STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I
APPEAL NO: 2021AP463

COLECTIVO COFFEE ROASTERS, INC., TANDEM RESTAURANT, LLC d/b/a THE TANDEM, WRECKING CREW, INC., IRON GRATE BBQ COMPANY, INC., EAST TROY BREWERY COMPANY, LOGAN & POTTER, INC., BUCKLEY'S KISKEAM INN, LLC, OTHER ONES MKE, LLC, BCT 5, LLC, COMPANY BREWING, LLC, BRYHOPPER'S BAR & GRILL, LLC, THE RIVER'S BAR, LLC, ETCETERA BY BLH, LLC, REMBS, LLC, KRO BAR, INC., RIVERMILL, INC. and PORK'S PLACE OF KAUKANA, LLC,

Plaintiffs-Respondents.

v.

SOCIETY INSURANCE, A MUTUAL COMPANY,

Defendant-Appellant.

Appeal from the Circuit Court for Milwaukee County,
Case No. 20-CV-2597
The Honorable Laura Gramling Perez, Presiding

BRIEF OF DEFENDANT-APPELLANT SOCIETY INSURANCE, A MUTUAL COMPANY

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Disposition Below. The circuit court held that Colectivo alleged it suffered a loss of use of covered property, which was sufficient to state a claim that Colectivo experienced a direct physical loss of or damage to covered property.

2. The Society Policy provides Civil Authority coverage when the government prohibits access to Covered Property because of damage to other property. When Colectivo limited its operations in response to social distancing orders, was access to its property "prohibited" because of damage to other property?

Disposition Below. Although the circuit court did not decide whether the Social Distancing Orders were imposed in response to physical damage on or around the covered premises, the court held that Colectivo stated a

claim for Civil Authority coverage because of the limitation on in-person dining

3. The Society Policy provides Contamination coverage when there is a contamination on Covered Property, resulting in action by a governmental authority that prohibits access to the Covered Property. When Colectivo limited its operations because of social distancing orders and the suspected presence of COVID-19 was there a "contamination" that resulted in action by the government to prohibit access to Covered Property or production of its product?

Disposition Below. The circuit court held that Colectivo stated a claim for Contamination coverage because the Social Distancing Orders limited in-person dining in response to COVID-19's potential presence on covered property, which the court reasoned was a dangerous condition.

4. The Society policy excludes coverage for "Consequential Losses," defined as "[d]elay, loss of use or loss of market." Does the "Consequential Losses" exclusion bar coverage for Colectivo's alleged losses resulting from COVID-19 or the governmental closure orders?

Disposition Below. After finding the Amended Complaint's allegations were sufficient to trigger an initial grant of coverage, the circuit

court failed to address whether any exclusions reversed that initial grant of coverage.

5. The Society policy excludes coverage for "Acts or Decisions," defined as "[a]cts or decisions, including the failure to act or decide, of any person, group, organization or governmental body." Does the "Acts or Decisions" exclusion bar coverage for Colectivo's alleged losses resulting from the governmental closure orders?

Disposition Below. After finding the Amended Complaint's allegations were sufficient to trigger an initial grant of coverage, the circuit court failed to address whether any exclusions reversed that initial grant of coverage.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

This case presents an issue of first impression regarding the application of settled insurance law to determine whether the COVID-19 pandemic or orders issued by the State of Wisconsin caused "direct physical loss of or damage to" property covered under a businessowners insurance policy. The Court can decide this issue on the briefs, but oral argument may be helpful. To guide insurers and insureds in Wisconsin, this Court should publish its decision.

STATEMENT OF THE CASE

This is an insurance coverage dispute. Colectivo Coffee Roasters, Inc. and others (collectively referred to as "Colectivo") bought insurance policies from Society that pay for their loss of income when there is "direct physical loss of or damage to" covered property (their restaurants, bars, and event spaces in Wisconsin). Colectivo seeks to expand coverage beyond the terms of the policy to include loss of use of its property allegedly due to COVID-19 and public health orders that limited Colectivo's operations, even though its covered property was not physically lost or damaged.

Society did not agree to provide coverage for every possible disruption to Colectivo's business when it calculated its premium. The plain meaning of the Society Policy is clear and there is no ambiguity in the common policy language "direct physical loss of or damage to" covered property. This standard policy language requires the insured to show (1) physical damage, in the form of tangible injury to covered property, or (2) physical loss, in the form of actual destruction or dispossession of covered property.

The State of Wisconsin issued several "social distancing" orders to limit person-to-person transmission of COVID 19, primarily by limiting

gatherings of people. Under the orders, restaurants could not offer in-person service where diners could potentially infect each other. But restaurants were not shut down—the orders expressly allowed them to continue serving food and drink for takeout and delivery. Colectivo complied with these orders by closing its dining rooms to on-premises dining.

The Amended Complaint alleged that, "[i]t is likely customers, employees, and/or other visitors to the insured properties over the last several months were infected with COVID-19 and thereby infected the insured properties with COVID-19." It alleged these customers, in turn, may have caused COVID-19 "particles" to be present on Colectivo's premises. Even if this conjecture were provable, the mere presence of COVID-19 is not physical damage or loss. Colectivo's property remained physically unharmed, present, and usable, so there was no direct physical loss of or damage to covered property.

Colectivo experienced a loss of certain use of covered property (e.g., in-person dining), but the Society Policy does not provide Business Income or Extra Expense coverage for that sort of loss. Similarly, Civil Authority and Contamination coverage are inapplicable because access to Colectivo's

Property was not "prohibited" by the government, let alone in response to other property damage or contamination of the covered property.

Even if the pandemic triggered coverage for loss of business income, the Policy's exclusions reverse the initial grant of coverage. The Consequential Losses exclusion bars coverage for business income resulting from a claim for loss of market or use. The Acts or Decisions exclusion bars coverage for a covered cause of loss (a "direct physical loss") that arises from a governmental rule or requirement.

The plain meaning of the Society Policy is clear, and Colectivo did not allege facts to state a plausible claim for relief under its terms. Accordingly, Society moved to dismiss the Amended Complaint.

The circuit court for Milwaukee County (Judge Laura Gramling Perez, presiding) denied Society's motion to dismiss. The circuit court reasoned that Colectivo suffered a "direct physical loss of" covered property because it experienced a loss of use (*i.e.*, in-person dining). The court also concluded there was a dangerous condition on or around Colectivo's covered property because COVID-19 was "widespread" and likely present on covered property, which, in turn, caused a governmental entity to "prohibit" access to covered property. This decision was in error because it

misconstrued key policy terms and permitted conjectural allegations to survive a motion to dismiss.

This Court should reverse and remand with instructions to dismiss the Amended Complaint with prejudice.

LEGAL STANDARD

1. Standard of Review

Review of a motion to dismiss presents the legal question of whether the complaint states a claim for relief, which this Court reviews *de novo*. *Doe 56 v. Mayo Clinic Health Sys.—Eau Claire Clinic, Inc.*, 2016 WI 48, ¶ 14, 369 Wis. 2d 351, 880 N.W.2d 681. The motion to dismiss here was based on interpretation of an insurance policy and application of the policy to the allegations in Colectivo's Amended Complaint, which is also subject to de novo review. *State Farm Mut. Auto. Ins. Co. v. Langridge*, 2004 WI 113, ¶ 13, 275 Wis. 2d 35, 683 N.W.2d 75.

2. Interpreting an Insurance Policy

Wisconsin courts employ a three-step procedure to determine coverage. *Am. Fam. Mut. Ins. Co. v. Am. Girl, Inc.*, 2004 WI 2, ¶ 24, 268 Wis. 2d 16, 673 N.W.2d 65. First, the court interprets the policy's plain meaning and examines "the facts of the insured's claim to determine whether the policy's insuring agreement makes an initial grant of coverage" and, "[i]f

it is clear that the policy was not intended to cover the claim asserted, the analysis ends there." *Id*. Second, if the policy does provide an initial grant of coverage, the court determines whether any exclusions preclude coverage. *Id*. Third, the court considers whether an exception to the exclusion reinstates coverage. *Id*.

