IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BIG ONION TAVERN GROUP, LLC; HEADQUARTERS BEERCADE LLC; MACHINE 1846 LLC; THE NEW 400 LLC; HARPER THEATER LLC; WELCOME BACK LLC; LEGACY HOSPITALITY LLC; MCBRIDES AURORA INC.; MCBRIDE'S PUB INC.; MCBRIDE'S ON 52 INC.; HOMESLYCE IS WHERE THE HEART IS LLC; 3458 NORCLARK RESTAURANT LLC; HAPPY CAMPER PIZZERIA LLC; 1913 NORTHCO LLC; THE BURGER PHILOSOPHY LLC;; TAI'S LOUNGE INC.; ALEXANDERS CAFE 64 INC.; ALEXANDERS RESTAURANT INC.; BK & MM VENTURES LLC; DOUBLE K & A SPORTS INC.; OR1 INC.; ROOKIES 5-ROSELLE INC.; TRIPLE K & A SPORTS BAR INC.; VILLAGE SQUIRE INC.; VILLAGE SQUIRE NORTH INC.; VILLAGE SQUIRE OF MCHENRY INC.; VILLAGE SQUIRE SOUTH INC.; 3471 N ELSTON INC.; CALM & CHAOS LLC; 108 KINZIE LLC; SANCERRE HOSPITALITY I LLC; HARLEN-RASCALS, INC.; YMPV INC.; OVIE BAR & GRILL LLC; WOODFIRE BRICK OVEN PIZZA LLC; ANDERSONVILLE 5310 LLC; CLARK 5260 LLC; MUNSTER TAVERNS, INC.; WELLS 1525 LLC; 1270 STOREFRONT LLC; 2450 N MILWAUKEE LLC; 806 W RANDOLPH LLC; A PITZALLA BLUES LLC; QUEEN MARY LLC; RAMBUTTAN LLC; ROBERTA NOWAKOWSKI INC.; 3478 N CLARK STREET INC; EXIT PLAN HOLDINGS LLC; GOUNTANIS ENTERPRISES, INC.; ALL DAY BROADWAY LLC; TS2 INC.; OLMAR CORP INC.; THE BARRELMAN TAVERN INC.; 540 WEST MADISON HOSPITALITY GROUP LLC; NICHE RESTAURANT GROUP LLC

Plaintiffs,

Hon. Judge Edmond Chang

Case No. 20-cv-02005

JURY TRIAL DEMANDED

v.)
)
)
SOCIETY INSURANCE, INC.)
)
)
Defendant.

UNITED POLICYHOLDERS' MOTION FOR LEAVE TO APPEAR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS UNDER RULE 12(b)(6) OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

United Policyholders ("UP") hereby moves this Honorable Court for leave to file the accompanying *amicus curiae* brief in support of the Plaintiff's response (Dkt. 124-1) to Defendant's Motion to Dismiss or in the Alternative for Summary Judgment (Dkt. 113). UP has a special interest in this litigation and can offer its unique perspective to the Court as it considers the issues raised by Defendant's motion to dismiss.

ARGUMENT

District courts have inherent authority and broad discretion to grant leave to file an *amicus* brief. *Leigh v. Engle*, 535 F. Supp. 418, 420 (N.D. Ill. 1982) (citing 3A C.J.S. Amicus Curiae 3); *Aliano v. The Quaker Oats Co*., 2017 Us Dist Lexis 1158, 2017 WL 56638 (N.D. Ill. Jan. 04, 2017); *Adams v. City of Chicago*, No. 94 C 5727 , 1995 U.S. Dist. LEXIS 11649 , 1995 WL 491496, at *1 (N.D. Ill. Aug. 11, 1995); *National Organization for Women, Inc. v. Scheidler, et al.*, 223 F.3d 615, 616 (7th Cir. 2000) ("Whether to permit a nonparty to submit a brief, as amicus curiae, is … a matter of judicial grace."); *United States v. El-Gabrowny,* 844 F. Supp. 955, 957 n.1 (S.D.N.Y. 1994); *United States v. Gotti,* 755 F. Supp. 1157, 1159 (E.D.N.Y. 1991); *In re Bayshore Ford Truck Sales, Inc.*, 471 F.3d 1233, 1249 n.34 (11th Cir. 2006); *Stauart v. Huff*, 706 F.3d 345, 355 (4th Cir. 2013); *Jin v. Ministry of State Sec.*, 557 F. Supp. 2d 131, 136 (D. D.C. 2008); *James*

Square Nursing Home, Inc. v. Wing, 897 F. Supp. 682, 683 n.2 (N.D. N.Y. 1995). "There are no specific prerequisites for appearing as *amicus*. Leave to appear *amicus curiae* has been granted where it may be useful or otherwise desirable to the Court." *Adams*, No. 94 C 5727, 1995 U.S. Dist. LEXIS 11649, 1995 WL 491496 (quoting S. Ct. R. 37.1 ("An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court.")).

