insured property unusable or uninhabitable, may exist in the absence of structural damage to the insured property.*

Id. at 17 (quoting *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 200 (Minn. App. Ct. 1997));[4] *see also Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x. 823, 825–27 (3d Cir. 2005) (finding contamination of a home's water supply that rendered the home uninhabitable constitutes "direct physical loss"); *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 709 (E.D. Va. 2010) (finding "direct physical loss" where home was "rendered uninhabitable by the toxic gases" released by defective drywall), *aff'd*, 504 F. App'x. 251 (4th Cir. 2013); *Stack Metallurgical Servs., Inc. v. Travelers Indem. Co. of Conn.*, 2007 WL 464715, *8 (D. Or. 2007) (holding that industrial furnace sustained "direct physical loss or damage" when lead contamination prevented it from being used for intended commercial purpose); *Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147, 152 (Minn. Ct. App. 2001) (holding that a direct physical loss had occurred when an insured's property—cereal oats—was infested by an unapproved pesticide because "function [was] seriously impaired"); *Pepsico, Inc. v. Winterthur Int'l Am. Ins. Co.*, 806 N.Y.S.2d 709, 711 (N.Y. App. Div. 2005) (rejecting argument that "demonstrable alteration" was required, holding instead that coverage is triggered when the "*function and value [of the property] have been seriously impaired*").

Second, Cincinnati's motion fails to provide any text-based analysis in support of its preferred construction of "direct physical loss or damage," instead pointing to a string of cases Defendants contend require dismissal. This is improper. *Henderson Road*, 2021 WL 168422 at *12; *see also Fayette Cty. Housing Auth. v. Housing & Redev. Ins. Exch.*, 771 A.2d 11, 15 (Pa. Super. 2001) (stating it "would amount to abdicating our judicial role were we to decide such cases by the purely mechanical process of searching the nations courts to ascertain if there are conflicting decisions"). Review of the plain and ordinary meaning of "direct physical loss or damage," as

[4] Emphasis is added unless otherwise indicated.

required, shows that structural alteration of property is not required and that Plaintiffs' construction is reasonable. Dismissal is therefore inappropriate. *See, e.g.*, *Essex House*, 404 F. Supp. at 987 ("Any reasonable interpretation of the policy resulting in coverage of the insured must be adopted by the trial courts in Ohio.").

The terms "direct," "physical," "loss," and "damage" go undefined in the Policies' relevant forms. Accordingly, consideration of their dictionary definitions is appropriate. *See, e.g.*, *Henderson Road*, 2021 WL 168422 at *13. *Nothing* about the plain and ordinary meaning of these words on their own or when strung together requires structural alteration. "Direct" is often defined as "characterized by close logical, causal, or consequential relationship;" "marked by absence of an intervening agency, instrumentality, or influence;" or "proceeding from one point to another in time or space without deviation or interruption." Merriam-Webster, https://www.merriam-webster.com/.[5] COVID-19's presence and Closure Orders, as opposed to a separate "intervening force," are the alleged source of Plaintiffs' losses. *Advance Cable Co., LLC v. Cincinnati Ins. Co.*, 788 F.3d 743, 746 (7th Cir. 2015).

Pertinent definitions of "physical" describe something "having material existence" or "perceptible especially through the senses." Merriam-Webster. This does not require structural alteration. An event or condition that prevents persons from inhabiting or operating a room in their home or business is no less "physical" of a loss under these definitions than an event that destroys that room. Cincinnati confuses "physical" with "structural." But those terms are not interchangeable. *See Wakerfern Food Corp. v. Liberty Mutual Fir Ins. Co.*, 968 A.2d 724, 735 (NJ. App. Div. 2009) ("Since 'physical' can mean more than material alteration or damage, it was incumbent on the insurer to clearly and specifically rule out coverage in the circumstances where

[5] All websites cited herein were last visited on April 29, 2021.

it was not to be provided, something that did not occur here.").