At each step of the analysis, the plain language of the insurance policy is the starting point of the analysis. *Wisconsin Pharmacal Co., LLC v. Nebraska Cultures of California, Inc.*, 2016 WI 14, ¶ 20, 367 Wis. 2d 221, 876 N.W.2d 72; *see also Tischendorf v. Lynn Mut. F. Ins. Co.*, 190 Wis. 33, 208 N.W. 917, 921 (1926) ("The liability of an insurance company is based upon a contract entered into between the parties, ***and must be governed by the provisions thereof***....").[1]

To aid in the plain meaning analysis, courts apply canons of construction, including:

- Insurance policies are interpreted in their entirety; thus, the insurer's choice of language in one provision affects the interpretation of the same or similar terms in other sections. *Kraemer Bros. v. United States Fire Ins. Co.*, 89 Wis. 2d 555, 562, 278 N.W.2d 857 (1979); *Frost ex rel. Anderson v. Whitbeck*, 2002 WI 129, ¶ 21, 257 Wis. 2d 80, 654 N.W.2d. 225.

[1] In this brief, emphasis is added and citations or quotations are omitted unless otherwise noted.

- Absurd results should be avoided. *Olguin v. Allstate Ins. Co.*, 71 Wis. 2d 160, 165, 237 N.W.2d 694, 697 (1976).

Where policy language is unambiguous, courts do not construe language in an insurance policy in favor of the insured. *Lawver v. Boling*, 71 Wis. 2d 408, 421, 238 N.W.2d 514, 521 (1976). The use of common policy terms may preclude a finding of ambiguity. *E.g., Wis. Label Corp. v. Northbrook Prop. & Cas. Ins. Co.*, 2000 WI 26, ¶ 31, 233 Wis. 2d 314, 607 N.W.2d 276 ("We agree with the court of appeals' determination that this definition is unambiguous and that no physical injury to tangible property occurred in this case. Language in an insurance contract is interpreted according to its common and ordinary meaning."). Policy language is not ambiguous because more than one dictionary definition exists for it or because courts in different jurisdictions have reached different outcomes. *Hirschhorn v. Auto–Owners Ins. Co.*, 2012 WI 20, ¶ 23, 338 Wis. 2d 761, 809 N.W.2d 529; *Peace v. Nw. Nat'l Ins. Co.*, 228 Wis. 2d 106, ¶ 60, 596 N.W.2d 429 (1999).

STATEMENT OF FACTS

1. The Society Businessowners Policy

Society issued a Businessowners Policy to Colectivo. (R.50-51; App.51.) A set of forms comprises the policy, with each setting forth coverage, such as Liquor Liability Coverage, Businessowners Liability Coverage, or Businessowners Special Property Coverage ("BSPC"). (R.50:58-59; App.83).

The coverage at issue relates to Colectivo's physical property. The described premises under the Policy are the restaurants Colectivo operates in Wisconsin and Illinois. (R.18: ¶1, 50:30; App.55, 250). "Covered Property" includes the building, fixtures, permanently installed machinery and equipment, and personal property owned by the insured and used to operate and maintain the premises. (R.50:140; App.165).

The BSPC Form obligates Society to "pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss." (*Id.*). A Covered Cause of Loss is "[d]irect physical loss unless the loss is excluded or limited under this coverage form." (R.50:141; App.166).

The BSPC also provided additional coverages, as follows:[2]

> • **Business Income**: 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".[3] The suspension must be caused by direct physical loss of or damage to covered property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss……We will only pay for loss of Business Income that you sustain during the "period of restoration" and that occurs within 12 consecutive months after the date of direct physical loss or damage.
>
> • **Extra Expense**: We will pay necessary Extra Expense you incur during the "period of restoration" that you would not have incurred if there had been no direct physical loss or damage to covered property at the described premises. The loss or damage must be caused by or result from a Covered Cause of Loss…. We will only pay for Extra Expense that occurs within 12 consecutive months after the date of direct physical loss or damage.

(R.50:144-45; App.169-70).

Importantly, both Business Income and Extra Expense coverages are limited to the "period of restoration" of physical loss or damage. (*Id.*)

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[2] The formatting of the policy excerpts has been modified for this Brief.

[3] "Period of Restoration" refers to the period of time that

> a. Begins immediately after the time of direct physical loss or damage for Business Income or Extra Expense coverage caused by or resulting from any covered Cause of Loss at the described premises; and
>
> b. Ends on the earlier of:
>
> (1) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or (2) The date when business is resumed at a new permanent location.

(R.50: 170; App.195).

Colectivo also claims coverage under the Policy's Civil Authority and Contamination coverages. The Civil Authority coverage has two requirements: (a) access to the insured property is prohibited, (b) due to a dangerous physical condition on nearby property:

> **Civil Authority**: 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 you sustain and necessary Extra Expense 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 the area; 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.

(R.50:146-47; App.171-72).

Likewise, the Contamination coverage has two requirements: (a) access to the insured property is prohibited, (b) due to contamination:

> **Contamination**: If your "operations" are suspended due to "contamination":
>
> **(1)** We will pay for your costs to clean and sanitize your premises, machinery and equipment, and expenses you incur to withdraw or recall products or merchandise from the market. We will not pay for the cost or value of the product.

> The most we will pay for any loss or damage under this Additional Coverage arising out of the sum of all such expenses occurring during each separate policy period is $5,000; and
>
> **(2)** We will also pay for the actual loss of Business Income and Extra Expense you sustain caused by
>
> **(a)** "Contamination" that results in an action by a public health or other governmental authority that prohibits access to the described premises or production of your product.
>
> ….
>
> **(3)** Contamination Exclusions
>
> All exclusions and limitations apply except Exclusions B.2.j.(2) and B.2.j.(5)
>
> **(4)** Additional Definitions:
>
> **(a)** "Contamination" means a defect, deficiency, inadequacy or dangerous condition in your products, merchandise or premises.

(R.50:147-48; App.172).

The Society Policy includes exclusions to coverage under the BSPC Form, including:

- **Ordinance or Law**: Excludes coverage resulting from, in relevant part, "the enforcement of or compliance with any ordinance or law: (1) regulating the construction, use or repair of any property… This exclusion, Ordinance or Law, applies whether the loss results from: (1) An ordinance or law that is enforced even if the property has not been damaged; or (2) The increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition of property or removal of its debris, following a physical loss to that property."

- **Consequential Losses**: Excludes coverage resulting from "[d]elay, loss of use or loss of market…."

- **Acts or Decisions**: Excludes coverage resulting from "[a]cts or decisions, including the failure to act or decide, of any person, group, organization or governmental body."

(R.50:155, 157, 159; App.180, 182, 184).

2. COVID-19 and the Social Distancing Orders

COVID-19 surfaced in late 2019 and, throughout 2020, became a global pandemic, resulting in a "unique public health crisis the likes of which few among us have ever seen." *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶ 165, 391 Wis. 2d 497, 942 N.W.2d 900 (Hagedorn, J., dissenting).

In response to COVID-19, Governor Tony Evers and the executive branch issued rules and orders to minimize transmission. In the Amended Complaint, Colectivo alleged that two of the many executive actions related to the pandemic caused it a "direct physical loss":[4]

- **Emergency Order 5**, issued March 17, 2020 by the Secretary-designee, ordered a "statewide moratorium on mass gatherings of 10 people or more to mitigate the spread of COVID-19." Crucially, the Order closed all restaurants for in-person service, but explained restaurants "may remain open for take-out or delivery service only." (R.18:¶38; App.257; *see also* https://evers.wi.gov/Documents/COVID19/UPDATEDOrder10People.pdf).