Amici assist "in cases of general public interest by making suggestions to the court, by providing supplementary assistance to existing counsel, and by insuring a complete and plenary presentation of difficult issues so that the court may reach a proper decision." *Newark Branch, N.A.A.C.P. v. Town of Harrison, N.J.*, 940 F.2d 792, 808 (3d Cir. 1991) (citations omitted). Courts often grant leave to nonprofit organizations like UP with knowledge and perspective that may assist in the resolution of the case. *See Bryant v. Better Bus. Bureau*, 923 F. Supp. 720, 728 (D. Md. 1996); *see also Perry-Bey v. City of Norfolk, Va.*, 678 F. Supp. 2d 348, 357 (E.D. Va. 2009). This Court has exercised its inherent authority and discretion previously. *See*, *Leigh*, 535 F. Supp. 418; *Aliano*, 2017 Us Dist Lexis 1158, 2017 WL 56638; *Adams*, No. 94 C 5727 , 1995 U.S. Dist. LEXIS 11649, 1995 WL 491496.

Although the Federal Rules of Civil Procedure do not contain a rule governing the filing of *amicus* briefs, district courts often look to Federal Rule of Appellate Procedure 29 and United States Supreme Court Rule 37 for guidance. *See, e.g.*, *Am. Humanist Ass'n v. Mid-Nat'l Capital Park & Planning Comm'n*, 147 F. Supp. 3d 373, 389 (D. Md. 2015); *Resort Timeshare Resales, Inc. v. Stuart*, 764 F. Supp. 1495, 1500-01 (S.D. Fla. 1991). Rule 29 provides that a prospective *amicus* must file, along with the proposed brief, a motion that states "the movant's interest" and "the reason why an *amicus* brief is desirable and why the matters asserted are relevant to the

disposition of the case." FED. R. APP. P. 29(a)(3).

I. United Policyholders' interest in this case.

The pending motion to dismiss is one of the earliest challenges nationwide to a policyholder's ability to state a claim for business interruption insurance coverage stemming from the COVID-19 pandemic. The nature of the arguments raised by Defendant are sweeping in scope, and touch issues ubiquitous in similar litigation.

The application of insurance contracts requires special judicial handling. Not only are insurance contracts adhesive in nature, which compels judicial balancing, but effectuating indemnification in case of loss is a fundamental economic and social objective that courts can advance. UP respectfully seeks to assist this Court in fulfilling these important roles.

UP is a non-profit, tax-exempt, charitable organization founded in 1991 that provides valuable information and assistance to the public on insurers' duties and policyholders' rights. UP monitors developments in the insurance marketplace and serves as a voice for policyholders in legislative and regulatory forums. UP helps preserve the integrity of the insurance system by educating consumers and advocating for fairness in sales and claim practices. Grants, donations and volunteers support the organization's work. UP does not accept funding from insurance companies.

UP's work is divided into three program areas: *Roadmap to Recovery*™ (disaster recovery and claim help), *Roadmap to Preparedness* (disaster preparedness through insurance education), and *Advocacy and Action* (advancing pro-consumer laws and public policy through submission of *amicus curiae*). UP hosts a library of informational publications and videos related to personal and commercial insurance products, coverage and the claims process at www.uphelp.org.

State insurance regulators, academics, and journalists throughout the U.S. routinely engage with UP on issues impacting policyholders. UP's Executive Director, Amy Bach, Esq., has served as an official consumer representative to the National Association of Insurance Commissioners since 2009.

In furtherance of its mission, UP regularly appears as *amicus curiae* in courts nationwide to advance the policyholder's perspective on insurance cases likely to have widespread impact. UP's *amicus* brief was cited in the U.S. Supreme Court's opinion in *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999).

UP has been actively involved as *amicus curiae* in Illinois courts since 1995 and submitted briefs in recent cases, including: *West Bend Mutual Insurance Co v. New Packing company, Inc.* (Illinois Appellate Court First District Appeal No. 11-1507); *Maremont Corporation v. Edward William Chesire, et al*. (Illinois Appellate Court First District Appeal No 96-0146); *Employers Insurance of Wausau v. City of Waukegan, et al*. (Illinois Appellate Court Second District Appeal Nos. 2-97-0606 and 2-97-0901); *Country Mutual Insurance Company v. Livorsi Marine, Inc., et al.* (Supreme Court of Illinois No. 99807); *Board of Education of Township High School District No. 211 v. International Insurance Company* (Illinois Appellate court First Judicial District Appeal No. 98-0084); *Benoy Motor Sales, Inc. v. Universal Insurance Company* (Illinois Appellate court, Appeal No. 96-0536); *Avery v. State Farm Mutual Automobile Insurance Company* (Illinois Supreme Court Appeal No. 91494).

UP seeks to fulfill the classic role of *amicus curiae* by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that may have escaped consideration. *Miller-Wohl Co., Inc. v. Comm'r of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). As commentators have stressed, an *amicus* is often in a superior position to

focus the court's attention on the broad implications of various possible rulings. R. Stern, *E. Greggman & S. Shapiro, Supreme Court Practice*, 570-71 (1986) (quoting Ennis, *Effective Amicus Briefs*, 33 CATH. U. L. REV. 603, 608 (1984)).

II. The issues addressed by the *amicus* brief are useful and relevant to the Court's review of Defendant's motion to dismiss.

Defendant's motion to dismiss makes several assertions, including that: (1) there is no Business Income or Extra Expense coverage because Plaintiffs' claim was not the result of physical loss or damage due to the actual or suspected presence of the Coronavirus; (2) the partial temporary limitation of plaintiffs' operations imposed by executive orders is not physical loss or damage; (3) that there is no coverage under the Civil Authority Additional Coverage in part because there is no physical damage and access to the plaintiff's premises has not been prohibited; (4) there is no coverage under the Contamination Additional Coverage because the executive orders did not prohibit access to the described premises and were not the result of an issue with Plaintiffs' products, merchandise or premises (along with other reasons); and (5) the Law or Ordinance Exclusion prevents coverage because they regulate the use of Plaintiffs' properties. The public at large has a significant interest in this issue, which is being actively litigated throughout the country. This Court's disposition of Defendant's motion has the potential to affect thousands of policyholders, not only in Illinois but nationwide.