Neither "loss" nor "damage" necessarily requires structural alteration under their plain and ordinary meanings. Definitions of "loss" include not only "destruction" and "ruin," but also "the act of losing possession: deprivation" and "failure to… utilize." Merriam-Webster; *see also* Thesaurus.com, Loss, https://www.thesaurus.com/browse/loss (including "deprivation," "dispossession," and "impairment" as synonyms for "loss"). Similarly, "damage" means more than tangible injury. *See* Merriam-Webster (defining "damage" to include expense and cost); Thesaurus.com (listing "contamination," "impairment," "deprivation," and "detriment" as synonyms for "damage"); *see also Dundee Mut. Ins. Co. v. Marifjeren*, 587 N.W.2d 191, 194 (N.D. 1998) ("Clearly, without qualification, the term 'damage' encompasses more than physical or tangible damage." (quoting *Black's Law Dictionary* 389 (6th ed. 1990))).

Even if "damage" were to unambiguously require structural alteration, that would only drive home the fact that "direct physical loss ***or*** damage," when read as a whole, does not require structural alteration because of the phrase's disjunctive "or." *See, e.g.*, *Ungarean*, 2021 WL 1164836 at *6; *Williams*, 2021 WL 767617 at *4; *Henderson Road*, 2021 WL 168422 at *10; *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 801 (W.D. Mo. 2020). "It would be one thing if coverage were limited to direct physical 'damage,'" but Cincinnati chose to "extend[] [coverage] to direct physical 'loss'" to property as well. *Society*, 2021 WL 679109 at *8. Adopting Cincinnati's construction would render policy language superfluous, contrary to traditional canons of insurance policy construction. *See, e.g.*, *Affiliated FM Ins. Co. v. Owens-Corning Fiberglass Corp.*, 16 F.3d 684, 686 (6th Cir. 1994).

Indeed, as discussed, courts evaluating COVID-19 BI-insurance claims nationwide have held that under the plain and ordinary meaning of the phrase, "direct physical loss or damage"

covers the circumstances alleged here, where Plaintiffs lost the use, functionality, and habitability of covered property, even absent physical damage to property. *See, e.g.*, *N. State Deli, LLC v. Cincinnati Ins. Co.*, 2020 WL 6281507, *3 (N.C. Super. Ct. Oct. 9, 2020). Had Cincinnati intended to provide BI coverage only where covered property was structurally altered, it could have done so expressly. Indeed, Cincinnati has specifically defined related terms in other forms included in Plaintiffs' Policies. *See, e.g.*, Dkt. 61-1 at 115 (defining "property damage" in Commercial General Liability Coverage Form to include "physical injury to tangible property"). The Court cannot now supply terms Cincinnati omitted when drafting the Policies.

Third, Cincinnati mistakenly relies on the Policies' "period of restoration" provisions ("POR") to advance its structural alteration interpretation. The POR states that BI-insurance coverage begins at the time of direct physical loss and ends at the earlier of the date when covered property is "repaired, rebuilt or replaced," or when the business is "resumed at a new permanent location." *E.g.*, Dkt. 61-1 at 73–74. Contrary to Cincinnati's argument, nothing in the POR requires structural alteration. Indeed, "[t]here is nothing inherent in the meanings of those words that would be inconsistent with characterizing the Plaintiffs' loss of their space due to the shutdown orders," or coronavirus contamination, "as a physical loss." *Society*, 2021 WL 679109 at *9. Rather, the POR "describes a time period during which loss of business income will be covered, rather than an explicit definition of coverage." *Id.* And the clear purpose of the POR is to require that any repair, rebuilding, or replacement of covered property be performed "with reasonable speed and similar quality" to prevent slow workmanship or intentional delay from increasing an insurer's payment of lost business income. Dkt. 61-1 at 74. Furthermore, because the POR can end on the date "when the business is resumed at a new permanent location," the Policies contemplate that covered physical loss or damage to property may not necessitate repair, rebuilding, or replacement.

