STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

THREE WON THREE, CORP, EIGHTY ATE, LLC, & ATE ATE, LLC,

Plaintiffs,

-v-

PROPERTY-OWNERS INSURANCE COMPANY,

Defendant.

Case No. 20-011994-CB

Hon. Muriel D. Hughes

OPINION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND DENYING PLAINTIFFS' CROSS-MOTION FOR PARTIAL SUMMARY DISPOSITION

At a session of said Court held in Wayne County, Michigan,

on this: 3/17/2021

PRESENT: Muriel D. Hughes
Circuit Judge

This civil matter is before the Court on a motion to dismiss filed by Defendant Property-Owners Insurance Company ("Property-Owners") and a cross-motion for partial summary disposition filed by Plaintiffs Three Won Three, Corp, Eighty Ate, LLC, Ate Ate LLC. For the reasons stated below the Court grants Defendant's motion and denies Plaintiffs' motion.

I. BACKGROUND

Plaintiffs operate restaurants in Wayne County. Each plaintiff purchased business interruption insurance policies from Property-Owners. Plaintiffs were forced to temporarily close

their in-person dining operations based on Governor Whitmer's stay-at-home Executive Orders ("the Orders") relating to the COVID-19 pandemic. The Orders allowed Plaintiffs to provide carry-out and delivery dining services, but barred restaurants from providing dine-in services. Later, the ban was loosened to allow some dine-in service with particular restrictions, such as limiting capacity to 25% and social distancing of 6 feet between diners. Plaintiffs claim that they were required to alter their properties to comply with the restrictions to prevent transmission of Covid-19. They also state that they have been required to regularly disinfect surfaces within their properties to prevent the accumulation of Covid-19 on surfaces that might infect staff and diners.

In the case before the Court, after Property-Owners denied coverage for Business Income losses suffered as a result of the pandemic and the Executive Orders, Plaintiffs filed a complaint seeking such insurance coverage. Plaintiffs allege that they are entitled to coverage under the Business Income and Civil Authority coverage provisions of their insurance policies.

Plaintiffs' complaint includes two claims: Count I is for declaratory judgment pursuant to MCR 2.605 which would declare that the policies do cover Plaintiffs' Business Income claim and Count II is for breach of contract as a result of Defendant's denial of coverage for Plaintiffs' Business Income loss. Now before the Court is Property-Owners motion to dismiss and Plaintiffs' cross-motion for partial summary disposition as to their claim for declaratory relief. The substance of Plaintiffs' cross-motion is essentially the same as their response to Property-Owners' motion.

II. STANDARDS FOR DETERMINING MOTIONS FOR SUMMARY DISPOSITION

Defendant bases its motion on MCR 2.116(C)(8). MCR 2.116(C)(8) provides for summary disposition where "[t]he opposing party has failed to state a claim on which relief can be granted." A motion for summary disposition under (C)(8) tests the legal sufficiency of the complaint. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). The trial court

may consider only the pleadings in rendering its decision. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). All factual allegations in the pleadings must be accepted as true. *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 380-381; 563 NW2d 23 (1997). "The motion should be granted if no factual development could possibly justify recovery." *Beaudrie*, *supra* at 130. "A motion under MCR 2.116(C)(8) may only be granted when a claim is so clearly unenforceable that no factual development could possibly justify recovery. *Adair v Michigan*, 470 Mich. 105, 119, 680 N.W.2d 386 (2004)." *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 160; 934 NW2d 665 (2019).

Plaintiffs' cross-motion as to their claim for declaratory relief is based on MCR 2.116(I)(2). "MCR 2.116(I)(2) specifically authorizes the court to render summary disposition in favor of the party opposing the motion if it appears that such party is entitled to judgment. MCR 2.116(I)(2) is subject to MCR 2.116(G)(5)[1] and 2.119(E)(2)[2] concerning the materials that the court may consider in granting summary disposition." § 63:9.Disposition by the court, 3 Mich. Ct. Rules Prac, Forms § 63:9.

