UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

RISING DOUGH, INC. (d/b/a MADISON SOURGOUGH), WILLY MCCOYS OF ALBERTVILLE LLC, WILLY MCCOYS OF ANDOVER LLC, WILLY MCCOYS OF CHASKA LLC, WILLY MCCOYS OF SHAKOPEE LLC, WHISKEY JACKS OF RAMSEY LLC (d/b/a/ WILLY MCCOYS RAMSEY), GREEN HILLS GRILLE, LLC, AND CASH-MCKEOWN FUTURES LLC, Individually and on behalf of all other similarly situated.

Plaintiffs,

v.

SOCIETY INSURANCE,

Defendant.

Case No.: 2:20-CV-00623-JPS

UNITED POLICYHOLDERS' AND NATIONAL INDEPENDENT VENUE ASSOCIATION MOTION FOR LEAVE TO APPEAR AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS

United Policyholders ("UP") and National Independent Venue Association ("NIVA") hereby move for leave to file the accompanying *amici curiae* brief in support of the Plaintiffs' response to Defendant's motion to dismiss (D.E. 19). UP and NIVA have 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

The decision whether to grant an application to intervene as *amicus curiae* lies wholly within the discretion of the court. *Clark v. Sandusky,* 205 F.2d 915, 917 (7th Cir. 1953). Ordinarily, an *amicus curiae* brief that duplicates arguments made in the litigant's briefs is not allowed. *Ryan*

v. Commodity Futures Trading Com'n, 125 F.3d 1062, 1063 (7th Cir. 1997). An amicus brief is only appropriate when (1) a party is not adequately represented or is not represented at all; (2) the would-be amicus has a direct interest in some other lawsuit that may be affected by a decision in the present case; or (3) the amicus has a unique perspective, or information, that can assist the court beyond what the parties are able to do. *Nat'l Org. for Women, Inc. v. Scheidler,* 223 F.3d 615, 617 (7th Cir. 2000).

The term *amicus curiae* means friend of the court, not friend of a party. *Ryan,* 125 F.3d at 1063. This means that the *amici* are to assist the court "by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs." *Voices for Choices v. Illinois Bell Telephone Co.,* 399 F.3d 542, 545 (7th Cir. 2003). The perspective and arguments of the *amici* are to be sufficiently separate and distinct to warrant the court's consideration, even if the *amicus* may be aligned with a certain party in some of its positions. *See Appleton Papers, Inc. v. George A. Whiting Paper Co.,* No. 08-C-16, 2008 WL 2323930 (E.D. Wis. June 4, 2008) (where the court granted the United States' motion to file a brief as *amicus curiae,* holding that while the parties and the *amicus* may be aligned in some of their positions, its perspective and arguments were sufficiently separate and distinct). Leave should be granted where "the brief will assist the judges by presenting ideas, arguments, theories, insights, facts or data that are not to be found in the parties' briefs." *Voices for Choices,* 339 F.3d at 545.

Courts often grant leave to nonprofit organizations like UP and other proposed *amici* with knowledge and perspective that may assist in the resolution of the case. *See Bryant v. Better Bus. Bureau,* 923 F. Supp. 720, 720 (D. Md. 1996); *see also Perry-Bey v. City of Norfold, Va.,* 678 F. Supp. 2d 348, 357 (E.D. Va. 2009). This Court specifically has exercised its inherent authority and discretion previously. *See Baldus v. Members of the Wis. Gov't Accountability Bd.,* 862 F. Supp.

2d 860, 863 (E.D. Wis. 2012); and *Johnson v. U.S. Office of Personnel Management*, No. 14-C-0009, 2014 WL 1681691 (E.D. Wis. April 28, 2014*).*

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 for guidance. *In re Becker*, No. 09-C-170, 2009 WL 2762787 (E.D. Wis. Aug. 28, 2009). 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. Interest of *Amici* in This Case.

The pending motion to dismiss is one of the earliest challenges, not only in Wisconsin, but 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. Proposed *amici* respectfully seek to assist this Court in fulfilling these important roles.

a. United Policyholders

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 regulator 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 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.

