

EXHIBIT A

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

IN RE: SOCIETY INSURANCE CO. COVID-
19 BUSINESS INTERRUPTION
PROTECTION INSURANCE LITIGATION

This Document Relates to All Cases

MDL No. 2964

Master Docket No. 20 C 5965

Judge Edmond E. Chang

Magistrate Judge Jeffrey I. Cummings

**PLAINTIFFS' NOTICE OF SUPPLEMENTAL AUTHORITY AND WISCONSIN RULING
DENYING MOTION TO DISMISS IN A SOCIETY INSURANCE COVID-19 BUSINESS
INTERRUPTION CASE**

In light of Society's Notice of Wisconsin Ruling Dismissing Society COVID-19 Business Interruption Case (Dkt. 103-1), Plaintiffs, through undersigned Plaintiffs' Co-Lead Counsel, respectfully submit this Notice of Supplemental Authority and Wisconsin Ruling Denying Motion to Dismiss in a Society COVID-19 Business Interruption Case regarding a recent Wisconsin state court ruling. Plaintiffs state as follows:

1. On January 29, 2021, Judge Laura Gramling Perez of the Circuit Court of Milwaukee County, Wisconsin, denied Defendant Society Insurance's Motion to Dismiss the complaint in *Colectivo Coffee Roasters, Inc. v. Society Insurance*, Case No. 2020-CV-002597 (transcript attached as "Exhibit 1"), a case in which the class-representative plaintiffs made many of the same allegations, including that "Covid created a physical danger in and around the plaintiffs' premises" (Hr'g Tr. at 42:1-10), that are at issue in the Bellwether Motions in this action and in which Society asserted many of the same arguments as it does here under its standard-form policy language.

2. The *Colectivo* court held that the arguments presented in the Defendant's Motion to Dismiss were insufficient to warrant dismissal of plaintiffs' claims. (*Id.* at 43:14-17.) Judge Perez first

rejected Society's attempt to "conflate[]" the term "direct physical loss" with "damage" and found that the Society policy was ambiguous with respect to whether a "dangerous condition in the premises" triggered business interruption coverage. (*Id.* at 37:2-20.) Because such ambiguity must be construed against the insurer under Wisconsin law, the court held this ambiguity foreclosed a dismissal based on the contract language alone. (*Id.* at 37:20-24.)

3. The Court then emphasized that factual arguments about whether there was direct physical loss or damage were not appropriate for disposition in a motion to dismiss: "Certainly the defense raises interesting and very material factual arguments, and those are arguments that I think are appropriately made at some point in this lawsuit, but it is certainly not the rule of this court at this point to resolve factual disputes . . ." (*Id.* at 43:17-22.) Specifically, the Court noted that the plaintiffs' complaint in that case, like the Bellwether Motions, included "scientific and factual" support for the allegations that "Covid was widespread and likely was present in the plaintiffs' restaurants and the plaintiffs' premises at the time of the governor's March 2020 orders." (*Id.* at 42:11-17.)

4. Moreover, Judge Perez noted that the plaintiffs had adequately plead that Governor Evers' Executive Orders caused a physical loss of the plaintiff's property. (*Id.* at 43:25-44:2.) In a similar vein to its holding on allegations of direct physical loss, the Court emphasized that questions of whether the plaintiffs "'could still continue [their] business unabated and in another manner,' . . . again bring factual issues to bear that are not appropriately considered by this Court in connection with a motion to dismiss." (*Id.* at 44:4-10.)

Dated: February 2, 2021

Respectfully submitted,

/s/ Timothy W. Burns

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EXHIBIT 1

COLECTIVO COFFEE ROASTERS, INC.,
ET AL.,

Plaintiffs,

CASE NO. 2020-CV-002597

vs.

SOCIETY INSURANCE,
A MUTUAL COMPANY,

Defendant.

MOTION TO DISMISS HEARING

BEFORE THE HONORABLE LAURA GRAMLING PEREZ,
CIRCUIT COURT JUDGE
JANUARY 29, 2021

APPEARANCES:

JAY URBAN, Attorney at Law, appeared on behalf of
plaintiffs via Zoom telephone conference.

JANET CAIN AND HEIDI VOGT, Attorneys at Law, appeared on
behalf of the defendant via Zoom telephone conference.

GEORGENE L. LITTLEFAIR
Official Court Reporter

THE CLERK: Case Number 2020-CV-002597,
Colectivo Coffee Roasters, Inc., et al. versus Society
Insurance, A Mutual Company. Your appearances,
please.

MR. URBAN: Jay Urban of Urban and Taylor
appears for the plaintiffs in this action. It's also an
allegation of a class action.

MS. CAIN: Janet Cain and Heidi Vogt on behalf
of Society Insurance.

THE COURT: Good morning, everybody. We're here
today for a hearing on Society's motion to dismiss the
complaint.

Before we talk about the merits of the motion,
I'll note for the record that we're conducting the
hearing today, perhaps ironically, given the allegations
of the complaint, during a nationwide health emergency as
a result of the Covid-19 Pandemic, and because of orders
that have been entered by the Chief Judge of the First
District Circuit Court, we're not able to safely and
appropriately meet in person in the courthouse in order
to conduct our hearing. Because of that we're conducting
the hearing remotely using the Zoom platform.

All three counsel and I are appearing using both

1 a video and an audio feed. Madam clerk, madam court
2 reporter and my law clerk are participating using only an
3 audio feed, and there are a number of people connected
4 with Society who are essentially observing today who are
5 appearing using either an audio feed or by telephone.

6 In order to insure that the hearing is open to
7 the public, we are streaming it live on YouTube.

8 Mr. Urban, I assume you don't have any objection
9 to proceeding in this fashion today?

10 MR. URBAN: No, I follow the rules.

11 THE COURT: Ms. Cain, I assume you don't either?

12 MS. CAIN: No, no objection.

13 THE COURT: All right. Good. So let's talk
14 about the motion. I have had the opportunity to review
15 the parties' submissions so you should know I have read
16 through the briefs. I may have a couple of questions for
17 both sides as we proceed.

18 But, Ms. Cain, I guess I'll turn things over to
19 you. Is there anything you'd like to particularly point
20 my attention to or emphasize or add to your brief the
21 arguments in your briefing?

22 MS. CAIN: Yes, thank you, Judge. As you know,
23 the plaintiffs are alleging that their business
24 operations were suspended due to the pandemic and the
25 government orders limiting their operations to take-out

1 and delivery service, and therefore they claim they are
2 entitled to coverage under the Society policies for their
3 business income losses.

4 The policies provide business income and extra
5 expense coverage when operations are suspended due to,
6 quote, "direct physical loss of or damage to covered
7 property," and as I'm sure the Court is aware that's
8 really the key term that we're here to discuss today.

9 The plaintiffs claim that the partial temporary
10 loss of use of their property is direct physical loss of
11 property and that Covid-19 was, quote, on or around,
12 unquote, their property, and it was physically damaged by
13 the presence of Covid-19.

14 Under Wisconsin law and the cases from a
15 significant majority of other jurisdictions that have
16 addressed this term, "physical loss of or damage to
17 property," the plaintiffs have not sustained either loss
18 of or damage to their property so as to trigger coverage
19 under the policies.