III. DISCUSSION

Preliminarily, it should be noted that, like any other contract, an insurance policy is an agreement between the parties. *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429; 761 NW2d 846 (2008). "An insurance policy is a contract that should be read as a whole to determine

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[1] MCR 2.116(G)(5) provides:

> The affidavits, together with the pleadings, depositions, admissions, and documentary evidence then filed in the action or submitted by the parties, must be considered by the court when the motion is based on subrule (C)(1)-(7) or (10). Only the pleadings may be considered when the motion is based on subrule (C)(8) or (9).

[2] MCR 2.116(E)(2) provides:

> When a motion is based on facts not appearing of record, the court may hear the motion on affidavits presented by the parties, or may direct that the motion be heard wholly or partly on oral testimony or deposition.

what the parties intended to agree on. In interpreting insurance policies, we are guided by well-established principles of construction. The policy must be enforced in accordance with its terms; therefore, if the terms of the contract are clear, we cannot read ambiguities into the policy. Clear and specific exclusionary clauses must be given effect, but are strictly construed in favor of the insured." *McKusick v Travelers Indem Co*, 246 Mich App 329, 332-333; 632 NW2d 525 (2001)[Authorities omitted].

"If an ambiguous term exists in the contract, courts should generally construe the term against the contract's drafter, unless the drafter presents persuasive extrinsic evidence that the parties intended a contrary result." [Citations omitted] *Scott v Farmers Ins Exch*, 266 Mich App 557, 561; 702 NW2d 681 (2005).

Finally, an insurer is free to define or limit the scope of coverage it will provide as long as the language of the policy leads to only one reasonable interpretation and is not in contravention of public policy. *Zurich-Am Ins Co v Amerisure Ins Co*, 215 Mich App 526; 547 NW2d 52 (1996). "The terms used in an insurance policy either are clearly defined within the policy or are given their commonly used meaning." *Group Ins Co of Michigan v Czopek*, 440 Mich 590, 596; 489 NW2d 444 (1992). Therefore, the dispute before the Court rests on a determination of terms and the parties' obligations under their respective insurance contracts.

A. <u>Business Income Coverage</u>

In support of its motion, Defendant Property-Owners first contends that Plaintiffs are not entitled to Business Income coverage because, under the insurance policies, Plaintiffs have not suffered a "direct physical loss" to the covered properties. Plaintiffs' position is that coverage does not require that their properties suffered a structural alteration of the properties. Property-Owners' second argument is that Plaintiffs have not adequately alleged a "suspension of business." Plaintiffs provide no response to this second argument.

The relevant provisions in the insurance policies' "Business Income Form" provide:

> 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 damage to property at ... The loss or damage must be caused by or result from a Covered Cause of Loss. ...
>
> [Form 64004, §A.1.].
>
> "Suspension" means:
>
> a. The slowdown or cessation of your business activities; or
> b. That a part or all of the described premises is rendered untenantable, if coverage for Business Income Including "Rental Value" or "Rental Value" applies.
>
> [Id, §F.7.)].

The "Causes of Loss – Special Form" provides;

> **A. COVERED CAUSES OF LOSS**
>
> When Special is shown in the Declarations, Covered Causes of Loss means Risks of Direct Physical Loss unless the loss is:
>
> 1. Excluded in Section B., Exclusions; or
> 2. Limited in Section C., Limitations that follow.
>
> [Form 64010, §A.][Emphasis added].
>
> **B. EXCLUSIONS**
>
> 1. 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.
>
> **a. Ordinance or Law.**
>
> The enforcement of any ordinance or law:
>
> > (1) Regulating the construction, use or repair of any property; or
> > (2) Requiring the tearing down of any property, including the cost of removing its debris. ...

...

c. Governmental Action

Seizure or destruction of property by order of governmental authority. However, we will pay for loss or damage caused by or resulting from acts of destruction ordered by governmental authority and taken at the time of a fire to prevent its spread, if the fire would be covered under this Coverage Part.

...

i. Virus or Bacteria

We will not pay for loss or damage caused by or resulting from virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease. With respect to any loss or damage subject to this exclusion, such exclusion supersedes any exclusion relating to "pollutants."

[Id, §B.1.].

2. We will not pay for loss or damage caused by or resulting from any of the following:

...

b. Delay, loss of use or loss of market.

[Id, §B.2.].

3. We will not pay for loss or damage caused by or resulting from any of the following, 3.a. through 3.c. However, if an excluded cause of loss that is listed in 3.a. through 3.c. results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.