- **Emergency Order 12**, the "Safer at Home Order," issued March 24, 2020 by the Secretary-designee,

[4] This brief will refer to these orders collectively as "the Social Distancing Orders."

> ordered individuals to "stay at home" subject to exceptions for "essential" public and private activities. The Order explained that "social distancing – the practice of keeping at least six feet apart from others and avoiding physical contact – is the only effective means of slowing the rate of infection." The Order continued the closure of in-person dining and drinking, while allowing take-out service of food and alcoholic beverages, as well as delivery of food and non-alcoholic beverages, to continue subject to requirements to encourage social distancing. (R.18:¶38; App.257; *see also* https://evers.wi.gov/Documents/COVID19/EMO12-SaferAtHome.pdf).

The Social Distancing Orders were issued to enable social distancing and avoid social contact to reduce the spread of COVID-19. (*Id.* at 2; *see also* R.18:¶102; App.268). Governor Evers and DHS have eased social distancing measures, and restaurants have returned to in-person service.

3. Colectivo's Claim

Colectivo alleges in the Amended Complaint that the public could not access its premises after the Social Distancing Orders took effect. (*E.g.*, R.18:¶¶105, 107; App.269). Later, in response to Society's motion to dismiss, Colectivo clarified that the Social Distancing Orders only shut down "on-premises dining." (R.62:2; *see also, supra*, at 24-25 (the Social Distancing Orders closed in-person dining, but permitted restaurants to continue to serve takeout and delivery)).

Colectivo made a claim with Society for loss of business income, which was denied. (R.18:¶¶ 2, 111; App.250, 270).

4. Procedural History and Circuit Court Decision

On April 16, 2020, Colectivo sued Society (R.1.) and then filed the Amended Complaint on October 29, 2020. (R.18; App.248). This is a putative class action, and no class was certified. (*Id*. ¶¶ 112-19; App.270-71).

Colectivo's Amended Complaint details COVID-19 and the Social Distancing Orders. (*Id*. ¶¶71-108; App.262-69). It also alleges that it is "likely" COVID-19 "infected" its premises because people infected with COVID-19 were "likely" present over a span of a few months and deposited COVID-19 "particles" on covered premises. (R. 18:¶¶96, 101; App.267-68). Colectivo closed its premises to on-premises dining because of COVID-19 and the Social Distancing Orders. (R.18:¶¶105, 107, App. 269; R.62:2).

The Amended Complaint requests declarations that Colectivo is entitled to coverage under the Business Income, Civil Authority, Extra Expense, Contamination and Sue and Labor provisions. (R.18:30, 33, 37; App.273, 276, 280). Colectivo also asserts claims alleging that Society breached the Policy and acted in bad faith by denying coverage. (R.18:32, 34, 38).

Society moved to dismiss the Amended Complaint. (R.48-57). In an oral ruling, the circuit court denied Society's motion. (R.84; App.3; *see also* R.70; App.1). The circuit court reasoned that Colectivo alleged a "direct physical loss of" covered property because it experienced a loss of use (i.e., in-person dining), so it stated a claim under the Policy. (R.84 at 37:5-12, 43:25-44:10, 45:6-10). Next, the court concluded there was a dangerous condition on or around Colectivo's covered property because there were sufficient facts alleged to show COVID-19 was "widespread and likely was present" at Covered Property (R.84 at 42:13-14, 44:14). The circuit court did not address any other coverages or policy exclusions.

This Court accepted Society's petition for leave to appeal.

ARGUMENT

The Society Policy provides Business Income and Extra Expense Coverage only when there has been "direct physical loss of or damage to" Covered Property. The Amended Complaint's allegations fail to show that COVID-19 or the Social Distancing Orders did anything more than temporarily limit the use of Colectivo's property. A mere loss of use without a corresponding physical alteration or displacement, however, does not constitute a "direct physical loss of or damage to" covered property.

The analysis begins and ends with the plain meaning of the Policy. The phrase "direct physical loss of or damage to" is unambiguous because it is not "fairly susceptible" to more than one meaning. Each word chosen has a distinct meaning in both common usage and the insurance market. Colectivo must plausibly allege that its Covered Property was tangibly damaged or destroyed, or that an external event caused the physical dispossession of its property. It did not.

The Social Distancing Orders did not trigger coverage. They *limited* – but did not eliminate – Colectivo's use of its property to prevent person-to-person transmission. The Covered Property was not tangibly damaged or destroyed, and Colectivo was not dispossessed of its property by the Social Distancing Orders. The restaurant itself was not damaged and its employees were allowed to prepare food there. The Social Distancing Orders only limited how Colectivo could use its property, not *whether* it could use its property.

Colectivo says it is "likely" that COVID-19 was present on its premises. Just because COVID-19 was "widespread," however, does not support the leap to the virus being present, much less physically affecting covered property. This sort of conclusory allegation does not specify how,

even if present, COVID-19 physically damaged covered property. *See* Wis. Stat. § 802.02(1)(a) (complaint shall contain "short and plain statement of the claim").

But the alleged presence of COVID-19 on Covered Property does not trigger coverage. The virus, even if present on property, leaves no lasting trace and is eliminated by a simple washing, and thus does not constitute physical damage or loss. The virus's "suspected presence" did not damage property under the ordinary meaning of the word "damage" because it does not cause a tangible change to property. The virus does not cause a "direct physical loss of" covered property because it does not cause the physical destruction or dispossession of Covered Property. Colectivo still has possession of its property; the property is not physically uninhabitable, unusable, or destroyed. Claims for "loss of use" are not covered under the ordinary meaning of "direct physical loss of" covered property.

Even though Colectivo alleged that COVID-19 was present on its property, it does not show that the virus physically altered the property to qualify as "loss of" or "damage to" the covered property. Therefore, the legal conclusion asserted in the Amended Complaint that COVID-19 caused a "direct physical loss of or damage to" Covered Property (R.18:¶75; App.263)

is not sufficient to state a claim for relief because legal conclusions are "not accepted" and are "insufficient to withstand a motion to dismiss." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 18, 356 Wis. 2d 665, 849 N.W.2d 693. This allegation is a bare legal conclusion because Colectivo does not allege facts to back it up, such as that the structural integrity of its restaurant or business personal property has been altered, or its physical characteristics have been changed—the walls remain standing, the roof has not been torn off, and the property remains untouched by fire or water. Colectivo could still use the restaurant for preparing and serving food for takeout and delivery (and still can). Consequently, Colectivo does not state a claim for coverage under the Business Income or Extra Expense coverages.

Colectivo cannot show it is entitled to Civil Authority or Contamination coverage either. No "public health or other governmental entity" *prohibited* access to the Covered Property, let alone in response to damage to other property or "contamination" at the premises.

Colectivo cannot claim coverage under the Sue and Labor provision of the Society policy. The Sue and Labor provision is not a grant of coverage, it is a condition the insured must comply with.

And if Colectivo could show an initial grant of coverage under the Business Income, Extra Expense, Civil Authority, or Contamination coverages, the Consequential Losses or Acts or Decisions exclusions would bar coverage. Simply put, Colectivo's alleged losses, if any, were a loss of use or loss of market caused by the action of a governmental authority.

Colectivo does not state a plausible claim for relief under any theory, and the circuit court erred by deciding otherwise.

I. The Society Policy Does Not Provide An Initial Grant Of Coverage Because There Was No Direct Physical Loss Of Or Damage To Covered Property.

"Direct physical loss of or damage to" Covered Property is the baseline requirement for Business Income or Extra Expense Coverage. The meaning of this phrase is clear: Colectivo must show COVID-19 or the Social Distancing Orders caused (1) physical damage, in the form of tangible injury to covered property, or (2) physical loss, in the form of actual destruction or dispossession of Covered Property. COVID-19 and the Social Distancing Orders did not cause either of these prerequisites for coverage.