The Court will benefit by reviewing the perspective of *amicus*, who has considerable experience in briefing courts on insurance coverage issues and an interest in ensuring a proper ruling under the doctrines of policy interpretation. United Policyholders' proposed amicus brief will analyze relevant precedent not already addressed in Defendant's motion or Plaintiff's response, including analysis of whether the involved covered causes of loss cause "direct physical loss and damage" under a property insurance policy.

WHEREFORE, United Policyholders hereby requests that this Court enter an order granting this motion for leave to file an *amicus curiae* brief and accepting the proposed *amicus curiae* brief in consideration of Defendant's motion to dismiss.

A copy of United Policyholders' *amicus curiae* brief is attached hereto as Exhibit "A."

Dated: September 11, 2020

Respectfully submitted,

/s/ John S. Vishneski

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on September 11, 2020, he caused a true and correct copy of the foregoing to be filed with the Clerk of the Court and served electronically via the court's CM/ECF system on all attorneys of record.

/s/ John S. Vishneski III
One of the Attorneys for Plaintiff

Exhibit A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
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BIG ONION TAVERN GROUP, LLC; HEADQUARTERS BEERCADE LLC; MACHINE 1846 LLC; THE NEW 400 LLC; HARPER THEATER LLC; WELCOME BACK LLC; LEGACY HOSPITALITY LLC; MCBRIDES AURORA INC.; MCBRIDE'S PUB INC.; MCBRIDE'S ON 52 INC.; HOMESLYCE IS WHERE THE HEART IS LLC; 3458 NORCLARK RESTAURANT LLC; HAPPY CAMPER PIZZERIA LLC; 1913 NORTHCO LLC; THE BURGER PHILOSOPHY LLC;; TAI'S LOUNGE INC.; ALEXANDERS CAFE 64 INC.; ALEXANDERS RESTAURANT INC.; BK & MM VENTURES LLC; DOUBLE K & A SPORTS INC.; OR1 INC.; ROOKIES 5-ROSELLE INC.; TRIPLE K & A SPORTS BAR INC.; VILLAGE SQUIRE INC.; VILLAGE SQUIRE NORTH INC.; VILLAGE SQUIRE OF MCHENRY INC.; VILLAGE SQUIRE SOUTH INC.; 3471 N ELSTON INC.; CALM & CHAOS LLC; 108 KINZIE LLC; SANCERRE HOSPITALITY I LLC; HARLEN-RASCALS, INC.; YMPV INC.; OVIE BAR & GRILL LLC; WOODFIRE BRICK OVEN PIZZA LLC; ANDERSONVILLE 5310 LLC; CLARK 5260 LLC; MUNSTER TAVERNS, INC.; WELLS 1525 LLC; 1270 STOREFRONT LLC; 2450 N MILWAUKEE LLC; 806 W RANDOLPH LLC; A PITZALLA BLUES LLC; QUEEN MARY LLC; RAMBUTTAN LLC; ROBERTA NOWAKOWSKI INC.; 3478 N CLARK STREET INC; EXIT PLAN HOLDINGS LLC; GOUNTANIS ENTERPRISES, INC.; ALL DAY BROADWAY LLC; TS2 INC.; OLMAR CORP INC.; THE BARRELMAN TAVERN INC.; 540 WEST MADISON HOSPITALITY GROUP LLC; NICHE RESTAURANT GROUP LLC

Plaintiffs,

Hon. Judge Edmond Chang

Case No. 20-cv-02005

JURY TRIAL DEMANDED

v.)
)
)
SOCIETY INSURANCE, INC.)
)
)
Defendant.)

UNITED POLICYHOLDERS' *AMICUS CURIAE BRIEF* IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS UNDER RULE 12(b)(6) OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

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United Policyholders ("UP") submits this *amicus curiae* brief in support of the Plaintiffs' response (Dkt. 124-1) to Defendant Society Insurance, Inc.'s ("Society") Motion to Dismiss or in the Alternative for Summary Judgment (Dkt. 113). UP has a special interest in this litigation[1] and can offer its unique perspective to the Court as it considers the issues raised by Defendant's motion.

The uncontrolled spread of SARS-COV-2 ("coronavirus") throughout the community, like a spreading wildfire, constitutes a risk of loss that should be covered by insurance. Businesses that were habitable and safe for their usual and intended use one day now have become unsafe for their usual and intended use due to the infiltration of the COVID-19 disease through the community at large. The inability to use property because it has become unsafe due to some physical condition outside the policyholder's control is the exact type of "physical loss" of property the insurance policy here was intended to address. The very courthouse where this Court would hold hearings on motions like this is now unsafe for its intended use as a gathering spot for judges, court personnel, litigants and the public. Several months ago, the courthouse was safe—now it is unsafe due to the community spread of coronavirus. Court proceedings now have to take place over Zoom. The physical use of the courthouse is impaired. This constitutes a "physical loss."