...

b. Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body.

[Id, §B.3.].

As an initial matter, the Court notes that the policy does not define "direct physical loss." Pursuant to case law, regarding interpreting the policy, "An insurance contract should be read as a whole, with meaning given to all its terms." *Dancey v Travelers Prop Cas Co*, 288 Mich App

1, 8; 792 NW2d 372 (2010). "The court's role is to 'determine what the agreement was and effectuate the intent of the parties," *Hunt v Drielick,* 496 Mich 366; 852 NW2d 562 (2014), quoting *Auto-Owners Ins Co v Churchman*, 440 Mich 560; 489 NW2d 560 (1992). Therefore, the Court rejects Plaintiffs' rather lengthy argument regarding the plain meaning and dictionary definition of the words "loss," "direct," "physical," and "damage" in favor of interpreting the context of the contract language and relevant case law in the matter.

To determine the meaning of the term "direct physical loss," the parties provide numerous state and federal cases in support of their respective positions. However, many of these cases are not binding on the Court. The state court decisions are either unpublished or are from other jurisdictions, or both. Although unpublished decisions are not binding on the Court under the rule of stare decisis, MCR 7.215(C)(1), the Court may find the reasoning in them persuasive. In addition, "[a]lthough lower federal court decisions may be persuasive, they are not binding on state courts."*Abela v Gen Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004). Thus, the ramifications of Covid-19, the Governor's Executive Orders, and the resulting issues in this case present the Court with several issues of first impression. The Court must first apply the standards for the interpretation and construction of contracts and then may take into account any authority which the Court finds persuasive. Some of the relevant cited decisions are as follows:

- *Asian Food Serv, Inc v Travelers Cas Ins Co of Am*, No. 18-13454, 2020 WL 2733831, at 5 (ED Mich, May 26, 2020) - the Eastern District of Michigan rejected a claim for business income coverage, recognizing that "[t]he Sixth Circuit, applying Michigan law, has found that this language -'direct physical loss or damage'- encompasses tangible, physical losses, not economic losses."

- *Gavrilides Mgmt Co v Mich Ins Co*, Case No. 20-258-CB-C30 (Ingham County, July 2020), appeal pending - the Ingham County Circuit Court, when faced with similar claims for coverage arising out of the COVID-19 pandemic, held that direct physical loss or damage to property is not caused by the SARS-CoV-2 Virus.

- *Turek Enterprises, Inc v State Farm Mut Auto Ins Co*, 484 F Supp 3d 492 (ED Mich, 2020) – The court held that "accidental direct physical loss to Covered Property" is an

unambiguous term that plainly requires Plaintiff to demonstrate some tangible damage to Covered Property." *Id* at 502.

The above decisions are consistent with the now more than 25 courts, many of which have been cited by Property-Owners, which have rejected similar claims for Business Income coverage arising out of the COVID-19 pandemic. Plaintiffs cite numerous cases[3] that support their position that direct physical loss or damage can be something other than structural alteration. For example, in *Studio 417, Inc v Cincinnati Ins Co*, 478 F Supp 3d 794, 801 (WD Mo, 2020), the court considered the terms "physical loss" or "physical damage" as they relate to COVID-19's impact on small business operations under policies providing Business Income and Civil Authority coverage, which are materially similar to the policy here. The *417 Studio* court

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[3] Some of Plaintiffs' supporting cases are:

- *Acorn Inv Co v Mich Basic Prop Ins Ass 'n*, No. 284234, 2009 WL 2952677, at 2 (Mich App, September 15, 2009) - "The use of the word 'direct' [describing loss in a property insurance policy] signals 'immediate' or 'proximate' cause, as distinct from remote or incidental causes."

- *Advance Cable Co, LLC v Cincinnati Ins Co*, 788 F3d 743, 746 (CA 7, 2015) - "[Common sense suggests that [direct] is meant to exclude situations in Which an intervening force plays some role in the damage."

- *Ashland Hosp Corp v Afliziated FM Ins Co*, No. CIV.A. 11-16-DLB-EBA, 2013 WL 4400516, at 5 (ED Ky, August 14, 2013) - holding that the damage to plaintiff's data network caused by overheating is "direct" because "the harm flows immediately or proximately from the heat exposure."