A. The Policy's Use of the Phrase "Direct Physical Loss of or Damage To" Unambiguously Requires Physical Alteration or Dispossession.

1. The Plain Meaning of Each of the Policy Terms.

Although the Society Policy does not define "direct physical loss of or damage to," this phrase is common to insurance policies. Each word used in this phrase has a distinct and established plain meaning.

Direct means "stemming ***immediately*** from a source," and "marked by ***absence of an intervening agency***, instrumentality, or influence." *Paradigm Care & Enrichment Ctr., LLC v. W. Bend Mut. Ins. Co.*, No. 20-CV-720-JPS-JPS, 2021 WL 1169565, at *5 (E.D. Wis. Mar. 26, 2021), appeal filed, (7th Cir. Apr. 20, 2021) (citing Direct, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/direct (last visited Jun. 10, 2021))[5]; *see also Gister v. American Family Mutual Insurance Co.*, 2012 WI 86, ¶ 30, 342 Wis. 2d 496, 818 N.W.2d 88 (defining "direct" as "proceeding without interruption in a straight course or line; not deviating or swerving.").

Physical means "pertaining to real, tangible objects." BLACK'S LAW DICTIONARY (11th ed. 2019). In the insurance context, the "requirement that

[5] Unpublished decisions are included in Society's Appendix.

the loss be 'physical' ... is widely held to ... preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property." *Hartford Ins. Co. of Midwest v. Mississippi Valley Gas Co.*, 181 F. App'x 465, 469–70 (5th Cir. 2006) (quoting 10A COUCH ON INS. § 148:46 (3d ed. 2005)); *Iannucci v. Allstate Ins. Co.*, 354 F. Supp. 3d 125, 140 (N.D.N.Y. 2018) (same). Thus, as the Court explained in *Wisconsin Label*, "physical" imposes a limiting principle on insurance coverage—it limits coverage to events that have a tangible impact on a physical thing. 2000 WI 26, ¶ 31.

Loss means "the state or fact of being destroyed or placed beyond recovery." *RTE Corp. v. Maryland Casualty Co.*, 74 Wis. 2d 614, 624, 247 N.W.2d 171 (1976) ("We conclude that a reasonable person in the position of RTE would have known that loss," as the term is used in the phrase direct physical loss or damage to, "meant destruction or damage to insured property."); *see also Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, No. CV 17-04908 AB (KSX), 2018 WL 3829767, at *4 (C.D. Cal. July 11, 2018) ("the phrase 'loss of' includes the permanent dispossession of something").

Damage means "loss due to injury; injury or harm to person, property, or reputation; hurt, harm." *State v. Brown*, 2010 WI App 113, ¶ 12, 328 Wis. 2d 241, 789 N.W.2d 102 (citing Webster's Third New International Dictionary 571, 1164, 1818 (1993)). "In ordinary parlance and widely accepted definition, physical damage to property means distinct, demonstrable, and physical alteration of its structure." *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 235 (3d Cir. 2002).

Taken together, the plain meaning of "direct physical loss of or damage to Covered Property" is not ambiguous: Colectivo cannot show COVID-19 or the Social Distancing Orders caused (1) physical damage, in the form of tangible injury to covered property, or (2) physical loss, in the form of actual destruction or dispossession of Covered Property. *See, e.g., Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, 499 F. Supp. 3d 288, 294 (S.D. Miss. 2020) (applying identical language and concluding "the property is either physically lost, i.e., the insured suffers a permanent dispossession of the property, or it is damaged."); *see also Total Intermodal Servs.*, 2018 WL 3829767, at *4 ("[T]he 'loss of' property contemplates that the property is misplaced and unrecoverable, without regard to whether it was damaged,"

and "the phrase 'loss of' includes the permanent dispossession of something.").

The lines between loss and damage in the Society policy are easily drawn. Consider, for example, a fire at an insured's property. If the fire occurs in the kitchen and does not affect the dining room, the property has been damaged, but not lost. But if the entire restaurant is burned down, there has been a loss. Damage and loss have distinct meanings: Damage requires a physical injury; loss requires something that causes physical dispossession, such as a catastrophic fire or theft. Society's interpretation renders none of these terms superfluous, and it correctly denied coverage because COVID-19 and the Social Distancing Orders did not cause direct physical loss of or damage to Covered Property.

2. Direct Physical Loss Means Destruction or Dispossession of Covered Property, Not Loss of Use.

In *RTE Corp.*, the Wisconsin Supreme Court examined the meaning of "direct physical loss of," and concluded that it requires physical destruction or damage to insured property. 74 Wis. 2d at 624 (applying Webster's Third New International Dictionary definition of "loss"). In support, the Court explained:

> If one reads the entire policy and the endorsements and substitutes for the word 'loss' the dictionary definition (*i.e.*, "the state or fact of being destroyed or placed beyond recovery") ***the policy makes good sense***.

Id.

The circuit court erred by finding, contrary to *RTE Corp.*, that Colectivo alleged a direct physical loss when covered property was not "destroyed or placed beyond recovery." *RTE Corp.* explains that the Society Policy requires physical harm:

> It is evident that what is necessary for coverage under the loss provision is that the physical location, which is the subject of the policy, have some type of structural damage and that the loss must be more or less permanent such as to render it a loss.

(R.42 at 11:19-24; App.13). For there to be a physical loss, the covered property must be physically destroyed, rendered useless or uninhabitable, or the insured must have been dispossessed of the covered property. This is what the plain meaning requires, and courts in Wisconsin and across the country agree. Because Colectivo's Amended Complaint does not allege facts showing any of these physical conditions, the allegations about the loss of use or function of covered property fail to trigger coverage for a direct physical loss.

Only losses that are "physical" are covered. *Manpower Inc. v. Ins. Co. of the State of Pennsylvania* illustrates what is required for a loss to be

"physical." No. 08C0085, 2009 WL 3738099 (E.D. Wis. Nov. 3, 2009). After the entire building that housed the insured's space was rendered unstable and potentially unsafe by a collapse, the insured sued for coverage. The court held that the insured had suffered a loss of its interest in the property when the collapse prevented it from using the property for its intended purpose, explaining that the "loss was 'physical' in that it was caused by a physical event – the collapse – which created a physical barrier between the insured and its property." *Id*. at *6; *see also Ward Gen. Ins. Servs., Inc. v. Employers Fire Ins. Co.*, 7 Cal. Rptr. 3d 844, 850 (Cal. Ct. App. 2003), *modified on denial of reh'g* (Jan. 7, 2004) ("direct ***physical*** loss" requires loss of something that "has a material existence, formed out of tangible matter, and is perceptible to the sense of touch").

In *Advance Cable Co., LLC v. Cincinnati Ins. Co.*, 788 F. 3d 743 (7th Cir. 2015), a case arising out of the Western District of Wisconsin, the Seventh Circuit considered the meaning of "direct physical loss" when an insured's roof sustained cosmetic hail damage. The court noted that the insured was not asking for coverage of "intangible damage," but was claiming that the hail caused visible indentations to the roof surface. *Id.* at 747. In finding there was "direct physical loss," the court stated that "this

denting changes the physical characteristics of the roof and thus satisfies that language of the policy." *Id*.

Applying "direct physical loss of or damage to," or similar terms, courts outside Wisconsin have found coverage only where there is a physical change to property:

- Physical intrusion of a substance on the property that compromises the physical integrity of the property and made the property uninhabitable, such as the release of ammonia requiring remediation. *Gregory Packaging, Inc. v. Travelers Property Cas. Co. of America*, No. 2:12-cv-04418, 2014 WL 6675934 (D. N.J., Nov. 25, 2014).

