Supreme Court Case No. S277893

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ANOTHER PLANET ENTERTAINMENT, LLC,

Petitioner,

v.

VIGILANT INSURANCE COMPANY,

Respondent.

Request for Certification to Decide a Matter of California Law Presented in a Matter Pending in the U.S. Court of Appeals, Ninth Circuit
Case No. 21-16093

PETITIONER ANOTHER PLANET ENTERTAINMENT'S OPENING BRIEF

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ISSUE PRESENTED

The United States Court of Appeals for the Ninth Circuit certified the following question for this Court's consideration:

> Can the actual or potential presence of the COVID-19 virus on an insured's premises constitute "direct physical loss or damage to property" for purposes of coverage under a commercial property insurance policy?

Another Planet Ent., LLC v. Vigilant Ins. Co., 56 F.4th 730, 734 (9th Cir. 2022). This Court may reframe certified questions to address any issues pertinent to the dispute. Cal. R. Ct. 8.548(f)(5); *Another Planet*, 56 F.4th at 734 ("We do not intend our framing of this question to restrict the California Supreme Court's consideration of any issues that it determines are relevant.").

INTRODUCTION

In 1962, this Court first announced a principle of insurance policy interpretation that has guided thousands of insurance coverage disputes: standard policy language must be construed to protect the reasonable expectations of the insured. *Steven v. Fid. & Cas. Co.*, 58 Cal. 2d 862, 868-69 (1962). Since then, through dozens of careful decisions, this Court has crafted a legal

framework that has come to define the entire industry. The California Supreme Court has always been at the vanguard of modern insurance law, and the question now before this Court presents a pivotal opportunity either to reaffirm this bedrock principle, or to depart from it sharply.

The words "direct physical loss or damage to property," or slight permutations, are found in nearly all commercial property insurance policies. For years, courts have urged the insurance industry to define what these words mean—to make plain for insureds what insurers intend their policies to cover—but no definition has issued.

Now, this phrase has become the focus of over 2,000 cases nationwide. Property insurers, like respondent Vigilant Insurance Company, promised to provide a backstop against "all risks" of loss arising from "direct physical loss or damage to property" "caused by or result[ing] from a peril not otherwise excluded." For years, insurers, including Vigilant's parent company, made public statements indicating that losses arising from a pandemic would fall within the ambit of these "all-risk" insurance policies. Following the 2002 SARS outbreak, the insurance industry issued a new standardized exclusion so

insurers could state that their "all-risk" policies excluded losses caused by viruses. But many insurers elected to forgo use of that exclusion—or of any language alerting insureds to any notion that their "all-risk" policies did not insure losses caused by viruses. They did so even though they knew that courts, including this Court, had for decades recognized that the presence of hazardous microscopic substances could cause loss or damage to property, and even though they knew that by not using the industry's standard-form virus exclusion, a pandemic could cause them substantial financial loss.

When the COVID-19 Pandemic forced businesses like Another Planet to cease operations, the entire insurance industry concertedly yanked the safety net that they had sold to their insureds, arguing suddenly that the SARS-CoV-2 virus could not cause "direct physical loss or damage to property."

In the ensuing wave of insurance coverage litigation, America's courts once again were asked to construe this undefined phrase in the context of the Pandemic. Courts had never been asked to consider whether a peril like SARS-CoV-2, so virulent and deadly that it shut down the entire nation, could trigger coverage under "all-risk" insurance policies. Given the

magnitude of the losses that businesses were suffering, these cases presented a tension between what SARS-CoV-2 was (its physicality and how it interacted with property), the fate of insurance companies that had long feared (publicly) that a pandemic could wreak havoc on their financial positions, and decades of insurance law that found "direct physical loss or damage to property" when a microscopic substance rendered property unfit for its intended use.

The first decisions—decided on the pleadings, as in this case—began to issue in the summer of 2020, before we more fully understood what SARS-CoV-2 was and before we had any idea of the extent of its impact. There were no vaccines. The nation was locked down, terrified by SARS-CoV-2's lethality. People routinely disinfected packages and deliveries. It was hard to find toilet paper.

Those initial court decisions, uneasy in the novel Pandemic context, favored the insurers. Courts, without the benefit of a robust scientific understanding of the virus's properties and behaviors, seemed incredulous that a particle, which theoretically could be removed or neutralized with household cleaning supplies, could cause "direct physical loss or damage to property."

The insurance industry all but weaponized those early decisions, to great effect, and now most COVID-19 insurance coverage cases hold in their favor.

But they are wrong, and they threaten to undercut the pillars of insurance law that this Court has built for over a half-century.

First, significant evidence shows that insurers, like Vigilant, knew that a virus like SARS-CoV-2 could cause covered property damage or loss. The actions of the insurance industry in the last 15 years show this, comparing this case's insurance policy's own clauses shows this, and insurers admitted this time and again until they faced the reality of the COVID-19 Pandemic. Given all this evidence, companies like Another Planet reasonably expected coverage when the Pandemic materialized.

Second, basic principles of contract interpretation tell us that there must be a difference between "loss" and "damage." Examining what we now know about SARS-CoV-2 and how it interacts with property and airspaces shows that this virus causes "direct physical damage" when it is present in and on property.

Third, decades of insurance cases tell us that when property is rendered unfit for its intended use because of the presence of a dangerous (or even merely irritating) substance or condition, the insured has suffered a "direct physical loss" under an "all-risk" insurance policy. The key source that insurers and courts have relied upon to depart from this traditional understanding of "loss" is an insurance treatise that misstated the law. Insurers, like Vigilant, have exploited that misstatement, which now threatens the stability of insurance law and the ability of companies like Another Planet to protect themselves adequately.

Fourth and finally, in the unique context of the COVID-19 Pandemic, shuttering businesses was an act of mitigation, preventing further "direct physical loss [and] damage" to covered property. As this Court has recognized, the mitigation doctrine requires that businesses like Another Planet be reimbursed for their losses reasonably incurred to avoid or reduce additional covered losses.

This Court has never shied away from making difficult groundbreaking decisions, especially when it comes to insurance law. For the reasons discussed below, this Court should break

from the trend of wrongly decided COVID-19 insurance coverage cases, shore up the sound principles that it has espoused across decades, and answer the certified question in the affirmative.

FACTUAL AND PROCEDURAL HISTORY

Another Planet's story is characteristic of thousands of other California businesses that suffered financially during the COVID-19 Pandemic. Another Planet is an independent, locally owned concert production company, operating venues in the San Francisco Bay Area, Northern California, and Nevada. As people began to get sick in early 2020, Another Planet could not operate its concert venues in a manner that would protect the health and safety of its employees, performing artists, and concert attendees. Thus, Another Planet had to suspend its operations, resulting in significant financial losses.

I. The Vigilant Policy

Vigilant sold Another Planet a Customarq Series Entertainment Insurance Program, which includes a Property Insurance Section and a Liability Insurance Section and was in effect May 1, 2019, to May 1, 2020 (the "Policy" or "Vigilant Policy"). 3-E.R.-439. The Property Insurance section provides "all-risk" property insurance—that is, it insures against all risks

of physical loss or damage except those plainly, clearly, conspicuously, and expressly excluded. 3-E.R.-456. Unlike "enumerated perils" property insurance policies, which cover only certain causes of loss, "all-risk" property insurance policies provide broad coverage for unprecedented and unanticipated risks of loss. 3-E.R.-395 ¶ 46.

The Policy consists of various standard forms and endorsements that define the scope of coverage. 3-E.R.-396 ¶ 47; *see generally* 3-E.R.-427. Like most commercial property insurance policies, the Policy insures not only against physical loss or damage to covered property, but also for resulting economic and financial losses, referenced in the Policy as "Business Income With Extra Expense" coverage. 3-E.R.-483-97.

The Policy's Business Income With Extra Expense coverage is designed, understood, stated, and intended to cover insureds for economic losses, including losses from the interruption and/or reduction of its business, suffered as a result of "direct physical loss or damage" to covered property that is "caused by or result[s] from a covered peril." 3-E.R.-485. Vigilant elected not to define or explain the phrase "direct physical loss or damage." *See generally* 3-E.R.-483-97. Under this coverage, Vigilant promised

to pay for Another Planet's actual loss of business income sustained because of the "impairment" of Another Planet's operations. 3-E.R.-485.

The Policy contains additional time element coverages for "Extra Expense" for losses, including "business income loss," occasioned by the "impairment" of Another Planet's operations stemming from "Civil Authority" orders or the inability to conduct business because of events affecting "Dependent Business Premises" (property of those upon whom Another Planet depends to conduct its own business). 3-E.R.-485-88, 569-70. Each of these additional time element coverages requires "direct physical loss or damage to property" on or around Another Planet's premises or those of "dependent businesses." 3-E.R.-485-88.

Because the Policy is a package (or combination) policy, it also provides third-party liability insurance for claims of others against Another Planet. Even though the liability portion covers "damages that the insured becomes legally obligated to pay by reason of liability: imposed by law; or assumed in an insured contract; for . . . property damage caused by an occurrence to which this coverage applies," 4-E.R.-634, it contains an exclusion for "damages, loss, cost or expense arising out of the actual,

alleged or threatened contaminative, pathogenic, toxic or other hazardous properties of biological agents." 4-E.R.-732. "Biological Agents" is defined to include "viruses or other pathogens (whether or not a microorganism)." 4-E.R.-733. On the other hand, the Policy's property and time element coverages lack *any* exclusion for losses caused by or resulting from the viruses, communicable diseases, or pandemics.