- *Prudential Prop & Cas Ins Co v Lillard—Roberts*, No. CV-01-1362-ST, 2002 WL 3 1495830, at 7 (D Or, June 18, 2002) - "{T}he inclusion of [the] word [physical] negates any possibility that the policy was intended to include 'consequential or intangible damage,' such as depreciation in value, within the term 'property damage.'"

- *Sentinel Mgmt Co v NH Ins Co*, 563 NW2d 296 (Minn App, 1997) - "Direct physical loss also may exist in the absence of structural damage to the insured property."

- *Wakefern Food Corp v Liberty Mutual Fire Insurance Company*, 406 NJ Super 524 (App Div, 2009), in which a store lost power due to electrical grid and transmission malfunction, the court stated that, "[s]ince 'physical' can mean more than material alteration or damage, it [is] incumbent on the insurer to clearly and specifically rule out coverage in the circumstances where it was not to be provided." *Id* at 735.

- *One Place Condo, LLC v Travelers Prop Cas Co of Am*, No 11 C 2520, 2015 WL 2226202, 9 (ND Ill, April 22, 2015). The court opined, "Where a general all-risk commercial or homeowner's policy insures against both 'loss' and 'damage' to an existing structure, 'physical' damage may take the form of loss of use of otherwise undamaged property, which in tum suffices as a covered loss."

explained that "[o]ther courts have similarly recognized that even absent a physical alteration, a physical loss may occur when the property is uninhabitable or unusable for its intended purpose."

The Court is not persuaded by the case law that Plaintiffs offer in support of their argument such as *Studio 417*. Aside from being out-of-state cases, in the Court's view these cases do not consider the unambiguous language and plain meaning of the policy at issue in this case.

For example, the Business Income Form, § A.1 states:

> 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 term "period of restoration" indicates that the parties contemplated there must be tangible damage to the property, which would need to be repaired or restored to its original condition, thereby requiring a "period of restoration." Any other interpretation of the word "physical" such as Plaintiffs' interpretation that there need not be tangible damage would render the word "physical" meaningless.

Plaintiffs, however, assert that the policy language is ambiguous and requires examining the ordinary common usage and offers definitions found in a dictionary. They assert that definitions of "physical" found in Merriam-Webster Online Dictionary show that the term describes something "having material existence" and that a virus has material existence. The Court disagrees. Here, the plain language of the insurance policy and all the policy provisions, taken as a whole, *McKusick, supra,* require that there must be some direct physical change to or "some tangible damage" to the property to be entitled to Business Income loss benefits and the overwhelming majority of courts agree. *Id.* Nothing in the insurance policy here indicates that a cause of loss entitling an insured to Business Income loss can be something other than direct,

tangible damage to the property or physical building itself. Moreover, there is nothing ambiguous about the virus exclusion, which provides that Property-Owners "will not pay for loss or damage caused by or resulting from virus … that induces or is capable of inducing physical distress, illness or disease…" Hence, there is no interpretation or understanding that a loss or damage caused by a virus would be covered under the policy.

Regarding the issue of "suspension" of business, although Defendant argues that case law holds 'necessary suspension' in an insurance policy to require a complete cessation, this runs contrary to Property-Owners' own policy language. As explained above, "suspension" is defined suspension as a "slowdown or cessation of your business activities" or "a part or all of the described premises is rendered untenable, if coverage for business… applies." Based on the unambiguous language, a "slowdown" is a "suspension" of business activities. However, in the second possibility, if part of the property is "untenable," coverage due to suspension also requires that Business Income coverage applies. Nevertheless, as explained above, there must be some direct physical change to or "some tangible damage" to the property to be entitled to Business Income. In addition, the numerous exclusions in the instant insurance policy bar coverage under the second part of the definition of "suspension."

B. Civil Authority Coverage

With respect to "civil authority" coverage, Property-Owners argues that Plaintiffs have not satisfied the requirements of the policy to be entitled to Business Income coverage. The "Business Income (and Extra Expense) Actual Loss Sustained Coverage Form" provides in relevant part:

> **5. Additional Coverages**
>
> **a. Civil Authority**
>
> In this Additional Coverage - Civil Authority, the described premises are premises to which this Coverage Form applies, as shown in the Declarations. When a Covered Cause of Loss causes

> damage to property other than property at the described premises, we will pay for the actual loss of Business Income ... caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:
>
> > (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
> >
> > (2) 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.
>
> [Form 64014, §A5][Emphasis added].

