IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Black Magic, LLC d/b/a Black Magic Café and Fancy That! Bistro & Catering, LLC, on behalf of themselves and all others similarly situated, Plaintiffs, v. Twin City Fire Insurance Company and Sentinel Insurance Company, Limited, Defendants.	Civil Action No. 2:20-cv-1743-BHH Civil Action No. 3:20-cv-2382-BHH **ORDER**

This matter is before the Court upon the consolidated class action complaint filed by Plaintiffs Black Magic, LLC d/b/a Black Magic Café ("Black Magic") and Fancy That! Bistro & Catering LLC ("Fancy That!"), on behalf of themselves and all others similarly situated (collectively "Plaintiffs") against Defendants Twin City Fire Insurance Company ("Twin City") and Sentinel Insurance Company, Limited ("Sentinel") (collectively "Defendants"). In their consolidated class action complaint, Plaintiffs seek a declaratory judgment of rights and obligations as well as breach of contract damages under insurance policies that Defendants issued to Plaintiffs (and other similarly situated policy holders). According to Plaintiffs, Defendants improperly denied their claims for business income losses and related covered expenses stemming from the COVID-19 pandemic.

On February 9, 2022, Defendants filed a motion to dismiss Plaintiffs' consolidated class action complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Plaintiffs filed a response to Defendants' motion on March 1, 2022, and Defendants filed a reply on March 15, 2022. For the reasons set forth below, the Court grants Defendants' motion and dismisses Plaintiffs' consolidated class action complaint.

BACKGROUND

Plaintiff Black Magic filed its initial complaint in Civil Action 2:20-cv-1743 on May 4, 2020, against Twin City, Hartford Fire Insurance Company, and Hartford Financial Services Group. On March 15, 2021, the Court granted motions to dismiss filed by Hartford Fire Insurance Company and Hartford Financial Services Group.

Plaintiff Fancy That! filed its initial complaint in Civil Action 3:20-cv-2382 on June 24, 2020, against Sentinel and Hartford Financial Services Group. On October 14, 2021, the Court granted the motion to dismiss filed by Hartford Financial Services Group.

On January 7, 2022, the Court entered a text order granting Plaintiffs' unopposed motion to consolidate the two actions, thereby allowing Plaintiffs to file their proposed consolidated class action complaint as an amended complaint in both Civil Action 2:20-cv-1743 and Civil Action 3:20-cv-2382. The Court designated Civil Action 2:20-cv-1743 as the lead case and directed the parties to make all future filings in Civil Action 2:20-cv-1743. (*See* ECF No. 37 in Civil Action 2:20-cv-1743.)

As previously mentioned, in their consolidated class action complaint, Plaintiffs seek a declaratory judgment and breach of contract damages on behalf of themselves and others similarly situated. Specifically, Plaintiffs seek a declaration that their "business income claims resulting from the government orders issued in response to COVID-19 and the virus itself allege a 'direct physical loss'" that is covered by the insurance policies at issue. (ECF No. 1 ¶ 100.) Additionally, Plaintiffs allege that Defendants breached its

contracts with Plaintiffs (and others similarly situated) "by failing to pay business income and extra expense claims caused by the governmental orders issued in response to COVID-19 and the virus itself." (*Id.* ¶ 104-105.)

In their motion to dismiss, Defendants argue that the insurance policies at issue do not cover Plaintiffs' alleged losses because: (1) the policies include an unambiguous "Virus Exclusion"; (2) Plaintiffs have not alleged a basis under which their losses qualify for the narrow "Limited Coverage" exception to the Virus Exclusion; (3) Plaintiffs cannot demonstrate that their operations were suspended because of "direct physical loss of or physical damage to property"; and (4) Plaintiffs have not alleged a plausible basis for Civil Authority coverage.

Plaintiffs' complaint incorporates by specific reference the insurance policy that Twin City issued to Black Magic bearing policy number SBA AD5441 DV ("Twin City policy") as well as the insurance policy that Sentinel issued to Fancy That! bearing policy number 22 SBA AE3310 ("Sentinel policy") (collectively referred to as "the policies"). (ECF No. 40 ¶¶ 35 and 36.) Plaintiffs did not attach copies of the policies to their complaint, but Defendants did submit copies in connection with their motions to dismiss. (*See* ECF No. 42-2 and 42-3.) The policies include the following provisions that are relevant to the issues before the Court.