UP has been serving Wisconsin residents since 2002, and interfaces with the Wisconsin Office of the Insurance Commissioner on a regular basis on a variety of rate, policy form and claim issues via the proceedings of the National Association of Insurance Commissioners, where UP's Executive Director, Amy Bach, Esq. participates as an official consumer representative.

UP is involved as *amicus curiae* in Wisconsin courts and nationwide. Specifically, UP appeared *amicus curiae* in the following Wisconsin matters: *Mary Haley et al v. Kolbe and Kolbe Millwork Co, Inc. and Fireman's Fund Insurance Company*, 866 F.2d 824 (7th Cir. 2017), *Advance Cable Co., LLC v. Cincinnati Ins. Co.*, 788 F.3d 743 (7th Cir. 2015), *Plastics Engineering Co. v. Liberty Mut. Ins. Co.*, 759 N.W.2d 613 (Wis. 2009), *Johnson Controls v. Employers Insurance of Wausau*, 665 N.W.2d 257 (Wis. 2003). 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 seeks to fulfill the classic role of *amicus curiae* by articulating a distinctive perspective, presenting specific information, ideas, arguments and law which supplement the efforts of counsel. *Voices for Choices,* 399 F.3d at 545. 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)).

B. National Independent Venue Association.

NIVA is a trade association formed in 2020 just prior to the pandemic, with nearly 2,000 charter members in all 50 states. NIVA's members are independent performing-arts venues, both for- and non-profit, employing thousands of people and are part of the cultural backbone of their communicates. Pabst Theater Group in Milwaukee, Wisconsin is one such member. More information is available at https://www.nivassoc.org/.

II. The Issues Addressed by the *Amici* Brief are Useful and Relevant to the Court's Review of Defendant's Motion to Dismiss.

Defendant's motion to dismiss asserts that a party *cannot* plead in good faith COVID-19 related business interruption coverage because "direct physical loss of or damage to covered property "requires more than a temporary and partial limitation of operations at the insured premises. 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 Wisconsin but nationwide.

The Court will benefit by reviewing the perspective of *amici* UP, 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, and the perspective of hundreds of businesses that are members of proposed *amici* NIVA. The proposed brief will analyze relevant precedent not already addressed in Defendant's motion or Plaintiffs' response, including analysis of what constitutes "direct physical loss of or damage" under property insurance policies with the same or similar language.

WHEREFORE, United Policyholders and National Independent Venue Association, hereby requests that this Court enter an order granting this motion for leave to file an *amicicuriae* brief and accepting the proposed *amici curiae* brief in consideration of Defendant's motion to dismiss. A copy of the proposed *amici curiae* brief is attached hereto as Exhibit "A."

s/ Christina M. Phillips

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Motion to Appear Amicus using the United States District Court for the Eastern District of Wisconsin's CM/ECF service, which will send notification of such filing to all counsel of record on this 20th day of July 2020.

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UNITED POLICYHOLDERS AND NATIONAL INDEPENDENT VENUE ASSOCIATION BRIEF OF *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

EXHIBIT
A

INTRODUCTION

Through this brief, as supplementary to Plaintiffs' opposition to Defendant's Motion to Dismiss, *amici curiae* United Policyholders ("UP") and National Independent Venue Association ("NIVA")[1] seek to address the limited issue that certain types of loss can be alleged to have caused "direct physical loss of or damage."

I. INTEREST OF *AMICI* IN THIS MATTER

The issue of whether the current pandemic can cause "direct physical loss of or damage" to property—part of the coverage grant of Plaintiffs' policies—is at the forefront of COVID-19-related business interruption litigation in Wisconsin and nationwide. This Court's treatment of this issue has the potential to affect a multitude of other claims made by policyholders not only in Wisconsin, but across the nation as this undefined language is found in most property insurance policies. Simply put, this Court's ruling on Defendant's motion to dismiss has the potential to impact litigants in future cases in Wisconsin and elsewhere, as well as claimants not yet in litigation with their insurers.