Several of the time element coverages are limited to certain losses during a "period of restoration," which the Policy defines as (among other things) "immediately after the time of direct physical loss or damage by a covered peril to property" "until your operations are restored, with reasonable speed, to the level which would generate the business income amount that would have existed if no direct physical loss or damage occurred, including the time required to" "repair or replace the property." 3-E.R.-578.

Another Planet sustained covered Business Income and Extra Expense losses as defined in the Policy. These Business Income and Extra Expense losses were sustained because of the "impairment" of Another Planet's business operations because of "direct physical loss or damage" to insured premises and "dependent business premises." These Business Income and

Extra Expense losses were also caused by the state, municipal, and other civil authority orders issued throughout California and Nevada in response to the actual presence of the virus.

II. Another Planet's Coverage Claim and Lawsuit

Another Planet turned to Vigilant for coverage of its Pandemic-related losses. When Vigilant refused coverage, Another Planet sued on October 23, 2020, asserting claims for contractual breaches, bad faith, and fraud, seeking damages and declaratory relief. 4-E.R.-792. In response, Vigilant moved to dismiss, arguing principally that (i) the complaint failed to allege "direct physical loss or damage to property," and (ii) Another Planet's allegations regarding the presence of COVID-19 at insured premises were "conclusory." 4-E.R.-793. The District Court granted Vigilant's motion, concluding that "Another Planet's facilities did not shut down because of the virus's presence on facility surfaces. Rather, those facilities shut in response to the closure orders, which would have required them to remain closed even if Another Planet could have proven to a certainty that the virus was not present at its facilities." 4-E.R.-785. The court, nonetheless, noted that it was theoretically possible for an insured to establish "that the virus created

physical loss or damage" and granted Another Planet leave to amend. 4-E.R.-785-86.

Another Planet filed a First Amended Complaint asserting additional allegations in support of its claim for covered losses. 3-E.R.-379. In the First Amended Complaint, Another Planet alleged that SARS-CoV-2 was present on and in its properties, the properties of dependent businesses, and on property within the vicinity of its own insured premises. 3-E.R.-405-06 ¶¶ 76-78. Another Planet also alleged that SARS-CoV-2 physically alters property when present. 3-E.R.-380 ¶ 5, 398 ¶ 53. The First Amended Complaint stated scientific information supporting these allegations. 3-E.R.-398-401 ¶¶ 51-57. Another Planet further described the government's response to SARS-CoV-2's spread and alleged that the response was motivated—in part—to slow, limit, and prevent physical loss of and damage to property (thereby protecting people). 3-E.R.401-05 ¶¶ 58-75. Because of SARS-CoV-2's presence and the resulting civil authority orders, Another Planet alleged that its business had been "impair[ed]" within the Policy's meaning. 3-E.R.-406 ¶ 79. Finally, Another Planet alleged that it had incurred costs to prevent SARS-CoV-2 from re-entering (and thus further damaging) its property, which

Vigilant must pay under the longstanding mitigation doctrine. 3-E.R.-406 ¶ 76.

The First Amended Complaint also contains allegations that demonstrate that the parties intended the Policy to insure losses caused by viruses, including the long history of Vigilant, its parent company (Chubb Limited), and the insurance industry in general all publicly recognizing that a pandemic could create substantial liabilities under policies just like Vigilant's. *See* 3-E.R.384-89 ¶¶ 19-25, 391¶ 30.

Vigilant filed another motion to dismiss. 3-E.R.-356. The Court granted Vigilant's second motion, this time with prejudice, holding that additional allegations regarding civil authority orders did not establish that those orders were passed "'as a direct result' of the virus having caused actual property damage" to locations near Another Planet's insured properties and that Another Planet's claim for coverage under the Building and Personal Property coverage was not sufficiently tied to any claimed losses for direct physical loss or damage caused by SARS-CoV-2. 1-E.R.-003-04. The district court premised these holdings on the supposition that whether SARS-CoV-2 was present at the relevant locations "seems unknowable," 4-E.R.-785,

and reasoned that the premises were closed solely because of civil authority orders, not because of SARS-CoV-2's presence. 1-E.R.-003.

Another Planet appealed to the Ninth Circuit. 4-E.R.-788. After briefing and argument, the Ninth Circuit certified its question to this Court on December 29, 2022. This Court agreed to review the certified question on March 1, 2023.

ARGUMENT

I. Principles of Insurance Policy Interpretation

This case centers on the meaning of the undefined term "direct physical loss or damage to property," which is ubiquitous in "all-risk" commercial property insurance policies. "While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply." *Bank of the W. v. Superior Ct.*, 2 Cal. 4th 1254, 1264 (1992). The parties' mutual intentions and understandings govern the policy's interpretation, ascertaining that intent from the language that the parties used in the policy, whenever possible. Cal. Civ. Code §§ 1636, 1639; *AIU Ins. Co. v. Superior Ct.*, 51 Cal. 3d 807, 821-22 (1990). "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause

helping to interpret the other." Cal. Civ. Code § 1641. Words and policy provisions are given their "clear and explicit" meanings, interpreted in their "ordinary and popular sense." *Id.* §§ 1638, 1644. Thus, "[i]f the meaning a layperson would ascribe to the language of a contract of insurance is clear and unambiguous, a court will apply that meaning." *Montrose Chem. Corp. v. Admiral Ins. Co.*, 10 Cal. 4th 645, 666-67 (1995).

However, "[a] policy provision is ambiguous when it is susceptible to two or more reasonable constructions." *E.M.M.I. Inc. v. Zurich Am. Ins. Co.*, 32 Cal. 4th 465, 470 (2004). Whether a term is ambiguous is a context-specific inquiry. Although "the intention of the parties is to be ascertained from the writing alone, if possible," Cal. Civ. Code § 1639, the meaning of a policy provision "may be explained by reference to the circumstances under which it was made, and the matter to which it relates." *Id.* § 1647. Consequently, "'even if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning to which the language of the contract is yet reasonably susceptible.'" *Dore v. Arnold Worldwide, Inc.*, 39 Cal. 4th 384, 391 (2006) (citation and brackets omitted). Parties may offer extrinsic evidence "to

prove a meaning to which the language of the instrument is reasonably susceptible," even if the policy language appears plain and unambiguous by itself. *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 37 (1968).

An ambiguity is resolved by giving the policy language the meaning that the insurer believed that the insured understood at the time of issuing the policy. Cal. Civ. Code § 1649. If applying this rule does not eliminate the ambiguity, then the policy's language must "be interpreted most strongly against the party who caused the uncertainty to exist." *Id.* § 1654. In the context of form insurance contracts, such as this case (and most coverage cases), ambiguities are resolved in favor of coverage. *AIU*, 51 Cal. 3d at 822 ("Because the insurer writes the policy, it is held 'responsible' for ambiguous policy language, which is therefore construed in favor of coverage."). Thus, promises of insurance coverage are interpreted broadly, "protect[ing] not the subjective beliefs of the insurer but, rather, 'the objectively reasonable expectations of the insured.'" *Montrose*, 10 Cal. 4th at 667.

II. Evidence Showing Insurers Intended to Cover Losses Caused by a Virus Like SARS-CoV-2

This Court has explained that ascertaining an insurance policy's meaning depends on the context in which the policy was issued and in which the claim for coverage arises. "The proper question is whether the word is ambiguous in the context of *this* policy and the circumstances of *this* case. The provision will shift between clarity and ambiguity with changes in the event at hand." *Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co.*, 5 Cal. 4th 854, 868 (1993) (citations omitted); *accord Yahoo Inc. v. Nat'l Union Fire Ins. Co.*, 14 Cal. 5th 58, 69 (2022) ("the meaning of the word or phrase must be considered in light of its context").

Examining the Ninth Circuit's certified question "in the context of *this* policy and the circumstances of *this* case" provides clarity that insurers, including Vigilant, knew (and led insureds to believe) that "all-risk" insurance was intended to cover losses caused by the presence of a virus—and specifically, in the event of a pandemic.

A. Vigilant Should Have Written a Narrower, Unambiguous Coverage Grant.

The Policy promises coverage for losses arising from "direct physical loss or damage to property" "caused by or result[ing]

from a peril not otherwise excluded." 3-E.R.-456. This promise is extremely broad. "Indeed, one would struggle to think of damage *not* covered by this language." *K.V.G. Props., Inc. v. Westfield Ins. Co.*, 900 F.3d 818, 821 (6th Cir. 2018) (considering insurance for "all 'Risks of Direct Physical Loss'").

But courts have struggled with applying it, especially in the context of the COVID-19 Pandemic. *E.g.*, *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, 506 F. Supp. 3d 360, 373 (E.D. Va. 2020) ("The Court finds that the phrase 'direct physical loss' has been subject to a spectrum of interpretations in Virginia on a case-by-case basis, ranging from direct tangible destruction of the covered property to impacts from intangible noxious gasses or toxic air particles that make the property uninhabitable or dangerous to use."); *Novant Health Inc. v. Am. Guar. & Liab. Ins. Co.*, 563 F. Supp. 3d 455, 459 (M.D.N.C. 2021) ("Even before the pandemic, courts struggled with defining physical loss in insurance policies where the policy left the term undefined, in cases involving asbestos, lead, bacteria, harmful gases, and more."); *accord Ashland Hosp. Corp. v. Affiliated FM Ins. Co.*, 2013 WL 4400516, at *8 (E.D. Ky. Aug. 14, 2013) ("Defendant *itself* struggled with how to interpret the phrase 'direct physical

loss or damage.'"); *Cherokee Nation v. Lexington Ins. Co.*, 2021 WL 506271, at *3 (Okla. Dist. Jan. 28, 2021) ("Carriers have utilized the phrase *direct physical loss* for over fifty (50) years and courts have begged carriers to define the phrase to avoid the precise issue before the Court now."), *rev'd,* 521 P.3d 1261 (Okla. App. 2022).