First, the policies' Special Property Coverage Form provides that the insurance companies "will pay for direct physical loss of or physical damage to Covered Property . . . caused by or resulting from a Covered Cause of Loss." (ECF No. 42-2 at 39; ECF No. 42-3 at 48.) Both policies define Covered Cause of Loss of "RISKS OF DIRECT PHYSICAL LOSS unless the loss is: a. Excluded in Section **B. EXCLUSIONS**; or b. Limited in

Paragraph A.4. Limitations; that follow." (ECF No. 42-2 at 40; ECF No. 42-3 at 49 (emphasis in original).)

With respect to "Business Income," the policies provide:

> (1) 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 physical loss of or physical damage to property at the "scheduled premises", including personal property in the open (or in a vehicle) within 1,000 feet of the "scheduled premises", caused by or resulting from a Covered Cause of Loss.

(ECF No. 42-2 at 48; ECF No. 42-3 at 57.) With respect to "Extra Expense" coverage, the policies provide:

> (1) We will pay reasonable and necessary Extra Expense you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or physical damage to property at the "scheduled premises", including personal property in the open (or in a vehicle) within 1,000 feet, caused by or resulting from a Covered Cause of Loss.

(ECF No. 42-2 at 48; ECF No. 42-3 at 57.)

In addition, the policies define "Period of Restoration" as the time beginning "with the date of direct physical loss or physical damage caused by or resulting from a Covered Cause of Loss at the 'scheduled premises,'" and ending when the property "should be repaired, rebuilt or replaced with reasonable speed and similar quality," or when "your business is resumed at a new, permanent location." (ECF No. 42-2 at 62; ECF No. 42-3 at 71.)

Pursuant to the policies' "Civil Authority" provisions, "insurance is extended to apply to the actual loss of Business Income you sustain when access to your 'scheduled premises' is specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property in the immediate area of your 'scheduled premises.'"

(ECF No. 42-2 at 49; ECF No. 42-3 at 58.)

Of particular relevance to this case are the policies' endorsements for "limited fungi, bacteria or virus coverage," which provide in pertinent part:

> We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss:
>
> (1) Presence, growth, proliferation, spread or any activity of "fungi", wet rot, dry rot, bacteria or virus.
>
> (2) But if "fungi", wet rot, dry rot, bacteria or virus results in a "specified cause of loss" to Covered Property, we will pay for the loss or damage caused by that "specified cause of loss".
>
> This exclusion does not apply:
>
> (1) When "fungi", wet or dry rot, bacteria or virus results from fire or lightning; or
>
> (2) To the extent that coverage is provided in the Additional Coverage – Limited Coverage for "Fungi", Wet Rot, Dry Rot, Bacteria and Virus with respect to loss or damage by a cause of loss other than fire or lightning.

(ECF No. 42-2 at 134; ECF No. 42-3 at 144.)

The "Additional Coverage – Limited Coverage for . . . Virus" "only applies when the . . . virus is the result of . . . [a] 'specified cause of loss' other than fire or lightning"; or "Equipment Breakdown Accident occurs to Equipment Breakdown Property," and "only if all reasonable means were used to save and preserve the property from further damage at the time and after that occurrence." (ECF No. 42-2 at 135; ECF No. 42-3 at 145.) The policies define "Specified Cause of Loss" as "Fire; lightning; explosion, windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; water damage." (ECF No. 42-2 at 63; ECF No. 42-3 at 72.) Also, the

"Additional Coverage – Limited Coverage for . . . virus" applies to "loss or damage," which is defined as "Direct physical loss or direct physical damage to Covered Property caused by . . . virus, including the cost of removal of the . . . virus"; "[t]he cost to tear out and replace any part of the building or other property as needed to gain access to the . . . virus": and "[t]he cost of testing performed after removal, repair, replacement or restoration of the damaged property is completed, provided there is reason to believe that . . . virus [is] present." (ECF No. 42-2 at 135; ECF No. 42-3 at 145.)

STANDARD OF REVIEW

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) examines the legal sufficiency of the facts alleged on the face of a plaintiff's complaint. *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999). To survive a Rule 12(b)(6) motion, "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. The "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). A claim is facially plausible when the factual content allows the court to reasonably infer that the defendant is liable for the misconduct alleged. *Id.* When considering a motion to dismiss, the court must accept as true all of the factual allegations contained in the complaint. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). The Supreme Court has explained that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions," and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Twombly*, 550 U.S. at 678.