Many restaurants and other businesses have made business interruption claims on policies with the same language or similar to the language found in Plaintiffs' policies, and have had their claims denied, to disastrous effect. As previously explained by one court, "[t]he purpose of business interruption insurance cannot be clearer – to ensure that [the policyholder] had the financial support necessary to sustain its business in the event disaster occurred… Certainly, many

[1] Pursuant to Fed. R. App. Procedure 29(a)(4), UP and NIVA affirm that no party's counsel authored this brief, that no party or party's counsel contributed money to any *amici curiae* party that was intended to fund preparing or submitting this brief, and no person contributed money that was intended to fund preparing or submitting the brief.

business policyholders…lack the resources to continue business operations without insurance proceeds." *Bi-Econ. Mkt., Inc. v. Harleysville Ins. Co. of New York*, 886 N.E.2d 127, 131 (2008). As further explained by the *Bi-Economy* court, "the purpose of the contract was not just to receive money, but to receive it promptly so that in the aftermath of a calamitous event, as Bi–Economy experienced here, the business could avoid collapse and get back on its feet as soon as possible." *Id.*, at 132. The insurance industry's wholesale, across-the-board denial of all claims for business interruption losses related to the 2020 pandemic[2] has produced exactly the kind of calamity predicted by the *Bi-Economy* court.

II. SUMMARY OF ARGUMENT

As set forth herein, Defendant's position regarding interpretation of the coverage grant has been widely rejected. Defendant chose not to define the phrase "direct physical loss of or damage" in the policies issued to Plaintiffs. Structural alteration of covered property is not a necessary element of "direct physical loss of or damage,"[3] especially where the insured property is otherwise rendered unusable or unusable for its intended purpose.

In addition, infestation by a harmful substance , such as the presence of a noxious or disease causing agent in and around the insured property, can constitute "direct physical loss of or damage" property, and business interruption coverage may be triggered where infestation of insured

[2] *See* https://www.reuters.com/article/us-health-coronavirus-chubb-wiesenthal/simon-wiesenthal-center-sues-chubb-to-ensure-coronavirus-insurance-coverage-idUSKBN22B2NP (quoting a Chubb executive as saying that "The industry will fight this tooth and nail."); *see also* https://www.washingtonpost.com/business/2020/04/22/businesses-insurance-coverage-coronavirus/ (last visited July 2, 2020).

[3]The policies issued to Plaintiffs' contain the language "direct physical loss of or damage to." Other policies use the phrase "direct physical loss or damage to," omitting the word "of" after "loss." The potential impact of the presence of the word "of" is beyond the scope of this brief.

property by a harmful substance – even if the infestation is merely presumed or imminent – causes a "necessary suspension" (either completely or in part) of the insured business's "operations."

ANALYSIS

I. THE INABILITY TO USE A RESTAURANT FOR ITS INTENDED PURPOSE CONSTITUTES "DIRECT PHYSICAL LOSS OF OR DAMAGE"

A. "Direct Physical Loss Of or Damage" Does Not Require Structural Alteration

The Policy does not define any of the key terms, "loss of" or "damage to" covered property, or even "direct physical loss." When terms are undefined, Wisconsin courts will look to give each word its ordinary or common meaning as they would be understood by a reasonable insured. *See Acuity v. Bagadia*, 750 N.W.2d 817 (Wis. 2008); *Martinez v. Calimlim*, 739 F.Supp.2d 1142, 145 (E.D. Wis. 2010). Additionally, Wisconsin courts will, where possible, interpret a contract so as to give reasonable meaning to each provision, without rendering any portion superfluous. *Dwitt Ross & Stevens, S.C. v. Galaxy Gaming & Racing, Ltd. Partnership*, 682 N.W.2d 839, 849 (Wis. 2004).

