UNITED STATES DISTRICT COURT
SOUTHER DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

DANIEL B. O'KEEFE, CELESTE A. FOSTER O'KEEFE, and THE DANCEL GROUP, INC.	**PLAINTIFFS**
V.	**CIVIL ACTION NO. 1:08CV600-HSO-LRA**
STATE FARM FIRE AND CASUALTY COMPANY, and MARSHALL J. ELEUTERIUS	**DEFENDANTS**

RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR DECLARATORY JUDGMENT/PARTIAL SUMMARY JUDGMENT RE: SCOPE OF COVERAGE AND STATE FARM'S CROSS-MOTION, AND MEMORANDUM IN SUPPORT OF CROSS-MOTION, FOR PARTIAL SUMMARY JUDGMENT

COMES NOW, Defendant, State Farm Fire and Casualty Company, and files this, its Response in Opposition to Plaintiffs' Motion for Declaratory Judgment/Partial Summary Judgment re: Scope of Coverage and State Farm's Cross-Motion, and Memorandum in Support of Cross-Motion, for Summary Judgment and in support thereof would show the following:

The O'Keefes are charged with knowledge of the contents of the subject policy, including the Declarations Page, as a matter of law, and cannot be heard after loss to complain that the policy did not insure the proper parties. Plaintiffs' Motion for Declaratory Judgment/Partial Summary Judgment should be denied and State Farm's Cross-Motion for Summary Judgment should be granted based on the foregoing as will be set out in detail below.

I. FACTUAL BACKGROUND

Plaintiffs, Daniel and Celeste O'Keefe (O'Keefes) are the sole officers of The Dancel Group, Inc. *See* State of Mississippi Secretary of State, Corporate Filings, attached hereto

collectively as Exhibit "A."[1] "Dancel was formed in 1984, by Daniel O'Keefe and Celeste Foster O'Keefe."[2] *See* Plaintiffs' Second Am. Complaint, ¶ 9, attached hereto as Exhibit "B." Dancel Productions, Inc., filed its Application for Certificate of Authority in Mississippi in 1994. Ex. A. Dancel Production, Inc., changed its name to Dancel Visual Communications, Inc., in 1999. *Id.* In 2007, the named changed again to The Dancel Group, Inc. *Id.*

Plaintiffs have judicially admitted in the Second Amended Complaint that The Dancel Group, Inc., is a Mississippi corporation and, thus, are prevented from arguing otherwise. *See* Exhibit "B," ¶ 2; *see also, The Dancel Group, Inc., et al. v. USF&G, et al.* Civil Action No. 1:08-CV-01321, Complaint, attached hereto as Exhibit "C," ("The Dancel Group, Inc., was, at all times pertinent to the Complaint, a Mississippi Corporation with its principle place of business at 10265 Rodriguez Street, D' Iberville, Mississippi, 39540.").

The O'Keefes own the property located at 10265 Rodriquez Street, D'Iberville, Mississippi. *See* Deed of Trust, attached hereto as Exhibit "D."[3] The O'Keefes applied for and received State Farm Business Policy, Policy No.99-B5-9935-5, which lists the insured location as "10265 Rodriguez Street, D'Iberville Mississippi, 39540-4820." *See* Certified Copy of Policy No. 99-B5-9935-5, 100001, attached hereto as Exhibit "E." The named insureds on the subject policy, as admitted by the Plaintiffs, are Celeste A. Foster and Daniel B. O'Keefe. *Id.*; *see also,* Plaintiffs' Memorandum in Support of Motion For Declaratory Judgment/Partial Summary Judgment Re: Scope of Coverage, [61] ¶ 5(f)("The named insureds on the Declarations Page for

[1] For the sake of simplicity, State Farm combined all documents pertaining to Plaintiff, The Dancel Group, Inc.'s corporate filing into one exhibit.

[2] State Farm is uncertain whether this is actually when "Dancel" was incorporated as the documents filed with the Mississippi Secretary of State indicate that the date of incorporation was June 1993. State Farm maintains, however, that this fact is immaterial. Ex. A.

[3] State Farm is in the process of obtaining the Deed of Trust applicable to this property at the time of loss and will supplement as soon as received.

State Farm Business Policy Number 99-35-9935-5(sic) at the time of Hurricane Katrina were Celeste A. Foster [O'Keefe] and Danny O'Keefe.")[4]. There is no dispute that the O'Keefes received the subject policy booklet. *See* Correspondence from Celeste A. Foster, dated March 20, 2006, attached hereto as Exhibit "F."

Additionally, the application for insurance which was signed by "Celeste A. Foster" and dated June 23, 1999, shows the policy was applied for in the name of Celeste A. Foster and Daniel O'Keefe. *See* Application for Insurance, attached hereto as Exhibit "G." Nowhere on the application is The Dancel Group, Inc., referenced as an insured or as having any interest in the subject policy or property. Ex. G. The Dancel Group, Inc., was a tenant at the insured location. *See* Lease between The Dancel Group, Inc., and Celeste A. Foster, attached hereto as Exhibit "H," and Correspondence from State Farm to the O'Keefes dated April 27, 2006, attached hereto as Exhibit "I."