DISCUSSION

In their motion to dismiss, Defendants first assert that the Virus Exclusion unambiguously bars coverage for Plaintiffs' claims, citing in support this Court's decision in *Coffey & McKenzie, LLC v. Twin City Fire Ins. Co.*, No. 2:20-cv-1671-BHH, 2021 WL 1310872, at *3 (D.S.C. April 8, 2021), along with numerous other decisions from other jurisdictions. (*See* ECF No. 42 at 9-10, n. 5 and n. 6 (citing cases).)

Next, Defendants argue that because Plaintiffs' alleged losses fall within the plain terms of the Virus Exclusion, their claims are barred unless Plaintiffs' alleged losses fall within one of the narrow exceptions to the exclusion. There is no dispute that Plaintiffs' alleged losses did not result from fire or lightning (the first exception), but as to the second exception, Defendants assert that Plaintiffs have not plausibly alleged either (1) that the virus itself was the result of an equipment breakdown or "specified cause of loss" other than fire or lightning or (2) that Covid-19 caused "direct physical loss or physical damage to covered property."

Furthermore, with respect to the issue of direct physical loss or physical damage to property, Defendants assert that even if the Virus Exclusion did not apply, Plaintiffs' claims still would fail because Plaintiffs' claims do not trigger business income and extra expense coverage in the first place, insofar as Plaintiffs' temporary loss of use of their commercial premises does not constitute direct physical loss of property and because the temporary presence of Covid-19 does not cause direct physical damage to property.

Finally, Defendants assert that Plaintiffs' claims for Civil Authority coverage fail because: (1) again, Plaintiffs have not plausibly alleged direct physical loss or damage to any property, and losses caused indirectly or directly by a virus are excluded; (2) Plaintiffs

identify no property in the immediate area that experienced direct physical loss that resulted in the issuance of the civil authority orders; (3) the orders that temporarily barred Plaintiffs from offering on-site dining were issued to prevent the spread of Covid-19 to people, and no restrictions were imposed as a direct result of physical loss or damage to property in the immediate area of Plaintiffs' restaurants; and (4) "access" to Plaintiffs' properties was not specifically prohibited by order of a civil authority.

In response to Defendants' arguments, Plaintiffs assert that the Virus Exclusion does not bar coverage, pointing to section A.2.i. of the policies, which provides: "[b]ut if . . . virus results in a 'specified cause of loss' to Covered Property, we will pay for the loss or damage caused by that 'specified cause of loss.'" This section further provides that the exclusion does not apply to the extent that coverage is provided in the Additional Coverage-Limited Coverage for "virus with respect to loss or damage by a cause of loss other than fire or lightning." (ECF No. 45 at 6, 12-13 (quoting ECF No. 42-2 at 134-35).) According to Plaintiffs, the second exception to the Virus Exclusion applies in this case, and Plaintiffs assert that they have adequately pleaded direct physical losses as a result of Covid-19 to survive a Rule 12(b)(6) motion. Specifically, with respect to the issue of direct physical losses, Plaintiffs point to the allegations in their complaint that Covid-19 lives "on surfaces for a prolonged period" and "is so pervasive that it renders the property uninhabitable and unusable," and Plaintiffs assert that, at the very least, physical loss and physical damage are capable of more than one meaning and are ambiguous as a matter of law. Next, Plaintiffs argue that even if the exception to the Virus Exclusion does not apply, Defendants' narrow reading of the Virus Exclusions exceptions renders the "Limited Coverage" illusory. Finally, Plaintiffs argue that they have sufficiently pleaded an adequate

basis for Civil Authority coverage, citing in support a case from the Western District of Missouri where the court denied a motion to dismiss finding that the plaintiffs' adequately alleged that access to their restaurants was prohibited to such a degree as to trigger civil authority coverage. (ECF No. 45 at 21 (citing *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 803 (W.D. Mo. 2020)).)