Over 60 years ago, in *Hughes v. Potomac Insurance Co.*, the Court of Appeal addressed how to apply "all risks of physical loss of and damage to [a] dwelling" when land beneath the insureds' home subsided, leaving the building still structurally intact, but now partially overhanging a 30-foot cliff. 199 Cal. App. 2d 239, 242-43 (1962), *abrogated on other grounds, Sabella v. Wisler*, 59 Cal. 2d 21 (1963). The insurer contended that no "loss or damage had occurred unless some tangible injury to the physical structure itself could be detected." *Id.* at 248. The court refused to accept this position, admonishing the insurer that its broad coverage grant would be applied broadly unless the policy contained some other limiting provision. Indeed, "[c]ommon sense requires that a policy should not be so interpreted *in the absence of a provision specifically limiting coverage in this manner*." *Id.* at 248-49 (emphasis added).

So, for over 60 years, Vigilant and other insurers have been on notice that their "all-risk" coverage grants would be construed broadly under California law, and if they wanted to limit coverage in a certain manner, their policies would need to be drafted to reflect that. And they decided not to do so.

Now, without having limited their "all-risk" coverage grants with definitions or other provisions, insurers like Vigilant are arguing that property is not "damaged" unless it suffers a "tangible physical alteration," and property is not "lost" unless the insured suffers a "permanent dispossession" of it. *See* Def.-Appellee's Answering Br., *Another Planet Ent., LLC v. Vigilant Ins. Co.*, 2022 WL 3347003, at *16-17, *39 (Aug. 5, 2022) ("Vigilant Br."). That is not what the Policy says. Vigilant could have done what the *Hughes* court said and written a coverage grant containing something like any of the following:

> "Direct physical loss or damage" means either a tangible physical alteration to property or a permanent dispossession of property.
>
> "Tangible physical alteration to property" requires a change to the structure or physical nature of the property that will persist in perpetuity unless measures are taken to repair the property or the

> property is harmed beyond repair and needs to be replaced.
>
> "Repair" does not mean mere cleaning of property or filtering airspaces.
>
> "Permanent dispossession of property" occurs when the Insured no longer is able to use the property, and will never again be able to use the property, whether because of theft, contamination, or another event or new condition occasioned upon the property.

But insurers like Vigilant have not attempted to limit their promises of coverage in any way, despite courts "begg[ing]" "for over fifty (50) years" "to avoid the precise issue before the Court now." *Cherokee*, 2021 WL 506271, at *3. If insurers do not want their "all-risk" policies to respond in certain situations, they must make that plain, for "[a]ny exception to the performance of the basic underlying obligation must be stated clearly to apprise the insured of its effect." *Cal-Farm Ins. Co. v. TAC Exterminators, Inc.*, 172 Cal. App. 3d 564, 577 (1985).

Why insurers have not updated this confusing language for over 60 years is perplexing. In the liability context, the industry has created a byzantine maze of policy provisions, yet in commercial property policies, insurers are still fighting with their

insureds about what constitutes "direct physical loss" and "direct physical damage." *See, e.g.*, *Anthem Elecs., Inc. v. Pac. Emps. Ins. Co.*, 302 F.3d 1049, 1053, 1057, 1059 (9th Cir. 2002) (CGL policy defined "property damage" to include "loss of use of tangible property that is not physically injured," and excluded coverage for certain "property that has not been physically injured" except for "the loss of use of other property arising out of sudden and accidental physical injury to [the insured's] product or [the insured's] work after it has been put to its intended use.").

What is clear, however, is that Vigilant—and the entire insurance industry—knew that "all-risk" insurance would respond in a pandemic, and their statements and actions over many years—including in writing the Vigilant Policy—show that.

B. Extrinsic Evidence of Knowledge that the Policy Covers Pandemic Risks

California contract law entitles litigants to proffer extrinsic evidence to show reasonable interpretations of a contract. *E.g.*, *Dore*, 39 Cal. 4th at 391; *Pacific*, 69 Cal. 2d at 37. In pleading its case, Another Planet raised two issues bearing on how a court should interpret "direct physical loss or damage to property" in the context of the COVID-19 Pandemic: (1) statements imputable

to Vigilant before the COVID-19 Pandemic that acknowledged its insurance policies covered risks of pandemics; and (2) the absence of the Insurance Services Office's ("ISO") standard virus and bacteria exclusion for "all-risk" insurance coverage. As discussed below, both indicate that it was reasonable to interpret the Policy as covering pandemic-related losses.

1. *Prior Knowledge of the Covered Risks of Pandemics*

Another Planet's First Amended Complaint contains extensive allegations—backed by factual sources—of what Vigilant and its parent company, Chubb, knew in the years before the COVID-19 Pandemic. 3-E.R.-384-92. This knowledge suggests policy intent. *See Montrose*, 10 Cal. 4th at 672 (pre-drafting evidence of "the insurance industry['s] . . . awareness of potential coverage issues involving continuous or progressively deteriorating bodily injury and property damage" left "little doubt that the definition of 'occurrence' in the newly drafted standard form CGL policy was intended to provide coverage when damage or injury resulting from an accident or 'injurious exposure to conditions' occurs during the policy period"); *Knowledge*, Black's Law Dictionary (11th ed. 2019) ("'Intention and knowledge

commonly go together, for he . . . who knows the consequences of his act usually intends them.'" (citation omitted)).

Many resources were available to Vigilant that detailed the risks of a pandemic and the likelihood of coverage under commercial property policies like the Vigilant Policy. For instance, the Insurance Library Association of Boston, "the leading resource for and provider of literature, information services, and quality professional education for the insurance industry and related interests," stated on its website:

> The past 20 years [have] seen the rise of a number of pandemics. Slate recently published an article on what has been learned about treating them in that time. We thought it might be apt for us to take a look back and see what the insurance industry has learned as well.

3-E.R.-385 (footnote omitted). One white paper warned in 2018, "Even with today's technology, a modern severe pandemic would cause substantive direct financial losses to the insurance community. In addition, indirect losses would be severe, most notably on the asset side of the balance sheet." 3-E.R.-386 (footnote omitted).

Knowing that a pandemic would cause substantial financial loss in the insurance industry is relevant to the question of whether a virus like SARS-CoV-2 can cause "direct physical loss or damage to property." If a virus could not cause that covered loss or damage, then why would the industry see the potential for such financial losses for insurers?

Another Planet went further, pointing out that Chubb disclosed in its 2017 Annual Report that it had "substantial exposure to losses resulting from natural disasters . . . such as . . . catastrophic events, *including pandemics*," which "could impact a variety of our businesses, including our commercial and personal lines . . . ." 3-E.R.-391-92 (emphasis added). Indeed, Chubb's acknowledgment of the risk that viruses and pandemics posed to its insurance positions is echoed in years of 10-K filings with the United States Securities and Exchange Commission, including for the fiscal year ending December 31, 2019, which disclosed, "We have substantial exposure to losses resulting from . . . catastrophic events, including pandemics."[1] Chubb acknowledged that as it

[1] Chubb Limited Annual Report 2019 at 19, *available at* https://s1.q4cdn.com/677769242/files/doc_financials/2020/ar/2019-Chubb-Limited-Annual-Report.pdf (*last visited* March 26, 2023) [App'x Doc. 1], *also available at*

was making this statement, released on February 27, 2020, "the U.S. and many other nations of the world are shutting down much of their social and economic activity in response to the spread and threat of the coronavirus."[2] These statements show that the Chubb companies knew that policies like the Vigilant Policy would respond to pandemic-related claims. *Cf. Heston v. Farmers Ins. Grp.*, 160 Cal. App. 3d 402, 414 (1984) (brief in another matter reflecting insurer's interpretive position relevant to interpretation of the policy at issue).

2. *ISO's Standard Exclusion for Losses Caused by Viruses and Bacteria Shows that Losses Can Be Caused by Viruses.*

"[T]he presence of standardized industry provisions and the availability of interpretative literature are of considerable assistance in determining coverage issues. Such interpretative materials have been widely cited and relied on in the relevant case law and authorities construing standardized insurance policy language." *Montrose*, 10 Cal. 4th at 670-71 (citation omitted). *See also Pardee Constr. Co. v. Ins. Co. of the W.*, 77 Cal.

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https://www.sec.gov/Archives/edgar/data/896159/000089615920000003/cb-12312019x10k.htm (*last visited* Mar. 27, 2023).

[2] *Id.* at 3.

App. 4th 1340, 1359 (2000) (subsequent drafts of ISO standard forms "evince . . . alternative express limiting language that could have been employed").

SARS-CoV-1, a coronavirus just as lethal as but far less transmissible than SARS-CoV-2, appeared in China in 2002 and spread around the world for the next two years.[3] Following that outbreak, ISO developed and released (in 2006) a standardized "all-risk" insurance exclusion for losses due to viruses and bacteria.[4] In the accompanying circular, ISO noted that examples of "viral and bacterial contaminants are rotavirus, SARS, [and] influenza," observing, "The universe of disease-causing organisms is always in evolution."[5] ISO recognized that viruses could cause property damage:

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[3] *See* Caladaria, et al., *COVID-19 and SARS: Differences and similarities*, 4 Dermatologic Therapy 33 (July 2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7235519/ [App'x Doc. 2]; LeDuc & Barry, *SARS, The First Pandemic of the 21st Century*, 10 Emerging Infection Diseases (Nov. 2004), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3329048/ [App'x Doc. 3].