The policy at issue provides insurance for "Coverage A – Buildings" and "Coverage C – Loss of Income." *See* Ex. E at 100001. The Declarations Page shows that "Coverage B – Business Personal Property" is excluded. *Id.*

The relevant language of the policy is as follows:

POLICY LANGUAGE

> **DEFINITIONS**: throughout this policy, the words "you" and "your" refer to the Named Insured shown in the Declarations and any other person or organizations qualifying as a Named Insured under this policy.
>
> **SECTION I**
> **PROPERTY**
> **COVERAGES**
> **COVERAGE A –**
> **BUILDINGS**

[4] Of note, and for the sake of clarity, the Declaration Page lists the Named Insureds as "Celeste A. Foster and Daniel O'Keefe." *See* Ex. C at 100001.

When a limit of insurance is shown in the Declarations for Coverage A, we will pay for accidental direct physical loss to buildings at the premises described in the Declarations caused by an insured loss.

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COVERAGE B –
BUSINESS PERSONAL
PROPERTY

When a limit of insurance is shown in the Declarations for Coverage B, we will pay for accidental direct physical loss to business personal property at the premises described in the Declarations caused by an insured los.

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COVERAGE C –
LOSS OF INCOME

If Loss of Income coverage is shown in the Declarations, we will pay:

1. for the actual loss of "business income" you sustain due to the necessary suspension of your "operations" due to the "period of restoration". The suspension must be caused by accidental direct physical loss to property at the described premises, including personal property in the open (or in a vehicle) within 100 feet; caused by an insured loss;

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LOSSES
NOT INSURED

1. We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. We do not insure for such loss regardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the executed event to produce the loss:

***

d. flood, surface water, waves, tides, tidal waves, overflow of any body of water or their spray, all whether driven by wind or not;

***

SECTION II
COMPREHENSIVE
BUSINESS LIABILTY
COVERAGE L –
BUSINESS LIABILITY

We will pay those sums that the insured legally obligated to pay as damages because of **bodily injury, property damages, personal injury** or **advertising injury** to which this insurance applies.

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SECTION II
DESIGNATION
OF INSURED
WHO IS AN INSURED

1. If you are designated in the Declarations as:

a. an individual, you and your spouse are insureds but only with respect to the conduct of a business of which you are the sole owner;

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Ex. E.

State Farm adjusted the claims made on the policy correctly, and determined that The Dancel Group, Inc., was not a named insured. Ex. I. Plaintiffs allege in their Memorandum that "State Farm denied the claim for 'business income', *in toto*, based upon the false assertions that the subject policy of insurance does not insure the business activities of Dance l- since the only 'named insureds' on the Dec Page are Danny and Celeste O'Keefe." Document No. [61] ¶ 3. Plaintiffs' statement is a material misrepresentation of fact. State Farm adjusted and paid the O'Keefes $67,570.00 under Coverage A for damage to the building structure and $22,764.00 under Coverage C, loss of income Ex. J. State Farm's payment of $22,764.00 provides evidence that the loss of income claim was not denied "*in toto.*"

The following facts are not in dispute:

- The subject policy insures the commercial property located at 10265 Rodriguez Street, D' Iberville, Mississippi.
- The O'Keefes, not The Dancel Group, Inc., own the commercial building located on the Declarations Page and insured by the subject policy.
- The Dancel Group, Inc., is the tenant and rents space from the O'Keefes to conduct its business in the insured location.
- The Dancel Group, Inc., is a registered corporation recognized by the State of Mississippi.
- The Dancel Group, Inc., is not a named insured on the subject policy.

- The only named insureds on Policy No. 99-B5-9935-5, are Daniel O'Keefe and Celeste A. Foster.

Plaintiffs in this matter have also filed suit against United States Fidelity and Guaranty Company ("USF&G") in a separate cause of action. Plaintiffs maintain that the USF&G policy covers "contents within the business premises, and the business operations of The Dancel Group, Inc., ..." and, further "[t]he business insurance contract provided Plaintiffs with coverage for various risk or perils, including coverage for business personal property; the contents identified on the Declarations Page, and coverage for interruption of business operations conducted from those premises…" *See* Exhibit "C," ¶ 7 and ¶ 8, respectively. Plaintiffs specifically state, "USF&G represented to the Plaintiffs that said business policies were being issued to protect the property and income interests of The Dancel Group, Inc..." *See* Exhibit "C" ¶ 9.

Plaintiffs have failed to acknowledge the USF&G policy in their motion for summary judgment or in their responses to discovery. *See* Document No. [60] and [61]; The O'Keefes and The Dancel Group, Inc.'s responses to discovery requests, attached as Exhibit "K." However, in Plaintiffs' Second Amended Complaint, Plaintiffs judicially admit: "[b]etween 1995 and August 29, 2005, Mr. Eleuterius provided Mr. and Mrs. O'Keefe and/or The Dancel Group, Inc., with all of their insurance coverage except for a business policy issued by St. Paul Travelers Insurance Company." *See* Exhibit "B," ¶ 9. To date, Plaintiffs have withheld any information on the USF&G business policy.

II. SUMMARY JUDGMENT STANDARD

Summary Judgment should be granted, "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue of material fact that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "Of course, a party

seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record,] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *see also Burleson v. Tex. Dep't of Crim. Justice*, 393 F.3d 577, 589 (5th Cir. 2004). "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). Further, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* (*citing*, 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2725, pp. 93-95 (1983)).

