No. 225 PA-21-2 FOURTEENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

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

Plaintiffs-Appellees,

v.

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

Defendants-Appellants.

From Durham County

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NORTH CAROLINA RESTAURANT & LODGING ASSOCIATION AND RESTAURANT LAW CENTER, AND ANGUS BARN, INC. *AMICI CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS-APPELLEES

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From Durham County

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NORTH CAROLINA RESTAURANT & LODGING ASSOCIATION AND RESTAURANT LAW CENTER *AMICI CURIAE* BRIEF IN SUPPORT OF PLAINTIFFS-APPELLEES

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The North Carolina Restaurant & Lodging Association ("NCRLA"), and Restaurant Law Center respectfully submit this *Amici Curiae* brief in support of Plaintiffs-Appellees. *Amici*, on behalf of thousands of individual members in North Carolina and nationally, and on behalf of North Carolina restaurants generally, have a strong interest in this case and offer their unique perspective to the Court regarding the lower court's ruling. Specifically, *Amici* explains: (1) the effect of the Coronavirus pandemic and the related civil authority orders on the North Carolina restaurant industry, and (2) why the absence of a virus exclusion in Defendant-Appellant Cincinnati Insurance Company ("Cincinnati")'s policy demonstrates its intent to provide coverage for virus-related losses.

INTRODUCTION

As epicenters of social gathering, North Carolina's restaurants, including Plaintiffs' establishments, were among the hardest hit by the Coronavirus pandemic and related local, state, and national government closure orders (the "Government Orders"). Although the devastation to the restaurant industry was unprecedented, the risks – viruses and civil authority orders that prohibit access to restaurant premises – were not unforeseen perils. In fact, these risks were well known to the restaurant industry. To that end, when purchasing all-risk property policies, Plaintiffs – like many other North Carolina restaurant policyholders – expressly sought out policies that would protect them fully in the event of foreseeable risks causing unprecedented harm.

Here, Defendant-Appellant Cincinnati Insurance Company ("Cincinnati")

issued in North Carolina and elsewhere broad "all risk" property policies that covered loss resulting from any kind of direct "physical loss" to "Covered Property" unless expressly excluded. The policies expressly covered damages arising from civil authority orders prohibiting access to property. Further, Cincinnati opted not to include in Plaintiffs' policies a specific provision designed to exclude viruses or virus-related perils. Having chosen to underwrite the risk of virus-related exposures, Defendant-Appellant should not be permitted to rewrite the policies now. Under axiomatic principles of policy interpretation, Plaintiffs are covered for their losses, and the lower court ruling should be upheld.

INTEREST OF *AMICI CURIAE*

NCRLA: *Amicus* NCRLA is a non-profit trade organization that represents, promotes, and educates the North Carolina hospitality industry. NCRLA has 3,000 members and works on behalf of 20,000 restaurants and hotels statewide. NCRLA's members employ roughly 250,000 of the North Carolina restaurant and lodging industry's 500,000-strong workforce (which comprises 11% of North Carolina's workforce). NCRLA submits this brief on behalf of its thousands of small business and other members throughout North Carolina whose restaurants and hotels were devastated by COVID-19 and the resulting Government Orders mandating physical closure.

Restaurant Law Center: *Amicus* Restaurant Law Center is a public policy organization affiliated with the National Restaurant Association, the world's largest foodservice trade association. The industry is comprised of over one million

establishments that represent a broad and diverse group of owners and operators—from large national outfits, to small, family-run neighborhood restaurants, and everything in between. The industry employs over 15 million people and is the nation's second-largest private-sector employer. Through regular participation in amicus briefs on behalf of the industry, the Restaurant Law Center provides courts with the industry's perspective on legal issues that may have industrywide implications.

SUMMARY OF ARGUMENT

I. The hospitality industry is a significant sector of the North Carolina economy and a major driver of economic activity. North Carolina restaurants create employment and entrepreneurship opportunities, draw tourists to North Carolina, produce significant tax revenue, and serve as an integral part of the cultural fabric. The COVID-19 pandemic and Government Orders decimated North Carolina's restaurant industry. Yet Cincinnati ignores the reality that as a direct result of the virus and the Government Orders, Plaintiffs lost the physical use of their restaurants, resulting in a significant loss of business income and extra expense. The insurer's improper coverage denial only exacerbates the restaurant industry's losses.