In other words, for Civil Authority coverage to apply, two conditions must be met: (1) a "Covered Cause of Loss" must "cause damage to a property other than the property covered by the policy; and (2) the "action of civil authority" must "prohibit access" to the covered premises due to direct physical loss or damage to a property within one mile of the covered property.

Here, Plaintiffs provide only bare assertions and statements that Covid-19 caused direct physical loss of or damage to properties within one mile of Plaintiffs' covered properties. Plaintiffs mention limitations on hospitals, but do not specify which ones or where they are located. Nor did the Governor's Executive Order prohibit total access to these places.

Some courts, for example *TMC Stores, Inc v Federated Mut Ins Co*, No. A04-1963, 2005 WL 1331700, at 4 (Minn Ct App, June 7, 2005),[4] interpreting similar provisions have held that

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[4] The court in *TMC Stores, Inc v Federated Mut Ins Co*, No. A04-1963, 2005 WL 1331700, at 4 (Minn Ct App, June 7, 2005) explained:

> Other jurisdictions that have examined this access issue have found that, generally, coverage under the civil authority section is only available when access is completely prohibited. *See, e.g., Abner, Herrman & Brock, Inc v Great N Ins Co,* 308 FSupp2d 331, 336-37 (SDNY 2004) (finding civil authority provision applies only when access to the premises is completely denied); *Dixson Produce, LLC v Nat'l Fire Ins Co of Hartford,* 99 P3d 725, 729 (Okla Ct

coverage under the "civil authority" provision "is only available when access is completely prohibited." The Governor's Executive Order did not require Plaintiffs to close their restaurants or prohibit Plaintiffs' employees or customers from accessing the restaurants. It merely limited the type of service Plaintiffs could provide. Therefore, because access to Plaintiffs' restaurants was not "completely prohibited," coverage does not apply.[5] Moreover, Plaintiffs fail to allege direct physical damage to any specific adjacent property. The Court is also not persuaded by *North State Deli, LLC v The Cincinnati Ins Co,* 2020 WL 6281507, at *3 (NC Super), another case cited by Plaintiffs. The *North State Deli* court stated:

> In the context of the Policies, therefore, "direct physical loss" describes the scenario where business owners and their employees, customers, vendors, suppliers, and others lose the full range of rights and advantages of using or accessing their business property. This is precisely the loss caused by the Government Orders. Plaintiffs were expressly forbidden by government decree from accessing and putting their property to use for the income-generating purposes for which the property was insured. These decrees resulted in the immediate loss of use and access without any intervening conditions. In ordinary terms, this loss is unambiguously a "direct physical loss," and the Policies afford coverage.
>
> [Emphasis added].

The *North State Deli* case deals with different executive orders and also seems to heavily rely on dictionary definitions to determine the intent behind the provisions of the contract. Indeed, the executive orders in *North State Deli* completely prohibited access to the property.

> App 2004) (holding that even though travel to the business was inconvenient, unless access was prohibited, the business could not recover under civil authority policy provision).

[5] Plaintiffs also cite *Sloan v Phoenix of Hartford Insurance Co*, 46 Mich App 46; 207 NW2d 434 (1973) in support of coverage under the "civil authority" provision. In *Sloan,* the insurer declined "civil authority" coverage for loss of business income suffered by a movie theater when that theater and surrounding businesses were closed pursuant to the Governor's executive order issued in response to widespread riots.. The insurer contended there was no coverage because plaintiff's theater had not itself suffered physical damage in the riots. The Court of Appeals rejected that argument. *Id* at 51. However, *Sloan* is distinguishable because, unlike the case at bar, in *Sloan*, the executive order completely prohibited access to the theater.

Defendant, Property-Owners, disagrees and argues that the "virus exclusion" clearly bars coverage. Even if the "Business Income" or "civil authority" provisions applied, the policy exclusions bar coverage. As indicated above, those exclusions are ordinance or law, governmental action, delay, loss of use or loss of market, acts or decisions of any governmental body, and virus or bacteria.