[4] *See* ISO Circular, "New Endorsements Filed to Address Exclusion of Loss Due to Virus or Bacteria," (July 6, 2006), https://www.propertyinsurancecoveragelaw.com/files/2020/03/ISO-Circular-LI-CF-2006-175-Virus.pdf [App'x Doc. 4].

[5] *Id.*

> Disease-causing agents may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property. When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property (for example, the milk), cost of decontamination (for example, interior building surfaces), and business interruption (time element) losses.[6]

ISO expressly warned that "the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing [property] policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent."[7] Thus, ISO thought that insureds reasonably could expect coverage for property damage and business losses caused by viruses under "all-risk" policies, and to help insurers make plain the intent *not* to cover virus-related losses, ISO issued its standard exclusion.

Despite widespread use of the standard exclusion for over a decade, Vigilant elected not to include the exclusion (or any virus

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[6] *Id.*

[7] *Id.*

exclusion) in the Policy's first-party property and business interruption coverages. *Cf. Dye Salon, LLC v. Chubb Indem. Ins. Co.*, 518 F. Supp. 3d 1004, 1008 (S.D. Mich. 2021) (Vigilant's sister insurer included the ISO standard exclusion in the policy at issue there).[8]

The existence of the standard exclusion for losses caused by viruses and bacteria developed specifically for commercial property policies is evidence that insurers like Vigilant knew that viruses can, and do, cause "direct physical loss or damage to property." As the Wisconsin Supreme Court reasoned, "If the insuring agreement never confers coverage for this type of liability as an original definitional matter, then there is no need to specifically exclude it. Why would [an insurer] exclude [a type of damage] if the damage could never be considered [covered] in the first place?" *American Fam. Mut. Ins. Co. v. Am. Girl, Inc.*, 673 N.W.2d 65, 78 (Wis. 2004). At the very least this is a

[8] Another Planet cites *Dye* solely to illustrate the ISO exclusion's availability to Vigilant and takes no position on whether that case was properly decided or whether the ISO exclusion would, in fact, bar coverage for Pandemic-related business losses, even had Vigilant elected to include it in the Policy.

reasonable interpretation of the Policy, considering the ISO exclusion's existence.

C. Vigilant Did Not Exclude Loss Caused by Viruses from First-Party Coverages, But It Did Exclude Such Loss from Third-Party Coverage.

Ascertaining policy intent relies on an evaluation of not only what language *constitutes* a policy, but also what language was *omitted* from the policy. In construing an insurance policy, knowing what is not—but could have been—in the policy carries legal significance. *See Safeco Ins. Co. of Am. v. Robert S.*, 26 Cal. 4th 758, 764 (2001) (courts "are not to insert what [the insurer has] omitted"); *Fireman's Fund Ins. Cos. v. Atl. Richfield Cos.*, 94 Cal. App. 4th 842, 852 (2001) (an insurer's "failure to use available [exclusionary language] gives rise to the inference that the parties intended not to so limit coverage").

"The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Cal. Civ. Code § 1641. Reading the Policy's different provisions "side by side" to see what words Vigilant used elsewhere provides an interpretive "key" to ascertain the Policy's intent. *AIG Prop. Cas. Co. v. Cosby*, 892 F.3d 25, 28-29 (1st Cir. 2018) (Souter, J.) (comparing two

exclusions and finding that because one was more detailed, the other was ambiguous).

The Policy's liability coverage promises to pay "damages that the insured becomes legally obligated to pay by reason of liability: imposed by law; or assumed in an insured contract; for . . . property damage caused by an occurrence to which this coverage applies." 4-E.R.-634. Thereafter, the liability coverage contains an exclusion for "damages, loss, cost or expense arising out of the actual, alleged or threatened contaminative, pathogenic, toxic or other hazardous properties of biological agents." 4-E.R.-732. "Biological Agents" is defined to include "viruses or other pathogens (whether or not a microorganism)." 4-E.R.-733. Thus, a reasonable interpretation of these provisions, when read together, is that Vigilant understood that "viruses" could "cause[]" "property damage" and sought to exclude third-party claims arising from "property damage" "caused by" "viruses."

The first-party "all-risk" coverages promise to pay for losses "caused by or result[ing] from a peril not otherwise excluded." 3-E.R.-456. Unlike the liability coverage, there is no exclusion regarding "biological agents" or "viruses" in the "all-risk"

coverages. Reading the Policy as a whole, with each clause helping to interpret the other, a reasonable interpretation is this: viruses like SARS-CoV-2 can cause "property damage" or "damage to property," and although the Policy may exclude coverage for *third*-party claims for property damage caused by viruses, *first*-party claims are not subject to any such an exclusion, and thus covered. Because this is a reasonable interpretation and favors coverage, it should be given effect. *Montrose*, 10 Cal. 4th at 667.

Thus, there is substantial evidence to show that Vigilant knew that "all risks" insurance included coverage for losses caused by a virus like SARS-CoV-2, and the Policy is susceptible Another Planet's reasonable constructions.

III. The Presence of SARS-CoV-2 Constitutes "Direct Physical Damage" to Property.

SARS-CoV-2 is a physical substance with physical attributes and interacts with the physical world. The Vermont Supreme Court took up the question now before this Court: how to interpret "direct physical loss or damage to property" in the context of the COVID-19 Pandemic and the alleged physical presence of SARS-CoV-2 in, on, and around insured property (as

Another Planet alleged). *Huntington Ingalls Indus., Inc. v. Ace Am. Ins. Co.*, 2022 VT 45, ¶ 15, 287 A.3d 515, 523 (Vt. 2022).[9] That court reviewed an order granting judgment on the pleadings in favor of the insurers, *id.* ¶ 1, and construed "direct physical loss or damage to property" under insurance doctrine consistent with California's. *See id.* ¶ 19. Acknowledging that most courts considering business interruption coverage for the COVID-19 pandemic held in favor of insurers, *id.* ¶ 20, the court held that allegations like Another Planet's prevented judgment on the pleadings because SARS-CoV-2's presence, if proved, could cause "direct physical damage" to property. *Id.* ¶¶ 41-46. This Court should reach the same result.

A. SARS-CoV-2 Is a Physical Agent Capable of Causing "Direct Physical Damage to Property."

COVID-19 is a disease caused by the virus known as SARS-CoV-2.[10] A virus, including SARS-CoV-2, is a microscopic

[9] For ease of reference, subsequent citations are only to the Vermont Reports and paragraph numbers.

[10] World Health Organization, *Coronavirus disease (COVID-19): How is it transmitted?*, (updated December 23, 2021), https://www.who.int/emergencies/diseases/novel-coronavirus-2019/question-and-answers-hub/q-a-detail/coronavirus-disease-covid-19-how-is-it-transmitted [App'x Doc. 5].

though distinctly physical substance.[11] SARS-CoV-2 "is an enveloped virus, meaning that its genetic material is packed inside an outer layer (envelope) of proteins and lipids."[12] Like any physical substance, it interacts with its environment, including the cells it infects,[13] and the air and other matter it contaminates.

This virus spreads from person to person (replicating in host cells) in several known ways:

> (1) inhalation of very fine respiratory droplets and aerosol particles, (2) deposition of respiratory droplets and particles on exposed mucous membranes in the mouth, nose, or eye by direct splashes and sprays, and (3) touching mucous membranes with hands that have been soiled either directly by virus-containing respiratory fluids or indirectly by touching surfaces with virus on them.[14]

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[11] Nat'l Human Genome Research Institute, *Virus*, (updated March 24, 2023), https://www.genome.gov/genetics-glossary/Virus [App'x Doc. 6].

[12] Centers for Disease Control and Prevention, *Science Brief: SARS-CoV-2 and Surface (Fomite) Transmission for Indoor Community Environments*, (updated March 24, 2021), https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/surface-transmission.html [App'x Doc. 7] ("*Fomites Brief*").

[13] *Id.*

[14] Centers for Disease Control & Prevention, *Scientific Brief: SARS-CoV-2 Transmission,* (updated May 7, 2021), https://www.cdc.gov/coronavirus/2019-ncov/science/science-

SARS-CoV-2 and its manners of contamination and transmission all constitute a physical event or condition and cause direct physical loss or damage to property.

When individuals infected with SARS-CoV-2 breathe, talk, cough, sneeze, yell, sing, or cheer, they expel droplets, including aerosolized droplets that remain airborne and, like toxic fumes, make the premises unsafe. Aerosolized SARS-CoV-2 alters the composition of the air it inhabits. Air is itself a physical substance made up of oxygen, nitrogen, and other gases, as well as water vapor and various other aerosolized substances.[15] The introduction of SARS-CoV-2-containing particles necessarily changes the physical composition of the air. SARS-CoV-2-containing particles also bond with other aerosols, including water vapor, forming entirely new particles.[16] SARS-CoV-2

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briefs/sars-cov-2-transmission.html [App'x Doc. 8] ("*Transmission Brief*").

[15] *See Air*, Encyclopedia Britannica (updated Oct. 4, 2022), https://www.britannica.com/science/air [App'x Doc. 9]; Oswin, et al., *The dynamics of SARS-CoV-2 infectivity with changes in aerosol microenvironment*, Proceedings of the Nat'l Acad. of Sci., Vol. 119 No. 27 (June 28, 2022), https://www.pnas.org/doi/10.1073/pnas.2200109119 [App'x Doc. 10].