20 As this Court knows, one judge in Wisconsin,
21 Judge David Weber in Door County, has addressed a similar
22 situation. He held that a governor's order regulating
23 the use of property is not a direct physical loss of
24 property. He thoroughly analyzed the claim of
25 Al Johnson's, a restaurant in Door County, for business

1 income loss when it changed its business operations to
2 take-out and delivery only due to Governor Evers'
3 orders. And he said, "The government order is not a
4 physical loss, and therefore Al Johnson's suspension of
5 its operations was not caused by a physical loss."

6 In addition, Judge Weber said that there had
7 been no physical event at Al Johnson's property that led
8 to the suspension of its operations such as there was in
9 the *Manpower* case, which was cited by the plaintiffs and
10 which I replied to in our reply brief. In that case the
11 court found a physical loss did exist because there was a
12 collapse of the building that the insured's business was
13 in, and that collapse was a physical event that created a
14 physical barrier between the insured and its property.

15 Here, like in the *Al Johnson's* case, there was
16 no physical event and no physical barrier between the
17 plaintiffs and their properties. In fact, they continued
18 to use their properties throughout the pandemic. The
19 plaintiffs argue in their brief and I imagine will argue
20 today that this case is different from *Al Johnson's*
21 because Al Johnson's did not make an allegation that
22 Covid-19 was present on its property, whereas they have
23 made such an allegation here.

24 However, the plaintiffs can't rest on
25 speculative allegations or legal conclusions to survive a

1 motion to dismiss. They must allege facts that plausibly
2 suggest that they're entitled to relief, and their
3 allegation that Covid-19 was on or around their property
4 and it has rendered their property unsafe and unfit for
5 use is nothing more than a speculative allegation and a
6 legal conclusion.

7 This Court shouldn't accept that allegation as a
8 well pleaded fact sufficient to survive a motion to
9 dismiss. However, even if it could be shown that
10 Covid-19 was on their premises, it wouldn't be sufficient
11 to show that Covid-19 caused damage to their
12 property. The property wasn't damaged or altered in any
13 way by the virus. They don't say there was a physical
14 event that affected their property such as in
15 *Manpower*. They don't allege that their property is in
16 need of repair due to a physical change. They don't say
17 that someone with Covid-19 was ever present on their
18 property. They don't allege how the virus physically
19 affected their property at all. They only say it was on
20 or around the property.

21 Courts addressing Covid-19 coverage issues in
22 other jurisdictions have made it clear that the virus
23 doesn't harm property, and other than a conclusory
24 allegation that their property was damaged the plaintiffs
25 do nothing to refute this.

1 For example, in the case *Uncork & Create*, which
2 was cited in my brief, a case out of West Virginia, the
3 court stated "The novel Corona virus has no affect on the
4 physical premises of a business." An Illinois case,
5 *Sandy Point Dental*, held that the Corona virus does not
6 physically alter the appearance, shape, color, structure
7 or other material dimension of property.

8 And in Wisconsin the case law interpreting what
9 physical loss is suggests that without an alteration
10 there's no physical loss. Judge Weber found those
11 Wisconsin cases that I've cited in my brief to be
12 persuasive on what physical loss means. Those cases held
13 that physical loss means tangible destruction of property
14 or physical damage to property such as an alteration in
15 appearance, shape, color or other material dimension.
16 Even *Couchon Insurance*, a well known authority, states
17 that the requirement that the loss be, quote, physical,
18 closed quote, is widely held to preclude claims when the
19 insured merely suffers a detrimental economic impact
20 unaccompanied by a distinct demonstrable alteration of
21 property. An unfounded allegation that the virus caused
22 physical property damage or loss cannot be accepted
23 without support for this proposition, especially in light
24 of the many cases that it held that it simply doesn't
25 affect property at all.

1 Despite plaintiffs' allegation that their
2 property was unfit for use, they pointed to absolutely no
3 damage to or physical change in their property
4 whatsoever. In fact, they've continued to use their
5 property to prepare their product and to deliver their
6 product to customers. Employees continue to work on
7 their property. Customers and delivery service employees
8 are collecting orders on their property. The property
9 hasn't been affected at all. It's in the same condition
10 today that it was in the day before Governor Evers issued
11 his order. The only thing that's been affected is how
12 the plaintiffs can use the property, and that was
13 affected by a government order, not by any physical
14 change or intrusion on the property.

15 Other courts that have addressed complaints that
16 alleged that the virus was present and that it damaged
17 property and still denied coverage. For example, in a
18 recent case in Georgia, *Johnson vs. Hartford Financial*
19 *Services Group*, which is also cited in my brief, the
20 Northern District of Georgia Federal Court held that even
21 though the plaintiff alleged there was an infiltration
22 and proliferation of the virus which caused a physical
23 loss of or damage to their premises, this wasn't
24 sufficient to trigger coverage, and the court granted the
25 insurer's motion to dismiss. The court held that even if

1 it considered the mere presence of Covid-19 to be enough
2 to cause a direct physical loss of or damage to property,
3 the plaintiff still didn't state a facially plausible
4 claim. The plaintiff never alleged that Covid-19 was
5 ever actually on their premises. There was no allegation
6 of anyone on the premises with the virus. The plaintiffs
7 just alleged that because of the high number of cases in
8 Georgia and the ease of person to person transmission it
9 must have been on their premises. The court said this
10 was conjecture and speculation, and the plaintiff can't
11 rely on speculation and conjecture to survive a motion to
12 dismiss.

13 The plaintiffs' allegations in this case are
14 equally speculative, and there's no allegation that
15 anyone was on their premises at all with the virus at
16 anytime. This case involves restaurants that had to
17 temporarily change their operations to take out and
18 delivery only because the governor ordered them to cease
19 in-person dining to stop the spread of Covid-19. They
20 didn't cease to change their operations because there was
21 physical loss of property or physical damage to their
22 property. There simply wasn't. The policy requires
23 direct physical loss of or damage to property that caused
24 suspension of operations. There's nothing physical about
25 the governor's orders as Judge Weber and so many other

1 courts across the country have recognized. There wasn't
2 a fire, an earthquake, no collapse that affected the
3 property that led to the suspension of their operations.
4 There was simply an order.

5 Now, the plaintiffs have argued that there can
6 be loss of property without damage to property. This is
7 true in some situations, as some courts have found loss
8 to mean permanent dispossession of property, even without
9 any damage to the property. Here there was no permanent
10 disposition. The governor's orders were temporary, not
11 permanent. Furthermore, the plaintiffs were not
12 dispossessed of their property at all. They continued to
13 have access to it. They continued to use it. Their
14 employees still showed up for work, even when the dining
15 room was closed to the public. Their property was and
16 still is in their possession. In fact, nothing prevented
17 the plaintiffs from using their dining rooms. They just
18 couldn't use them to serve customers. All that changed
19 was how their property could be used for a temporary
20 period of time.