- A physical change in the covered property that "renders it useless." *Stack Metallurgical Services, Inc. v. Travelers Indemnity Co. of Connecticut*, No. 05–1315–JE, 2007 WL 464715 (D. Or. Feb. 7, 2007).

- A physical event on attached premises blocking access to Covered Property. *Manpower*, 2009 WL 3738099 at *6.

- A physical event that is likely to happen and will damage or destroy the covered property, such as an impending rockfall. *Murray v State Farm Fire & Casualty Co.*, 509 S.E. 2d 1 (W. Va. 1998).

- The permanent dispossession of some physical thing, such as through theft or fire. *Real Hospitality, LLC*, 499 F. Supp. 3d at 294.

In each of these instances, the property was either uninhabitable, unusable, the insured totally lost access, or there was a condition imposing an immediate risk of harm to the property itself.

COVID-19 and the Social Distancing Orders did not change the physical characteristics of the property. Access was not prohibited because

of a physical event like a building collapse. The suspected presence of COVID-19 poses no risk to property; the virus does not injure physical property, and it can be eliminated with household disinfectant. U.S. Dept. of Health and Human Services, Centers for Disease Control and Prevention, Guidance for Cleaning and Disinfecting: Public Spaces, Workplaces, Businesses, Schools, and Homes (April 28, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/pdf/reopening_america_guidance.pdf (R.56:134-142); *see also Mama Jo's, Inc. v Sparta Ins. Co.*, No. 17-cv-23362-KMM, 2018 WL 3412974, at *9 (S.D. Fla., June 11, 2018) (holding there was no coverage where insured could sweep up dust from road construction because property was not uninhabitable or unusable). COVID-19 and the Orders did not make restaurants uninhabitable or unusable: employees could still work there preparing food for takeout and delivery. At most, COVID-19 and the Orders limited, but did not prevent or prohibit, the use of Colectivo's property without rendering a structural change.

Considering that the Policy says "direct ***physical*** loss," this loss of use unaccompanied by physical alteration is not covered. *Pentair v. American Guarantee and Liability Insurance*, 400 F.3d 613 (8th Cir. 2005), held that

the mere loss of use and function of a factory was not a direct physical loss, when a factory in Taiwan was shut down due to an earthquake that disabled the electrical substation powering the factory. *Id*. at 616. Although the factory itself did not suffer any physical harm, it was unable to operate without power and the plaintiff sought to recover losses and extra expenses caused by the shutdown. *Id*. at 614. The court held that even though the factory could not perform its intended function, the mere loss of use or function did not constitute "direct physical loss or damage." *Id*. at 615-617.

In *Source Food Tech. v. U.S. Fid. and Guaranty*, 465 F.3d 834, 835 (8th Cir. 2006), the plaintiff owned a load of beef product that had been manufactured, packaged, and loaded onto a truck by its supplier in Canada. The U.S. Department of Agriculture issued an embargo on imports of beef from Canada due to mad cow disease, and the plaintiff was unable to access its product. Although there was no evidence that plaintiff's beef product was contaminated by mad cow disease, the plaintiff contended that the loss of use, function, and access to it constituted a "direct physical loss" under the terms of its policy. *Id*. at 835-36. The court held that because the property, namely the beef product, was not physically damaged or contaminated, the plaintiff had failed to establish a direct physical loss. *Id*. at 837 38; *see also*

Roundabout Theatre Company v. Continental Casualty, 302 A.D.2d 1, 3, 6-7 (N.Y. App. Div. 2002) (no direct physical loss or damage where theater company lost all access to its premises due to a municipal order that closed theater's street because of a nearby accident); *Newman Myers Kreines Gross Harris, P.C. v. Great Northern Ins. Co.*, 17 F. Supp. 3d 323, 331 (S.D.N.Y. 2014) (finding that the words "direct" and "physical" require "actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons exogenous to the premises themselves or the adverse business consequences that flow from such closure"); *Iannucci*, 354 F. Supp. 3d at 140 ("The requirement that the loss be 'physical,'… is widely held to … preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.").

Interpreting the Policy as a whole supports the plain meaning of "direct physical loss" as distinct from "loss of use." *See RTE Corp.*, 74 Wis. 2d at 620 ("The contract is to be considered as a whole in order to give each of its provisions the meaning intended by the parties."). "[I]nterpretations that render policy language superfluous are to be avoided…." *Progressive*

Northern Ins. Co. v. Olson, 2011 WI App 16, ¶ 8, 331 Wis. 2d 83, 793 N.W.2d 924.

When the Society Policy intends to provide coverage for loss of use, it expressly says so. For instance, in coverage related to the personal property of invitees to the Covered Property, the Policy provides:

> We will pay those sums that you become legally obligated to pay as damages because of direct physical loss or damage, ***including loss of use***, to Covered Property[6] caused by accident and arising out of any Covered Cause of Loss."

(R.50:119; App.144). Similarly, the liability coverage portion of the Policy defines "property damage" to include "Loss of use of tangible property that is not physically injured." (R.51:12; App.213). In a section of the policy related to confidential or personal information, the policy refers to "Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data." (R.50:126; App.151).

By using the phrase "loss of use" in some portions of the policy and not in others, Society intended that "loss of use" was distinct from, and not part of, "direct physical loss." The terms have different meanings and are not interchangeable or synonymous.

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[6] "Covered Property, as used in this Coverage Extension, means tangible property of others, including personal effects of guests, customers and employees, in your care, custody or control." (R.50:119; App.144).

Colectivo's claim for "loss of use" of its restaurant would require this Court to write "loss of use" into the policy as follows: "direct physical loss of [including loss of use] or damage to" Covered Property. *Cf. Inter-Ins. Exch. of Chicago Motor Club v. Westchester Fire Ins. Co.*, 25 Wis. 2d 100, 104, 130 N.W.2d 185 (1964) ("no contract of insurance should be re-written by construction to bind an insurer to a risk which it did not contemplate and for which it was not paid"); *KD Unlimited Inc. v. Owners Insurance Company*, No. 1:20-CV-2163-TWT, 2021 WL 81660, at *4 (N.D. Ga., Jan 5, 2021) ("[T]he Court cannot rewrite the contract to manufacture additional coverage, such as expanding 'direct physical loss' to include loss-of-use damages when the property has not been physically impacted.").

There was no direct physical loss of Colectivo's property as there was no destruction of its property nor was it dispossessed of its property. Loss of use of part of its property is not a direct physical loss.

3. Physical Damage Requires Actual, Demonstrable Change to Covered Property.

The meaning of physical damage is well-established—it means physical injury or harm to covered property. *Wis. Label*, 2000 WI 26, ¶ 31; *Brown*, 2010 WI App 113, ¶ 12. Thus, physical damage requires a "tangible alteration…to a physical edifice" or a "detrimental change to the to the

property's operational capabilities," that is, something that affects the "structural integrity of the covered property." *Johnson v. Hartford Fin. Servs. Grp., Inc.*, No. 1:20-CV-02000-SDG, 2021 WL 37573, at *5 (N.D. Ga. Jan. 4, 2021) (holding that COVID-19 does not cause physical damage to covered property). A purely economic injury is not physical damage. *Iannucci*, 354 F. Supp. 3d at 140.