In the matter before this Court, it is undeniable that Plaintiffs' businesses sustained losses as a result of the pandemic. In an effort to avert illness and injury to citizens and to slow or prevent community spread of the coronavirus—which itself is a tangible, physical thing—Illinois Governor Pritzker issued several Executive Orders that required the closure of bars and restaurants, including Plaintiffs' properties. Complaint ¶¶ 48-52. These orders acknowledge and verify what

[1] As stated in more detail in its Motion for Leave to File Amicus Curiae Brief, UP is a non-profit, tax-exempt, charitable organization founded in 1991 that provides valuable information and assistance to the public on insurers' duties and policyholders' rights. UP monitors developments in the insurance marketplace and serves as a voice for policyholders in legislative and regulatory forums. UP helps to preserve the integrity of the insurance system by educating consumers and advocating for fairness in sales and claim practices. Grants, donations and volunteers support the organization's work. UP does not accept funding from insurance companies.

is apparent to all: the presence of coronavirus "on or around Plaintiffs' premises rendered the premises unsafe and unfit for their intended use." (Complaint ¶ 49.) As a result, Plaintiffs allege they sustained significant losses that continue to this day (Complaint ¶ 53) while the impact of combating the community spread of coronavirus suppresses or prevents normal business operations.

Nevertheless, Society denied Plaintiffs' claim on the incredible assertion that "the actual or alleged presence of the coronavirus" on or around Plaintiffs' premises did not constitute "direct physical loss." Complaint ¶ 7. According to Society, there is no coverage under its "all risk" policy unless the property insured has been "altered in appearance, shape, color or in other material dimension." Motion at 5. Society's position is contrary to Illinois law, and courts around the country have rejected Society's construction of the "direct physical loss of or damage to Covered Property" language.

Society argues that even if the Court finds its position on physical loss or damage unpersuasive, the "ordinance or law" exclusion in its policies should bar coverage. This is incorrect. The exclusion does not apply to executive orders. Even if it did, this exclusion does not apply when physical damage is caused by extraneous forces, and as a result of that damage, a governmental body enforces an ordinance against a covered property.

In this brief, UP analyzes the meaning and proper construction of "direct physical loss of or damage to property," and why the ordinance or law exclusion does not apply here.

ARGUMENT

Properly Construed, Society's Property Policies Provide Coverage for the Loss of Property Sustained by Plaintiffs

The rules of contract construction in Illinois are well known, and as applied correctly, they compel here a construction of Society's all risk policies that supports Plaintiffs' interpretation and

claim. "In construing the terms in an insurance policy, the court must ascertain the intent of the parties." *Outboard Marine Corp. v. Liberty Mutual Ins. Co*., 154 Ill.2d 90, 607 NE 2d 1204, 1217 (1992). "If the terms in the policy are clear and unambiguous, the court must give them their plain, ordinary, popular meaning." *Id.* "If a term in the policy is subject to more than one reasonable interpretation within the context in which it appears, it is ambiguous." *Id.* "Ambiguous terms are construed strictly against the drafter of the policy and in favor of coverage." *Id.* This is especially true with respect to exclusionary clauses." *Id.* "This is so because there is little or no bargaining involved in the insurance contracting process, the insurer has control in the drafting process, and the policy's overall purpose is to provide coverage to the insured." *Id.* The "public policy of this State… requires that insurance contracts be construed and enforced to accord with the objectively reasonable expectations of the *insured*." *Posing v. Merit Ins*., 258 Ill. App.3d 827, 629 N.E.2d 1179, 1183 (Ill. 3 Dist. 1994).

"Physical Loss" Cannot Mean the Same Thing as "Physical Damage"

Applying these rules of construction to Society's "Businessowners Special Property Coverage Form (the "Property Form")," Plaintiffs' claims of loss are proper and covered. The Property Form coverage grant provides: "We will 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" (emphasis added).[2] The Property Form does not define "direct physical loss" or the disjunctive "[direct] physical damage," and thus those terms must be construed in their ordinary, common usage. *Bellington Realty v. Philadelphia Ins. Co*., No. 10 C 7224, 2013 WL 2403620, *3 (N.D. Ill. May 31, 2013). Under the rules of construction, the terms "loss of" and "damage to" must mean different things.

[2] Covered Causes of Loss is defined to mean "Direct Physical Loss unless the loss is excluded or limited under this coverage form."

Several courts presented with this issue have so concluded. For example, in *Manpower Inc. v. Insurance Co. of the State of Pennsylvania*, No. 08C0085, 2009 WL 3738099 (E.D. Wis. Nov. 3, 2009), the court analyzed a policy that covered "all risk of direct physical loss of or damage to property described herein except as hereinafter excluded." The policyholder asserted that the collapse of an adjacent building rendered its property—leased offices in a building—inaccessible, resulting in a direct physical loss. Id. at *5. The insurer argued that the policyholder did not suffer loss because the collapse "did not physically damage, move or alter the [insured] property in any way." *Id*.

In concluding in favor of the policyholder, the *Manpower* court stated:

> As an initial matter, I reject ISOP's argument that a peril must physically damage property in order to cause a covered loss. As noted, **the policy covered physical losses in addition to physical damage, and if a physical loss could not occur without physical damage, then the policy would contain surplus language**. However, a contract must, where possible, be interpreted so as to give reasonable meaning to each provision without rendering any portion superfluous. *See,e.g., Dewitt Ross & Stevens, S.C. v. Galaxy Gaming & Racing Ltd. P'ship,* 273 Wis.2d 577, 597, 682 N.W.2d 839 (2004). Thus, 'direct physical loss' must mean something other than 'direct physical damage.' Indeed, if 'direct physical loss' required physical damage, the policy would not cover theft, since one can steal property without physically damaging it.