In the present case, summary judgment is not appropriate for Plaintiffs as they have wholly failed to set forth any evidence or set of facts that support summary judgment in their favor. Rather, summary judgment is appropriate for State Farm based on the judicial admissions in the pleadings, Plaintiffs' admissions, and the evidence presented in State Farm's Cross-Motion for Summary Judgment. State Farm's argument is set forth in detail below.

III. DECLARATORY JUDGMENT STANDARD

Under the Declaratory Judgment Act, the United States Supreme Court has consistently required that "the dispute be 'definite and concrete, touching the legal relations of parties having adverse legal interests.'" *Medimmune, Inc. v. Genetech, Inc*., 549 U.S. 118, 127 (2007) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937)). The dispute must "be 'real and substantial' and 'admit of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of

facts.'" *Id*. Such disputes are therefore distinguishable "from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot." *Aetna Life Ins. Co.*, 300 U.S. at 240. Accordingly, the Fifth Circuit has made clear that courts will dismiss requests for declaratory judgment that are merely "abstract or hypothetical." *United Transp. Union v. Foster*, 205 F.3d 851, 857 (5th Cir. 2000) (citation omitted); *Orix Credit Alliance, Inc. v. Wolfe*, 212 F.3d 891, 895-96 (5th Cir. 2000).

IV. ARGUMENT AND AUTHORITIES

Plaintiffs allege that The Dancel Group, Inc., should be afforded coverage under the subject policy. The basis for Plaintiffs' contentions that coverage should be extended to The Dancel Group, Inc., is not entirely clear, however, it appears that they have put forth four theories: 1.) that because The Dancel Group, Inc., was "operating" out of that building, the policy should provide coverage for The Dancel Group, Inc.,'s "business operations"; 2.) the term "business operation" is ambiguous and therefore, coverage should be extended to The Dancel Group, Inc., 3.) the O'Keefes are merely "doing business as" The Dancel Group, Inc.; 4.) the O'Keefes are the sole officers and owners of The Dancel Group, Inc., and as such, the O'Keefes are the persons who suffered the "loss of income" as a result of The Dancel Group, Inc.,'s inability to operate after Katrina and therefore they are entitled The Dancel Group, Inc.,'s business interruption loss under the policy. The Plaintiffs also state that they are making a claim for contents coverage under the policy however, they fail to make any allegations supporting their claim. Plaintiffs' theories are devoid of support in law or fact. Accordingly, Plaintiffs' Motion for Declaratory Judgment/Partial Summary Judgment should be denied.

a. Dancel Group, Inc., is Not Insured Under The O'Keefes' Business Policy

Plaintiffs allege the The Dancel Group, Inc., is entitled to coverage under the policy based on an unreasonable allegation that the policy language is ambiguous. The policy is not ambiguous, but rather is clear in its intent to only provide coverage for the named insureds. When read as a whole, as it must, the policy clearly provides coverage only to the O'Keefes for their business operations at the insured location. The Plaintiffs attempts to extend coverage to the The Dancel Group, Inc., have no basis in fact or law.

1. Plaintiffs Bear the Burden to Demonstrate an Ambiguity in the Policy

Plaintiffs fail to demonstrate that the Coverage C – Loss of Income provision is in any way ambiguous, as they claim. In order for Plaintiffs to demonstrate an ambiguity in an insurance contract, Plaintiffs bear the burden of showing that "a term or provision is susceptible to more than one reasonable meaning." *Leonard v. Nationwide Mut. Ins. Co.* 499 F.3d 419, 429 (5th 2007); accord *Catlin Syndicate Ltd. v. Imperial Palace of Miss.*, 2008 WL 5235888, at *5 (Dec. 15, 2008)(Ozerden, J.). In addressing this issue, the court must look to the policy itself, without "resort to extrinsic evidence." *Id.* "The mere fact that the parties disagree about the meaning of a provision of a contract does not make the contract ambiguous as a matter of law.'" *Id.* (alteration omitted; citation omitted). Where a policy provision "cannot be construed to have two or more reasonable meanings and it does not conflict with any other provisions in the policy," the provision is unambiguous as a matter of law. *Tuepker v. State Farm Fire & Cas. Co.*, 507 F.3d 346, 353 (5th Cir. 2007). "[A] court must refrain from altering or changing a policy where terms are unambiguous, despite resulting hardship on the insured." *Titan Indem. Co. v. Estes*, 825 So. 2d 651, 656 (Miss. 2002); *accord Farmland Mut. Ins. Co. v. Scruggs*, 886 So. 2d 714, 717 (Miss. 2004).

Plaintiffs argue that a "ruling that the policy operates in the fashion argued by State Farm would make Coverage Part C 'Loss of Income' in the 'Business Policy' State Farm sold to Plaintiff, and collected premiums on, **illusory**." Document No. [61], ¶4 (emphasis added). Yet, it is undisputed that State Farm's adjustment of Coverage C under the subject policy resulted in a payment to the O'Keefes in excess of $20,000 for loss of rents from The Dancel Group, Inc. Ex. J. Further, Celeste Foster understood that this policy would pay her loss of rents from her commercial lease with The Dancel Group, Inc. Ex. F. The O'Keefes made a claim for lost rents and accepted payment for that loss from State Farm. Plaintiffs can hardly argue that such a payment is illusory or that such an interpretation of the policy rendered it ambiguous.