21 The cases relied on by the plaintiffs that have
22 found loss of property without physical damage to
23 property involve some physical force or intrusion that
24 compromises the property making it uninhabitable or
25 unusable such as the collapse in *Manpower*, soot and smoke

1 from a wildfire, an accumulation of gasoline that
2 infiltrated property or rock falls from an unstable
3 retaining wall, all of which resulted in physical
4 compromise to property and inability to inhabit the
5 property. On the contrary, Covid-19 has no effect on the
6 physical property of plaintiffs' businesses.

7 Furthermore, unlike those cases, Covid-19 did
8 not make plaintiffs' property uninhabitable or unfit for
9 use as I've already stated. They continued to inhabit
10 the property and to use the property throughout the
11 pandemic even though the virus was allegedly on or around
12 the premises.

13 As one court recently stated, plaintiffs
14 maintain their inability to use their property
15 constitutes a direct physical loss. The court does not
16 agree. Plaintiffs' loss of usability did not result from
17 an immediate occurrence which tangibly altered or
18 disturbed their property in some perceptible way. The
19 order merely temporarily halted plaintiffs' business
20 operations, and that case is *Drama Camp Productions*, 2020
21 West Law, 8018579, out of Alabama, decided on December
22 30, 2020.

23 Furthermore, the business income coverage is
24 triggered when there's a direct physical loss of or
25 damage to property, which I've explained there wasn't,

1 but only for the period of restoration. That period is
2 defined in the policy as the period of time after direct
3 physical loss or damage until the date when the property
4 should be repaired, rebuilt or replaced. Here the
5 plaintiffs' property did not need repair, rebuilding or
6 replacement due to the presence of Covid-19, the alleged
7 presence of Covid-19, or Governor Evers' order. This
8 provision would make no sense if physical damage did not
9 occur. A temporary partial loss of use of property, the
10 loss alleged by the plaintiffs here, is not something
11 that can be repaired, rebuilt or replaced as those terms
12 are commonly understood. Judge Weber made specific
13 reference to this clause in deciding the *Al Johnson's*
14 case stating, quote, repaired, rebuilt, replaced. Seems
15 to me that this means the loss of use without more does
16 not constitute direct physical loss or damage, closed
17 quote.

18 Another court applied common canons of
19 construction and stated, "If we construe direct physical
20 loss or damage to require actual harm, it gives effect to
21 the other provisions of the policy." Considering all
22 these terms of the policy together, it's clear that there
23 must be direct physical loss of or damage to plaintiffs'
24 property which requires repair, rebuilding or replacing
25 in order to trigger coverage. Loss of use of property

1 due to a governor's order is not physical loss of
2 property, and no property needs to be repaired in order
3 for the plaintiffs to carry on their operations.
4 Therefore, under the clear policy language, the business
5 income and extra expense coverages do not apply.

6 The plaintiffs also claim they're entitled to
7 coverage under the civil authority coverage of the
8 policy. They had merely alleged in their complaint that,
9 quote, The governor's orders prohibit access to other
10 venues and businesses in the immediate areas around
11 plaintiffs' businesses," but do not indicate what those
12 businesses are, where those businesses are or what type
13 of physical damage those other businesses have allegedly
14 sustained. There are multiple requirements to trigger
15 civil authority coverage and plaintiff doesn't meet any
16 of them.

17 First, just as the plaintiffs do not plausibly
18 allege damage to their own property, they don't plausibly
19 allege damage to other property. They can only speculate
20 that Covid-19 was on their own property and can only
21 speculate it was on other property, and they can't show
22 that even if it was present it caused any physical damage
23 at all.

24 Second, the plaintiffs can't show that any civil
25 authority prohibited access to their property because of

1 damage to other property. They have not alleged the
2 governor's orders were issued because of damage to any
3 property, much less property that was in the immediate
4 area of their property. The orders were issued because
5 Governor Evers wanted to stop the spread of the virus
6 among groups of people. It was a ban on mass gatherings
7 telling people they were safer at home, not that they
8 couldn't go to restaurants because those restaurants were
9 physically damaged. Even if there was damage to
10 neighboring property, plaintiffs have not alleged that
11 that damage to other property led to an action by civil
12 authority to prohibit them from accessing their own
13 property. The orders were not issued in response to
14 neighboring property that was damaged.

15 Third, access to the plaintiffs' property was
16 not prohibited. The order allowed access to the
17 property. It didn't prohibit access. Limiting access to
18 a part of the plaintiffs' property for dining service is
19 not prohibiting access to their property. For these
20 reasons the civil authority coverage is not applicable.

21 The plaintiffs also claim they're entitled to
22 coverage for loss of business income under the
23 contamination coverage provisions of Society's
24 policies. Again, there are several requirements to
25 trigger this coverage which are present here. First and

1 most importantly, there was no contamination as that term
2 is defined in the policy. That term is defined as a
3 defect, deficiency, inadequacy or dangerous condition in
4 their products, merchandise or premises. It's illogical
5 to say that there was a defect, deficiency, inadequacy or
6 dangerous condition in products that they continued to
7 produce at property they continued to use on a daily
8 basis. If the plaintiffs' products were defective,
9 inadequate or presented a dangerous condition, plaintiffs
10 couldn't have continued to sell them but they did. If
11 the plaintiffs' premises were defective where there was a
12 dangerous condition on the premises, employees, customers
13 and delivery drivers would certainly not have been
14 allowed on the premises to prepare food or pick up food,
15 but they were. The possible speculated presence of
16 Covid-19 on plaintiffs' premises, which they continued to
17 use, does not meet the definition of contamination. Even
18 if it did, however, contamination must result in an
19 action by a public health or governmental authority to
20 prohibit access to the premises or production of their
21 products. That did not happen. There was no prohibition
22 of access, as I explained, and no prohibition on
23 production of their products. The governor's orders were
24 not issued because of contamination. They were issued to
25 stop the spread of virus among people.

1 THE COURT: Ms. Cain, if I could just interrupt
2 for a moment. Isn't one of the plaintiffs' products
3 dine-in meal service? Wasn't that a part of the
4 plaintiffs' product?

5 MS. CAIN: I don't think that's a part of the
6 plaintiffs' product. I think that is one of the services
7 that the plaintiffs --

8 THE COURT: So isn't it a service that they
9 provide, then? That's part of their business is
10 providing full-service dining services. So you seem to
11 argue that they were able to fully continue to provide
12 their product or carry on their business, but isn't part
13 of their business allowing people to come in and sit down
14 at their tables and order food and drink and stay there
15 to consume it?

16 MS. CAIN: That is part of their business. I
17 can't dispute that that's part of their business, but
18 they weren't prohibited from operating their
19 business. They were just told that they had to limit or
20 restrict the way they operated their business. There
21 still was no contamination on the premises caused by
22 Covid-19.