After a thorough review of the parties' arguments and the applicable law, the Court agrees with Defendants that Plaintiffs' consolidated class action complaint is subject to dismissal for several reasons. First, as Defendants point out in their motion, this Court has previously found that a similar Virus Exclusion, which stated that the insurance company "will not pay for loss or damage caused directly or indirectly by . . . [the] presence, growth, proliferation, spread or any activity of . . . virus," unambiguously barred a law firm's business interruption claim because the basis of the law firm's claim was that a virus (Covid-19) "directly or indirectly" caused the law firm's alleged losses. *Coffey*, 2021 WL 1310872, at *3. As this Court noted in *Coffey*, under South Carolina law, "[i]nsurance policies are subject to the general rules of contract construction," and "[w]here the contract's language is clear and unambiguous, the language alone determines the contract's force and effect." (*Id.* (quoting *Nationwide Mut. Ins. Co. v. Commercial Bank*, 479 S.E.2d 524, 526 (S.C. Ct. App. 1996), and *Williams v. Gov't Emps.' Ins. Co. (GEICO)*, 762 S.E.2d 705, 709 (S.C. 2014)).)

Here, the Court finds that the Virus Exclusion unambiguously excludes coverage caused directly or indirectly by a virus unless an exception to the exclusion applies. In other words, the Court agrees with Defendants that the coverage afforded by the Form 40 93 07 05 endorsement is comprised of a broad exclusion that is subject to two exceptions.

Therefore, the plain language of the endorsement does not cover all virus-related losses as Plaintiffs seemingly argue; rather, it covers only those virus-related losses that fall within either of the specific exceptions to the exclusion.

Here, Plaintiffs argue that their claims trigger the second exclusion, but the Court is not convinced by Plaintiffs' arguments and agrees with Defendants that Plaintiffs' complaint fails to plausibly allege that the virus itself was the result of a "specified cause of loss" other than fire or lightning. *See*, *e.g.*, *Firenze Ventures LLC v. Twin City Fire Ins. Co.*, 532 F. Supp. 3d 607, 613 (N.D. Ill. March 31, 2021) (holding that claimed losses due to the Covid-19 pandemic did not satisfy the "result of . . . a 'specified cause of loss'" requirement of the exception to a Virus Exclusion set forth in a Limited Coverage provision); *see also Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.*, 488 F. Supp. 3d 904, 910 (N.D. Cal. 2020) ("[Having failed to] allege[ ] that the virus was caused by any of the specified causes of loss . . . Plaintiffs have failed to meet their burden in showing that the business losses are covered under the Policy's Limited Virus exception to the Virus Exclusion."); *Wilson v. Hartford Cas. Co.*, 492 F. Supp. 3d 417, 428 (E.D. Pa. 2020) ("Plaintiffs do not attempt to plead any factual allegations that would allow the Court to reasonably infer that the virus is a result of a 'specified cause of loss' or equipment breakdown.").

Likewise, the Court agrees with Defendants that Plaintiffs' complaint fails to plausibly allege the second requirement for the second exclusion to apply–namely, that Plaintiffs' claimed losses are for "direct physical loss or physical damage to covered property." The reason is simple: Plaintiffs do not allege any facts to show that Covid-19 caused direct

physical loss or damage to property at their businesses.[1] The Court finds this latter point even more critical than the question of whether the Covid-19 was the result of a "specified cause of loss" because it means that Plaintiffs' claims fail even without consideration of the Virus Exclusion.

In other words, the Court agrees with Defendants that Plaintiffs' claims also fail for the simple reason that Plaintiffs have failed to meet the threshold requirement for coverage because they do not plausibly allege that Covid-19 caused physical loss or physical damage to covered property within the plain meaning of those terms. Indeed, most courts that have considered this question have determined that the physical presence of Covid-19 does not constitute physical property loss or damage, and courts have reached this conclusion even at the motion to dismiss stage. *See Uncork & Create LLC v. Cincinnati Ins. Co.*, 27 F.4th 926 (4th Cir. 2022) (holding that coverage for business income loss and other expenses did not apply to a claim for financial losses stemming from Covid-19 in the absence of any material destruction or material harm to covered premises); *Danville Reg'l Med. Ctr, LLC v. Am. Guarantee & Liab. Ins. Co.*, 2022 WL 521460, *7 (W.D. Va. Feb. 22, 2022) (collecting cases).[2] This Court is more persuaded by the decisions concluding that

[1] Nor is the Court convinced by Plaintiffs' argument that the Limited Coverage provision is illusory. *See Firenze Ventures LLC*, 532 F. Supp. 3d at 613 (rejecting the argument that the same Limited Coverage provision was illusory and collecting cases).