[16] *Oswin*, *supra* n.15.

physically interacts with and bonds to aerosol particles in the air through chemical processes and transforms those aerosol particles by altering their physical structure.[17]

SARS-CoV-2 particles in their various permutations may remain airborne long enough to travel a considerable distance, lingering in, attaching to, and spreading through air, including through HVAC systems.[18] A meta-analysis of transmission in indoor, non-healthcare settings "found evidence suggesting that long distance airborne transmission of SARS-CoV-2 might occur in indoor settings such as restaurants, workplaces, and venues for choirs," bolstering earlier evidence from experimental and biological studies.[19] Scientists have likened the ubiquitous aerosolized droplets of SARS-CoV-2 to smoke, present in the air

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[17] *Id.*

[18] *See* Nissen, et al., *Long-Distance Airborne Dispersal of SARS-CoV-2 in COVID-19 Wards*, Nature, (November 11, 2020), https://www.nature.com/articles/s41598-020-76442-2 [App'x Doc. 11].

[19] Duval, et al., *Long distance airborne transmission of SARS-CoV-2: rapid systematic review*, 377 BMJ 2022, (June 29, 2022) https://www.bmj.com/content/377/bmj-2021-068743 [App'x Doc. 12]. *See also* U.S. Environmental Protection Agency, *Indoor Air and COVID-19 Key References and Publications,* https://www.epa.gov/coronavirus/indoor-air-and-covid-19-key-references-and-publications (last visited March 27, 2023) (collecting sources) [App'x Doc. 13].

long after the source of its dissemination has gone.[20] Just like invisible smoke particles, the presence of SARS-CoV-2 alters the air and airspace in which it wafts.

Along with these effects on air, virus-containing particles quickly fall, settle on, and attach to surfaces and objects, where they transfer to other people who touch those surfaces.[21] This is "fomite transmission."[22] Scientists and public health authorities have identified transmission via objects as an uncommon, though important, cause of infection of SARS-CoV-2.[23] When SARS-CoV-2 attaches or binds to surfaces and objects, it converts

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[20] *See* Prather, et al., *Airborne Transmission of SARS-CoV-2*, 370 Science 303, 303-04 (Oct. 16, 2020), https://science.sciencemag.org/content/370/6514/303.2 [App'x Doc. 14].

[21] *See* CDC, *Fomites Brief*, *supra* n.12.

[22] *Id.*

[23] *See, e.g.*, *id.*; Cai, et al., *Indirect Virus Transmission in Cluster of COVID-19 Cases, Wenzhou, China, 2020*, 26 Emerging Infectious Diseases 1343, 1345 (June 2020), https://wwwnc.cdc.gov/eid/article/26/6/20-0412_article [App'x Doc. 15]; U.S. Dep't of Homeland Security, *Estimated Surface Decay of SARS-CoV-2 (virus that causes COVID-19) on surfaces under a range of temperatures, relative humidity, and UV Index*, https://www.dhs.gov/science-and-technology/sars-calculator (last visited March 27, 2023) [App'x Doc. 16]; *Fomites Brief*, *supra* n.12; *Transmission Brief, supra* n.14; WHO, *supra* n.10.

those surfaces and objects to active fomites.[24] Studies suggest that SARS-CoV-2 may remain viable (and therefore contagious) on some surfaces for hours or days.[25] People can become infected by touching surfaces where SARS-CoV-2 is present, then touching their eyes, nose, or mouth.[26] The physical alteration from an object to a fomite makes physical contact with those previously safe, inert surfaces (e.g., handrails, doorknobs, bathroom fixtures) unsafe.

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[24] Yansheng Geng & Youchun Wang, *Stability and transmissibility of SARS-CoV-2 in the environment*, Journal of Medical Virology (Aug. 30, 2022), https://onlinelibrary.wiley.com/doi/full/10.1002/jmv.28103 [App'x Doc. 17]; Lei Xie, et al., *A Nanomechanical Study on Deciphering the Stickiness of SARS-CoV-2 on Inanimate Surfaces*, ACS Appl. Mater. Interfaces (Dec. 18, 2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7770894/ (Fig. 2 showing physical effect of SARS-CoV-2 spike protein on various surfaces) [App'x Doc. 18].

[25] *See, e.g.*, *id.*; Sam Meredith, *Virus that causes Covid-19 can survive for 28 days on common surfaces, research says*, CNBC, (Oct. 12, 2020), https://www.cnbc.com/2020/10/12/virus-that-causes-covid-19-can-survive-for-28-days-on-surfaces-research-says.html [App'x Doc. 19]; Riddell, et al., *The effect of temperature on persistence of SARS-CoV-2 on common surfaces*, 17 VIROLOGY J., Art. No. 145 (2020), https://virologyj.biomedcentral.com/articles/10.1186/s12985-020-01418-7 [App'x Doc. 20]; DHS, *supra* n.23.

[26] CDC, *Transmission Brief, supra* n.14.

The presence of SARS-CoV-2 on property also causes physical loss and physical damage by requiring remedial measures to reduce, eliminate, or neutralize, the presence of SARS-CoV-2, including extensive cleaning and disinfecting; installing, modifying, or replacing filtration systems; remodeling and reconfiguring physical spaces; and other measures.[27] But even such measures, including frequent cleanings, cannot be assured to eliminate or exclude SARS-CoV-2 from a premises, given its ability to spread easily and quickly as long as people are entering the premises during an outbreak at or near the premises.[28] Similarly, although SARS-CoV-2 might be cleaned from surfaces when detected, this does not reduce the danger or mean that there has been no damage. In this respect, SARS-CoV-2 is no different from mold, asbestos, mudslides, smoke, oil spills, or similar elements

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[27] *See, e.g.*, U.S. Environmental Protection Agency, *Indoor Air and Coronavirus (COVID-19)*, (updated Jan. 27, 2023), https://www.epa.gov/coronavirus/indoor-air-and-coronavirus-covid-19 (linking to resources on remediating COVID-19-related risk) [App'x Doc. 21].

[28] *See, e.g.*, U.S. Environmental Protection Agency, *Air Cleaners, HVAC Filters, and Coronavirus (COVID-19)*, (updated July 7, 2022) https://www.epa.gov/coronavirus/air-cleaners-hvac-filters-and-coronavirus-covid-19 ("By itself, air cleaning or filtration is not enough to protect people from COVID-19.") [App'x Doc. 22].

that cause property damage, although they can be and typically are later removed, cleaned, or remediated.

Thus, SARS-CoV-2 causes physical damage and physical loss by, among other things, physically permeating, attaching to, binding to, corrupting, destroying, distorting, and altering property, and by rendering it unusable, unfit for its intended function, dangerous, and unsafe.

B. Contamination Is Physical Damage to Property.

California courts, including this Court, have held that contamination constitutes physical damage. In *AIU*, for example, this Court held, "Contamination of the environment satisfies [the] requirement" of property damage for purposes of a commercial general liability policy. 51 Cal. 3d at 842. Similarly, in *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.*, 45 Cal. App. 4th 1, 90 (1996), the Court of Appeal held that the injury caused by the contamination of a building with asbestos fibers and the attendant risk of release of that material constituted "physical injury to . . . tangible property" for purposes of commercial general liability policies. *Id.* ("The Injury is Physical," and observing that "courts have held that contamination of buildings and their contents from released

fibers constitutes a physical injury and, hence, property damage covered under the terms of the insurance policies"). Contamination by SARS-CoV-2 similarly constitutes "direct physical damage" to property for purposes of property policies.

Insurers, including Vigilant, have argued that SARS-CoV-2 cannot cause "direct physical damage" because contamination can be removed from surfaces using readily available, household cleaning products. *See* Vigilant Br., 2022 WL 3347003, at *23-*24 (Aug. 5, 2022). Whether or how well cleaning products work to remove or neutralize SARS-CoV-2 is not germane to the question of whether SARS-CoV-2 physically damages property. That damage happens when SARS-CoV-2 is introduced to a premises and modifies its air and surfaces. Even were it

> [e]stablish[ed] that disinfecting repaired any alleged property damage, it would not resolve whether contaminated property had been damaged in the interim, nor would it alleviate any loss of business income or extra expenses. [T]he duration of exposure may be relevant to the measure of policy benefits; it does not negate coverage.

Marina Pac. Hotel & Suites, LLC v. Fireman's Fund Ins. Co., 81 Cal. App. 5th 96, 112 (2022). Moreover, although we now

understand the efficacy of cleaning products at removing or neutralizing SARS-CoV-2, "[t]hat was not always the understanding of the appropriate precautions to take with items potentially exposed to the virus (many people, in the early months of the pandemic, left groceries and other items outside their homes for several days after first sanitizing them)." *Id.* at 111. Indeed, in the early Pandemic panic, it was often impossible to find cleaning products because people were hoarding them in fear for their lives.[29]

This argument also ignores the fact that household cleaners are not equally effective across all surfaces or materials where SARS-CoV-2 might attach.[30] It may be easier to remove SARS-CoV-2 from glass than from carpet or upholstery. Using household cleansers on certain materials also may create damage to those materials themselves or present a hazard to health, especially caustic cleansers and disinfectants.

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[29] *See, e.g.*, Rachel Nania, *Where Has All the Lysol Gone?*, AARP (Aug. 5, 2020), https://www.aarp.org/health/conditions-treatments/info-2020/lysol-shortage-coronavirus.html [App'x Doc. 23].

[30] *See* Geng, *supra* n.24 ("The stability and viability of SARS-CoV-2 on surfaces is highly dependent on surface materials.").

Finally, household cleaners cannot remove SARS-CoV-2 from the air.[31] While there are certain filters that can help reduce the amount of SARS-CoV-2, there is no evidence that they are completely effective.[32] Considering that Another Planet operates concert venues, the cost of effective filtration likely would have been extremely high. And we now know that most people contract COVID-19 by inhaling SARS-CoV-2 present in enclosed airspaces.[33] As discussed below, SARS-CoV-2's presence in a building's airspace constitutes covered damage.