23 THE COURT: Okay. Let me back up a little bit.
24 You're using the word "loss" -- the word "damage"
25 sometimes interchangeably here. There in the policy

1 there is coverage for a covered cost of loss. Covered
2 costs is defined as a direct physical loss. If there is
3 coverage, and I'm essentially describing my understanding
4 of the policy, and then I'm going to ask you if I'm
5 missing something. If coverage, then, a type of loss
6 that is compensable is direct physical loss of or damage
7 to covered property. So this language regarding damage
8 to covered property really isn't language that's
9 incorporated in the definition of the type of loss that's
10 covered. It's really a part of the definition of the
11 damages that are compensable. Do you understand what I'm
12 getting at? Am I missing something somehow? So there
13 are kind of two steps. First of all, is there covered
14 loss? And then the second step, if there is, what is the
15 insured able to collect for? And my reading of the
16 policy says that to answer the question of whether
17 there's a covered loss you look at whether there's a
18 direct physical loss. If there is, then to answer the
19 question of what losses, what damages is the insured able
20 to recover? The answer is they're able to recover their
21 direct physical loss over damage to covered property. So
22 there's sort of two different definitions at issue
23 here. Am I right about that? Do you get what I'm
24 getting at?

25 MS. CAIN: I think so. Under the business

1 income coverage, they're entitled to recover for the
2 business income due to suspension of operations caused by
3 a direct physical loss of or damage to property.

4 THE COURT: Right. So the first issue is was
5 the cause of this a direct physical loss?

6 MS. CAIN: True.

7 THE COURT: And your argument is essentially
8 that the plaintiff has not alleged and cannot allege that
9 they have suffered a direct physical loss, that there's
10 not a covered cause of loss here?

11 MS. CAIN: True.

12 THE COURT: All right. I'd like to -- so our
13 time is running short, and I do have a remaining calendar
14 today, and, as I said, I have read the parties'
15 submissions. So I'd like to give Mr. Urban an
16 opportunity to respond. I'll give you a chance,
17 Ms. Cain, on rebuttal briefly, but I'd like to turn
18 things over to Mr. Urban if I can.

19 MS. CAIN: Sure. And that's fine because I've
20 gone through the three types of coverage that they're
21 alleging they're entitled, and so I think this is a good
22 time for you to move to Mr. Urban.

23 THE COURT: Thank you.

24 Mr. Urban.

25 MR. URBAN: Thank you, Your Honor. So this

1 happens now and then, but what we have here is in the
2 very early stages of this case a motion to dismiss. A
3 motion to dismiss is a fatal sanction in a case. It says
4 not only is the courthouse closed to you, but you don't
5 even get a chance to describe what your business is. You
6 don't even get a chance to describe what your losses
7 are. It's asking you, Your Honor, to put your hand on
8 the scales of justice and quash it, and they're asking
9 you to do it, not in this case, in other cases.

10 So I see this debate all the time of which case
11 did I bring? Because I'm sitting here looking at
12 Ms. Cain and I'm sitting here looking at the Society
13 briefing and I'm sitting here looking at their policy,
14 and I'm saying to myself, "This ain't my case. These
15 ain't my clients," because they're not. My clients are
16 the clients that have a dine-in service only. This
17 business that they were all engaged in carry-out and they
18 could instantly flip the switch, I rejected those cases
19 from time to time. There has to be a situation here
20 where you cover your losses. I'm actually surprised, and
21 I know we have some Society people on the telephone
22 today. I'm actually surprised that Society took such
23 great lengths to basically corner the market on writing
24 policies for bars and restaurants to have such little
25 regard for the various different ways of how bars and

1 restaurants work.

2 I put myself through college and law school
3 working in bars and restaurants, and what I'm hearing
4 today has very little to do with the true operations of
5 those things. For example, we represent bars. You can't
6 take out drinks from a bar. So when your bar is
7 closed -- because Covid is everywhere. Covid is in the
8 air. Covid is worse than smoke. Smoke you can at least
9 see where it is. Covid is literally every single place,
10 and even if you don't have Covid, you can still transmit
11 Covid. And in March of this year, in April of this year,
12 continuing all the way to this point, we know less than
13 ten percent about Covid, but we know it is everywhere,
14 and we know what Society's policy is. We know it doesn't
15 have an exclusion to Covid. It does not have a virus's
16 exclusion in its policy. That hasn't even been addressed
17 or talked about here. So this is an all-risk policy, and
18 they're trying to reinvent the facts that we pled because
19 we have pled -- there's two purposes, like you said, of
20 physical loss. There's direct physical loss and then
21 there's physical damages. Those are not interchangeable
22 and we pled both.

23 If Covid is everywhere, there's lots of ways
24 that it can be loss. Many of my clients did not go to
25 their premises. What did they use their open dining

1 rooms for? They were supposed to convert their in-house
2 five-course hopefully someday Michelin star restaurant
3 into a storage facility? We didn't know back when this
4 happened what surfaces would do.

5 Look, Your Honor, look what pains you took in
6 the Milwaukee County Task Force on Covid to present your
7 rendered surfaces to antibacterialize, to put up
8 Plexiglas so much that I've remarked, "It looks like a
9 hockey rink in there." And these are all of the things
10 that come out in a case factually. That's not the case
11 that they're trying to defend against. That's the case
12 we brought. We've brought the case that the virus is
13 everywhere. We cited the science in our brief, and
14 they're trying to make this Court also something that
15 you're not, Your Honor. Are you the Court of Appeals or
16 the Supreme Court of Georgia? Are you the U.S. Supreme
17 Court? There is no case, no case, interpreting the
18 Society insurance policy. Every single case that they
19 cited in their thick brief involves a different insurance
20 policy, a different restaurant, in a different state,
21 with a different set of laws.

22 We know what Wisconsin laws require, and that is
23 any, any, ambiguity in a policy about what physical loss
24 is or isn't is subject to interpretation. The closest
25 thing we have is what Judge Edelman ordered in his ruling

1 in his case, which wasn't a Society policy. That was an
2 ISO policy which is really important. The Society could
3 have adopted ISO forms and had a case exactly like all
4 those other cases that it cites. It didn't. It chose to
5 write its own policy.

6 THE COURT: Mr. Urban, if I could interrupt and
7 ask you two questions: I'm confused because you're
8 referring to Judge Edelman. Are you referring to Judge
9 Weber in the Door County case, or is there a different
10 case you're referring to that I don't have in mind right
11 now?

12 MR. URBAN: On that particular point -- this is
13 a problem of preparation. We put everything in our heads
14 and then we spit it out too fast. The *Manpower* case,
15 Your Honor, the federal case, where Judge Edelman
16 addressed the direct physical loss and noted specifically
17 with that language that it can include loss of use. I
18 was more or less responding to the question that you
19 asked Ms. Cain kind of how these things are
20 different. It sounds like you've already appreciated the
21 difference in articulation between it's an and/or
22 proposition to the physical, not just the loss of use.

23 THE COURT: And can I also ask: So you say that
24 all of the other cases that have been decided sort of on
25 this issue related to Covid over the past, I suppose,

1 year, nine months, involve other policies. Do any others
2 involve a Society policy similar to this one?