Plaintiffs erroneously challenge the definition of "operations" under Coverage C – Loss of Income. Document No. [61] at 4. Yet Plaintiffs fail to show more than one reasonable interpretation of this definition, as they must. *Leonard*, 499 F.3d at 429. Plaintiffs have put forth *no* other reasonable interpretations and are not permitted to do so, for the first time, on rebuttal. *See, e.g., Wallace v. County of Comal*, 400 F.3d 284, 291 (5th Cir. 2005).

2. Plaintiffs Fail to Demonstrate More Than One Reasonable Interpretation of State Farm's Definition of "Operations," Which Is in Fact Clear and Unambiguous

Plaintiffs fail to show any reasonable interpretation for the definition of "operations" in the O'Keefes' business policy, let alone satisfy the requirement of showing more than one. Coverage C – Loss of Income provides coverage "for the actual loss of 'business income' you sustain due to the necessary suspension of your 'operations' during the 'period of restoration.'" *See* Ex. E at 100008. The policy defines "operations" to mean "the type of your business activities occurring at the premises shown in the Declarations." *Id.* at 100009. Along with defining the insured premises, the declarations page also defines who is included by "you" and

"your" used throughout the policy. *Id.* at 100005; *see* 3 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance*, § 40:26 ('Insurance carriers often employ the terms 'you' and 'your' throughout the language of a policy. These terms are typically defined as referring to the named insured shown in the declarations of the policy, and any other person or organization qualifying as a named insured under the policy.")[5]. The declarations page shows that the "**INSURED"** is "FOSTER, CELESTE A & O'KEEFE, DANIEL" and shows the "[l]ocation" as "10265 RODRIGUEZ ST/ DIBERVILLE MS 39540-4820." *Id.* at 100001 (emphasis in original). The Dancel Group, Inc. is not a named insured. *See id*.

The plain text of the policy clearly and unambiguously limits the scope of "operations" by *who* conducts the business: "operations" means "the type of *your* business activities occurring at the premises shown in the Declarations." Ex. E at 100009 (emphasis added). Celeste A. Foster and Daniel O'Keefe are the only named insureds, *id.* at 100001, and coverage is limited to the type of *their* business activities at the insured premises. The definition necessarily excludes any business activities of entities who are not named insured in the policy. Therefore, any business activities by The Dancel Group, Inc., are not covered by the plain text of the policy, which is likely why The Dancel Group, Inc. judicially admitted that it purchased a separate business insurance policy. Ex. B, ¶ 9.

The Mississippi Supreme Court has held in a closely analogous case that similar insurance language as State Farm's distinguishes between a closely held corporation and the officers and shareholders of that corporation. *Steinwinder v. Aetna Cas. & Sur. Co.*, 742 So. 2d

[5] The definitions section states, "the words "you" and "your" refer to the Named Insured… and any other person or organizations qualifying as a Named Insured under this policy." When reading the policy as a whole, as is required, it becomes apparent that the only section which allows for a qualifying organization to be considered a named insured is Section II. However, Section II of the subject policy is only applicable to Business Liability and as such, has no bearing on the claims Plaintiffs are making for property damage. Ex. E.

1150 (Miss. 1999) (plurality opinion)[6]; *see also Pharm. Mut. Ins. Co. v. Hardy*, 2005 WL 2445903 (N.D. Miss. Oct. 3, 2005) (endorsing and applying *Steinwinder*). In *Steinwinder*, the officers and shareholders of a closely held corporation brought suit under an uninsured motorist policy and argued that they should receive insurance benefits even though the corporation was the only named insured in the policy. *Steinwinder*, 742 So. 2d at 1151. The insurer denied the car insurance claim because the claimant was not a named insured in the policy even though he was an officer and shareholder. *Id.* The Mississippi Supreme Court surveyed the law of other states, found that a "majority of jurisdictions" hold an officer and shareholder in a closely-held corporation is not entitled to coverage without being a named insured, and adopted the same rule for Mississippi. *Id.* at 1151, 1154-55. The policy in *Steinwinder* defined "you" as one "who is an insured," and the court enforced the language by referring to the named insured in the policy declarations. *Id.* at 1152-53, 1155. The court held:

> In all of the aforementioned cases, there was policy language similar to the policy in this case – corporate policies listing only the corporation as named insured with "you" (the named insured) defined as "who is an insured" under the policy. There is little justification for holding otherwise. Those sophisticated enough to do business in the corporate form should be charged with the knowledge that corporations are, in law, a separate entity and that in order to extend coverage to others absent unusual circumstances or contrary representations, such others, corporate or human, should be named. Accordingly, this Court adopts the holding of the majority of jurisdictions and concludes that a corporate shareholder is not solely by virtue of being a shareholder entitled to uninsured motorist coverage under an insurance policy where the corporation is the only named insured.

Id. at 1155. The same result applies here, where shareholders and officers of The Dancel Group, Inc. are named insured, and The Dancel Group, Inc. is not.

Plaintiffs contend, however, that because The Dancel Group, Inc., performs business

[6] Four Justices joined the primary opinion, one Justice dissented on the substance of the primary opinion, and three Justices held the appeal was untimely. *Steinwinder*, 742 So. 2d at 1150, 1156.

activities at “the premises described on the Declarations Page,” it should be treated as if it were a named insured, even though it is not. Document No. [61] at 4. Plaintiffs' interpretation depends on the “place” where business is done, irrespective of who does the business. *Id.* As Plaintiffs would have it, “your” would be cut from the definition entirely. Plaintiffs’ interpretation is unreasonable and therefore unable to create an ambiguity. *See Leonard*, 499 F.3d at 429.