C. Airspace Is Insured Property.

Many COVID-19 coverage cases focus heavily on how SARS-CoV-2 behaves when it attaches to the surfaces in insured property, which makes sense for two reasons. First, most coverage cases were filed in the first year of the pandemic, before we knew

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[31] Centers for Disease Control, *Safety Precautions When Using Electrostatic Sprayers, Foggers, Misters, or Vaporizers for Surface Disinfection During the COVID-19 Pandemic* (updated Feb. 27, 2023), https://www.cdc.gov/coronavirus/2019-ncov/php/eh-practitioners/sprayers.html (explaining hazards of newer technologies that "spray disinfectant electrostatically, or disperse it through fog, mist, or vapor" that, if used, should be dispersed only by trained professionals) [App'x Doc. 24].

[32] *See* EPA, *Air Cleaners, HVAC Filters, and Coronavirus (COVID-19)*, *supra* n.28.

[33] *See* EPA, *Indoor Air and Coronavirus (COVID-19)*, *supra* n.27.

what we now know about SARS-CoV-2 and how it behaves.[34] For months, even years, infection prevention efforts focused on wiping down surfaces (and even groceries and packages) as much as they did on ventilating and filtering airspaces.[35] Second, when people think about "property," they usually think about land, buildings, and the objects in and on them.

But as discussed above, although fomite transmission can occur, we now know that most human-to-human transmissions of SARS-CoV-2 occur through aerosolized virus. Just as the virus can physically alter a surface when it succumbs to gravity, aerosolized droplets containing live virus changes the airspaces in which they float.

Airspaces are property and covered by insurance policies. "Land is the material of the earth, . . . and includes free or occupied space for an indefinite distance upwards as well as

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[34] *CCLT Case List*, U. of Penn. Carey L. S. Covid Coverage Litigation Tracker, https://cclt.law.upenn.edu/cclt-case-list/ (*last visited* Mar. 28, 2023) (1,559 of 2,365 COVID-19 insurance coverage cases were filed in 2020).

[35] *See, e.g.*, Yasmin Tayag, *How Are We Possibly Still Disinfecting Things?*, Atlantic (July 7, 2022), https://www.theatlantic.com/health/archive/2022/07/covid-spread-air-disinfect-sanitize-hygiene-theater/661507/ [App'x Doc 25].

downwards . . . ." Cal. Civ. Code § 659. "The owner of land in fee has the right to the surface and to everything permanently situated beneath or above it." *Id.* § 829. Under these principles, courts have long recognized that an owner of real property owns the airspace above it, too. *See Hinman v. Pac. Air Transport,* 84 F.2d 755 (9th Cir. 1936) ("We own so much of the space above the ground as we can occupy or make use of, in connection with the enjoyment of our land."); Witkin, Summary 11th Torts § 804 (2022) ("An encroachment on the space above land, as by trees, roots, or an overlapping portion of a building, is a continuing trespass, which may amount to a nuisance.").

Insurance works within these concepts. A vivid example is in condominiums. Because owning a condominium is ownership of the airspace that the specific unit occupies—and not the actual structure enclosing it—insurers offer different products for the condominium, versus the structure and common areas. *See, e.g.*, *Marina Green Homeowners Ass'n v. State Farm Fire & Cas. Co.*, 25 Cal. App. 4th 200, 203 (1994) (deciding "whether . . . a 'policy of residential property insurance' includes insurance issued to a condominium homeowners association to cover the common interest in the condominium project's structure, as distinguished

from the airspace owned by each individual condominium owner"). Title insurance giant Stewart Title states in its underwriting manual,

> The air itself is not real property; airspace, however, is real property when described in three dimensions with reference to a specific parcel of land. Such air rights are alienable. They can be sold, purchased, mortgaged, leased, or otherwise encumbered, subject to easements of light and air."[36]

Additionally, some liability policies contain "indoor air exclusions," seeking to bar coverage for bodily injury claims arising from injurious substances in air inside closed spaces. *See, e.g.*, *Century Sur. Co. v. Casino W., Inc.*, 329 P.3d 614, 618 (Nev. 2014) (exclusion for "'property damage[,]' . . . arising out of, caused by, or alleging to be contributed to in any way by any toxic, hazardous, noxious, irritating, pathogenic or allergen qualities or characteristics of indoor air regardless of cause"). Insurers have thus recognized that airspace is insurable

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[36] *Underwriting Manual: Air Space and Air Rights*, Stewart Virtual Underwriter, https://www.virtualunderwriter.com/en/underwriting-manuals/2005-8/UM00000109.html (*last visited* Mar. 26, 2023) [App'x Doc. 26].

property, and that contamination of indoor air can give rise to property damage.

Thus, a hazardous substance in the air enclosed within a building is covered under "all-risk" property insurance. California courts have long accepted that dangerous airborne particles, often invisible to the naked eye, constitute physical damage to property. *See Armstrong*, 45 Cal. App. 4th at 90 ("contamination of buildings and their contents from released [asbestos] fibers constitutes a physical injury and, hence, property damage covered under the terms of the insurance policies").

IV. The Presence of SARS-CoV-2 Causes "Direct Physical Loss" of Property.

With the benefit of hindsight and the swift mobilization of scientists the world over, we now better understand how SARS-CoV-2 "works." That knowledge along with speedy development of safe and effective vaccines have allowed society to reengage in person-to-person interactions and commerce more safely.

But in 2020, that was not the case—and likely will not be the case when the next pandemic arrives.[37] SARS-CoV-2's lethality and virulence in the Pandemic's initial wave were terrifying. In early March 2020, government officials stated publicly that SARS-CoV-2 was 10 times deadlier than the common flu.[38] By the end of that month, so many people in New York were sick and dying that the United States Army Corps of Engineers turned the sprawling Jacob K. Javits Convention Center into a pop-up military hospital.[39] People were dying so

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[37] *See, e.g.*, The White House, *American Pandemic Preparedness: Transforming Our Capabilities* at 5 (Sept. 2021), https://www.whitehouse.gov/wp-content/uploads/2021/09/American-Pandemic-Preparedness-Transforming-Our-Capabilities-Final-For-Web.pdf, ("As devastating as the COVID-19 pandemic is, there is a reasonable likelihood that another serious pandemic that may be worse than COVID-19 will occur soon—possibly within the next decade.") [App'x Doc. 27].

[38] *See, e.g.*, Testimony of Dr. Anthony Fauci, House Oversight & Reform Committee Hearing on Coronavirus Response, Day 1 (Mar. 11, 2020), *available at* https://www.c-span.org/video/?c4860450/user-clip-dr-anthony-fauci-addresses-covid-19-mortality-rate (start to 1:45).

[39] *See* C. Todd Lopez, *Corps of Engineers Converts NYC's Javits Center into Hospital*, DOD News (Apr. 1, 2020), https://www.defense.gov/News/News-Stories/Article/Article/2133514/corps-of-engineers-converts-nycs-javits-center-into-hospital/ [App'x Doc. 28].

quickly that cities had to resort to refrigerated tractor-trailers as makeshift morgues.[40]

This went on for months, into 2021, as outbreak upon outbreak swamped the nation's healthcare system.[41] Prominent individuals made news when they died from COVID-19, some after flouting shut-down orders and ridiculing mask mandates while attending indoor gatherings.[42] Thousands of Americans were dying every day, so many that by the end of June 2020, some 13% of adult Americans personally knew someone who had died of COVID-19.[43] In a word, terrifying.

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[40] *See, e.g.*, Simon Shuster, *'I Still Can't Believe What I'm Seeing.' What It's Like to Live Across the Street from a Temporary Morgue During the Coronavirus Outbreak*, Time (Mar. 31, 2020), https://time.com/5812569/covid-19-new-york-morgues/ [App'x Doc. 29].

[41] *See, e.g.*, Matthew Ormseth, et al., *Spiraling Covid-19 Deaths Leave Morgues Overflowing and Funeral Homes Turning Away Grieving Families*, Los Angeles Times (Jan. 21, 2021), https://www.latimes.com/california/story/2021-01-01/la-me-covid-19-death-toll-morgue-funeral-homes [App'x Doc. 30].

[42] *See, e.g.*, Aimee Ortiz & Katharine Q. Seelye, *Herman Cain, Former CEO and Presidential Candidate, Dies at 74*, N.Y. Times (July 30, 2020), https://www.nytimes.com/2020/07/30/us/politics/herman-cain-dead.html [App'x Doc. 31].

[43] *See* Amy Goldstein & Emily Guskin, *Almost One-Third of Black Americans Know Someone Who Died of Covid-19, Survey Shows*, Wash. Post (June 26, 2020), https://www.washingtonpost.com/health/almost-one-third-of-

What we knew at the beginning was rudimentary, looking back. We knew that SARS-CoV-2 attacked the respiratory system, spread person-to-person, was highly transmissible, especially in enclosed spaces, and was manifold more deadly than cold or flu viruses. We also knew that people could be infected with SARS-CoV-2, have no observable symptoms of COVID-19, and spread the disease without warning. Thus, shutting down businesses became necessary because allowing people—even healthy-seeming people—to gather, especially indoors, posed an unreasonable (frankly, dire) risk to human health.

A. "Direct Physical Loss" Occurs When a Risk to Human Health Renders Property Unusable.

When insured property becomes unusable for its intended purpose because of a condition that poses a danger to human health or safety, the insured has suffered a "direct physical loss" of that property. For decades before the COVID-19 Pandemic, courts routinely held that physical substances infiltrating property that rendered them unusable constituted "direct physical loss" to that property. *E.g.*, *Essex Ins. Co. v. BloomSouth*

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black-americans-know-someone-who-died-of-covid-19-survey-shows/2020/06/25/3ec1d4b2-b563-11ea-aca5-ebb63d27e1ff_story.html [App'x Doc. 32].