3 MR. URBAN: The only case that involves a
4 Society policy that is this same policy is the
5 *Al Johnson's* case, and I'll address that in a moment.
6 And nobody else has -- *Al Johnson's* case was about one
7 business operation that I know because one of the bars
8 and restaurants that I worked in was in Door County, has
9 goats on its roof. So just there it's a completely
10 different business entity. They only asked to analyze
11 that policy, and their complaint is completely different
12 than our complaint. We didn't plead the same things that
13 they pled. Judge Weber in that case, which, again, it's
14 instructive. It's another circuit court judge that
15 looked at things. But you're not the Court of Appeals
16 judge in that case. That judge's job was to apply this
17 policy to what *Al Johnson's* alleged, and at the end of
18 that decision the whole reason for that decision is that
19 the judge said several times throughout the
20 hearing. They didn't plead what we pled here, which was
21 there was contamination of the premises, that there was
22 loss of use, those kind of things. They didn't plead
23 that. He asked them to plead it. They didn't amend
24 their complaint ever.

25 We analyzed this case and quoted science. The

1 closest case that actually we could find about this
2 situation is the *Sentinel Management* case that we cite in
3 the Minnesota Court of Appeals. Again, general
4 authority, but if you want to look at some general
5 authority, and it talked about asbestos fibers not
6 physically altering the business structure, but there was
7 still a physical loss because of the danger of asbestos
8 and that it's airborne.

9 So we're dealing with, just like you said even
10 before we started the hearing, Your Honor, we're dealing
11 with some very specific things here, and what Society is
12 asking you to do is to assume that every single other
13 policy that they cited in their brief is Society; it's
14 not, that every single entity is *Al Johnson's*; they're
15 not, and our complaint isn't even the same complaint as
16 *Al Johnson's*.

17 Our amended complaint alleges all these things,
18 and we're only supposed to be looking at the four
19 corners, and I come into this hearing today in my Zoom,
20 and I've been to all these restaurants I represent, and
21 they don't operate in any way that the way Society is
22 saying that they operate. You even observed yourself
23 some of them are dine-in, some are other ones. Tandem,
24 who is the other named plaintiff, for example, also has a
25 World Central Kitchen component of it, so actually those

1 parts of their operations in the pandemic were not
2 affected. So this is -- these are discussions that we
3 have at the motion for summary judgment stage. What
4 we're talking about here is the heavy hand of the courts
5 saying you're not getting the chance to explore these
6 cases. At the notice pleading, we pled direct physical
7 loss. We pled the civil authority. They're just trying
8 to interpret what that civil authority means. The
9 governor said, "Stay home." That includes the
10 restaurateurs. You're to stay safe, stay home, and
11 they're saying that you can just willy-nilly walk around,
12 go to your property. I wouldn't do that. You'd have to
13 have a gun to my head to have me eat at a
14 restaurant right now. So this just completely is taking
15 out of context this public health crisis that we've never
16 been in before. The closest thing we've had is the SARS
17 virus, where, by the way, a lot of those other policies
18 cited by Society put virus exclusions in their policy.
19 Society chose not to. After SARS a whole wave of those
20 policies came to do that. And now they want to quibble
21 with what the civil authority means and that you can just
22 show up to work.

23 I heard Society argue today that all the
24 employees just stayed. What? That's baffling to me.
25 These folks shut down because you have an airborne virus

1 that can go anywhere and can affect anything. It can
2 even transfer it out on me. And you're being asked to
3 impose the ultimate sanction to say we're not even going
4 to let the justice system consider what these losses are
5 and what all these hundreds and thousands of businesses
6 are throughout the state of Wisconsin based on the
7 obligations that there is a physical loss under their
8 individual policy. They're trying to make this case that
9 case, and so there's five things that they're trying to
10 do to make you put that hand of justice on you on the
11 scales.

12 First, they want you to change or ignore law of
13 a motion to dismiss which is the four corners of the
14 complaint and the inferences from that complaint. Notice
15 pleading. Did we plead the case? Yes. Did we plead
16 different than *Al Johnson's*? Yes. We alleged direct
17 physical loss and damage to the property.

18 Interpretation of insurance policies also is
19 well known, and that's an ambiguity taking these things
20 into consideration. Their policy has not been analyzed
21 before by the Court of Appeals or the Supreme Court in
22 this state. You are the de novo person to do that. None
23 of those other cases are binding because they're not in
24 Society and the Door County is not binding because it's
25 not the same case.

1 Second, they want you to compare it to that
2 same case. They want you to say this case is just like
3 *Al Johnson's*, and it's not. We both can read the
4 complaint in that case and the judge said, "If these two
5 things were pled, I wouldn't be doing this." He even
6 said, "I think a Court of Appeals might even have to look
7 at me." It was a skin-of-the-teeth decision. I read it
8 again this morning. He even said, "Sometimes I have to
9 make a close call here, but I have to make it on the four
10 corners of the complaint or the inferences from the
11 complaint."

12 Third, they want you to change their policy to
13 be like these other policies. We can't do that, Your
14 Honor. Our clients pay good money for these policies,
15 and they purchased these policies that they had no hand
16 in drafting that don't have virus exclusions. The
17 contamination clause is an all-risk policy, and they
18 defined it as direct physical loss or damage. It's not
19 an ISO policy.

20 And then the fourth thing that I already talked
21 about is what we've already been talking about is they
22 also want you to change the business's practices, so they
23 want to embed in their argument that the governor shuts
24 you down, have everybody show up to work tomorrow and
25 just start taking out for people. At that point would

1 you even order something from a place? We haven't even
2 gotten into the whole facts of this case of all the food
3 product that had been spoliated because they had to leave
4 the process in the property. We don't know at that
5 point. Do you know what a restaurateur in March was
6 thinking? Half of my clients closed their properties
7 before the governor ordered it just because it was
8 unsafe. If you're told that there's asbestos in your
9 property and there's fibers in the air, a responsible
10 business says there's a direct physical loss on my
11 property here. It's in the air. It's everywhere. If we
12 knew we could spot it, we wouldn't be in a pandemic
13 because we could avoid it.

14 And the fifth thing that they want to do is they
15 want to change the civil order from the governor and use
16 that as their heavy hand to kick it out of court to say,
17 "You can still go to your property. You can still have
18 all your staff go to your property." Is that really what
19 we're dealing with here in a pandemic? That we have this
20 virus that's everywhere. It's airborne. It's
21 toxic. It's lethal. And we're just supposed to do
22 business as usual, turn on the spigot, and so all these
23 arguments that Society is ultimately making that I'm not
24 going to address here today, but I could, all have to do
25 with profitability. That's just damages. I think you

1 even noted that in your question. Well, if you can't do
2 dine-in, and could you do dine-in? Could you mitigate
3 your damages? Could you evolve your restaurant to do
4 something else?

5 Right now, for example, there's a bill pending
6 before the legislature to allow bars to serve cocktails
7 to go or your restaurants to serve cocktails to go.
8 Those are damages arguments. Those are damages for a
9 jury. Those are considerations for summary judgment.
10 That's after we have discovery. There hasn't been any
11 discovery in this case. Out of the gate there wasn't
12 even an answer. It was just denied based on the policy.
13 Most of these policies were denied within 24 hours of
14 submitting a claim. There was no investigation.

15 And so we have a virus, like I said, that is
16 absolutely everywhere. That is a physical loss. It's a
17 physical virus. It's airborne and it can't be seen, and
18 you're being asked to put the heaviest hand on the scales
19 of justice that there ever is, which is a motion to
20 dismiss to say you can't even come here and explore all
21 the allegations that you made based on the facts of this
22 case and the facts of this policy in the State of
23 Wisconsin with these laws.