II. Cincinnati promised to pay for "physical loss or damage" caused by ***all*** risks that are not specifically excluded. Neither the Coronavirus (or COVID-19) nor the Government Orders are excluded risks under the policies. To the contrary, the policies expressly provide coverage for the Civil Authority closures. Cincinnati failed to include a commonly used "virus" exclusion in the policies, which, if included, could

have precluded coverage for virus-related losses. Indeed, several of the plaintiff policyholders negotiated for such an exclusion to *not* be included in their policies. Having failed to include such an exclusion in an all-risk policy, Cincinnati knew it was providing coverage for such losses. In fact, other insurance companies selling similar all-risk property policies have admitted that choosing not to include the virus exclusion evinces an intent to cover such losses. Cincinnati should be held to honor its coverage promise.

ARGUMENT

I. RESTAURANTS SOUGHT INSURANCE COVERAGE TO SURVIVE UNPRECEDENTED HARDSHIP AND CONTINUE THEIR CRITICAL CONTRIBUTIONS TO NORTH CAROLINA'S ECONOMY AND CULTURE

North Carolina has over 20,000 restaurants and lodging establishments. North Carolina's hospitality industry suffered some of the most extreme consequences of the pandemic with a corresponding critical need for insurance proceeds to make up for the losses. During the pandemic, consumer spending in restaurants remained well below normal levels. For example, 79% of North Carolina's restaurant operators reported their total dollar sales volume in October 2020 significantly lower than it was in October 2019. Overall, sales were down 29% on average. Meanwhile, labor costs did not fall proportionately and, in some instances, costs were even higher during the COVID-19 pandemic. With costs higher and sales lower, the result was financial loss to restaurants' bottom line. Eighty-six percent of operators reported that their restaurant's profit margin was lower than it was prior to the COVID-19 outbreak.

The devastation of the hospitality industry in North Carolina had a broader impact on North Carolina. Every dollar spent at table-service restaurants—the businesses most affected by COVID-19 and state and local shutdown orders—would normally benefit the state's economy and boost the state's tax revenue. Pre-pandemic, the hospitality industry provided jobs for thousands of people and played, and continues to play, a vital role in local communities throughout the state. Specifically, pre-pandemic, the North Carolina restaurant and lodging industry provided 531,000 jobs, equal to 11 percent of the state's workforce, and generated approximately $27.3 billion in sales annually. The hospitality sector also generated over $3 billion for North Carolina in state and local taxes. Further, as noted, a restaurant contributes to the livelihood of dozens of employees, suppliers, purveyors, and related businesses.[1]

North Carolina's restaurants are also cultural centers, creating unique neighborhood identities and driving commercial revitalization. Restaurants bring stability and interest in seeing their neighborhoods grow and thrive. That is true of the many small (often family-owned) restaurants that make up the vast majority of the industry and are a vibrant part of the communities where they operate. Restaurants also serve as tourist draws – bringing in business to the state from elsewhere and shaping North Carolina's identity.

The past successes of the industry are not guaranteed in the future. Even

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[1] Eric Amel et al., *Independent Restaurants Are a Nexus of Small Businesses in the United States and Drive Billions of Dollars of Economic Activity That Is at Risk of Being Lost Due to the COVID-19 Pandemic* (June 10, 2020).

during "normal" pre-pandemic times, restaurants operate on a razor's edge. But after two years into the pandemic, almost a third of U.S. restaurants faced permanent closure.[2]

Fortunately, many of these businesses protected their interests (and North Carolina's interests) by purchasing all-risk property insurance, understanding that this insurance would supplement covered losses. However, insurers like Defendant-Appellant continue to campaign against payment, pretending that because the size of the losses were unprecedented, such loss simply cannot be paid. But "too large to pay" is not how insurance claims work. While the extent of the damage from the COVID virus and the related Government Orders may have been unforeseen, the risks themselves were long known to both the restaurant and insurance industry. This is evident alone from the 2003 spread of the "SARS" virus, also known as COVID-1. Policyholders purchased insurance for losses specifically from this and other viruses. The fact that COVID-2 – the virus of the 2020-22 pandemic – caused larger losses does not give the insurers a free pass.