As applied to the circumstances alleged here, the Policies' POR ends when Plaintiffs' Insured Premises are "repaired" or "rebuilt" in a manner that allows them to safely reopen within the confines of local restrictions, such as renovating an existing HVAC system to provide proper ventilation or installing protective plexiglass separators. *See* CAC ¶¶ 200–03, 208, 210; *see also Society*, 2021 WL 679109 at *9 ("If, for example, the coronavirus risk could be minimized by the installation of partitions and a particular ventilation system, then the restaurants would be expected to "repair" the space by installing those safety features."). Thus, the POR contemplates a meaning of "direct physical loss or damage" that encompasses the loss of function of covered property in the absence of structural alteration. No reasonable policyholder would expect for the POR, which establishes the quantifiable duration of coverage, to introduce an additional requirement, absent from the provisions defining coverage, that Insured Premises must be structurally altered.

Fourth, even if the Court adopts Cincinnati's construction of "direct physical loss or damage," Plaintiffs' allegations of the presence and contamination of COVID-19 at Insured Premises satisfy this restrictive definition. Plaintiffs allege structural alteration of the ambient air and surfaces of Insured Premises by COVID-19. CAC ¶¶ 63, 175-84, 199. These are not conclusory allegations; Plaintiffs have alleged that, at the time of filing, "[i]n addition to the multitude of visitors infected with COVID-19, including asymptomatic visitors, who spread the coronavirus on and around Plaintiffs' Insured Premises, at least 10 individuals at Plaintiffs' Insured Premises actually tested positive for COVID-19 during the period of restoration," *id.* ¶¶ 193–97, and the presence of the disease altered the structure of the air, the physical space, and the surfaces of Insured Premises, *id.* ¶¶ 181-84, 198-99, 200, 204, 212. Plaintiffs also allege COVID-19 has denied them use of their properties, requiring physical repair and causing necessary business suspensions, *id.* ¶¶ 184-214; that the functional space of Insured Premises was unusable for several

months and is now functional only in a severely diminished capacity, *id.* ¶¶ 184-214; and that events were cancelled, business operations were severely impacted, and numerous repairs and refurbishments were required to make Insured Premises safe for human occupation, *id.* ¶¶ 184-214. Thus, even under Cincinnati's restrictive interpretation, Plaintiffs state a claim for relief.

Many courts have held that allegations of the presence of COVID-19 sufficiently demonstrate a direct physical loss. *See, e.g., Goodwill Indu. Of Orange Cnty. Cal. v. Phila. Indem. Ins. Co.*, 2021 WL 476268, *3 (Super. Ct. Cal. Orange Cty. Jan. 28, 2021); *cf. Michael Cetta, Inc. v. Admiral Indem. Co.*, 2020 WL 7321405, at *10 (S.D.N.Y. Dec. 11, 2020) (finding no direct physical loss, construed to require structural alteration, where plaintiff "makes clear that COVID-19 was never found on its premises and that it has no reason to think the virus contaminated or damaged anything at the restaurant"). In addition, courts around the country have held that infestation of covered property by microscopic entities that are harmful to human health constitutes direct physical loss or damage. *See, e.g., Netherlands Ins. Co. v. Main St. Ingredients, LLC*, 745 F.3d 909, 916–17 (8th Cir. 2014) (salmonella); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, *6 (D.N.J. Nov. 25, 2014) (ammonia gas); *Stack Metallurgical Servs.*, 2007 WL 464715 at *8 (lead); *U.S. Fidelity & Guar. Co. v. Wilkin Insulation Co.*, 578 N.E.2d 926, 931 (Ill. 1991) (asbestos).

Fifth, Cincinnati impermissibly asks this Court to resolve multiple factual disputes regarding the veracity of Plaintiffs' allegations. Whether Plaintiffs can actually establish the alleged facts at trial is irrelevant at the motion to dismiss stage. *See Barnes v. Winchell*, 105 F.3d 1111, 1114 (6th Cir. 1997) (explaining that "there cannot be any disputed questions of fact at this [12(b)(6)] stage; the district court… 'must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations as true, and determine whether the plaintiff'" states a

claim for relief (quoting *In re DeLorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir. 1993))); *NECO, Inc. d/b/a Play It Again Sports v. Owners Ins. Co.*, 2021 WL 601501, *5 (W.D. Mo. Feb. 16, 2021) ("Plaintiff does not need to prove [its case] at this stage of the litigation.")).