First, Plaintiffs’ interpretation is backwards. Plaintiffs ask the Court to ignore what is intrinsic to the policy – the declaration of who is a named insured – and look instead to what is extrinsic to the policy – what entities are conducting business at the insured location at the time of loss. As a matter of law, however, extrinsic evidence plays no role in interpreting an insurance policy until Plaintiffs *first* establish that an ambiguity exists in the policy language. *Id.* Plaintiffs do not.

Second, under Plaintiffs’ misguided interpretation, *any* person who transacts business at the same location as the O'Keefes on the date of the loss becomes an incidental beneficiary of the policy. Thus, if multiple businesses all operate in the same building as the O'Keefes (as in a multi-story building), even temporarily, Plaintiffs' interpretation would indiscriminately extend coverage to all. Coverage would expand to include businesses that were not previously identifiable, did not pay a premium, and were unknown to State Farm. Plaintiffs' extreme position would greatly expand the scope of coverage to unforeseen and ever-changing risks and parties, contrary to fundamental insurance principles. *See, e.g.*, 3 Lee R. Russ & Thomas F. Segalla, *Couch on Insurance*, § 40:26 (2008) (noting the "limited nature of coverage provided to an additional insured, i.e., liability arising out the named insured's work or operations, “and” [i]f ‘you’ or ‘your’ were interpreted as including additional insureds, the scope of coverage provided to an additional insured would be expanded significantly”).

Third, the cases Plaintiffs cite to somehow show that there is an ambiguity in the policy all support State Farm's contention that the policy language is clear and unambiguous. Document No. [61] at 4-5 (citing *Miss. Farm Bureau v. Walters*, 908 So. 2d 765 (Miss. 2005) (granting summary judgment for insurer and holding policy language "clear and decisive"); *Harrison v. Allstate Ins. Co.*, 662 So. 2d 1092, 1094 (Miss. 1995) (holding uninsured motorist provision "is clear"); *Nationwide Mut. Ins. Co. v. Garriga*, 636 So. 2d 658, 662 (Miss. 1994) (en banc) (holding trial court "erred in determining that the above language is ambiguous and unclear when read together with the declaration page"); *State Farm Mut. Auto. Ins. Co. v. Scitzs*, 394 So. 2d 1371, 1374 (Miss. 1981) (reversing judgment against insurer because policy language was "plain and unambiguous" as a matter of law).

Indeed, a primary case Plaintiffs cite, *Mississippi Farm Bureau v. Walters*, is closely on point and supports State Farm's contention that the policy is unambiguous. 908 So. 2d at 769-70. Contrary to Plaintiffs' incomplete representation of *Walters*, the Mississippi Supreme Court held that an insurance provision is only ambiguous if the plaintiffs demonstrate that there is more than one *reasonable* interpretation of a clause, not merely more than one interpretation. *Walters*, 908 So. 2d at 769 (granting summary judgment to insurer and holding that "an alternate interpretation must be 'reasonable') (citation omitted). In *Walters*, as in this case, the policyholder disputed who was the named insured in the property insurance policy. *Id.* at 769-70. The Mississippi Supreme Court held that the policy's definition of "insured" as "you and residence of your household "was" clear and decisive." *Id.* at 769 (emphasis omitted). The Court consulted the "declarations and applications page" to determine who was the named insured in the policy and granted summary judgment for the insurer. *Id.* at 769-70. This Court need do no more to deny Plaintiffs' motion for summary judgment and grant summary judgment for State Farm.

As in *Walters*, the plaintiffs here would improperly have the Court disregard the plain language of the policy and the clear statements on the declarations page to alter who is insured under the business policy. Just as the Mississippi Supreme Court rejected that attempt in *Walters*, this Court should reject Plaintiffs' tortured misreading of the policy. Indeed, at least one court has affirmed judgment for State Farm where State Farm paid the insured's lost rental income and not the lost income of the insured's commercial tenant. *See, e.g., Landes v. State Farm Fire & Cas. Co.*, 907 S.W.2d 349 (Mo. Ct. App. 1995) (affirming summary judgment for State Farm, holding "[t]he only lost income was in the form of lost rent from appellant's tenant, P & E, during the period of restoration. State Farm compensated appellant for the lost rent during the period of restoration, amounting to a total payment of $35,046.57. Again, we believe State Farm complied with the coverage terms of the policy as they apply to loss of business income."). This Court should do the same.

Accordingly, the Coverage C – Loss of Income coverage is unambiguous as a matter of law and "should be enforced as written." *Walters*, 908 So. 2d at 769.

b. <u>The Dancel Group Inc., Is a Corporate Entity and Is Legally Distinct From the O'keefes as a Matter of Law.</u>

The Dancel Group, Inc., is a corporation[7], acknowledged by the State of Mississippi. However, Plaintiffs are trying to now persuade this Court to blur the lines between The Dancel Group, Inc., and the O'Keefes as individuals. As a matter of Mississippi law, Plaintiffs cannot carry their burden to have the corporate form of The Dancel Group, Inc., disregarded and thus, neither summary judgment, nor declaratory judgment is appropriate for Plaintiffs.