In Wisconsin, it has been held that "common sense suggests that [direct] is meant to exclude situations in which an intervening force plays some role in the damage." *Advance Cable Co., LLC v. Cincinnati Ins. Co.*, 788 F.3d 743, 746 (7th Cir. 2015). Absent from the term "direct" is the requirement that a structural alteration of covered property must occur. *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296 (Minn. Ct. App. 1997) ("Direct physical loss also may exist in the absence of structural damage to the insured property."). In fact, under a property insurance policy, the diminution of value of something, including through the failure of something to sustain its "essential functionality," can constitute a physical loss. *See American Motorists Ins. Co. v. Trane Co.*, 544 F.Supp. 669, 682 (W.D. Wis. 1982) ("it is clear that in Wisconsin the term

"property damage" does not require physical damage to the property; injury to tangible property may take the form of diminished value or loss of use."). Wisconsin courts have also recognized that physical loss may take place even if the structure of covered property remains unchanged. *See Manpower Inc. v. Ins. Co. of the State of Pennsylvania*, No. 08C0085, 2009 WL 3738099, at *5 (E.D. Wis. Nov. 3, 2009).

In *Manpower,* the District Court held that a peril does not need to physically damage property in order to cause a covered loss. *Id*. at *9. In this case, part of an insured's building collapsed, leaving an attached building untouched. The insured vacated the untouched building, losing income and incurring expenses as a result of the interruption of its business. *Id*. at * 1. The insurer refused to pay the large claim in its totality, arguing that the undamaged portion of the building was not a result of a "direct physical loss of or damage" and therefore the business interruption coverage did not apply. Disagreeing with the insurer, the Court stated that "direct physical loss" must mean something other than "direct physical damage", "since one can steal property without physically damaging it." As such, the Court reasoned that the insured had suffered "direct physical loss" of its business property. *Id.* at *6. Specifically, the insured had sustained a "loss" of its interest in the property when the collapse prevented it from using the property for its intended purpose. *Id.* It was also "direct" in that the collapse was the proximate cause of the insured's loss of interest in the property and not remote from the loss. *Id.* Accordingly, the Court held that the insured was entitled to coverage under the policy. *Id.*

The holding in *Manpower* is in keeping with a majority of courts that have similarly held that structural damage is not required to show physical alteration, loss or damage, especially where the insured property cannot be used for or is unsafe for its intended purpose. *Travco Ins. Co. v.*

Ward, No. 715 F. Supp. 2d 699, 708 (E.D. Va. 2010) (noting that the majority of cases nationwide find that physical damage to property is not necessary where, at least, the property has been rendered unusable by a covered cause of loss); *see also Sentinel Mgmt. Co.*, 563 N.W.2d at 300 ("Direct physical loss also may exist in the absence of structural damage to the insured property"); *Hughes v. Potomac Ins. Co.*, 18 Cal. Rptr. 650, 655 (Cal. Dist. Ct. App. 1962) (rejecting insurers argument that the dwelling had not sustained damage because there was no injury to the physical structure, but instead finding coverage because the dwelling was "*completely useless* to its owners.") (emphasis added)).

As is the case in most property insurance policies, Plaintiffs' policies were composed of standardized forms that were entirely within Defendant's control to draft or revise. Defendant chose not to include the word "structural," or any other term as a modifier to the terms "loss of" or "damage." As in most states, under Wisconsin law the insurer must bear the consequences of poor drafting and the choices that the insurer made in crafting its own policy language, because if the policy language is ambiguous, coverage should be resolved in favor of the insured. *See Heads-Up Hats LLC v. Am. Econ. Ins. Co.*, No. 11-C-1018, 2013 WL 365253 (E.D.Wis. Jan. 30, 2013) (citing to *Folkman v. Quamme*, 665 N.W.2d 857 (Wis. 2003). Having failed to narrow "loss of or damage" to "structural" damage, Defendant cannot now argue that "physical" means "structural."

B. A Property's Unsuitability for an Intended Purpose Constitutes "Physical Loss Of or Damage"

A dine-in restaurant's intended purposes include providing a safe environment for its occupants, and the use and enjoyment of that property by its customers without being placed in a dangerous situation. As set forth herein, one reasonable interpretation of the terms "loss of" or "damage to" covered property and "direct physical loss" is that the suspension of the restaurants'

business operations as a result of the proclamations was a direct "physical loss of" insured property because the property could not physically be used for its primary function as a full on-site dining establishment.