[2] *See also Carilion Clinic v. Am. Guar. & Liab. Ins. Co.*, No. 7:21cv00168, 2022 WL 347617, at *14 (W.D. Va. Feb. 4, 2022) (explaining that "losses due to the COVID-19 pandemic are not direct physical losses to . . . property"); *Kim-Chee LLC v. Phila. Indem. Ins. Co.*, No. 21-1082-cv, 2022 WL 258569, at *2 (2d Cir. Jan. 28, 2022) ("Even assuming the virus's presence at Kim-Chee's tae-kwon-do studio, the complaint does not allege that any part of its building or anything within it was damaged–let alone to the point or repair, replacement, or total loss."); *Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co.*, 22 F.4th 450, 458 (5th Cir. 2022) (concluding that "the Texas Supreme Court would interpret a direct physical loss of property to require a tangible alteration or deprivation of property. Because the civil authority orders prohibiting dine-in services at restaurants did not tangibly alter TBB's restaurants, . . . the policy does not provide coverage for TBB's claimed losses"); *Aggie Invs., LLC v. Cont'l Cas. Co.*, No. 21-40382, 2022 WL 257439, at *3 (5th Cir.

Jan. 26, 2022) (per curiam) ("'[D]irect physical loss of property' unambiguously requires a tangible alteration or deprivation of property."); *Ascent Hosp. Mgmt. Co. v. Emps. Ins. Co. of Wausau*, No. 21-11924, 2022 WL 130722, at *3 (11th Cir. Jan. 14, 2022) (per curiam) ("The district court correctly explained that 'direct physical loss or damage requires an actual physical change to property that COVID-19 particles cannot cause' because a contaminated location can be immediately restored to its previous state by cleaning and disinfecting—no repair or replacement required."); *10012 Holdings, Inc. v. Sentinel Ins. Co.*, 21 F.4th 216, 222 (2d Cir. 2021) ("[T]he terms 'direct physical loss' and 'physical damage' . . . do not extend to mere loss of use of a premises, where there has been no physical damage to such premises; those terms instead require actual physical loss of or damage to the insured's property."); *Santo's Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398, 401 (6th Cir. 2021) (finding that an insurance policy that required a "direct physical loss" was not implicated by COVID-19 because the restaurant had not been "tangibly destroyed, whether in part or in full"); *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327, 333 (7th Cir. 2021) (holding that " 'direct physical loss' requires a physical alteration to property"); *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141, 1145 (8th Cir. 2021) (finding no ambiguity and concluding that "[t]he policy clearly does not provide coverage . . . absent a showing of direct physical loss or physical damage"); *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885, 892 (9th Cir. 2021) ("Mudpie alleges the Stay at Home Orders temporarily prevented Mudpie from operating its store as it intended, and urges us to interpret 'direct physical loss of or damage to' to be synonymous with 'loss of use.' We cannot endorse Mudpie's interpretation. . . ."); *Goodwill Indus. of Cent. Okla., Inc. v. Phila. Indem. Ins. Co.*, 21 F.4th 704, 710 (10th Cir. 2021) (regarding a COVID-19 insurance claim: "The Business Income provision unambiguously covered only losses stemming from physical alteration or tangible dispossession of property. Neither occurred here."); *Gilreath Fam. & Cosm. Dentistry, Inc. v. Cincinnati Ins. Co.*, No. 21-11046, 2021 WL 3870697, at *2 (11th Cir. Aug. 31, 2021) ("[W]e do not see how the presence of those particles would cause physical damage or loss to the property."); *Mama Jo's Inc. v. Sparta Ins. Co.*, 823 F. App'x 868, 879 (11th Cir. Aug. 18, 2020) (holding that a "structure that merely needs to be cleaned has not suffered a 'loss' which is both 'direct' and 'physical' "); *Conn. Child.'s Med. Ctr. v. Cont'l Cas. Co.*, No. 3:21-cv-291, 2022 WL 168786, at *6 (D. Conn. Jan. 19, 2022) ("In short, whether the theory is based on 'loss of use' of property or based on 'physical damage' from the COVID-19 virus itself, the result is the same: there is no 'direct physical loss or damage' to property."); *Olmsted Med. Ctr. v. Cont'l Cas. Co.*, No. 21-1309, 2022 WL 126336, at *7 (D. Minn. Jan. 13, 2022) ("Olmsted's claim of physical loss or damage based on persons testing positive for COVID-19 or the presence of the virus in its buildings fails."); *Palomar Health v. Am. Guar. & Liab. Ins. Co.*, No. 3:21-cv-00490, 2021 WL 4035005, at *8-9 (S.D. Cal. Sept. 3, 2021) ("[T]he presence of the SARS-COV-2 virus and COVID-19 patients does not constitute direct physical loss of or damage to Palomar's property. Nor does the presence of the virus or patients constitute a risk of damage or physical loss."); *Northwell Health, Inc. v. Lexington Ins. Co.*, No. 21-cv-1104, 2021 WL 3139991, at *5 (S.D.N.Y. July 26, 2021) ("Northwell alleges that respiratory droplets carrying the coronavirus attach to surfaces, linger there, and 'thus compromise[ ] the physical integrity of the structures it permeates' and renders those structures 'unusable.' However, the Complaint does not allege any facts supporting the conclusion that the coronavirus compromises the physical integrity of objects by harming surfaces and structures, as opposed to harming the people who touch them.") (internal citation omitted) (alteration original); *Valley Health Sys., Inc. v. Zurich Am. Ins. Co.*, No. BER-L-1907-21, 2021 WL 4958349, at *5 (N.J. Super. Ct. Law Div. Oct. 18, 2021) ("[F]or the presence of a contaminant to constitute a direct physical loss of or damage to property, the substance must permeate the premises to distinctly and demonstrably compromise its physical integrity or render it entirely uninhabitable for a distinct period of time. This threshold has not been met here. The government orders are what caused Plaintiffs to be unable to fully use their properties, however, it was not because of any physical casualty to the property itself. Thus, as a matter of law, the claim that a harmful substance is present is insufficient to establish direct physical loss or damage to property."); *but see Novant Health, Inc. v. Am. Guar. & Liab. Ins. Co.*, No. 1:21-cv-309, 2021 WL 4340006, at *3 (M.D.N.C. Sept. 23, 2021) (holding that "[w]hether COVID-19 has resulted in direct physical damage or loss to Novant, and if so to what extent, are questions better evaluated on a developed factual record."); and *Elegant Massage*, 506 F. Supp. 3d at 372-76 (applying Virginia law, finding the phrase "direct physical loss" ambiguous, and holding that "while the [plaintiff's business] was not structurally damaged, it is plausible that Plaintiff's [sic] experienced a direct physical loss when the property was deemed uninhabitable, inaccessible, and dangerous to use by the