II. CINCINNATI'S ALL-RISK POLICY DOES NOT EXCLUDE COVERAGE FOR THE GOVERNMENT ORDERS OR VIRUS-RELATED LOSSES

A. Cincinnati's Policies Are "All-Risk" Insurance Policies

For years, Cincinnati marketed and sold its "all-risk" insurance policies in North Carolina (and nationally), collecting substantial premiums from policyholders

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[2] *See, e.g.*, Anita Sharpe, Jon Dominick Querolo, *One-Third of U.S. Restaurants Face Permanent Closure This Year*, Bloomberg (July 31, 2020) *available at* https://www.bloombergquint.com/onweb/one-third-of-u-s-restaurants-face-permanent-closure-this-year.

who expected the full coverage for which they paid. Specifically, Cincinnati's industry-standard policy form insures against "direct 'loss' . . . caused by or resulting from any Covered Cause of Loss." But Covered Cause of Loss does not specify a particular cause. Instead, it circles back and defines "cause" in terms of loss: "direct 'loss unless the loss is excluded or limited in the Coverage Part." Because "cause" is defined in terms of the resulting loss, this insurance is for *all* causes, not excluded. Put simply, that which is not excluded is covered.[3]

Faced with unprecedented losses caused by COVID-19 and the Government Orders, restaurants rightfully turned to their insurers for coverage under their "all risk" property insurance policies. These policyholders reasonably understood, expected, and believed their policies would cover business income losses from any and all non-excluded risks, including the COVID-19 pandemic and executive orders like the Government Orders. COVID-19 and the related executive shutdown orders had forced restaurants to close and mandated that customers and employees stay at home. Further, these risks materially impaired restaurants' physical space and prevented them from functioning as envisioned. Millions of square feet of vital physical space were lost when on-premises dining was limited or barred entirely. Restaurants were dispossessed of their tangible spaces and their premises experienced real, material, and detrimental physical changes and loss. Physical measures taken included: dining rooms closed or limited capacity; areas blocked off;

[3] *See, e.g.*, *Studio 417, Inc. v. The Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 797 (W.D. Mo. Aug. 12, 2020) (describing Cincinnati's policy: "All-risk policies cover all risks of loss except for risks that are expressly and specifically excluded.").

seating areas eliminated; barriers erected and dividers installed; layouts altered; fixtures and furniture removed; self-service stations gone; spaces shuttered; floors marked; and plexiglass mounted. These are but a few of the *physical* manifestations of the direct physical loss or damage that restaurants have suffered. Yet insurers like Cincinnati refused to recognize coverage for any of these physical losses.

In denying coverage, Cincinnati ignored that the burden is on the insurer issuing an "all risk" policy to show that a loss comes within an exclusion specified in the policy. Moreover, "[o]ur Supreme Court has further held that "provisions of insurance policies and compulsory insurance statutes which extend coverage must be construed liberally so as to provide coverage, whenever possible by reasonable construction." *Integon Insurance Company v Ward*, 184 N.C. App.532, 646 S.E.2d 395 (Ct. App 2007), quoting State Capital Ins. Co. *v. Nationwide Mut. Ins. Co.,* 318 N.C. 534, 538-39, 350 S.E.2d 66, 68 (1986).

Defendant-Appellant falls short under this North Carolina interpretive standard. The all-risk policies it issued to Plaintiffs expressly cover loss from both civil authority closures and viruses. First, the policies expressly contemplate coverage for civil authority directives like the Government Orders.[4] Second, although

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[4] Cincinnati's policies provide "Civil Authority coverage." This coverage insures against losses "caused by action of civil authority that prohibits access to the 'premises.'" The Government Orders expressly prohibited access (both full and partial) to Plaintiffs' premises, resulting in physical loss of use and access to the properties. *See, e.g.*, *Studio 417, Inc.*, 478 F. Supp. 3d at 803 ("Plaintiffs adequately allege that they suffered a physical loss, and such loss is applicable to other property. Additionally, Plaintiffs allege that civil authorities issued closure and stay at home orders throughout Missouri and Kansas, which includes properties other than Plaintiffs' premises.").

most insurance policies (including some Cincinnati policies) contain a virus exclusion, the policies Cincinnati sold the Plaintiffs did not. Because virus-related losses were not expressly excluded, they must be construed as included under the all-risk policy form.