Plaintiffs have pled that COVID-19 has attached and adhered to Insured Premises' surfaces and ambient air in a manner that causes loss and damage by physically altering the same and by rendering the affected premises affirmatively dangerous to human health. *E.g.*, CAC ¶¶ 175-78; *see also id.* ¶¶ 71–92 (alleging, with references to scientific literature, how coronavirus spreads and affects ambient air and physical spaces and surfaces). Cincinnati's characterization of these comprehensive allegations as "speculative … and devoid of factual support" is wrong. MTD 10. The CAC clearly "tenders more than mere naked assertions devoid of further factual enhancement." *Play It Again Sports*, 2021 WL 601501 at *5 (denying motion to dismiss).

Moreover, Cincinnati's contention that COVID-19 does not cause damage because it can be eliminated by cleaning inappropriately asks this Court to resolve a factual dispute in favor of *Defendants*. But Cincinnati's argument is directly contradicted by Plaintiffs' allegations. *See, e.g.*, CAC ¶¶ 199(g), (k); *see also id.* ¶¶ 200-12 (alleging facts showing physical alteration or structural degradation of covered property that necessitated extensive repairs beyond wiping down surfaces to reduce harm from COVID-19).[6] These allegations must be taken as true and construed in favor of *Plaintiffs*. Cincinnati's reliance on *Mama Jo's Inc. v. Sparta Ins. Co.*, 823 F. App'x 868 (11th

[6] Although not appropriate for the Court's consideration at this stage, Plaintiffs note that their allegations are supported by extensive scientific evidence while Cincinnati's assertions of decontamination are subject to scrutiny—or at least raise a genuine dispute for the factfinder. *See, e.g.*, Nevio Cimolai, *Environmental and Decontamination Issues for Human Coronaviruses and Their Potential Surrogates*, 92 J. of Med. Virology 11, 2498-510 (June 21, 2020), https://onlinelibrary.wiley.com/doi/10.1002/jmv.26170 (explaining that COVID-19 is "much more resilient to cleaning than other respiratory viruses tested," how decontaminant's effectiveness depends on its type and contact time on the property surface, and that the interaction of a decontaminant with the virus may make it difficult to test whether the decontaminant has actually eliminated the virus).

Cir. 2020), *cert. denied*, 2021 WL 1163753 (Mar. 29, 2021), and cases following its reasoning is therefore misplaced because *Mama Jo's* was decided upon a full evidentiary record, after *Daubert* motions and at summary judgment.

Sixth, the cases involving Cincinnati policies on which Cincinnati relies to advance dismissal are inapposite. For example, in *Chester County Sports Arena v. Cincinnati Ins. Co.*, 2021 WL 1200444, *7 (E.D. Pa. Mar. 30, 2021), the Eastern District of Pennsylvania dismissed the consolidated actions pending there against Cincinnati in part based on its reading of the Third Circuit's decision in *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226 (3rd Cir. 2002). But the Third Circuit's ruling, as applied to the CAC's allegations, counsels a different result: the court ruled that when the presence of asbestos in the insured building's premises renders the building's function "nearly eliminated or destroyed" or its structure "uninhabitable and unusable," the policyholder has suffered "physical loss or damage" under the policy, but affirmed summary judgment in favor of the insurer because the evidentiary record showed plaintiffs' "buildings had continuous and uninterrupted usage." *Id.* at 236. That is not the case here.