Several courts have addressed insurance claims involving microorganisms. These courts have concluded that the presence of microorganisms alone does not constitute physical damage. *E.g., Universal Image Prods., Inc. v. Fed. Ins. Co.*, 475 Fed. Appx. 569, 573 (6th Cir. 2012) (requirement of "direct physical loss or damage" not met where presence of bacteria in air conditioning system did not cause tangible damage to insured premises); *Mastellone v. Lightning Rod Mut. Ins. Co.*, 175 Ohio App. 3d 23, ¶ 68, 884 N.E. 2d 1130 (2008) (holding that mold does not constitute "physical damage" because "[t]he presence of mold did not alter or affect the structural integrity of the [property]"); *see also Diesel Barbershop, LLC et al. v. State Farm Lloyds*, 479 F. Supp. 3d 353, 360 (W.D. Tex. 2020) ("[T]he Court finds that the line of cases requiring tangible injury to property are more persuasive here and that the other cases are distinguishable…. COVID-

19 does not produce a noxious odor that makes a business uninhabitable."). Each of these cases shows the mere presence of a microorganism, like COVID-19, does not cause physical damage to property.

4. The Period of Restoration Clause is Further Evidence that "Physical" Loss or Damage Requires a Tangible Change in the Physical Characteristics of Property.

The fact that the Business Income and Extra Expense Additional Coverages of the Society Policy only provide coverage for loss of business income or extra expense to that sustained during a "period of restoration" further demonstrates the requirement of "physical" loss or damage. (R.50: 170; App.195). The definition of "period of restoration" provides additional context to the intended meaning of "physical loss of or damage to." Read together with the definition of "period of restoration," the phrase "physical loss of or damage to" does not encompass a temporary loss of use, without more. Rather, it refers to a loss or damage that requires the repair, rebuilding, or replacement of the property. *See, e.g.*, *Newman Myers*, 17 F. Supp. 3d at 332 (explaining that use of "repair" and "replace" in period of restoration clause "contemplates physical damage to the insured premises as opposed to loss of use of it"); *Roundabout Theatre*, 302 A.D.2d at 8 (same).

Recent cases from other jurisdictions have interpreted the identical "period of restoration" clause in similar cases. *Real Hospitality* recognized that when the "Period of Restoration" provision is considered, "it makes logical sense" that the property must first be lost or damaged before Business Income coverage is triggered. 499 F. Supp. 3d at 295. Similarly, in *Malaube, LLC v. Greenwich Insurance Company*, No. 20-22615-Civ, 2020 WL 5051581, at *9 (S.D. Fla. Aug. 26, 2020), the court stated that "if we construe 'direct physical loss or damage' to require actual harm, it gives effect to the other provisions in the policy." *See also Drama Camp Productions, Inc. v. Mt. Hawley Ins. Co.*, No. 1:20-CV-266-JB-MU, 2020 WL 8018579, at *6 (S.D. Ala. Dec. 30, 2020) (granting defendant's motion to dismiss, holding that the "period of restoration" expressly assumes the insured repairs, rebuilds, or replaces property, and plaintiffs' inability to use their property was not caused by an unsound or unhealthy condition of the property itself, which necessitated repair, rebuilding or replacement); *Newchops Restaurant Comcast LLC v. Admiral Indemnity Company*, No. 20-1949, 2020 WL 7395153, at *5 (E.D. Pa., Dec. 17, 2020) (stating that the definition of "period of restoration" as ending when property should be repaired, rebuilt or

replaced means that "the loss or damage to the property must be physical, affecting the structure of the property").

Here, there was no "period of restoration" because there was nothing on Colectivo's premises to be restored, and no reason for Colectivo to move its business to a new location. The Social Distancing Orders establish the opposite of this requirement – that Colectivo can continue to use its facility to prepare and serve takeout and delivery. The "period of restoration" provision further supports Society's position that there must be physical loss of or damage to property to trigger coverage.

5. The Majority of Cases Interpreting the Same or Similar Policy Language Hold that the Insured Must Show Tangible Damage, Destruction, or Physical Dispossession of Covered Property, and that COVID-19 or Social Distancing Orders Do Not Trigger Coverage.

Lawsuits have been filed by policyholders against insurers across the country seeking business income coverage resulting from the pandemic and social distancing orders. When determining whether the virus or governmental restrictions trigger coverage, the vast majority of federal courts have said "no" as the following cases and the cases cited elsewhere in this brief illustrate:

- *Diesel Barbershop*, 479 F. Supp. 3d at 360 (granting defendant's motion to dismiss plaintiffs' complaint seeking business

interruption coverage, when plaintiffs claimed that this included loss of use of their property);

- *10E, LLC v. Travelers Indem. Co. of Connecticut, et al.*, 483 F. Supp. 3d 828, 835-36 (C.D. Cal. 2020) ("[L]osses from inability to use property do not amount to direct physical loss of or damage to property. Physical loss or damage only occurs when the property undergoes a distinct, demonstrable, physical alteration, and detrimental economic impact is not enough.");

- *Plan Check Downtown III, LLC v. Amguard Ins. Co.*, 485 F. Supp. 3d 1225, 1231-32 (C.D. Cal. 2020) (government limitation on restaurant operations due to the coronavirus is not a "direct physical loss of or damage to Covered Property"; that argument "would be a sweeping expansion of insurance coverage without any manageable bounds");

- *Sandy Point Dental, PC, v. Cincinnati Ins. Co.*, 488 Supp. 3d 690, 694 (N.D. Ill. 2020) ("The coronavirus does not physically alter the appearance, shape, color, structure, or other material dimension of the property.");

- *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, 491 F.Supp.3d 738, 740 (S.D. Cal. 2020) (speculative allegations of virus on the premises were insufficient because "the presence of the virus itself, or of individuals infected [with] the virus, at Plaintiffs' business premises or elsewhere do not constitute direct physical losses of or damage to property");

- *Uncork & Create, LLC v. The Cincinnati Ins. Co.*, 498 F. Supp. 3d 878, 883-84 No. 2:20-cv-00401, 2020 WL 6436948 (S.D.W.V. 2020) (COVID-19 on surfaces can be eliminated with disinfectant, and thus even the actual presence of the virus would not be sufficient to trigger coverage).

- *Real Hospitality, LLC d/b/a Ed's Burger Joint v. Travelers Cas. Ins. Co. of America*, 499 F. Supp. 3d at 294 (reasoning that the policy language required that "the property is either physically lost, i.e., the insured suffers a permanent dispossession of the property, or it is damaged," and finding that COVID-19 or social distancing orders did not trigger coverage).

6. The Absence of a "Virus Exclusion" is Irrelevant.

Colectivo alleged in its Amended Complaint that there is no exclusion in Society's policy for losses arising out of viruses. (R.18 at ¶¶ 4, 5, 45-50; App.251, 258-59). The implication is that the lack of an exclusion somehow creates coverage. Where, as here, a loss falls outside a policy's coverage grants, the presence or absence of any policy exclusion is irrelevant. *Am. Girl.*, 2004 WI 2, ¶ 24. "It is well-settled that an exclusion from insurance coverage cannot create coverage." *Women's Integrated Network, Inc. v. U.S. Specialty Ins. Co.*, No. 08 CIV. 10518 (SCR), 2012 WL 13070116, at *8 (S.D.N.Y. Oct. 26, 2012). With no coverage under a policy to begin with, the absence of an exclusion does not create coverage. Courts should not look beyond the plain language of a policy to find coverage based on what the policy does not provide.

B. Colectivo Did Not Allege That COVID-19's Suspected Presence on its Property or Social Distancing Orders Caused It to Suffer a Direct Physical Loss of or Damage to Covered Property.

Throughout the Amended Complaint, Colectivo alleges two bases for coverage: the possible presence of COVID-19 and the Social Distancing Orders. These allegations, even taken as true and liberally construed, fail to satisfy the legal requirements for showing that Colectivo suffered a "direct

physical loss of or damage to" its property. Neither provide coverage, because they do not directly impact physical property.

The circuit court erred by concluding that COVID-19 and the Social Distancing Orders may cause direct physical loss of or damage to covered property. Colectivo cannot merely characterize its alleged injuries as a direct physical loss of or damage to property without backing that assertion up with facts. This Colectivo did not do.