[7] It should be noted that throughout Plaintiffs' Motion, they refer to themselves as one entity, however, they are not. The Dancel Group, Inc., is a corporation. Daniel and Celeste O'Keefe are individuals, who also act as the officers of The Dancel Group, Inc. The O'Keefes and The Dancel Group, Inc., should not be confused or considered to be the same and interchangeable.

Quite simply, there is no basis in law for the type of action that Plaintiffs are seeking to accomplish. It is patently unfair to allow the O'Keefes to utilize the corporate form of The Dancel Group, Inc., to receive certain benefits and then to disregard that corporate form in order to obtain additional benefits. Public policy dictates that the corporate form of The Dancel Group, Inc., must be respected because it is recognized as the separate entity as a matter of law. The Plaintiffs should not be allowed to flow interchangeably from individual to corporation at will.

A basic principle of corporate law in Mississippi, "is that a corporation possesses a separate identity from its shareholders, whether such shareholders are individuals or corporations.:" *Brown v. Readwood, Inc.* 1996 WL 33370666, 1 -2 (N.D. Miss. 1996); *see also, N. Am. Plastics, Inc. v. Inland Shoe Mfg. Co.*, 592 F. Supp. 875, 877 -878 (N.D. Miss. 1984), (citing *FMC Finance Corp. v. Murphree*, 632 F.2d 413, 421 (5th Cir. 1980) (consideration of piercing doctrine between parent and subsidiary)). The United States District Court for the Northern District, citing the Mississippi Supreme Court stated, "[t]he corporation should retain its distinct identity, even though all or a majority of its stock is held by a single individual or corporation." *Id.*, (citing, *Johnson & Higgins v. Commissioner of Ins.*, 321 So. 2d 281, 284-285 (Miss. 1975)). The Mississippi Supreme Court has specifically recognized that a corporate entity is distinct and retains its distinction even though all of its stock may be owned by a single individual or although the corporation is a so-called 'family' or 'closed' corporation. *Johnson & Higgins* at 285, (*citing* 18 Am. Jur. 2d Corporations § 13, at 558-59 (1965)). Furthermore, "The Mississippi Supreme Court has long held a commitment to the legal integrity of the corporate entity..." *Gray v. Edgewater Landing, Inc.*, 541 So. 2d 1044, 1047 (Miss. 1989).

The Dancel Group, Inc., and the O'Keefes are seeking to disregard the corporate form of The Dancel Group, Inc., under the allegation that the O'Keefes are the sole stockholders and officers, and that they are, in effect, the same entity. However, clearly, Mississippi law does not allow the corporate form to be disregarded on these facts alone. Rather, it has been recognized that it makes no difference if the corporation is comprised of many or singular stockholders, the corporate form must be recognized and should only be disregarded in the most extraordinary cases. This is not one of those cases.

The *Readwood* court went on to state,

> Mississippi follows the general rule of law that the distinct corporate identity will be maintained unless to do so would subvert the ends of justice. Piercing the corporate veil is reserved for factual circumstances which are ***clearly extraordinary***. The doctrine of piercing the corporate veil should be applied with great caution, and not precipitately. It should ***not*** be applied where those in control have intentionally adopted the corporate form to secure its advantages, unless the corporation exists to perpetrate a fraud, or is merely an instrumentality or agent of the majority shareholder(s).

Readwood at 2 (emphasis added; citations omitted).

Plaintiffs are trying to pierce the corporate veil of The Dancel Group, Inc., however, they have turned the concept on its head. Plaintiffs are not seeking liability of officers of a corporation but rather, are seeking to pierce their own corporation's veil in an attempt to disregard the corporate form in order to extend insurance coverage to an entity that is not named on the Declarations Page. However, Plaintiffs have failed to provide any evidence to support their position that the corporate form should be disregarded under Mississippi law.

The Mississippi Supreme Court has recognized that in order for a court to disregard the corporate entity, "the aggrieved party must show (a) some frustration of contractual expectations regarding the party to whom he looked for performance; (b) the flagrant disregard of corporate

formalities by the defendant corporation and its principals; (c) a demonstration of fraud or other equivalent misfeasance on the part of the corporate shareholder." *Gray v. Edgewater Landing, Inc.* 541 So. 2d 1044, 1047 (Miss. 1989)(citing *T.C.L., Inc. v. Lacoste,* 431 So.2d 918, 922 (Miss.1983); *Thames & Co. v. Eicher,* 373 So. 2d 1033, 1035 (Miss. 1979)). In order for Plaintiffs to succeed, they must present credible evidence on each of the three prongs of the test. *Gray v. Edgewater Landing, Inc.* 541 So.2d 1044, 1047 (Miss. 1989).

Here, Plaintiffs have failed to offer any evidence in support of the three prong test as set forth in *Gray*. The Plaintiffs' motion is completely lacking of any evidence to support the O'Keefes' position that they are the alter egos of The Dancel Group, Inc. The mere assertion of this position does not provide evidence that it is so, and as such, Plaintiffs cannot carry their burden. The Plaintiffs' failure to support their position with any evidence is a fundamental flaw in their motion and warrants denial of same.