Flooring Corp., 562 F.3d 399, 405 (1st Cir. 2009) (odor from carpet and adhesive "*can* constitute physical injury to property"); *Port Auth. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (property sustained a direct physical loss due to presence of asbestos fibers); *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, 2016 WL 3267247, at *9 (D. Or. June 7, 2016) (smoke infiltration in theatre caused direct property loss or damage), *vacated by stipulation following settlement*, 2017 WL 1034203 (D. Or. Mar. 6, 2017); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co.*, 2014 WL 6675934, at *5 (D.N.J. Nov. 25, 2014) (closure of facility because of accidentally released ammonia; while "structural alteration provides the most obvious sign of physical damage, . . . property can sustain physical loss or damage without experiencing structural alteration"); *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 707-10 (E.D. Va. 2010) (gasses emanating from drywall caused "'direct physical loss'"); *Mellin v. N. Sec. Ins. Co., Inc.*, 115 A.3d 799, 805 (N.H. 2015) (cat urine odor inside condominium constitutes direct physical loss; "physical loss may include not only tangible changes to the insured property, but also changes that are perceived by the sense of smell and that exist in the absence of structural

damage"); *Western Fire Ins. Co. v. First Presbyterian Church,* 437 P.2d 52, 55-56 (Colo. 1968) (en banc) (church suffered "direct physical loss" when gasoline around and beneath it rendered it dangerous to use); *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332, 1335 (Or. App. 1993) (methamphetamine odor constituted property damage); *Schlamm Stone & Dolan, LLP v. Seneca Ins. Co.*, 800 N.Y.S.2d 356, at * 5 (N.Y. Sup. 2005) ("the presence of noxious particles, both in the air and on surfaces . . . , would constitute property damage under the terms of the policy"); *Matzner v. Seacoast Ins. Co.*, 1998 WL 566658, at *2 (Mass. Super. Aug. 12, 1998) (building with unsafe levels of carbon monoxide sustained direct physical loss); *Arbeiter v. Cambridge Mut. Fire Ins. Co.*, 1996 WL 1250616, at *2 (Mass. Super. Mar. 15, 1996) (presence of oil fumes in building constituted "physical loss" to building).

Notably, in many of these cases, the substance complained of was merely unpleasant or irritating and did not pose a significant risk to human life: smoke, methamphetamine odors, and cat urine. It follows that if a substance is introduced to and present in property that is reasonably likely to cause severe

illness and even death, like SARS-CoV-2, then that substance's presence even more clearly constitutes a "direct physical loss."

An exemplary California case illustrating that danger, alone, can constitute a covered loss is *Hughes*. After the landslide left their house partially overhanging a 30-foot cliff, the Hughes family made a claim under their homeowner's policy. 199 Cal. App. 2d at 242. In the subsequent appraisal, the structure was determined to have suffered only $50 of damage. *Id.* at 243. By contrast, the appraisal determined that the family had suffered damages related to "personal property in the dwelling, $125; trees, shrubs and lawn, $800; fences, $150; concrete walk, $105; extra living expenses, $250." *Id.* But a retaining wall to prevent further subsidence, which eventually could cause actual structural damage to the house, would cost $19,000. *Id.* At a bench trial, the court ordered the insurer to pay the cost of the retaining wall. *Id.*

The Court of Appeal affirmed. It explained that even though it was technically true that the "paint remain[ed] intact and its walls still adhere[d] to one another," no "rational persons would be content to reside there." *Id.* at 248, 249. In other words, the threat to human safety alone, regardless of any

"tangible injury" to the property, was "physical loss or damage" of property. The home simply could not be used as intended by the Hughes family considering this risk; thus, there was covered loss.

Under *Hughes*'s reasoning, if walking into a building is likely to place human health or safety in imminent peril, then the inability to use those premises constitutes "direct physical loss" of the property because it cannot be used for its intended purpose(s). In the context of the COVID-19 Pandemic, walking into *any* building where people could gather created a severe risk that all those people would become infected by SARS-CoV-2, that some of them would become gravely ill, and that some would die.

Another Planet operates concert venues. Given what we knew at the beginning of the COVID-19 Pandemic, and absent safe and effective vaccines, Another Planet could not operate its venues without creating an unreasonable risk to human health and safety. It had to close its venues because no "rational persons" would expose themselves to the dangers that SARS-CoV-2 posed. Thus, Another Planet suffered a "direct physical loss" of its insured premises because they could not be used as intended, due to SARS-CoV-2's ubiquitous presence.

B. *Huntington* Is Consistent with California Law, Most COVID-19 Coverage Cases, and Decades of Decisions Finding "Direct Physical Loss."

Despite all these cases, courts have struggled when confronted with losses sustained in the COVID-19 Pandemic. The Vermont Supreme Court's *Huntington* decision is a good example of how COVID-19 coverage cases can fit within historical jurisprudence on the issue of "direct physical loss." And it accords with California law.

Huntington analyzed the concept of "direct physical loss" in the COVID-19 Pandemic context. 2022 VT 45, ¶¶ 21-25, 28-38. Under the principle of *ejusdem generis*, "direct physical loss or damage" should be interpreted so that "direct physical" (specific terms) apply to both "loss" and "damage" (general terms). *Id.* ¶ 24. Thus, the court determined this policy language involves two distinct concepts: "direct physical loss" and "direct physical damage." *Id.* Considering dictionary definitions, *id.* ¶ 21, 26, the court then elaborated that "direct physical loss" involves four concurrent features: (1) persistent (2) destruction *or deprivation* of property, (3) in whole or in part, (4) with a causal nexus to a physical event or condition. *Id.* ¶ 28.

Persistence, the court reasoned, is implied from the policy's period-of-restoration provision (common in most "all risks" policies with time element coverages, including the Vigilant Policy): the physical event or condition must require "some kind of intervention"—that it be "rebuilt, repaired, or replaced" in some fashion—to restore the property to a safe and usable state. *Id.* ¶¶ 35-37.

"Deprivation or destruction of property" includes circumstances when property "is harmed to the extent that it is physically gone from the world" but also includes "*circumstances in which property is not harmed but may not be used for some reason*." *Id.* ¶ 29 (emphasis added). "[D]eprivation may also occur when property is unusable due to a health hazard." *Id.* (collecting cases). The court admonished that covered loss of use is not prospective, and that inability to use property alone does not establish a "direct physical loss." *Id.* ¶ 30.

Coverage is afforded when the insured is deprived of property "in whole or in part," as long as the policy contains language permitting recovery "to the extent it is 'wholly or

partially' unable to conduct its business." *Id.* ¶ 31.[44] The court cautioned that any partial loss nevertheless "must be discrete and identifiable." *Id.* ¶ 32.

Finally, the court reasoned that to meet the "direct" and "physical" requirements of "direct physical loss," the "deprivation of property must be causally linked to a physical event." *Id.* ¶ 33. That means "'simply the consequential result' of" a "physical condition of the insured property." *Id.* (quoting *Western*, 437 P.2d at 55). So, while coverage is afforded for property contaminated with asbestos, mold, and toxic gas, there is no coverage when, for instance, the government orders a cessation of use of untouched or otherwise safe or saleable property. *Id.* ¶¶ 33-34.

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[44] This is common in most "all-risk" first-party policies, including the Vigilant Policy. Its "Our Loss Payment Options" provision permits Vigilant to "take all *or any part* of the covered property at an agreed or appraised value" "[i]n the event of loss or damage." 3-E.R.475 (emphasis added). Its Business Income and Extra Expense coverage promises to pay for "business income loss you incur due to the actual *impairment* of your operations." 3-E.R.-485 (emphasis added). The Civil Authority and Dependent Business Premises coverages cover losses arising from "actual impairment of your operations." 3-E.R.487-88. "Impairment" is different from "cessation," for instance, indicating that a "diminishment . . . of function or ability" would be covered. *Impairment*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/impairment (*last visited* Mar. 25, 2023).

In this regard, *Huntington* is in line with most COVID-19 insurance decisions nationwide, which found no coverage when insureds alleged loss stemming solely from shutdown orders, as well as the subset of decisions that found a potential for coverage for insureds who alleged loss because SARS-CoV-2 was in, on, and around covered property. *See id.* ¶ 34 (citing *Wakonda Club v. Selective Ins. Co.*, 973 N.W.2d 545, 552-54 (Iowa 2022) (no coverage when insured had no knowledge of SARS-CoV-2's presence on its premises)); *id.* ¶ 43 (insured alleged SARS-CoV-2 altered property and that to use it safely, insured had to make physical changes to it (citing *Marina*, 81 Cal. App. 5th at 111)).

Although the Vermont Supreme Court discussed how to determine whether there was "direct physical loss," it did not address whether the presence of SARS-CoV-2 in, on, or around covered property constituted a "direct physical loss." It did not do so because it had determined that the insured had adequately alleged "direct physical damage." *Id.* ¶ 47. But as *Huntington*'s analysis demonstrates, whether the presence of SARS-CoV-2 causes a "direct physical loss" is embedded within the Ninth Circuit's certified question because the phrase "direct physical loss or damage" contains the distinct concepts of "direct physical

loss" and "direct physical damage." Because this Court is reviewing that question in articulating California law, and not reviewing this case for an error below, this Court is free to (and should) answer this question alongside that of "direct physical damage." Cal. R. Ct. 8.548(f)(5).