The Amended Complaint alleges that it was "likely" COVID-19 "particles" were present on covered property. (R.18:¶101; App.268). "The presence of any COVID-19 particles," in turn, allegedly "causes direct physical harm, direct physical damage, and direct physical loss to property." (R.18:¶95; App.266). Colectivo also asserts that the "presence of people infected with or carrying COVID-19 particles renders physical property in their vicinity unsafe and unusable, resulting in direct physical loss to the premises and property." (R.18:¶96; App.267).

COVID-19 is principally transmitted through person-to-person contact, especially in closed spaces. But COVID-19's suspected presence at the Covered Property does not physically injure the Covered Property because the structural integrity remains sound. *E.g., Johnson,* 2021 WL

37573, at *3 (holding that COVID-19 does not cause physical damage); *Mastellone*, 175 Ohio App. 3d 23, ¶ 5 (holding that mold does not constitute "physical damage" because "[t]he presence of surface mold did not alter or affect the structural integrity of the [property]"); *Mama Jo's*, 2018 WL 3412974, at *9 (holding that dust and construction debris which required daily cleaning did not constitute direct physical loss). Simple cleaning and disinfecting remove the virus from the covered property, so the virus does not damage, destroy, displace, or alter property in any tangible way, as those words are plainly and ordinarily understood. *See CDC Guidance for Cleaning and Disinfecting*, *supra* at 39.

Nor is Colectivo's allegation that COVID-19 caused a "direct physical loss of or damage to" its property (*e.g.*, R.18:¶95; App.266) sufficient to state a claim for relief because "legal conclusions are insufficient to withstand a motion to dismiss." *Data Key*, 2014 WI 86, ¶ 19. This allegation is a bare legal conclusion because Colectivo does not allege facts that back it up, such as that the structural integrity of its restaurant or business personal property has been altered, or its physical characteristics have been changed—the walls remain standing, the roof has not been torn off, and the property remains

untouched by fire or water. Colectivo could still use the restaurant for preparing and serving food for takeout and delivery.

The Social Distancing Orders caused, at most, a limitation on the use of Colectivo's property; it cannot reasonably be argued that the Social Distancing Orders physically altered Colectivo's Covered Property. Further, Colectivo was not required to close nor was it prohibited from accessing its Covered Property because of the Orders. The Social Distancing Orders simply changed how Colectivo could serve customers to reduce the likelihood of person-to-person transmission. But losses of use that do not result from a physical change damaging, destroying, or causing the physical dispossession of Covered Property are not covered.

There has been no alteration of Colectivo's covered property, and therefore there has been no "direct physical loss of or damage to covered property at the described premises" and no "Covered Cause of Loss" within the meaning of the Society Policy. The only consequence of the alleged presence of the virus is the possibility of transmission of COVID-19 among people. Without physical damage, alteration, or dispossession, however, the virus's presence is not direct physical loss of or damage to covered property.

II. Civil Authority Coverage Does Not Apply.

For Civil Authority coverage, Colectivo must show that a Covered Cause of Loss caused damage to property other than property at the described premises (i.e. a third party's property) and action of civil authority prohibited access to the insured's premises. Neither of these prerequisites to coverage exist—there was no damage to any property, much less damage that prohibited access to Colectivo's property.

A. There Was No Damage to Other Property Caused by a Covered Cause of Loss.

To trigger Civil Authority Coverage, there must be damage to "property other than property at the described premises." (R.50:146-47; App.171-72). That damage must be caused by a "Covered Cause of Loss." (*Id*.). "Covered Cause of Loss" means "Direct Physical Loss unless the loss is excluded or limited under this coverage form." (R.50:140; App.165). There was no "direct physical loss" to any property—either the insured's property or the property of others. The presence or suspected presence of the COVID-19 virus on any premises does not constitute direct physical loss. *See supra* at 49-53.

B. A Civil Authority Did Not Prohibit Access to Colectivo's Premises Because of a Covered Cause of Loss.

"Prohibit" is defined by Merriam-Webster as "1. to forbid by authority: enjoin; 2a. to prevent from doing something; b. preclude." Prohibit, *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/prohibit (last visited June 10, 2021). Synonyms for "prohibit" include "ban, bar, enjoin, forbid, interdict, outlaw, proscribe." *Id*. It is not reasonable to interpret the word as including only a partial limitation of access. *Ski Shawnee, Inc. v. Commonwealth Ins. Co.*, No. 3:09–CV–02391, 2010 WL 2696782, at *5 (M.D. Penn. July 6, 2010) (rejecting insured's argument that road closure which limited access to insured's premises by 70% satisfied the policy requirement that access be prohibited).

As the term "prohibit" is commonly understood, the Social Distancing Orders did not prohibit access to the insured's premises. The Orders expressly allowed customers to access restaurants for takeout service. *Supra* at 24-25. Employees were allowed to access the premises to prepare takeout orders. At no time was access prohibited.

The Wisconsin Supreme Court has rejected claims for Civil Authority coverage such as those presented here. In *Adelman Laundry & Cleaners, Inc.*

v. Factory Ins. Ass'n, 59 Wis. 2d 145, 207 N.W. 2d 646 (1973), the Court interpreted a policy that provided coverage for business interruption loss under a provision entitled "Interruption by Civil Authority." Like Society's Civil Authority provision, the policy in *Adelman* required that access to the insured premises had to be prohibited by order of civil authority "as a direct result of the peril(s) insured against." *Id*. at 147. While the insured claimed that it sustained damages because of a curfew imposed after the Milwaukee civil disturbance in 1967, access to the insured's premises was not prohibited because of any physical damage to property. In finding no coverage, the Wisconsin Supreme Court relied on *Two Caesars Corp. v. Jefferson Ins. Co.*, 280 A. 2d 305 (D.C. 1971), which construed a policy to make a loss compensable only where the order of civil authority prohibiting access to the premises was predicated upon damage to or destruction of business property. *Id*. at 147. The *Adelman* Court explained that the civil authority clause did not delete the requirement of damage or destruction of property, because the extension for civil authority coverage was a coverage extension that included "the actual loss as covered hereunder." *Id*. at 148.

Similarly, the Civil Authority coverage in the Society policy requires damage to other property caused by a Covered Cause of Loss, *i.e.* direct

physical damage. Like in *Adelman*, there was no direct physical damage to property which prohibited access to the insured's property. Thus, there was no damage caused by a Covered Cause of Loss under Society's Policy.

Cases from other jurisdictions are in accord with *Adelman*. In *United Air Lines, Inc. v. Ins. Co. of State of PA*, 439 F.3d 128 (2d Cir. 2006), United Air Lines sought recovery for losses caused by the temporary shutdown of Reagan Washington National Airport following the September 11, 2001 terrorist attacks. *Id*. at 129. United invoked a substantially similar clause, providing coverage "when access to the Insured Locations is prohibited by order of civil authority as a direct result of damage to adjacent premises." *Id*. According to United, the shutdown was due to damage at the Pentagon nearby. *Id*. The Second Circuit found there was no coverage because, even assuming the Pentagon could be considered "adjacent premises," the government's "decision to halt operations at the Airport indefinitely was based on fears of future attacks," not the fact that the Pentagon was damaged. *Id*. at 134; *see also Pappy's Barber Shops, Inc. v. Farmers Group, Inc.*, 487 F.Supp.3d 937, 945 (S.D. Cal. 2020) (explaining that civil authority coverage "only provides coverage to the extent that access to Plaintiff's physical premises is prohibited, and not if Plaintiff's are simply prohibited from

operating their business."); *Ski Shawnee*, 2010 WL 2696782, at *4 ("[W]here the action of a civil authority merely hinders access to the covered premises, without completely prohibiting access, federal courts have held that such action is not covered under policies like the one in the instant case."); *S. Tex. Med. Clinics, P.A. v. CNA Fin. Corp.*, Civil Action No. H–06–4041, 2008 WL 450012, at *10 (S.D. Tex. Feb. 15, 2008) (evacuation of county before hurricane making landfall was "due to" fear of future damage rather than existing damage); *Paradies Shops, Inc. v. Hartford Fire Ins. Co.*, No. 1:03 CV–3154–JEC., 2004 WL 5704715, at *1-2, *6-8 (N.D. Ga. Dec. 15, 2004) (holding that there was no coverage, in part, because the FAA's order that grounded planes after September 11th was not a "direct result" of property damage).