B. Cincinnati's Policies Cover Virus-Related Losses

There is no dispute that Plaintiffs' policies do not include a virus exclusion. There is also no dispute that such an exclusion is commonly used in the insurance marketplace. Cincinnati could have specifically excluded viral losses from coverage but chose to not include such an exclusion in its policy. Accordingly, it is reasonable to conclude that Cincinnati intended its policy to cover virus-related losses like those stemming from COVID-19.

Viral contamination is not an unknown risk in the restaurant or insurance industry. For this reason, the insurance industry developed a "virus exclusion" that explicitly precludes coverage for losses associated with viruses. Beginning in 2006, insurers across the country incorporated the standard form Insurance Services Office ("ISO") "virus" exclusions into property policies. Cincinnati, like all other insurers, understood the risk of loss associated with viruses and pandemics when it issued Plaintiffs' policies. Unlike other insurers, though, Cincinnati ignored these warnings and failed to exclude such losses in its policies sold to Plaintiffs-Appellees. In denying a similar motion to dismiss by Cincinnati, the *Brown's Gym* court ruled: "As the sole drafter of the policy, Cincinnati had the power to bar business income and extra expense coverage for losses caused by viruses by simply including a virus exclusion

among its many exclusions, but it failed to do so."[5]

The absence of this exclusionary virus language demonstrates Cincinnati's intent to cover such losses. It had a virus exclusion available to it – both the ISO form and one presumably included with other Cincinnati policies.[6] If Cincinnati wanted to exclude losses caused by viruses or pandemics, it could have. When insurers promise to cover all "loss" unless a "loss" is specifically excluded and then fail to use clear and distinct language to exclude a cause of loss known in the market, they act at their own peril. Having failed to do so, especially when it had the language at hand, Cincinnati must pay what it promised to cover for Plaintiffs-Appellees: all "loss" unless that "loss" is specifically excluded. Because Cincinnati did not exclude virus and pandemic-related losses, the loss here is covered.

Other insurers have confirmed that when the virus exclusion is absent, it demonstrates an intent to cover such risks. For instance, some insurers asked state regulators if they could omit the virus exclusion (making it "optional" rather than "mandatory," as ISO proposed), in order to offer their customers broader coverage. *See* Greater New York Mutual Insurance Company ("GNY") Explanatory Memorandum, Response to Objection 1 Dated 4-30-2012.[7] Specifically, in its

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[5] *Brown's Gym, Inc. v. Cincinnati Ins. Co.*, No. 20-CV-3113, 2021 WL 3036545, at 50 (Pa. Ct. Common Pleas July 13, 2021).

[6] *See* Cincinnati's 10-Q filing: "***Most*** of our standard market commercial property policies . . . do not contain a specific exclusion for COVID-19.") (emphasis added).

[7] *See Legal Sea Foods, LLC v. Strathmore Ins. Co.*, No. 1:20-cv-10850 (D. Mass.), ECF #36 (Second Amended Compl.), case reported at 523 F.Supp.3d 147 (D.Mass 2021), *aff'd* 36 F.4th 29 (1st Cir. 2022). Strathmore is a GNY insurance company, which is