24 So the closest thing we have is the Edelman
25 decision, the *Manpower* decision, that talks about some of

1 these issues, but not all of these issues, and that case
2 allowed the case to go forward because Judge Edelman
3 ruled that he rejected the ISOP's argument -- ISOP is the
4 defense insurance policy in that case -- that a peril
5 must physically damage property. He rejected that. He
6 said there could also be other types of physical losses
7 and so forth, including loss of use of the property, and
8 just because you can go to a property doesn't mean you
9 can make profit like the year before or even make money
10 like the year before. I mean, I would imagine that
11 Society has denied claims before when people tried to
12 say, "Someone stole my cappuccino machine," and then they
13 go evaluate the cappuccino machine and your cappuccino
14 machine was broken. "It wasn't our fault." It's just
15 like being in a car accident. "Oh, you damaged the
16 fender of my car." "No, that was preexisting damage.
17 That damage was there from before." This is a situation
18 that's different. This has to do with losses arising out
19 of Covid out of something that's airborne.

20 So I know that the Court has a calendar and time
21 is short. I took special attention. I did not want to
22 read. I think my key did a very nice brief. I thought
23 their brief was very good, too. It just isn't this case.
24 And so we, of course, briefed this, but I wanted to just
25 kind of highlight it for the Court some of the ways that

1 this case is pled and how this is really a very important
2 issue and an issue of very, very first impression for
3 this Court, and if I were the judge, I would want to have
4 a lot more information. And I'm not saying we didn't
5 plead enough because we did. I would be wanting to
6 consider these issues in the confines of a summary
7 judgment after there are facts, because right now the
8 facts that are being stated are the way that you're being
9 asked to interpret the policies of these facts are not
10 this policy, and they're not the way that these
11 businesses operate. Maybe some of them, and maybe those
12 cases will get rejected down the road. For example, I
13 don't represent any -- we made some class allegations,
14 but if somebody has a property that is just a
15 drive-through -- like the McDonalds drive-through window,
16 yes, you can eat in the property, but if you can
17 immediately pivot to being something else, those are
18 damages arguments, extent of damages arguments.

19 THE COURT: Thank you, Mr. Urban.

20 Ms. Cain, anything briefly on rebuttal?

21 MS. CAIN: Just briefly, Judge. I did refer the
22 Court several times to the standard on a motion to
23 dismiss and the *Data Key Partners* case in Wisconsin is
24 one we cited in our brief, and it pretty much sets forth
25 in detail what the Court is looking for on a motion to

1 dismiss and what the plaintiff needs to do. And he has
2 to make well pleaded allegations that establish that he's
3 entitled to the relief that he's seeking.

4 Mr. Urban was talking about things that he says
5 are not in this case. What I can tell you is that many,
6 many of the decisions cited in my brief and that have
7 been rendered across this country do interpret the exact
8 same language as is in the Society policy, that being the
9 business income coverage language requiring direct
10 physical loss of or damage to property.

11 What I heard from Mr. Urban was that the virus
12 is everywhere, and what I didn't hear from him is how
13 that causes damage to property or how a government order
14 causes a loss of property. And I think that it's clear
15 from Judge Weber's decision that a government order
16 doesn't constitute a loss of property, and I realize that
17 Judge Weber is another circuit court judge in Wisconsin,
18 but he is the only judge thus far who has interpreted
19 this type of language in a policy. He looked at
20 Society's policy in great detail, and here we're asking
21 this Court to look at Society's policy as well as the
22 allegations they pled in their complaint to see if those
23 allegations measure up. And based on the fact that the
24 virus doesn't cause physical damage and the fact that
25 there was no loss of property in this case the plaintiff

1 cannot survive a motion to dismiss.

2 I just want to speak briefly about *Manpower*, and
3 I did talk about it initially, but Mr. Urban claims that
4 that is the case that this Court should look as most
5 similar. That case is not similar to this case because
6 in that case there was a physical event, a collapse that
7 caused physical damage, and that's why the insured in
8 that case couldn't use their property. The court
9 specifically said there was a physical event, a collapse,
10 that caused a barrier between the plaintiff and his
11 property. We have nothing like that here.

12 And, lastly, plaintiff talks about how some of
13 his clients or maybe even all of his clients did not do
14 take-out and delivery. He didn't plead anything about
15 that in his complaint, and we're left with the case that
16 has Colectivo as a plaintiff, which, as I understand it,
17 is primarily a coffee and pastry-type business that
18 clearly could have served customers with take-out and
19 delivery despite the fact that they may not have been
20 allowed to have customers dine in at their restaurant.

21 I think if the Court just looks at the
22 allegations of the complaint and the language of the
23 Society policy, it should find, as most other courts have
24 found, that interpreted similar or exact same language
25 that there was no physical loss of or damage to property

1 and that's fatal to plaintiffs' claim.

2 Thank you, Judge.

3 THE COURT: Thank you, Ms. Cain.

4 I'd like to go off the record for a moment and
5 talk about how to proceed today. So, madam court
6 reporter, we're off the record.

7 *(Off the record.)*

8 THE COURT: We're back on the record. First of
9 all I just want to commend counsel on both sides. I
10 thought that the briefing and the argument were excellent
11 on this. This is certainly an interesting and somewhat
12 novel case, and I thought that both sides have done a
13 really excellent job of presenting your side.

14 This is a motion to dismiss, and we're all well
15 aware of the legal standards on a motion to dismiss.
16 Ms. Cain references the *Data Key Partners* case and that
17 is certainly sort of a leading case on the standard. A
18 motion to dismiss for failure to state a claim tests the
19 legal sufficiency of the complaint. Plaintiffs must
20 allege facts that plausibly suggest that they're entitled
21 to relief, and that's under *Data Key Partners vs. Permira*
22 *Advisers, LLC*, which is 356 Wis. 2d 665 2014 State
23 Supreme Court case. I note, however, that in reviewing a
24 motion to dismiss I'm required to accept as true all well
25 pleaded facts alleged in the complaint along with all

1 reasonable inferences from those facts, and that's under
2 both *Data Key Partners* and *Kaloti Enterprises, Inc. vs.*
3 *Kellogg Sales Company*, which is a 2005 State Supreme
4 Court case, 283 Wis. 2d 555.

5 I am required to dismiss the claim only if it is
6 quite clear that under no conditions can the plaintiff
7 recover. That's under *Casteel vs. McCaughtry*, 176 Wis.
8 2d 571, a 1993 State Supreme Court case as well as myriad
9 other cases, no doubt.