The additional Cincinnati decisions applying Illinois, Pennsylvania, and West Virginia law are also distinguishable. *See Bend Hotel Dev. Co., LLC v. The Cincinnati Ins. Co.*, 2021 WL 271294, *2 (N.D. Ill. Jan. 27, 2021) (no allegations of viral contamination); *TJBC, Inc. v. The Cincinnati Ins. Co.*, 2021 WL 243583, *4 (S.D. Ill. Jan. 25, 2021) (interpreting "direct physical loss" to require "tangible damage" based on, inexplicably, the Seventh Circuit's interpretation of "physical injury"); *Riverside Dental of Rockford, Ltd. v. Cincinnati Ins. Co.*, 2021 WL 346423 (N.D. Ill. Jan. 19, 2021) (no analysis of "direct physical loss or damage"); *4431, Inc. v. Cincinnati Ins. Co.*, 2020 WL 7075318, *11 (E.D. Pa. Dec. 3, 2020) (concluding Pennsylvania law requires plaintiffs' alleged "loss and the bar to operation from which it results must bear a causal

relationship to some physical condition of or on the premises" and an attendant "operational [in]utility," which Plaintiffs allege here); *Uncork & Create LLC v. The Cincinnati Ins. Co.*, No. 2:20-cv-00401, 2020 WL 6436948 (S.D. W. Va. Nov. 2, 2020) (plaintiff did not allege "employees or patrons with infections traced to the business;" court improperly engaged in factual determination regarding decontamination of COVID-19); *Sandy Point Dental, PC v. The Cincinnati Ins. Co.*, 2020 WL 5630465 (N.D. Ill. Sept. 21, 2020) (finding no coverage where plaintiff's complaint lacked substantiating allegations of physical damage).

Finally, to the extent there is any doubt about the proper construction of "direct physical loss or damage," the Court should conclude it is susceptible to more than one reasonable interpretation. In such circumstances, and at this stage of the litigation, the provision should be construed in favor of Plaintiffs and a finding of coverage. *See, e.g.*, *Henderson Road*, 2021 WL 168422 at *12. At the very least, where policy language is ambiguous, Plaintiffs should be permitted to develop extrinsic evidence in support of their interpretation of this critical policy phrase. *See, e.g.*, *Kenevan v. Empire Blue Cross & Blue Shield*, 791 F. Supp. 75, 79 (S.D.N.Y. 1992). Indeed, Plaintiffs have alleged extrinsic evidence that will show Plaintiffs suffered direct physical loss or damage. *See* CAC ¶¶ 18, 60, 199. Plaintiffs are entitled to have the Court consider extrinsic evidence in support of their interpretations of key policy provisions and must therefore be given an opportunity to develop such evidence through discovery regarding, for example, Cincinnati's policy-drafting history, its understanding of critical policy provisions, and the creation and inclusion of a virus exclusion in other Cincinnati policies.

V. PLAINTIFFS ARE ENTITLED TO CIVIL AUTHORITY COVERAGE

Plaintiffs have plausibly alleged the requisite physical loss or damage to trigger Civil Authority coverage, including with express allegations of damage to other property from the presence of coronavirus in the air and on the surfaces at several medical institutions and other

businesses nearby the Insured Premises. *See S. Dental Birmingham LLC v. Cincinnati Ins. Co.*, 2021 WL 1217327, at *6 (N.D. Ala. Mar. 19, 2021) (rejecting Cincinnati's argument that coronavirus "is not causing direct physical loss to other property" based on plaintiff's sufficient allegations of physical loss or damage to its own premises, and because plaintiff "pleaded that property other than its Property was damaged"). Plaintiffs' allegations of property damage to surrounding properties are extensive and specific, identifying actual properties within miles of the Insured Premises that have suffered property damage from COVID-19's presence and explaining how such viral presence causes property damage. *See, e.g.*, CAC ¶¶ 87–95, 199 (allegations of damage), 167–74 & 176–77 (allegations of other property). Cincinnati fails to explain how these comprehensive allegations, which must be taken as true, are insufficient.