Id. (emphasis added). Similarly, in *Total Intermodal Services, Inc., v. Travelers Property Cas. Co. of Am*., No. CV 17-04908 AB (KSx), 2018 WL 3829767 (C.D. Cal. July 11, 2018), the court observed that:

> The Coverage clause provides coverage for the 'direct physical loss ***of*** or damage to Covered Property caused by or resulting from a Covered Cause of Loss' (emphasis in original). Thus, the Coverage clause applies to the 'loss of' Covered Property. Under an 'ordinary and popular meaning,' *Ward Gen. Ins. Servs., Inc. v. Employers Fire Ins. Co*., 114 Cal.App.4th 548, 554, as modified on denial of reh'g (Jan. 7, 2004), the 'loss of' property contemplates that the property is misplaced and unrecoverable, without regard to whether it was damaged. **Furthermore, to interpret 'physical loss of' as requiring 'damage to' would render meaningless the 'or damage to' portion of the same clause, thereby violating a black-letter canon of contract interpretation—that every word be given a meaning**. *See* Cal. Civ. Code § 1641 ('The whole of a contract is to

> be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.'); *Lyons v. Fire Ins. Exch.*, 161 Cal.App.4th 880, 886 (2008) (insurance policy must be read so 'that all words in a contract are to be given meaning').

Id. at *3 (bold emphasis added).[3]

Finally, the United States District Court for the Western District of Missouri denied the insurer's motion to dismiss the policyholder's claim of business income loss resulting from the coronavirus pandemic. In *Studio 417, Inc. v. The Cincinnati Ins. Co.*, 20 CV 3127-SRB) (S.D. Mo., August 12, 2020), the court construed the meaning of "direct physical loss or direct physical damage" in an all-risk property policy. Like Society does here, the insurer in *Studio 417* argued that there could be no "direct physical loss" without "actual, tangible, permanent, physical alteration of property." Id. at *7. The policyholder disagreed, asserting that (1) the phrase "physical loss or physical damage" means the policies covered both physical loss or damage; (2) that either a "loss" or a "damage" was required for coverage; and (3) that "loss" must mean something different from "damage." *Id*. The Studio 417 court agreed with the Plaintiff that it could state a claim without alleging a permanent physical alteration of property:

> Upon review of the record, the Court finds that Plaintiffs have adequately stated a claim for direct physical loss. First, because the Policies do not define a direct 'physical loss' the Court must 'rely on the plain and ordinary meaning of the phrase.' [Citation omitted.] The Merriam-Webster dictionary defines 'direct' in part as 'characterized by close logical, causal, or consequential relationship.' Merriam-Webster, www.merriamwebster.com/dictionary/direct (last visited

[3] Although *Intermodal* involved a dispute about whether the mis-delivery of two shipping containers of specialty printer equipment constituted "direct physical loss of or damage to Covered Property" to trigger coverage under a liability policy, the distinction drawn between the meaning of "loss" and "damage" is still apt. What *is* different, however, is the construction of the word "loss" in the context of movable property versus real property. The *Intermodal* court concluded that in the context of movable property, "loss" meant it had been "misplaced" and "unrecoverable." That construction does not make sense, however, in the context of evaluating a "loss" of real property, which cannot be "misplaced" or "unrecoverable" because real property is not movable. The word "loss" in Society's policies must make sense in the context of the risk insured against, and that construction must be consistent with the reasonable expectations of the insured. Here, "loss" must make sense in the context of property rights attendant to the Plaintiffs' real property interests. As discussed below, a principal property right is the right of use. Given that Plaintiffs purchased Society's policies to protect Plaintiffs' property (real or otherwise), the closures and restrictions of Plaintiffs' rights to use their premises for normal business operations due to community spread of the coronavirus and Govern Pritzker's Executive Orders results in direct physical loss to covered property.

> August 12, 2020). 'Physical' is defined as 'having material existence: perceptible especially through the senses and subject to the laws of nature.' Merriam-Webster, www.merriam-webster.com/dictionary/physical (last visited August 12, 2020). 'Loss' is 'the act of losing possession' and 'deprivation.' Merriam-Webster, www.merriam-webster.com/dictionary/loss (last visited August 12, 2020).

Studio 417, at *8. When construing the disjunctive phrase "physical loss of or physical damage to," courts consistently conclude that "loss" and "damage" apply to different conditions. This Court should similarly conclude: (1) "physical loss" and "physical damage" are not synonymous; and (2) a "physical loss" can occur without a visible, structural alteration of property.

"Property" is More Than Just a Thing

In construing the phrase "direct physical loss of or damage to property," it is critical not to forget the word "property." A thing is not "property" unless and until legal rights attach to it. The Supreme Court described the nature of "property" in the context of the federal tax lien statute as a "'bundle of sticks,' a collection of individual rights which, in certain combinations, constitute property." *United States v. Craft*, 535 U.S. 274, 278 (2002) (*citing* B. Cardozo, Paradoxes of Legal Science 129 (1928)). "State law determines only which sticks are in a person's bundle." *Id*. Black's Law Dictionary defines "ownership" as "[t]he bundle of rights allowing one to **use**, manage, and enjoy property, including the right to convey it to others. Ownership implies the right to possess a thing, regardless of any actual or constructive control. Ownership rights are general, permanent, and heritable." Black's Law Dictionary 1215 (9th ed. 2009) (emphasis added); *see also Detrana v. Such*, 368 Ill. App. 3d 861, 868, 859 N.E.2d 142 (2006) (quoting Black's Law Dictionary seventh edition's definition of "ownership").