Covid-19 does not cause a direct physical damage or loss to property, and the Court finds no reason to think that South Carolina law requires a different result. Thus, the Court agrees with Defendants that Plaintiffs' claims simply do not trigger coverage in the first instance.

Finally, the Court also agrees with Defendants that Plaintiffs' allegations do not implicate Civil Authority coverage. First, Plaintiffs do not plausibly allege a covered cause of loss to property in the immediate area of their premises. Second, Plaintiffs do not plausibly allege that "access" to their property was "specifically prohibited" by one of Governor McMaster's orders. *See*, *e.g.*, *Legal Sea Foods, LLC v. Strathmore Ins. Co.*, 523 F. Supp. 3d 147, 154 (D. Mass. 2021) (noting that the "relevant inquiry is whether the Orders prohibited access," and not whether it was "economically feasible for [a restaurant] to continue restaurant operations solely for carry-out and delivery sales").

For all of the foregoing reasons, the Court grants Defendants' motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Although the Court is certainly sympathetic to the difficult situations facing Plaintiffs and other businesses as a result of the Covid-19 pandemic, the Court concludes that the allegations in Plaintiffs' complaint do not trigger coverage under the plain and unambiguous terms of the policies.

CONCLUSION

After review, the Court **ORDERS** that Defendants' motion to dismiss (ECF No. 42 in Civil Action No. 2:20-1743 and ECF No. 29 in Civil Action No. 3:20-cv-2382-BHH) is **GRANTED** for the reasons set forth in this order, thereby resulting in the dismissal of both

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Executive Orders because of its high risk for spreading COVID-19, an invisible but highly lethal virus").

Civil Action No. 2:20-cv-1743-BHH and Civil Action No. 3:20-cv-2382-BHH.

IT IS SO ORDERED.

/s/Bruce H. Hendricks
The Honorable Bruce H. Hendricks

September 8, 2022
Charleston, South Carolina