memorandum to New York regulators, GNY acknowledged that coverage exists for "this type of loss ('pandemic')" in the absence of a virus exclusion. *Id.* It told regulators that that viruses and pandemics could result in potential covered losses in "Business Interruption/Time Element coverage segments." *Id.* It gave specific examples of diseases spreading in indoor, highly trafficked spaces (like restaurants) that may create a covered loss. *Id.* Indeed, GNY recognized that "restaurants are probably the most likely to experience such events." *Id.* It acknowledged that a "pandemic" loss from "contagious disease" could involve a wide variety of vectors, including losses "transmitted to third parties via ingestion," "direct contact to an insured's products," or "spread through the HVAC system" in a building—the last of which has, unfortunately, been proven true during the COVID-19 pandemic. *Id.* GNY downplayed the possibility that a virus "would spread throughout a vast proportion of the apartments and condominiums across NYC that we insure," but it nonetheless admitted that it was deliberately insuring that kind of risk. *Id.* Crucially, the insurer admitted what all standard-form property insurers knew: policyholders reasonably expect this coverage and would never willingly part with it. GNY said: "[W]e do not anticipate that any of our insureds will voluntarily request this [virus] exclusion; some (habitational risks) because it would never enter their minds as a problem for which they would voluntarily reduce coverage; others (restaurants) because they feel that such an event is well within the realm of possible

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why the memorandum appears in the Strathmore case. In a COVID-19 suit against Strathmore, the policyholder offered this memorandum as evidence that the policy covered Covid-19 related losses.

fortuitous occurrences and should be covered should such an event arise." *Id.* GNY's explanations for this proposal illustrate why insurer coverage denials like Defendant-Appellant's are improper.

The ISO, which represents insurers in drafting new forms, also acknowledged viruses might trigger coverage under property policies like Cincinnati's and said this was why its proposed virus exclusion to the standard property policy insurance form was necessary.[8] Overall, this illustrates that Plaintiffs-Appellees' policy interpretation is reasonable under North Carolina law – i.e., that the absence of a virus exclusion is evidence that Cincinnati intended to cover such loss. It also shows that this risk was insurable, that the insurer wanted to insure against it (in exchange for premiums), that standard policies covered it, and that policyholders would never willingly surrender it. In short, the insurance industry understood it was insuring these risks.

The ISO and GNY filings conflict with Defendant-Appellant's current legal argument that a virus cannot cause "direct physical loss of or damage" to property. Insurers have already expressed an intent to sell policyholders insurance against pandemic risk. Indeed, insurance companies understood the meaning of "direct physical loss of or damage" to property includes the impact of a pandemic or disease-causing agents on the operation and profitability of a business. And the GNY filings

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[8] *See Legal Sea Foods, LLC v. Strathmore Ins. Co.*, No. 1:20-cv-10850 (D. Mass.), ECF #36 (Second Amended Compl.), ¶ 36 (quoting ISO's justification for the virus exclusion, which was that "building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria" and that such contamination could trigger business-interruption coverage).

show that at least one insurance company specifically expected that merely removing a virus exclusion from a property insurance policy restores the expected coverage for virus-caused losses that existed before the introduction of virus exclusions.

Ultimately, the absence of a virus exclusion in Defendant-Appellant's policy is relevant to understanding what is a "physical loss." It shows: (1) the understanding of the insurance industry that virus-related losses are covered by all-risk policies, and (2) that Cincinnati's decision not to include a virus exclusion evinces the parties' intent—and the plaintiffs' reasonable expectation—that virus-related losses would be covered. North Carolina law requires that the policy language be construed in favor of plaintiffs in order to give effect to the policies' dominant purpose of indemnity. Interpreting Plaintiffs' policies as Cincinnati instead suggests would deprive Plaintiffs of the full coverage they purchased and would allow Cincinnati to retroactively amend its policies to escape its coverage obligations for which it has already collected premiums.

CONCLUSION

For these and the other reasons stated herein, *Amici* respectfully request the Court uphold the lower court's ruling in favor of Plaintiffs-Appellees.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28(j) of the Rules of Appellate Procedure, counsel for *Amici* certifies that the foregoing brief, which is prepared using 12-point Century Schoolbook font, is less than 3,750 words (excluding cover, indexes, tables of authorities, certificates of service, this certificate of compliance, and appendices) as reported by the word-processing software.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the attorney is, and at all times hereinafter mentioned was, more than eighteen (18) years of age; and that on this day, copies of the foregoing will be served on the following by electronic mail:

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The undersigned attorney certifies that the forgoing is true and correct.

This the 16th day of January 2024.

s/ Guy W. Crabtree

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