The concept of "property itself, in a legal sense, is nothing more than the exclusive right 'of possessing, enjoying and disposing of a thing,' which, of course, includes the **use** of a thing." *Chicago & W. Ind. R.R. v. Englewood Connecting Ry.*, 115 Ill. 375, 385, 4 N.E. 246, 249 (1886)

(emphasis added). "The owners of real property have the constitutional right to **use** their property in any manner they desire, providing that such use does not interfere with the welfare of the people generally." *Ave. State Bank of Oak Park v. Village of Oak Park*, 99 Ill. App. 2d 329, 337, 241 N.E.2d 630, 634 (App. 1st Dist. 1968) (emphasis added).

The "use" right is the key insured property right many of the restaurant plaintiffs have in the insured property because they lease restaurant spaces. See Dkt 29-4, p. 58. It is the "use" property right that is directly interfered with by community spread of the very physical coronavirus. Plaintiffs' allege that "[t]he continuous presence of the coronavirus on or around Plaintiffs' premises has rendered the premises unsafe and unfit for their intended **use** and therefore caused physical … loss under the Policies." Complaint ¶ 49 (emphasis added). Plaintiffs' alleged loss of intended use, partial or complete, constitutes "direct physical loss of Covered Property" under Society's policies given the nature of property rights.

Society's Policy Must Be Read as a Whole

Society deals with the nature of "property" much more specifically and clearly in the general liability section of its policy. It defines "Property Damage" as: (a) "Physical injury to tangible property" and (b) "Loss of use of tangible property that is not physically injured." Dkt 29-4, p. 76. It is clear from this definition that the loss of use property right is protected, with the limitation that "tangible" property is affected. The clear line drawn here is to avoid coverage for mere loss of value or loss of use relating to intangible property (e.g., intellectual property rights).

Society's Special Property Coverage Form gets at the same concepts, albeit more awkwardly and vaguely with the phrase "direct physical loss of or damage to Covered Property." Dkt 29-4, p. 78. As noted above, the broad and vague phrase "physical loss of property" must be construed in the insureds' favor. The fact that Society itself, when it tries to be more specific, equates property damage with "loss of use of tangible property that is not physically injured" is

convincing as to the reasonableness of Plaintiffs' interpretation of "physical loss of property" as encompassing "loss of use of tangible property that is not physically injured."[4]

Courts Recognize Loss of Use of Tangible Property as Physical Loss of Property

Courts recognize that "direct physical loss" occurs without any alteration in "appearance, shape, color or in other material dimension" of the covered property. In *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1 (W. Va. 1998), the court held that rocks threatening to fall on property below a hillside triggered coverage under a property policy, despite the fact that the rocks had not yet fallen. One of several homeowner's policies purchased by the claimants insured the "accidental direct physical loss to the property." *Id.* at 16. The insurer contended that its policy did not "cover any losses occasioned by the potential damage that could be caused by future rockfalls." *Id.* Observing that direct physical loss provisions apply where property is "injured," not destroyed, and that direct physical loss can be present "in the absence of structural damage to the insured property," (*id.* at 17, *citing Sentinel Management Co. v. New Hampshire Ins. Co.*, 563 N.W.2d 296, 300 (Minn. App. 1997)), the court reasoned that the direct physical loss provision was satisfied under the circumstances:

> The properties insured … in this case were homes, buildings normally thought of as a safe place in which to dwell or live. It seems undisputed from the record that on February 22, 1994 all three of the plaintiffs' homes became unsafe for habitation, and therefore suffered real damage when it became clear that rocks and boulders could come crashing down at any time. The record suggests that until the highwall on defendant Harris' property is stabilized, the plaintiffs' houses could scarcely be considered "homes" in the sense that rational persons would be content to reside there.
>
> We therefore hold that an insurance policy provision providing coverage for … an 'accidental direct physical loss' to insured property requires only that the property be damaged, not destroyed. **Losses covered by the policy, including those**

[4] Notably, Society's "Top Shelf EXTENSION ENDORSEMENT" specifically recognizes "loss of use" as a subset of "direct physical Loss or damage." Its Guest's Personal Property Coverage states: "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." Dkt 29-4, p. 46.

> **rendering the insured property unusable or uninhabitable, may exist in the absence of structural damage to the insured property**.

509 S.E.2d at 17 (emphasis added).

Just like in *Murray*, the community spread of coronavirus, including on or near Plaintiffs' premises, caused a direct physical loss. Plaintiffs' establishments cannot physically be used for their intended purpose—eat in dining—which has been interrupted by this pandemic.

Similarly, in *Gen. Mills, Inc. v. Gold Medal Ins. Co.*, 622 N.W.2d 147 (Minn. Ct. App. 2001), the court held that the policyholder sustained a "direct physical loss to insured property" when FDA regulations prevented it from selling food products treated with an unapproved pesticide, despite the fact the food products were safe for human consumption. In this case, an independent contractor hired by General Mills to treat its oats with an FDA-approved pesticide instead used a cheaper but unapproved pesticide. Although the pesticide had been approved by the FDA for treatment of other foods, and there was no dispute that the pesticide presented no hazard to the consuming public, its application to General Mills' oats violated FDA regulations on adulteration of food products. *Id*. at 150. General Mills could not sell its oat stocks or finished products that incorporated them under federal law. General Mills tendered the loss for coverage under a first party property policy, and its insurer denied the claim.