A recent Florida case addressed similar Civil Authority provisions in a case where a dental office sought coverage for its pandemic related losses. In *Nahmad DDS PA v. Hartford Cas. Ins. Co.*, 499 F. Supp. 3d 1178 (S.D. Fla. 2020), the court held there was no Civil Authority coverage. The court noted that the plaintiffs had alleged that they suspended or reduced their practice due to government orders, and "[m]erely restricting access to

Plaintiffs' dental practice for essential medical services does not trigger coverage under the Policy's Civil Authority provision." *Id*. at 1188.

Colectivo cannot establish either that there was damage to other property or that access to its property was prohibited by civil authority. The "order of a civil authority" at issue here has everything to do with protecting human life by controlling when and how people assemble in particular places, and nothing to do with any damaged property. No damaged property is referenced in the Executive Orders and the Executive Orders did not prohibit access to Colectivo's property. As set forth above, COVID-19 does not damage physical property, so Colectivo's Amended Complaint does not identify any property that was physically damaged. The Court should conclude there is no Civil Authority coverage.

III. Contamination Coverage Does Not Apply.

"Contamination," as defined in the Policy, is "a defect, deficiency, inadequacy or dangerous condition in your products, merchandise or premises." (R.50:147-48; App.172). When, as here, an insured is able to use premises for food preparation and sale, those premises are not defective, deficient, inadequate or dangerous.

To recover Business Income under the Contamination Coverage, Colectivo would have to show that "Contamination" resulted in an action by a public health or other governmental authority to *prohibit* access to the described premises or production of its product. As noted, access to Colectivo's premises was not prohibited and production of Colectivo's products was not prohibited. Colectivo was allowed to use its premises to produce its product for customers. The Social Distancing Orders did not require closure or restriction of Colectivo's operations due to contamination, but rather due to the desire to prevent the spread of COVID-19 from personal contact between humans.

Colectivo cannot establish that its premises or product were contaminated, or that a governmental authority prohibited access to its premises or production of its product, which is necessary to trigger coverage under the Contamination Coverage in the policy. The allegation that COVID-19 was "likely" present is entirely speculative and, even if true or provable, would not constitute contamination because Colectivo still had access to and use of its property to prepare orders for off-premise consumption. Further, it would strain the plain meaning of "prohibit" to hold that a partial limitation

on use was a prohibition. Therefore, Colectivo's loss of business income is not covered under the Contamination coverage of the Society policy.

IV. The Sue and Labor Provision Does Not Provide Coverage.

Colectivo alleges that it was "required to suspend operations to reduce the spread of COVID-19 and to prevent further losses occasioned by its spread on Plaintiff's premises" (R.18:¶62;App.260-61) and it has sustained a loss covered by the Sue and Labor provision arising from the COVID-19 virus and associated orders. (R.18:¶¶163-66;App.280).

The "Sue and Labor" provision is found in the "Property Loss Conditions" section. (R.50:161; App.186). It is not a coverage grant - it is a Condition that the Insured must comply with. It does not provide separate coverage. This provision refers to protecting "Covered Property" from further damage, not to business income or extra expense losses. Colectivo is not making a claim for damage to "Covered Property," it is making a claim for loss of business income and extra expense. Finally, Society will not pay for any subsequent loss or damage resulting from a cause of loss that is not a Covered Cause of Loss. To be a Covered Cause of Loss, there must be direct physical loss. There was no direct physical loss to Colectivo's property. Therefore, even if this provision did provide coverage, it is inapplicable

because the claimed loss is not a Covered Cause of Loss. This policy provision has no application to Colectivo's claims.

V. Exclusions Bar Colectivo's Claims.

A. Colectivo's Claims are Barred by the Consequential Losses Exclusion.

The Consequential Losses exclusion bars coverage because any detrimental effect on its business from COVID-19 or the Social Distancing Orders is due to a "loss of market" or "loss of use." (R.50:157; App.182).

While no Wisconsin case on point discusses this exclusion, other jurisdictions have held that losses resulting from anything other than actual physical loss are excluded. In *Dictiomatic, Inc. v. U.S. Fid. & Guar. Co.*, 958 F. Supp. 594, 604 (S.D. Fla. 1997), an insured claimed loss of business income due to physical damage caused by a hurricane. However, the court determined that losing business income business income was not due to property damage, since its lack of sales resulted from factors other than the damage caused by the hurricane. *Id.* at 602-03. The court stated:

> To recover under the business interruption policy in this case, Dictiomatic must prove that it sustained damage to property that is covered under the policy and that the damage was caused by a covered cause of loss, that there was an interruption to the business ("suspension of operations") which was caused by the property damage, and that there was an actual loss of business income during the period of time necessary to restore the business and that the loss of income

> was caused by the interruption of the business and not by some other factor or factors.

Id. at 602.

Here, there is no direct physical loss of or damage to the Colectivo property. Even if there had been direct physical loss to Colectivo's property, the loss or damage would not stem from that physical condition; it would stem from the Social Distancing Orders and the government encouraging people to stay home and only leave as necessary (which could include going to restaurants for takeout or having delivery to their homes). Thus, the Consequential Losses exclusion applies.

B. Colectivo's Claims are Barred by the Acts or Decisions Exclusion.

The Acts or Decisions Exclusion bars coverage for any detrimental effect on Colectivo's business caused by the acts or decisions of a governmental authority, *i.e.*, the Social Distancing Orders limiting in-person service. (R.50:159; App.184).

Although there is no Wisconsin case law interpreting this provision, this exclusion was cited in *Cytopath Biopsy Laboratory, Inc. v. U.S. Fidelity and Guar. Co.*, 774 N.Y.S. 2d 710, 6 A.D. 3d 300 (2004). The *Cytopath* court held there was no coverage for business interruption losses to plaintiff ordered to shut down after a discharge of noxious fumes in its building. The

court stated that plaintiff failed to establish that its losses stemmed from a direct physical loss to property, finding that "the real losses claimed herein resulted from refusal by the authorities to permit resumption of operations until proper permits were obtained and a more acceptable ventilation system was installed." *Id*. at 711.

Colectivo's loss of business income and the resulting extra expenses were not due to direct physical loss of or damage to property, as explained above. Rather, these alleged economic losses resulted from the acts or decisions of governmental authority to limit Colectivo's operations to takeout and delivery services.

CONCLUSION

This Court should reverse the circuit court and remand with instructions to dismiss the Amended Complaint with prejudice.

Respectfully submitted and dated at Milwaukee, Wisconsin this 21st day of June, 2021.

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CERTIFICATION

I hereby certify that this Brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with the following font:

> Proportional serif font: minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points, maximum of 60 characters per full line of body text. The length of this brief is 10,506 words.

Dated this 21st day of June, 2021.

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CERTIFICATE OF COMPLIANCE WITH
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I hereby certify that:

I have submitted an electronic copy of this Brief and Appendix which complies with the requirements of the Interim Rule for Wisconsin's Appellate Electronic Filing Project, Order No. 19-02.

I further certify that a copy of this certificate has been served with this Brief filed with the Court and served on all parties either by electronic filing or by paper copy.

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CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2021, I personally caused copies of the Brief of Defendant-Appellant Society Insurance, A Mutual Company to be mailed by first-class postage prepaid to:

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