10 I also consider other important legal
11 consideration here. The first is that it is a pretty
12 standard aspect of contract law that any ambiguity in a
13 contract is to be resolved against the drafter, and in
14 Wisconsin certainly insurance contracts should be read to
15 give the broadest possible coverage to the insured,
16 again, resolving any ambiguities in favor of the insured
17 and against the insurer who is, in fact, always the
18 drafter of the policy or at least typically the drafter
19 of the policy. Here, while I believe the defense raises
20 a number of very interesting and perhaps ultimately very
21 fruitful defenses, both in terms of the meaning of the
22 policy language in this case and the facts surrounding
23 the Covid-19 Pandemic in Milwaukee and how it affected
24 the plaintiffs in this case, I do not believe that the
25 defendants have established what they need to establish

1 in order to achieve a dismissal of the case at this
2 point. I believe it's too early and I believe that the
3 plaintiff has offered well pled allegations that
4 certainly resolving any inferences and any ambiguities in
5 the plaintiffs' favor as I must at this point, are
6 sufficient to state a claim in this case.

7 So first let me talk about some of what I see as
8 the ambiguities in the policy language. On the policy
9 language applies here only if there is a covered cause of
10 loss. So there's only coverage if there's a covered
11 cause of loss, and that is defined in the policy as
12 direct physical loss. Direct -- and essentially the
13 defense argues that there's no direct physical loss
14 that's been pled here, and therefore the plaintiffs' case
15 must fail at this point. Direct physical loss is not a
16 term that's defined in the policy. And in this case --
17 and I don't think it's entirely clear what it means at
18 this point. Here, defense counsel has both in its
19 briefing and during today's argument has often conflated
20 the term "direct physical loss" with "damage." So
21 essentially asserts that direct physical loss is to be
22 some kind of physical damage to the property. If you
23 look, though, elsewhere in the policy, there is a second
24 sort of definition or separate policy language that
25 states that the insurer will pay for loss of income, for

1 example, that is due to direct physical loss of or damage
2 to covered property. So elsewhere in the policy there's
3 a definition or use of the term "direct physical loss"
4 used as well as the term "damage" to the covered
5 property. So it would seem that looking at that direct
6 physical loss must be something other than damage or the
7 use of the word damage in that policy language would be
8 surplus language, and one does not construe contract
9 language so as to allow any of the material language to
10 be surplus language. So I don't think that it's so clear
11 that direct physical loss actually requires damage to the
12 covered property.

13 I think that other terms in the policy are also
14 somewhat ambiguous, including the question of what is a
15 dangerous condition in the premises? That language is
16 contained in the contamination clause, and an issue that
17 didn't receive a lot of attention in the briefs and I
18 think received almost no attention in today's arguments
19 the meaning of the language contained in the exclusions
20 in the policy. So I think that there is various
21 ambiguous language in the policy that under Wisconsin law
22 is to be construed against the insurer and that I think
23 forecloses a dismissal today based on that contract
24 language.

25 I think that discovery is necessary before sort

1 of discovery and perhaps further briefing applying the
2 particular facts of this case to the policy language are
3 necessary before the Court makes a decision ultimately as
4 to whether the policy language applies to the
5 circumstances here.

6 In talking about -- speaking of applying the
7 policy language to the circumstances here, you know, I
8 think Mr. Urban has sort of put his finger on the issue
9 here. Each party states a number of cases around the
10 country, both in connection with Covid-19 and business
11 losses, both those recent cases and other cases involving
12 other types of business losses. So the parties have
13 cited myriad cases from throughout the country holding
14 that certain types of losses are or are not covered under
15 certain policy language.

16 I would say the very fact that there are many
17 cases coming out in many different respects on these
18 types of issues illustrates the fact that the legal
19 issues to be decided here tend to be pretty fact
20 specific. You tend to look pretty carefully at the
21 specific policy language and the specific facts, the
22 specific type of loss and type of damages as a result of
23 that loss at issue in the case.

24 I think the fact that there are so many
25 different cases that each party has been able to find

1 from all over the country to try to illustrate its case
2 simply demonstrates that this is an issue that needs to
3 be decided on a motion to dismiss, that the issues around
4 the nature of the policy language here and the particular
5 facts present here are such that the case is not amenable
6 to decision on a motion to dismiss.

7 And I note, in particular, that the parties sort
8 of differ regarding the upshot of the *Manpower* case and I
9 think part of the reason for that difference is that it's
10 not clear whether this case, the degree to which this
11 case is like the *Manpower* case or not like the *Manpower*
12 case and what aspects of the holding in *Manpower* are
13 really applicable here, and I think it's difficult to
14 make those decisions without factual discovery and
15 without an opportunity to develop the facts in this case,
16 both on the part of the plaintiff and on the defense.

17 I think that certain case law that's been cited
18 isn't particularly helpful at this point in the
19 litigation. For example, the defense cites the *Wisconsin*
20 *Label Corp.* case which basically holds that the word
21 "physical" has a meaning that it's not surplusage, that
22 it means physical. And I don't disagree that in the
23 policy here the word "physical" has meaning, but I don't
24 believe that the *Wisconsin Label Corp.* particularly
25 instructive at this phase in the case regarding what the

1 meaning of the term "direct physical loss" is in
2 connection with this particular insurance policy.

3 Similarly, I'll note just sort of as an another
4 example, the defense offers the *General Casualty vs.*
5 *Rainbow Insulators* case which basically said that the
6 term "physical injury to tangible property is
7 unambiguous," but that is a different phrase. That's a
8 different term than the one used in the policy here, so
9 while the word "physical" used together with "injury to
10 tangible property" may well be unambiguous in connection
11 with the policy at issue in the *General Casualty Company*
12 case, I don't believe that the holding in that case is
13 particularly instructive in this one where there's really
14 entirely different policy language.

15 You know, and just to remark on the county case.
16 That's certainly an interesting and not unimportant case
17 in the context of this one, both because it involves
18 another policy issued by the defendant in this case and
19 because it's the only other case that's been decided on
20 this issue so far in the State of Wisconsin, and I
21 certainly have all respect for my colleague Judge Weber
22 in Door County. I don't believe that it is necessarily
23 clear -- and, first of all, obviously, we all know he's
24 another circuit court judge. His decision is by no means
25 binding on me, both because it's not published as circuit

1 court decisions in Wisconsin never are, and because he is
2 not an appellate court that is at a higher level than I
3 am, but I certainly do take into account the decisions
4 that my colleagues make. I think that it's important to
5 consider the analysis and the logic brought to bear by
6 other people who have looked at these issues. I don't
7 believe that it's particularly clear that Judge Weber's
8 analysis applies in this case partly because although the
9 policy language may be the same, I don't believe the
10 allegations are necessarily the same. And I will admit
11 that I have not had the opportunity to go back and pull
12 out the complaint in that case and sort of parse through
13 it and compare it to this one, but I think it is likely
14 that the allegations are different in many respects.

15 And, in any case, I do, as I've sort of alluded
16 to you already, I do believe that to make a ruling at
17 this point, at the motion to dismiss phase, concerning
18 the meaning of the policy language and the strength, I
19 should say, of the plaintiffs' allegations in its type of
20 loss, I think necessarily requires some degree of
21 resolution of ambiguities, including resolution of
22 ambiguities in favor of the defense and decision on
23 certain factual issues, neither of which I think are
24 appropriate, and I think we would all agree that neither
25 of which are appropriate on a motion to dismiss.