In the coverage litigation that ensued, the trial court found that General Mills had suffered a direct physical loss of insured property under its all-risk property policy. On appeal, the insurer argued that the district court had erred because the use of the unapproved pesticide did not render the oats (and products made from the oats) unfit for human consumption. The insurer argued that instead, the loss occurred because of government regulation and not "because of direct damage to the insured property," and thus there was no covered loss. *Id*. at 151-152. The appellate court rejected the insurer's argument, stating that "we have previously held that direct physical loss can

exist without actual destruction of property or structural damage to property; it is sufficient to show that insured property is injured in some way." *Id*. at 152, *citing Sentinel Mgmt. Co. v. New Hampshire Ins. Co.,* 563 N.W.2d 296, 300 (Minn. App. 1997) (finding the safe housing function of apartment building was "seriously impaired or destroyed by the presence of asbestos fibers, although the building itself did not suffer a 'tangible injury'"). Because the "function" of the food products produced by the insured was "not only to be sold, but to be sold with an assurance that they meet certain regulatory standards," that function was "seriously impaired" by the inability to lawfully distribute the goods due to FDA regulations. *Id*.

Rather than addressing the meaning of "physical loss of or damage to" in its policies, Society's motion is limited to construction of the word "physical"—which itself is not controversial. Ignoring the "loss or damage" issue, Society argues that there can be no "direct physical loss of or damage to" property unless the insured property has been "altered in appearance, shape, color or in other material dimension," *citing Travelers Ins. Co. v. Eljer Mfg., Inc*., 197 Ill.2d 278, 757 N.E.2d 481 (2001). Motion p. 5. In so doing, Society gives the phrase "loss of or damage to" no meaning, which plainly violates the rules of construction. The reason for its choice is obvious: if it presented a good faith interpretation of its policies, then Society could not have filed its motion.[5]

The Ordinance or Law Exclusion Does Not Preclude Coverage When Physical Damage is Caused by Extraneous Forces, and, As a Result of that Physical Damage, a Governmental Body Enforces an Ordinance Against Covered Property.

Society argues that, even if there is physical damage or loss, the ordinance or law exclusion precludes coverage. This is not true. The Policy includes the following exclusion:

[5] Plaintiffs' brief discusses in detail two key Illinois decisions that reject the idea that physical loss of damage to property requires alteration so UP does not repeat that discussion here. See *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64 (Ill. 1991) and *Board of Educ. v. Int'l Ins. Co.*, 308 Ill.App.3d 597, 720 N.E.2d 622 (Ill. 1999).

> 1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.
>
> **a. Ordinance Or Law**
>
> The enforcement of or compliance with any ordinance or law:
>
> (1) Regulating the construction, use or repair of any property; or
>
> * * *
>
> 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.

Dkt 29-4, p. 93.

As an initial matter, the ordinance or law exclusion is not applicable to Executive Orders. Society is required to draft clear and unambiguous exclusions. This exclusion applies solely to a law or ordinance, not an order of any type. But, Society is capable of using the term "governmental order" in its policies, and does in the spoilage Exclusions and the Governmental Action exclusion. Moreover, an Executive Order is neither a law nor an ordinance. A law is "the legislative pronouncement of the rules which should guide one's actions in society" (Barron's Law Dictionary, 5th Ed. (2003), 288), or "a statement in a statute, regulation, book or case opinion" (Bouvier Law Dictionary (2011), 619), or "[t]he aggregate of legislation, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative action." Black's Law Dictionary (11th ed. 2019). An ordinance is "an act of a city council or local governmental entity that has the same force and effect as a statute when it is duly enacted" (Barron's Law Dictionary, 5th Ed. (2003), 359), "an article of municipal legislation," (Bouvier Law Dictionary (2011), 767), or something passed by a municipal government (Black's Law Dictionary (11th ed. 2019). In contrast, an executive order "is issued by the executive head of

government, such as… a governor of a state," (Bouvier Law Dictionary (2011), 767), or "[a]n order issued by or on behalf of the President, usu. intended to direct or instruct the actions of executive agencies or government officials, or to set policies for the executive branch to follow." Black's Law Dictionary (11th ed. 2019.) No court, legislative body or municipal government was involved here, and as such Governor Pritzker's Executive Orders cannot be a "law" or "ordinance."