Instead, Cincinnati cites two cases that do not support dismissal here. *See* MTD 21 (citing *Dakota Girls, LLC v. Phila. Indem. Ins. Co.*, 2021 WL 858489, *7 (S.D. Ohio Mar. 8, 2021); *W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos.*, 2020 WL 6440037, *4 (C.D. Cal. Oct. 27, 2020)). In *Dakota Girls*, the district court rejected plaintiffs' entitlement to civil authority coverage because they failed to show that closure orders were issued *because of* property damage—a ground for dismissal Cincinnati does not rely on here. 2021 WL 858489 at *7. The plaintiffs' allegations in *W. Coast Hotel Mgmt.* pale in comparison to Plaintiffs' here. *See* 2020 WL 6440037 at *4 (explaining that plaintiffs' complaint contained two allegations regarding civil authority coverage, and the only allegation concerning damage to other property was conclusory: "In this case, the properties that are damaged are in the immediate area of the Insured Properties"). While the CAC *includes* the allegation that Closure Orders prohibited access to Plaintiffs' Insured Premises "in response to dangerous physical conditions resulting from a Covered Cause of Loss," that is not the extent of Plaintiffs' allegations. MTD 21 (quoting CAC ¶ 165). Rather, the CAC's

allegations are considerably more detailed, and they sufficiently allege damage to other property.

Plaintiffs have also plausibly alleged Closure Orders prohibited access to Insured Premises under the Policies, and Cincinnati's arguments to the contrary fail for six reasons. *First*, Plaintiffs' construction reasonably applies the ordinary meaning attached to the undefined "prohibits-access" phrase. Without any textual support, Cincinnati argues that this provision requires a civil authority to "*completely* prohibit *any and all* access" to Insured Premises to trigger Civil Authority coverage, and Closure Orders confining people to their homes do not suffice. *See* MTD 22–23. But Cincinnati's construction stretches the Policy's plain language too far, and it offers no plain-language analysis that it is the *only* reasonable interpretation of the phrase as a layperson would understand it. *See, e.g.*, *Ungarean*, 2021 WL 1164836 at *10 ("The contract merely requires that 'an action of civil authority … prohibits access to' Plaintiff's property. It does not clearly and unambiguously state that any such prohibition must completely and totally bar all persons from any form of access to Plaintiff's property whatsoever.").

The Closure Orders alleged here forbid customers and employees alike from either using the Insured Premises for their intended purposes or, in many cases, entering the Insured Premises altogether. *See* CAC ¶¶ 3–9 (Plaintiffs' businesses), 102–05, 110–12, 115, 126, 134–37, 139, 141, 148–52, 156–58 (Closure Order prohibitions), 185–92 (Closure Orders' effects on Plaintiffs' businesses at Insured Premises). For example, Closure Orders did not merely confine employees and customers to their homes; rather, they required the complete closure of non-essential and non-"life-sustaining" businesses, such as several of Plaintiffs' businesses, *id.* ¶¶ 110, 112, 115 124, 126, 134, 141, 149; and cancellation or indefinite postponement of all non-emergency or elective dental care, *id.* ¶¶ 136–37, 156–58. Where business premises are ordered to close to the public and ordinary business operations are banned, customers and employees alike are "prohibit[ed]" from

"access[ing]" Insured Premises. This construction reasonably applies the ordinary meaning of the undefined phrase's component words. *See, e.g.*, Merriam-Webster (defining "prohibit" as "to forbid by authority," "to prevent from doing something," and "preclude;" and defining "access" as "permission, liberty, or ability to enter, approach, or pass to and from a place," "freedom or ability to obtain or make use of something," and "a way or means of entering or approaching").

Second, Cincinnati's reliance on the "essential business" exemptions and the business-preservation permissions within some Closure Orders does not alter Plaintiffs' entitlement to Civil Authority coverage. Nothing in the Civil Authority provision suggests that every single individual must be explicitly and physically unable to enter the premises of a closed business to trigger coverage. And Cincinnati has not explained how a business owner purchasing BI insurance would have intended for this provision to preclude coverage when, as here, the government forbids its business from opening, its employees from coming to work, and its customers from entering the premises simply because the owner is physically able to access the building to, for example, check the mail. As the drafter of this boilerplate, adhesive contract, Cincinnati could have specified the contours of the prohibited access required for Civil Authority coverage. This Court cannot now read into the Policy what Cincinnati omitted.[7]

Third, Plaintiffs' construction gives effect to the Civil Authority provision as a whole, whereas Cincinnati's reading is inconsistent with the Policy's terms. The Civil Authority provision promises to pay "Extra Expense," *i.e.*, the costs incurred to avoid or minimize the "slowdown or cessation" of business operations. *E.g.*, Dkt. 61-4 at CIC 42, 63. Thus, Cincinnati will pay for necessary costs a policyholder incurs to keep its business *open* when a closure order prohibits