1 So looking at plaintiffs' allegations, I do
2 think that the plaintiff has included certain well pled
3 allegations that state a claim in this case. They
4 include allegations that Covid created the physical loss,
5 essentially the dining area, that Covid created a
6 physical danger in and around the plaintiffs' premises,
7 and the defense essentially argues that these allegations
8 are speculative, and therefore they are not well pled
9 allegations that this Court should consider on a motion
10 to dismiss.

11 However, the plaintiff includes several pages of
12 scientific and factual allegation to support that
13 allegation, that, in fact, Covid was widespread and
14 likely was present in the plaintiffs' restaurants and the
15 plaintiffs' premises at the time of the governor's March
16 2020 orders in this case. And so I don't believe those
17 allegations are speculative at this time.

18 And I should note -- and I do want to sort of
19 note as an aside the defense has cited certain cases from
20 other states that essentially stand for the proposition
21 that the presence of microbial or viral contamination
22 cannot be considered a physical loss. I don't think
23 those cases are necessarily applicable here. Here Covid
24 presents or potentially presents a particular type of
25 harm in that it's not something that's sort of present on

1 the surfaces of premises or in the HVAC equipment in
2 premises can be cleaned and then that's that. It is a
3 contamination that potentially comes into the dining area
4 with any given patron of a restaurant or eating
5 establishment and sort of is newly present potentially
6 with anybody who comes in and sits down and takes their
7 mask off and enjoys their meal while perhaps talking with
8 their friends or family. So at this point I don't think
9 that we can definitively say that we must follow other
10 cases that hold that to sort of the presence of microbial
11 or viral contamination that can be cleaned and dealt with
12 forecloses a claim for loss to the eating area in this
13 case, to the dining area.

14 So I don't believe that the allegations that
15 there was an actual physical loss, a direct physical loss
16 of at least a portion of the covered premises, are
17 speculative at this point. Certainly the defense raises
18 interesting and very material factual arguments, and
19 those are arguments that I think are appropriately made
20 at some point in this lawsuit, but it is certainly not
21 the rule of this Court at this point to resolve factual
22 disputes, and so I don't believe that the defendant's
23 factual arguments are really appropriately taken up at
24 this point.

25 I also think that the plaintiff has at least

1 potentially alleged that the governor's order caused a
2 physical loss of its dining areas. The allegation is
3 that the governor prohibited dining in any restaurants,
4 and although the defendant essentially says, "Well, that
5 wasn't really a physical loss of those areas. You could
6 use those areas for other things. You could still
7 continue your business unabated and in another manner,"
8 those again bring factual issues to bear that are not
9 appropriately considered by this Court in connection with
10 a motion to dismiss.

11 Finally, I would note that among other things I
12 think the plaintiff has appropriately alleged that the
13 presence of or the potential for Covid in the room
14 created a dangerous condition that caused the closing of
15 the dining room. It may have caused the closing of the
16 dining room on the plaintiff or plaintiffs' own action,
17 may have caused the closing of the dining room as a
18 result of the governor's order, but I do think there are
19 allegations that would bring the contamination clause in
20 the policy to bear because I think there are allegations
21 that there was a potential and that there is a potential
22 for Covid and that that created a dangerous condition in
23 the premises. I want to make clear that it is not my job
24 in connection with a motion to dismiss to resolve
25 conflicting factual or conflicting legal arguments.

1 There are arguments that the defense has made that may
2 well bear fruit down the road in connection with perhaps
3 limiting a class, perhaps in connection with summary
4 judgment, and perhaps if the case gets this far in
5 connection with argument concerning how I should instruct
6 the jury in connection with these claims, but I do
7 believe that the complaint contains well pleaded
8 allegations that if proven true would feasibly allow a
9 right of recovery for the plaintiffs, and so I will
10 decline to dismiss the case at this time.

11 With that, Mr. Urban, would you be so kind as to
12 submit a proposed order for my signature?

13 MR. URBAN: Yes, and customarily I just say for
14 the reasons in the pleadings and the reasons on the
15 record and I can even share that with Ms. Cain and her
16 team in advance. I just don't like to quibble.

17 THE COURT: No, I agree. I would prefer to keep
18 it simple and state that it's for the reasons stated on
19 the record. You can either just submit it under the
20 five-day rule or with a letter saying you've shown it to
21 defense counsel and they approve as to the form.

22 So, with that, I think we need to make clear
23 when the defense will file an answer to the complaint.

24 Ms. Cain, is ten days enough or would you ask
25 for more time?

1 MS. CAIN: I'd like a little more time than
2 that, Your Honor. Could we have, say, 21 days?

3 THE COURT: That's fine. Why don't we say
4 March 1st, just to give you kind of a round date?

5 MS. CAIN: That's fine.

6 THE COURT: Mr. Urban, I assume you'd have no
7 objection to that?

8 MR. URBAN: No, not on those kind of things.
9 And I will say, even in this case, we sort of grant each
10 other some extensions and so forth so I prefer to
11 practice that way.

12 THE COURT: Absolutely. I do want to get us
13 moving because I do have another case waiting for me, so,
14 Mr. Urban, if you could include in your proposed order
15 that the defendant shall file an answer by March 1st that
16 would be great.

17 Let's set a scheduling conference in late March,
18 early April somewhere. And here's where madam clerk is
19 frantically looking at my calendar trying to figure out
20 where she can fit something in.

21 Although, we had that jury trial go away and
22 perhaps set it that week.

23 THE CLERK: We can do a scheduling
24 conference. How is Thursday, March 18th at 9:00 a.m.?

25 THE COURT: Would that work for everybody?

1 MR. URBAN: I have an 8:30 motion by Zoom in
2 Dane County. I would think it would be over by 9:00.
3 Can we do 9:30?

4 THE CLERK: 9:30 a.m.

5 MS. CAIN: That's fine, too.

6 THE COURT: You sure that's enough time,
7 Mr. Urban?

8 MR. URBAN: You could give me more time. I just
9 don't know if courts run behind.

10 THE CLERK: Can we set it at 10:30?

11 MR. URBAN: That's good.

12 MS. CAIN: That's fine.

13 THE COURT: Let's make it 10:30 just so we don't
14 run the risk of falling behind if Dane County is behind
15 or there are Zoom issues or it runs long as today's
16 did. Anything else today?

17 MR. URBAN: No, nothing from plaintiffs.

18 MS. CAIN: Nothing from us. Thank you.

19 THE COURT: Excellent. Thank you, everybody. I
20 hope you all have a good weekend.

21 MS. CAIN: Thanks. You, too.

22 MR. URBAN: Bye.

23 THE COURT: Bye.

24 *(Proceedings concluded)*
25

1 STATE OF WISCONSIN)

2) S.S.

3 COUNTY OF MILWAUKEE)

4
5 I, GEORGENE L. LITTLEFAIR, C.S.R., an official
6 court reporter, in and for the Circuit Court of Milwaukee
7 County, do hereby certify that the foregoing is a true
8 and correct transcript of all the proceedings had and
9 testimony taken in the above-entitled matter as the same
10 are contained in my original machine shorthand notes on
11 the said trial or proceeding.

12
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14 Dated February 1, 2021

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17 Georgene L. Littlefair

18 *(Electronically Signed)*
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