The Policies cover either "loss of" or separately "damage to" covered property. This means Plaintiffs are covered for a loss of property even if there has not been any damage to it. Society's argument that "loss of" and "damage to" are synonymous, and that both require physical damage therefore fails. Society's construction violates the rule by assigning no independent meaning to the words "loss of," instead claiming it requires damage, just like the phrase that follows it: "damage to." To interpret the phrases synonymously would render the language superfluous. *See Nautilus Grp., Inc. v. Allianz Global Risks US*, No. C11-5281BHS, 2012 WL 760940, at *7 (W.D. Wash. Mar. 8, 2012); *Total Intermodal Services Inc. v. Travelers Prop. Cas. Co. of Am.*, No. CV 17-04908 AB, 2018 WL 3829767, at *3 (C.D. Cal. July 11, 2018).

The terms of the Policies establish that there are two alternative triggers of coverage: one, if there is "loss of" property; or two, if there is "damage to" property. The average person or businessowner purchasing the Society Policies would understand this insuring language to cover loss of functionality of the covered property as *physical loss of* property. *RTE Corp. v. Maryland Cas. Co.*, 74 Wis.2d 614, 624 (1976) (policy must be construed in accordance with reasonable understanding of a person in the position of the insured.). As a result of the various Executive Orders, Plaintiffs suffered a "physical loss of" covered property, including access to its dining rooms for their intended purposes, as well as the furnishings, tables, chairs, glassware, etc. which cannot be used for dine-in food consumption. Simply stated, Plaintiffs were deprived of the use and functionality of the insured property. Such deprivation is a "loss" in its most basic sense.

Courts have routinely recognized and held that properties sustain "direct physical loss or damage" when they lose habitability or functionality, including commercial functionality. *See Gen. Mills, Inc. v. Gold Medal Insurance Co.*, 622 N.W.2d 147, 152 (Minn. Ct. App. 2001) (a direct physical loss had occurred when an insured's property—cereal oats—was infested by an unapproved pesticide because "function [was] seriously impaired."). *See also Prudential Property & Casualty Ins. Co. v. Lillard-Roberts*, No. CV-01-1362-ST, 2002 WL 31495830, *29 (D. Or. June 18, 2002) ("Although the mere adherence of molecules to porous surfaces, without more, is not physical loss or damage, this case involves more, namely the inability . . . to enjoy the personal property because of the mold spores adhering to it."); *Cooper & Olive Indus. v. Travelers Indem. Co*., No. C-01-2400, 2002 WL 32775680, at *5 (N.D. Cal. Nov. 4, 2002) (policyholder could claim business income and losses from contamination of well with E. coli bacteria); *and Gregory Packaging, Inc. v. Travelers Property Casualty Co. of Am.*, No. 2:12-cv-04418, 2014 WL 6675934, *6 (D. N.J. Nov. 25, 2014) (holding that the discharge of ammonia gas inflicted direct physical loss of or damage to an insured's facility because it "physically transformed" the facility's air, leaving it "unfit for normal human occupancy and continued use."). Similarly, "even where some utility remains" in a business operation, a physical condition that renders a property unusable for its intended use constitutes physical loss or damage. *Cook v. Allstate Ins. Co*., No. 48D02-0611-PL-01156, at *9-*10 (Ind. Super. Nov. 30, 2007); *see also Stack Metallurgical Services, Inc. v. Travelers Indem. Co. of Connecticut*, No. 05-1315-JE, 2007 WL 464715, at *8 (D. Or. Feb. 7, 2007).

The SARS-CoV-2 virus is inherently noxious and its presence, presumed presence, or imminently threatened presence renders a restaurant unusable or unsafe for its intended purpose.

The inability to use the property or a significant portion of the property for its intended use, as was the case for the Plaintiffs here, constitutes a "direct physical loss of" the insured premises. *Manpower Inc.*, 2009 WL 3738099 at *9.

II. BOTH INFESTATION BY A HARMFUL SUBSTANCE AND SUSPECTED INFESTATION CAN CAUSE "PHYSICAL LOSS OF OR DAMAGE"

A. The Novel Coronavirus Is a Noxious and Disease-Causing Agent that Can Remain Aerosolized and Is Able to Attach to Surfaces for Prolonged Periods of Time

Suspected infestation of property by the novel coronavirus is enough to damage insured property. As was recently noted by the Pennsylvania Supreme Court,

> The enforcement of social distancing to suppress transmission of the disease is currently the only mitigation tool . . . COVID-19 does not spread because the virus is 'at' a particular location. Instead it spreads because of person-to-person contact . . . [and] [t]he virus can live on surfaces for up to four days and can remain in the air within confined areas and structures.