[7] Even if the Court disagrees and finds that businesses classified as "essential" are not entitled to Civil Authority coverage, such a finding does not warrant the complete dismissal of this action, as several Plaintiffs do not fall into any "essential business" category.

access to the insured business premises. Cincinnati's construction effectively reads out this portion of Civil Authority coverage by requiring the closure order to completely preclude entry to the insured business premises such that the business cannot operate on the premises *at all*. Such a reading is unreasonable. *Cf. Archer Daniels Midland Co. v. Aon Risk Servs., Inc. of Minn.*, 356 F.3d 850, 856 (8th Cir. 2004) ("As defined in Section 10B, extra expense clearly includes those expenses necessary to carry on business operations. Section 10B would not make any sense if the DIC policy were interpreted as covering only the extra expense incurred as a result of a complete cessation of business.").

Fourth, Plaintiffs' construction is supported by other COVID-19 BI insurance decisions. *See, e.g., Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 488 F. Supp. 3d 867, 879 (W.D. Mo. 2020) (finding allegations that closure orders permitted only emergency dental services sufficient to trigger coverage, and noting "the insurance policy did not specify that 'all access' or 'any access' to the insured property had to be prohibited"); *Studio 417*, 478 F. Supp. 3d at 803–04 (finding prohibition of access sufficient where "inside seating is prohibited in restaurants"); *Dino Palmieri Salons, Inc. v. State Auto. Mut. Ins. Co.*, 2020 WL 7258114, at * (Ohio Ct. Com. Pl. Nov. 17, 2020) (denying motion to dismiss where "the policy here does not specify that *all* access to the premises be absolutely prohibited").[8]

[8] Plaintiffs' construction is also supported by non-COVID-19 BI cases. *See, e.g., Altru HealthSys. v. Am. Prot. Ins. Co.*, 238 F.3d 961, 963 (8th Cir. 2001) (access prohibited where state health department order did not permit hospital to have patients inside facility and hospitals remained closed for 3 weeks); *Abner, Herrman & Brock, Inc. v. Great N. Ins. Co.*, 308 F. Supp. 2d 331, 336-37 (S.D.N.Y. 2004) (civil authority coverage applied to four days after September 11, 2001 where employees and customers could not enter premises); *Narricot Indus., Inc. v. Fireman's Fund Ins. Co.*, No. CIV.A.01-5679, 2002 WL 31247972, at *1, 4 (E.D. Pa. Sept. 30, 2002) (finding civil authority coverage where order prohibited business operations on insured premises but permitted access to emergency personnel); *cf. 54th Street Ltd. Partners, L.P. v. Fidelity & Guar. Ins. Co.*, 306 A.D.2d 67, 67 (N.Y. App. Div. 2003) (finding no civil authority coverage during time period that "restaurant was accessible to *the public, plaintiff's employees and its vendors*").

Fifth, Cincinnati's proffered cases do not move the needle in favor of dismissal. *See Torgerson Props., Inc. v. Continental Cas. Co.*, 2021 WL 615416, *2 (D. Minn. Feb. 17, 2021) (no analysis of "prohibits access"); *Ski Shawnee, Inc. v. Commonwealth Ins. Co.*, 2010 WL 2696782, *4 (M.D. Pa. July 6, 2020) (no civil authority coverage due to road closure where alternate routes provided customers access to the premises); *Syufy Enters. V. Home Ins. Co. of Ind.*, 1995 WL 129229, at *2 (N.D. Cal. Mar. 21, 1995) (no analysis of "prohibits access" or any similar phrase); *Goldstein v. Trumbull Ins. Co.*, 2016 WL 1324197, *12 (N.Y. Sup. Ct. Apr. 5, 2016) (no civil authority coverage where mandatory evacuation order was not directed to plaintiff's location, and transit-related closures only made travel to premises difficult). Indeed, *TMC Stores, Inc. v. Federated Mut. Ins. Co.*, actually *supports* Plaintiffs' construction. *See* 2005 WL 1331700, at *4 (Minn. Ct. App. June 7, 2005) ("If the record demonstrated a virtual economic shutdown of [plaintiff's] business, this would be a more difficult case."). The remaining decisions Cincinnati cites do not require dismissal either. The COVID-19 BI caselaw is mixed, with courts ruling in favor of both sides on this issue. Critically, however, "[i]f a term is not defined in the policy," as here, "the Court *must* look to the plain meaning of the words, not persuasive authority from other courts." *Henderson Road*, 2021 WL 168422 at *12. Cincinnati fails to provide *any* text-based support for its interpretation of "prohibits access."