Furthermore, what the O'Keefes are attempting to accomplish in this case is precisely what the Northern District warned against. The O'Keefes have adopted The Dancel Group, Inc.'s corporate form to avail themselves to all the benefits and advantages that the corporate form provides only to shed the corporate form when it suits their needs. The Dancel Group, Inc., and the O'Keefes have carefully retained their distinct personas. They maintain and file separate tax returns. *See* The Dancel Group Inc. and the O'Keefe's tax return documents, attached hereto as Exhibit "L." The O'Keefes prepared a commercial lease for The Dancel Group, Inc., to rent the space in the subject building, obviously indicating that it was a separate corporate form from them. Ex. H. Celeste O'Keefe recognized this difference when talking with her agent. *See* email correspondence attached hereto as Exhibit "M." And, in this very case, they have purposefully reserved their distinct identities in responding to discovery. *See* Plaintiffs' Discovery Responses

attached hereto as Exhibit "K." Clearly, Plaintiffs recognize the distinction when it serves them to do so. Plaintiffs should not be allowed to utilized the corporation to their advantage and then disregard it when it serves them. Plaintiffs' position is in direct opposition to Mississippi law.

c. <u>The Dancel Group, Inc., is Separately Insured Under a Business Policy With United States Fidelity and Guaranty Company</u>

Plaintiffs have failed to inform this Court that The Dancel Group, Inc., has an insurance policy with USF&G. Said policy is believed to cover the business "operations" of The Dancel Group, Inc., and is also believed to provide for business interruption coverage for The Dancel Group, Inc. Plaintiffs conspicuously failed to mention this insurance coverage in their Declaratory Judgment motion where they seek to have this Court, without the full benefit of all the facts, decide that they are entitled to coverage under a policy for which they are not covered.

Plaintiffs have judicially admitted the following in *The Dancel Group, Inc., et al., v. USF&G, et al.*, Civil Action No. 1:08-cv-01321:

<u>FACTS</u>

> 7. On August 29, 2005, the contents within the business premises, and the business operations of The Dancel Group, Inc., Daniel B. O'Keefe, Individually and d/b/a The Dancel Group, Inc., and Celeste A. Foster O'Keefe, Individually and d/b/a The Dancel Group, Inc conducted form 10265 Rodriguez Street, D'Iberville, Mississippi were insured by a policy of business insurance issued by USF&G, Policy Number BK02129597. Defendants should be in possession of a copy of the subject policy of insurance.
>
> 8. The business insurance contract provided Plaintiffs with coverage for various risks or perils, including coverage for business personal property; the contents identified on the Declarations Page, and coverage for interruption of the business operations conducted from those premises (and related expenses, extra expenses and consequential expenses). The business policy provides comprehensive coverage for the contents of the premises and loss of business income in the event of loss caused by a Hurricane, among other perils.
>
> 9. USF&G represented to the Plaintiffs that said business policies were being issued ***to protect the property and income interest of The Dancel Group, Inc.*** in the event of a loss, such as Hurricane Katrina.

…

> 11. The Plaintiffs timely placed USF&G on notice of their devastating losses. The Plaintiffs paid all the premiums due under the subject policies of insurance, and have performed all their obligations with regard to the subject claims.

See Exhibit "B", ¶ 7-9, 11 (emphasis added).

Based on The Dancel Group, Inc.'s judicial admissions in their complaint against USF&G, it is clear that The Dancel Group, Inc., and the O'Keefes, as the officers of The Dancel Group, Inc., appreciated the necessity of having a separate policy for business operations of The Dancel Group, Inc. And as evidence of their understanding of the distinct identities of the parties, they secured insurance policies for Daniel and Celeste O'Keefe for the commercial premises at issue and for The Dancel Group, Inc., as a separate business entity. Plaintiffs were aware of their insurance needs, obtained insurance to suit those needs, and now, after a loss, seek to retroactively change the terms of the O'Keefes' policy with State Farm. There is simply no support for Plaintiffs' position.

V. THERE ARE NO GENUINE ISSUES OF MATERIAL FACT THAT THE DANCEL GROUP, INC., IS NOT AN INSURED UNDER THE SUBJECT POLICY, AND, AS SUCH, SUMMARY JUDGMENT IS APPROPRIATE IN FAVOR OF STATE FARM.

The Dancel Group, Inc., is not a named insured under the subject policy: a material fact that is undisputed and dispositive. The O'Keefes, not the Dancel Group, Inc., applied for and received the subject policy. Accordingly, the O'Keefes are bound by the terms of the contract. Further, as the sole officers of The Dancel Group, Inc., they knew that the Dancel Group, Inc., was not insured under the subject policy. As there are no genuine issues of material fact, and summary judgment for State Farm is appropriate as a matter of law.

a. The Dancel Group, Inc., Is Not a Named Insured on the Subject Policy and Is Not Otherwise Entitled to Coverage Under the Subject Policy.

As has been clearly stated above and admitted by Plaintiffs in their motion, the Dancel Group, Inc., is not a named insured under the subject policy. The O'Keefes received the subject policy booklet and had ample time to change the terms of this coverage or to obtain additional coverage as they saw fit to insure the business operations of The Dancel Group, Inc. Ex. F. Plaintiffs elected not to do so. Instead, The Dancel Group, Inc., bought business operation insurance with USF&G. Ex. C. The Dancel Group, Inc., is admittedly not a named insured under the policy and is not entitled to coverage otherwise.