Friends of DeVito v. Wolf, 227 A.3d 872, 891 (Pa. 2020).

There is no commercial method to test for the presence of SARS-CoV-2 on property, many infected by SARS-CoV-2 are asymptomatic, yet able to transmit the virus, and as hundreds use restaurants daily, it is statistically certain that the virus was and continues to be present in high-trafficked restaurants. Physical loss or damage is therefore presumed.

The risk of transmission and property damage is heightened in restaurants, where air is recirculated, space is limited, surfaces are touched by multiple people, and tables turnover frequently. A recent study published by the U.S. Centers for Disease Control illustrates this point—describing how one asymptomatic patron, at an air-conditioned restaurant in Guangzhou, China, infected nine other diners from three different tables. *See* https://wwwnc.cdc.gov/eid/article/26/7/20-0764_article.

B. Physical Infestation of the Insured Property Can Cause Physical Loss or Damage

The insurance industry knows viruses can cause physical loss or damage, as evidenced by the creation of a virus exclusion endorsement following the SARS pandemic in the early 2000s. *See* Insurance Services Office ("ISO") form CP 01 40 07 06 "Exclusion of Loss Due to Virus or Bacteria." While the presence of such an exclusion does not necessarily preclude coverage, the failure to include such an exclusion: (1) undermines an insurer's attempt to re-write an existing policy post-loss to deny claims involving viruses; and (2) confirms that viruses are covered causes of loss that can cause physical loss and damage under an all-risk policy, like Plaintiffs' policies.

And, case law has long supported the proposition that infestation of a property by a harmful substance, or the surrounding area, by a disease-causing or noxious agent causes physical loss or damage when it is present in/around the property and/or permeates the interior of insured property. *See, e.g., Schlamm Stone & Dolan, LLP v. Seneca Ins. Co.*, 800 N.Y.S.2d 356 (N.Y. Sup. Ct. 2005) (noxious particles present in the insured property constituted property damage under the terms of the policy); *Azalea, Ltd. v. Am. States Ins. Co.*, 656 So. 2d 600, 602 (Fla. Dist. Ct. App. 1995) (physical loss and damage where unknown substance adhered to surfaces of insured property); *Am. All. Ins. Co. v. Keleket X-Ray Corp.*, 248 F.2d 920, 925 (6th Cir. 1957) (contamination of property with radioactive dust and radon gas were present in property thereby causing physical loss and damage). Thus, structural alteration does not have to be *visible* to be *physical*.

C. Presumed, Suspected, or an Imminent Threat of Infestation of the Insured Property by a Harmful Substance Can Constitute Physical Loss or Damage

Courts have also held there does not have to be actual infestation of property, so long as a physical cause imminently threatens a property's function or habitability. *See, e.g., Port Auth. v. Affiliated FM Ins. Co*., 311 F.3d 226, 236 (3d Cir. 2002) (physical loss or damage results "if an

actual release of asbestos fibers from asbestos-containing materials has resulted in contamination of the property such that its function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable, or if there exists an imminent threat of the release of a quantity of asbestos fibers that would cause such loss of utility" (emphasis added)); *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, 352 (8th Cir. 1986) (policyholder could claim business income coverage where risk of collapse necessitated abandonment of grocery store).

CONCLUSION

Structural alteration of the property is not required for "physical loss of or damage" where the property can no longer serve or is unsafe for its intended purpose. Rather, the unsuitability of a property for its intended purpose resulting in the suspension of business operations can and did constitute "physical loss of" the insured property under the Policies issued by Society.

Amici respectfully request that this Court consider these issues, ubiquitous in nearly every COVID-19 business interruption and civil authority case nationwide, in denying Defendant's motion to dismiss.

DATED this 20th day of July, 2020.

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