Finally, and in the alternative, to the extent the Court accepts Cincinnati's interpretation of the undefined "prohibits-access" phrase as reasonable, the Civil Authority provision is ambiguous, and dismissal is inappropriate. Instead, coverage should be construed in favor of Plaintiffs at this early stage, and the parties should be permitted to develop an evidentiary record to answer the factual inquiry presented by the ambiguous language. Indeed, under Ohio law, any ambiguity should be immediately and strictly construed against Cincinnati, as noted above.

VI. PLAINTIFFS ARE PLAUSIBLY ENTITLED TO SUE AND LABOR COVERAGE

Cincinnati's request to dismiss Plaintiffs' Sue and Labor claims should be denied. Cincinnati argues Plaintiffs cannot recover Sue and Labor costs because "there is no covered loss." MTD 23. As addressed above, Cincinnati has not shown that Plaintiffs' claims fail as a matter of law. Moreover, the losses Plaintiffs suffered as a result of the necessary suspension of their businesses are recoverable mitigation expenses. As the Minnesota Court of Appeals has explained,

> a sue and labor clause… provides a form of indemnity separate from the main insuring clause [that] requires the insured to take steps to prevent or minimize an imminent covered loss. Because this provision primarily benefits the insurer by limiting its exposure to liability, the insurer must reimburse the insured for the costs of mitigation, even if the policy would not otherwise cover those expenses."

Witcher Constr. Co. v. St. Paul Fire & Marine Ins. Co., 550 N.W.2d 1, 7–8 (Minn. Ct. App. 1996) (collecting cases from multiple jurisdictions). Indeed, Cincinnati is responsible for the reasonable and necessary costs Plaintiffs incurred by closing their businesses to mitigate loss, even if a covered loss has not occurred. *Id.* at 8. By shuttering their doors and vastly limiting operations in accordance with Closure Orders, Plaintiffs avoided further damage to covered property and deeper losses caused by the presence and spread of COVID-19—a covered cause of loss.

Additionally, Cincinnati's suggestion that Plaintiffs' Sue-and-Labor allegations are insufficient holds no water. While Plaintiffs' allegations *include* that they "incurred expenses in connection with reasonable steps to protect Covered Property," which, standing alone, might be insufficient to trigger Cincinnati's Sue and Labor obligations, that is not the *only* allegation of this kind. MTD 24 n.8 (quoting CAC ¶ 259); *see* CAC ¶ 200–03, 206–11 (alleging specific actions taken and costs incurred to protect property). Dismissal is not appropriate here.[9]

[9] Cincinnati's motion seeks dismissal of Cincinnati Insurance Company's corporate affiliates Cincinnati Casualty Company, Cincinnati Indemnity Company, and Cincinnati Financial Corporation. Plaintiffs do not dispute that the Policies were entered into with Cincinnati Insurance Company rather than the corporate affiliate defendants.

VII. CONCLUSION

For the reasons stated above, Cincinnati's Motion to Dismiss should be denied.

Dated: May 3, 2021

Respectfully submitted,

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*Applications for admission *pro hac vice* to be filed

CERTIFICATE OF SERVICE

The undersigned hereby certifies on May 3, 2021, that the undersigned electronically filed and served the foregoing document through this Court's ECF system to all counsel of record in this action.

/s/ Kenneth P. Abbarno
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