Plaintiffs also argue that the Covid-19 virus should not bar coverage because many courts have held that Covid-19 has caused physical impairment of properties such that there is a loss of habitability or functionality, including commercial functionality. Plaintiffs assert that there is a physical alteration caused by the virus because the virus can be found on surfaces, requiring cleaning as well as the use of hand sanitizers. Under Plaintiffs' interpretation, because the virus can be on surfaces, it causes tangible damage. At oral argument, Property-Owners responded that the virus does not change the properties and is a temporary condition that can be cleaned. The Court agrees with Property-Owners' argument that there has not been physical loss to the property.

Again, the Court is not convinced by the cases cited by Plaintiffs, which are not binding on this Court.[6] Plaintiffs conflate the terms "impairment," "habitability," and "functionality" with the term "direct physical damage," when they clearly are not the same. As noted earlier, this Court finds that, to be entitled to coverage, the clear and unambiguous term "direct physical loss

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[6]

- *Gen Mills, Inc v Gold Medal Ins Co*, 622 NW2d 147, 152 (Minn App, 2001) - Direct physical loss had occurred when an insured's property - cereal oats - was infested by an unapproved pesticide because "function [was] seriously impaired."

- *Stack Metallurgical Servs, Inc v Travelers Indem Co of Connecticut*, CIV 05-1315-JE, 2007 WL 464715, at 8 (D Or, February 7, 2007) - An industrial furnace sustained "direct physical loss or damage" when contamination prevented it from being used for ordinary commercial purposes.

- *Murray v State Farm Fire & Casualty Co*, 203 WVa 477; 509 S.E.2d 1 (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 concluded, "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 493.

or damages" in the policy requires that there must be direct physical change to or "some tangible damage" to the covered property. *Asian Food Serv, Inc, supra; Turek Enterprises, supra.*

Plaintiffs contend that, because the "virus exclusion" broadly excludes "loss or damage," rather than "loss of business income," the term is then ambiguous and may be interpreted to allow loss of business income. Indeed, Plaintiffs provides no case law as support for this interpretation. In support of its position, Property-Owners, however, provides *Part Two LLC v Owners Ins Co*, 7:20-cv-01047-LCS (ND Alabama), a recent federal case with a nearly identical virus exclusion provision. The *Part Two LLC* court held:

> The Virus exclusion in Part Two's policy is unambiguous. It excludes any 'loss or damage caused by or resulting from a Virus, bacterium, or other microorganism that induces or is capable of inducing . . . illness or disease.

While the lower federal court decisions are not binding upon this Court, the Court finds that the reasoning in *Part Two LLC* is sound and persuasive. Whether Plaintiffs argue that there was a loss due to the Executive Orders, which arose from the virus, or from the virus itself, the language of the policy clearly and unambiguously excludes loss or damage caused by or resulting from the virus. Any damage claimed by the executive order would qualify as resulting from the virus. Therefore, this Court finds that the virus exclusion provision unambiguously applies to all loss and damage resulting from a virus or bacteria directly or indirectly via the Governor's executive orders.

IV. CONCLUSION

Business Income loss coverage requires direct, tangible damage to the property or physical building itself. Moreover, because access to Plaintiffs' restaurants was not "completely prohibited," civil authority coverage does not apply. Coverage under the "civil authority" provision "is only available when access is completely prohibited." *TMC Stores, Inc, supra.* The insurance policy in this case clearly and unambiguously bars coverage for loss or damage caused

by or resulting from virus. *Part Two LLC, supra.* Therefore, Plaintiffs have failed to state a claim for which relief may be granted.

On the basis of the foregoing opinion,

The motion for summary disposition filed by Defendant Property-Owners Insurance Company is hereby **GRANTED**;

IT IS FURTHER ORDERED that the cross-motion for partial summary disposition filed by Plaintiffs Three Won Three, Corp, Eighty Ate, LLC, and Ate Ate, LLC is hereby **DENIED;**

IT IS FURTHER ORDERED that this resolves the last pending claim and closes the case.

IT IS SO ORDERED.

DATED: 3/17/2021

/s/ Muriel D. Hughes 3/17/2021
Circuit Judge