Even were Executive Orders a law or ordinance, this exclusion is not applicable to Executive Orders relating to the coronavirus. "So long as extraneous forces cause physical damage to property, this type of exclusion does not defeat recovery when, as a result, a governmental body enforces an ordinance against the property." *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 302 (Minn. Ct. App. 1997); *Sonstegard Foods Co. v. Wellington Underwriting, Inc.*, 2007 BL 4211, 6 (D. Minn. May 21, 2007) (same; policy included anti-concurrent causation language); *Levitz Furniture Corp. v. Hous. Cas. Co.*, 1997 BL 95, 6-7 (E.D. La. Apr. 28, 1997) (finding asbestos abatement was necessitated by the flood, not by the enforcement of a law or ordinance.").[6]

Throgs Neck Bagels, Inc. v. GA Ins. Co. of New York, directly takes on the exact situation here: an insurer attempting to disclaim coverage for an order issued "in response to the consequences of any catastrophic event affecting public safety." 241 A.D.2d 66, 72, 671 N.Y.S.2d 66, 70 (App Div, 1st Dept. 1998). The court declined to "render the underlying coverage nugatory in a host of cases where it would reasonably be expected to apply" reasoning that a:

> governmental agency could be expected to frequently issue various orders and decrees in response to the consequences of any catastrophic event affecting public safety, and an insurer could avoid coverage by simply claiming that such an order was one of the "causes" of the loss. Indeed, to apply defendant's interpretation here would mean that even if plaintiff's store had been one of those that had been completely destroyed by the fire, defendant could have declined coverage on the identical ground that the issuance of the vacate order was a concurrent "cause" of

[6] *See also* 10A Lee R. Russ & Thomas F. Segalla, Couch on Insurace § 152:26 (3d ed. 1995) ("Generally, courts have found [civil authorities exclusions] applicable where losses are solely the result of a civil condemnation order, and inapplicable where losses are caused by extraneous forces which result in a condemnation order.")

> the loss. To hold that the law or ordinance exclusion applies under circumstances such as here present would be an unreasonable construction that would frustrate the underlying purpose of the policy.

Id. (discussing causation and anti-concurrent causation language). Just as in *Throgs Neck Bagels*, permitting Society to prevail on its argument that an executive order somehow caused the loss, and as such it is not covered, would frustrate the underlying purpose of the policy. *See also General Mills, Supra* (FDA order followed adulteration of oats by unauthorized pesticide). The cause of the loss is the ubiquitous presence of coronavirus due to community spread, which presents a danger to people who enter property. Permitting Society to avoid the coverage obligations which it accepted by issuing the policy would render the underlying coverage nugatory.

Manpower, Inc. v. Insurance Company of the State of Pennsylvania, also addressed the issue of public safety and a subsequent law or ordinance. No. 08C0085, 2009 WL 3738099 (E.D. WI, Nov. 3, 2009). The court found there was coverage where a collapse rendered a complete building structure unstable, rendering "the entire building ('both damaged and undamaged sections') uninhabitable for a period of at least eight to ten weeks following the collapse due to damage to the support structure and entrances and exits" and damaged common elements of the building including fire escapes, plumbing and electrical services. *Id.* at *4. The court held:

> the collapse prevented Right from using its offices, at least until certain temporary repairs were completed. Accordingly, Manpower is entitled to reimbursement for any business interruption losses it sustained between the collapse and the time the necessary repairs could have been, or were, completed, up to $15 million. **Because coverage was available under the ordinary business interruption provisions of the policy, and the orders of the Department of Public Safety merely confirmed that the collapse rendered the entire building unstable, the $500,000 sublimit on civil authorities coverage does not apply.**

Id. (emphasis added.) Here, an extraneous force, the coronavirus, created danger in Plaintiff's locations by threatening public safety. Knowledge of the danger of community spread and consequent danger of the coronavirus preceded any executive orders. Governor Pritzker's

COVID-19 Executive Order No. 8 points to the coronavirus's propensity to adhere to surfaces as a reason for closing down dine-in restaurant operations. It prohibits dine-in operations, but allows limited operations for delivery, drive-through, carry-out and curbside pick-up "**due to the virus's propensity to physically impact surfaces and personal property**." (Emphasis added).

In *Ira Stier, DDS, P.C. v. Merchants Ins. Grp.*, the sole case cited by Society, is easily distinguishable. 127 A.D.3d 922, 923 (N.Y. App. Div. 2015). *Ira Stier* involved the enforcement of a building Code which caused a dentist to be unable to use property as a dental business, but there was no preceding physical loss or damage. The court found the exclusion for "losses caused directly or indirectly by the enforcement of any ordinance or law regulating the construction, use or repair or any property" applied. It held that "it was the enforcement of the Building Code by the Town's Building Department which prevented the plaintiff from utilizing the premises to engage in their dental business without a proper certificate of occupancy." *Id.* at 924.

Finally, once again, Society's policy must be read as a whole. The exclusions apply to both the all risks coverage and the several "additional" coverages. Dkt, 29-4, pp. 79-98. One of the additional coverages is for the Ordinance and Law risk. Notably, the Ordinance or Law exclusion that follows in the next section is explicitly not applicable to the Ordinance or Law additional coverage. Dkt 29-4, p. 88. This is, of course, necessary to avoid having the exclusion eliminate the entire additional coverage for the Ordinance or Law risk.

The same is not true, however, for the Civil Authority additional coverage. That coverage states: "When a Covered Cause of Loss caused damage to property other than 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." Dkt 29-4, p. 84. If the Ordinance or Law exclusion was intended to apply to circumstances covered by

the Civil Authority additional coverage – similar to Plaintiffs' claims here – then that additional coverage would also explicitly not be applicable to the Ordinance or Law exclusion. It is not. Dkt. 29-4, pp. 84-85. Consequently, if Society's broad interpretation of the Ordinance and Law exclusion applies to Governor's Pritzker's executive orders, then the Civil Authority additional coverage is surplussage (i.e. has no meaning or effect in the policy), which violates the above-referenced Illinois rules of construction. Such a construction cannot be allowed.

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Respectfully submitted,

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