Under Mississippi law, an insured has an affirmative duty to read his insurance policy. *Leonard*, 499 F.3d at 438; *Gulf Guar. Life Ins. Co. v. Kelley*, 389 So. 2d 920, 922 (Miss. 1980). Furthermore, constructive knowledge of the policies contents are imputed to the policyholder should the policyholder maintain that he did read the policy. *Id. citing, Ross,* 344 F.3d at 464 (quoting *Godfrey, Bassett & Kuykendall Architects, Ltd. v. Huntington Lumber & Supply Co., Inc.*, 584 So. 2d 1254, 1257 (Miss. 1991)). Accordingly, the O'Keefes individually and as officers of The Dancel Group, Inc., are charged with the knowledge that The Dancel Group, Inc., was not a named insured on the subject policy and are furthermore charged with knowledge of the terms of the contract generally. *In re Hellenic Inc*., 252 F.3d 391, 395 (5th. 2001)("[C]ourts generally agree that the knowledge of directors or key officers, such as the president and vice president, is imputed to the corporation...").

The issue here is very simple despite Plaintiffs' attempt to argue otherwise. Celeste O'Keefe executed the application for this policy of insurance in 1999 and is charged with knowledge of its contents. *Leonard* 499 F.3d at 438. Thus, at the time of application, the

Plaintiffs were aware that The Dancel Group, Inc., was not being insured under the subject policy and, in fact, The Dancel Group, Inc., bought a different policy with a different carrier to cover The Dancel Group, Inc., for business income loss.[8] Ex. C. From the date of the application until the date of loss, the O'Keefes could have changed the terms of the subject policy but chose not to do so. It is too late for the Plaintiffs to now complain that the policy did not afford the coverage they wanted.

The terms of the subject policy are clear and unambiguous as previously addressed. The only named insureds on the policy are Celeste A. Foster and Daniel O'Keefe, and Plaintiffs have admitted this fact. There is no coverage under the subject policy for The Dancel Group, Inc, despite Plaintiffs' arguments otherwise.

b. The Subject Policy Does Not Provide Coverage B, Personal Property Coverage

Plaintiffs have alleged in their Memorandum that they are seeking compensation for damages to the structure of the building insured under the subject policy and further that they are seeking compensation for "damage to the contents thereof…" *See* Document No. [61], ¶3. The subject policy does not provide for Coverage B, Personal Property coverage. The Declarations Page on the policy clearly states under **Coverages and Limits, Section I, B –** Business Personal Property: Excluded. *See* Ex. C at 100001. State Farm seeks summary judgment that Plaintiffs are not entitled to Coverage B, Business Personal Property because such property is unambiguously excluded from coverage as a matter of law.

[8] Now, after the loss, they are attempting to double dip by having two separate policies cover the same loss without advising the two carriers of the potential for excess coverage.

VI. CONCLUSION

Plaintiffs have failed to meet the burden required for summary judgment. Plaintiffs have failed to offer any evidence that the property at issue suffered an accidental direct physical loss, such that business interruption coverage should be afforded under the subject policy. It is the movant's burden to present evidence to support their position that summary judgment is appropriate. Plaintiffs have offered no evidence that The Dancel Group, Inc., suffered a loss at all, and further, they have offered no evidence that any loss suffered by The Dancel Group, Inc., was caused by an accidental direct physical loss which was not otherwise excluded by the terms of the policy. Additionally, as shown above, Plaintiffs have failed to set forth any set of circumstances which would support summary judgment or declaratory judgment in their favor.

Conversely, State Farm has set forth undisputed material fact which proves that The Dancel Group, Inc., was not a named insured on the policy and is not entitled to coverage under the subject policy otherwise. Partial Summary Judgment is warranted on these issues in State Farm's favor.

WHEREFORE, **PREMISES CONSIDERED,** State Farm respectfully requests that this Court grant its Motion for Summary Judgment determining that The Dancel Group, Inc., is not an insured and is not entitled to insurance coverage or proceeds under the policy. State Farm requests summary judgment as there is no coverage provided under the policy for Coverage B, Business Personal Property. State Farm respectfully requests that Plaintiffs' Motion for Declaratory Judgment/Partial Summary Judgment re: Scope of Coverage be denied because Plaintiffs have failed to carry their burden to have Summary Judgment or Declaratory Judgment granted. State Farm further requests any additional relief to which it may be entitled.

RESPECTFULLY SUBMITTED, this the 26th day of March, 2009.

WEBB, SANDERS & WILLIAMS, P.L.L.C.
363 NORTH BROADWAY
POST OFFICE BOX 496
TUPELO, MISSISSIPPI 38802
(662) 844-2137
DAN W. WEBB, MSB 7051
B. WAYNE WILLIAMS, MSB 9769
PAIGE C. BUSH, MSB 101072

BY: */s/ Paige C. Bush*
PAIGE C. BUSH

CERTIFICATE OF SERVICE

I, Paige C. Bush, one of the attorneys for Defendant, Defendants Fire and Casualty Company, do hereby certify that I have this date electronically filed the foregoing with the Clerk of the Court using the ECF system which sent notification of such filing to the following ECF participant:

Christopher C. Van Cleave, Esq.
CORBIN, GUNN & VAN CLEAVE, PLLC.
146 Porter Avenue (39530)
P.O. Drawer 1916
Biloxi, Mississippi 39533-1916

THIS, the 26th day of March, 2009.

/s/ Paige C. Bush
PAIGE C. BUSH