It is true that other states' high courts have ruled for insurers on this issue. But those decisions do not grapple with the "direct physical loss or damage" language or pleading standards as thoroughly as *Huntington*, they do not adhere to California's principles of insurance policy interpretations as closely as *Huntington*, they do not consider extrinsic evidence under this Court's standards, and they are not as intuitive as *Huntington*. *See Cajun Conti LLC v. Certain Underwriters*, --- So.3d ---, 2023 WL 2549132, at *5 (La. Mar. 17, 2023) (Hughes, J., *dissenting*) ("Like smoke from a fire next door that did no physical damage to the premises, but caused the business to be closed until the odor could be removed and the business cleaned, a physical loss occurred.").

Indeed, courts finding for insurers on this issue largely have been misled by a misstatement of the law in a leading

insurance treatise. As discussed below, this Court has the chance to guide California back down the right path.

C. *Couch*'s "Distinct, Demonstrable, Physical Alteration" Fallacy

Using reasoning like *Huntington*'s and relying on "the very fundamental principle that policy language be so construed as to give effect to every term," *Atlantic Mut. Ins. Co. v. J. Lamb, Inc.*, 100 Cal. App. 4th 1017, 1036 (2002), insureds like Another Planet have argued that there must be a difference between "loss" and "damage." *See, e.g.*, *Huntington*, 2022 VT 45, ¶ 24 ("the policy covers 'direct physical loss' and 'direct physical damage,' and each must have a distinct meaning. If such were not the case, there would be no need for the policy to differentiate between physical loss and physical damage").

As discussed above, "direct physical loss" has long been interpreted to mean loss of use, or an inability to use property for its intended purpose. Nevertheless, insurers (including Vigilant) have argued that "direct physical loss or damage" to property requires "a distinct, demonstrable, physical alteration of the property." *See* Vigilant Br., 2022 WL 3347003, at *16-*17 (Aug. 5, 2022). The California case most cited for this proposition is

MRI Healthcare Center of Glendale, Inc. v. State Farm General Insurance Co., in which a magnetic imaging machine was "ramped down" to fix a leaky roof and could not be ramped back up again. 187 Cal. App. 4th 766, 770 (2010). The policy covered "direct physical loss," but the insured's allegations stated:

> "[O]nce an MRI [machine] is shut down, the process of 'ramping' it back up is unpredictable." The complaint further alleges that an engineer's report made before the MRI machine was shut down warned of a risk that ramping the MRI machine up after it has been ramped down could be "difficult if not impossible" due to the "inherent nature" of the MRI machine and "the length of time that the magnet ha[s] been ramped (14 years)."

Id. at 772 (first modification ours). Thus, it was unclear what, if anything, "physical" had happened to the machine. According to the insured's allegations, its failure to ramp back up was attributed to its inherent nature and prior use.[45] But in the

[45] The policy in *MRI* also granted coverage only for "*accidental* direct physical loss," 187 Cal. App. 4th at 771 (emphasis added), a condition uncommon in "all risks" policies and absent from the Vigilant Policy. The lack of an "accident" was an independent basis to affirm the judgment. *Id.* at 780-82.

COVID-19 Pandemic, there is no question what the issue is: a virus with physical properties, creating illness and death.

In reaching its holding, the *MRI* court collapsed the distinction between "loss" and "damage," stating, "For there to be a 'loss' within the meaning of the policy, some *external force* must have acted upon the insured property to cause a *physical change* in the condition of the property, i.e., it must have been 'damaged' within the common understanding of that term." *Id.* at 780. So "loss" means "hav[ing] been 'damaged,'" per *MRI*.

The *MRI* court landed on a problematic secondary source to support its redefinition of "direct physical loss": Steven Plitt, *et al.*, *Couch on Insurance*, chapter 10A, section 148:46 (3d ed. 2010), which states that most jurisdictions require "a distinct, demonstrable, physical alteration of the property" as a prerequisite to "all-risk" insurance with coverage grants that hinge on "direct physical loss or damage" to property. *See MRI*, 187 Cal. App. 4th at 778-79. Prior to the COVID-19 pandemic and resulting insurance claims, *Couch*'s articulation of this principle was rarely cited. Indeed, in some 20 years prior to the

Pandemic, only a handful of California appellate courts had ever cited it (three, or so, including *MRI*).[46]

Now, *Couch*'s pronouncement of the law has taken center stage in COVID-19 insurance disputes. Nationwide, this language from the *Couch* treatise has been cited myriad more times in the last two years than in all the years leading up to 2020, since it first appeared in the treatise in 1999.[47]

But *Couch* is wrong. Or at least it was not supported by much authority before COVID-19 coverage litigation commenced. When insurers began relying heavily on the "distinct, demonstrable, physical alteration" language in the well-regarded treatise, a group of prominent practitioners delved into the history of *Couch*'s pronouncement of the law and discovered it had been stated upside-down. Richard P. Lewis, Lorelie S. Masters, Scott D. Greenspan & Chris Kozak, *Couch's "Physical*

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[46] A Westlaw search returned only two other published cases, *Doyle v. Fireman's Fund Insurance Co.*, 21 Cal. App. 5th 33 (2018), and *Simon Marketing v. Gulf Insurance Co.*, 149 Cal. App. 4th 616 (2007).

[47] A March 28, 2023, Westlaw search for the words "distinct," "demonstrable," and "physical" within the same sentence returned 387 cases, 344 of which were decided since the first wave of COVID-19 insurance coverage decisions issued, beginning in August 2020.

Alteration" Fallacy: Its Origins and Consequences, 56:3 Tort, Trial & Ins. Prac. L. J. 621 (Fall 2021) [App'x Doc. 33]. In its first appearance in the treatise, *Couch* had relied on only one case from the United States District Court for the District of Oregon for its formulation of the supposed majority position and overlooked at least 13 other cases holding to the contrary, finding broader coverage not limited by any "physical alteration" when insureds could not use their property as intended. *Id.* at 625. By the beginning of 2020, at least 35 cases adopted a broader interpretation than *Couch*'s formulation of the law, and "significantly fewer follow[ed] the *Couch* test." *Id.* at 622.

For nearly a quarter century, *Couch*'s misstatement has snowballed: the more that courts cited it, the more citations *Couch* collected to support its fallacy, which in turn encouraged still more courts to follow the fallacy. This only accelerated when the insurance industry seized upon *Couch*'s words as part of its campaign to reshape the law and avoid responsibility for the losses that it long knew the COVID-19 Pandemic would inflict on their own bottom lines.[48]

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[48] *See, e.g.*, Erik F. Knutsen & Jeffrey W. Stemple, *Infected Judgment: Problematic Rush to Conventional Wisdom and*

Couch should not be followed. In addition to threatening to deprive businesses of their insurance resources in one of the worst calamities of the last century, relying on *Couch*'s formulation of the law "risk[s] overruling decades of insurance law and drastically narrowing the scope of property insurance that forms the backbone of risk protection for homeowners, businesses, and the banks that lend to them." *Id*. at 623.

Asbestos cases provide a clear illustration of how an insured can suffer a covered "loss," without any "physical alteration" to the property. Asbestos functions exactly as it was designed to do, an immensely effective fireproofing material. But because of its danger to human health, property cannot be used as intended when it is present, so it causes a "direct physical loss." As the Minnesota Court of Appeals observed:

> Although asbestos contamination does not result in tangible injury to the physical structure of a building, a building's function may be seriously impaired or destroyed and the property rendered useless by the

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Insurance Coverage Denial in a Pandemic, 27 Conn. Ins. L. J. 186, 230-34 (2021) (describing the insurance industry's campaign to avoid pandemic-related claims in the media and in courtrooms, including collapsing the distinctions between "loss" and "damage") [App'x Doc. 34; *see also supra,* § II.B.1 (Chubb statements regarding risk of pandemics to earnings).

> presence of contaminants . . . . Under these circumstances, we must conclude that contamination by asbestos may constitute a direct, physical loss to property under an all-risk insurance policy.

Sentinel Mgmt. Co. v. N.H. Ins. Co., 563 N.W.2d 296, 300 (Minn. App. 1997).

In short, "loss" is different from "damage." *Couch* is a primary driver of decisions to the contrary, and it misstated the law that reasonable insureds have relied on for decades when purchasing insurance. If property cannot be used because doing so would endanger human lives, then the insured has suffered a "direct physical loss."

V. Another Planet's Mitigation of Covered Losses

Courts have struggled with COVID-19 insurance coverage cases because of SARS-CoV-2's nature and the way it enters and affects property in the first place. Unlike asbestos or gas-emanating drywall, SARS-CoV-2 does not inhere in materials used to build a structure. Unlike mold, it does not grow on its own within structures. Unlike smoke, urine, and methamphetamine odors, it is imperceptible. Unlike a landslide,

its presence does not threaten to bring down the walls around us.[49]

Unlike the other, more "traditional" substances or circumstances we associate with the notion of property damage, SARS-CoV-2 is not localized, but spread throughout entire cities (indeed, the world), and its danger to human health—what causes "direct physical loss" when it is present in and on property—was dramatically reduced through the swift development and distribution of safe and effective vaccines. Through vaccinations, more and more "rational persons" could enter and enjoy spaces that were once too dangerous to use.

Also uniquely, SARS-CoV-2 requires humans to exist and reproduce, remains viable for short periods without a host (days, at most), can be removed from many surfaces at low cost, and can be filtered from the air.

But disinfecting property works only until the next infected person, often asymptomatic and unknowing they are infected, enters the room and causes the space to be infiltrated anew with

[49] But it is like asbestos fibers, whose presence constitutes damage to tangible property even though they usually are not visible to the naked eye.

SARS-CoV-2. COVID-19 testing in the Pandemic's onset was not widely available and, because it involved nucleic acid testing rather than the antigen tests to which we are now accustomed, took days to return often unreliable results.[50] That made mitigation ("stopping the spread") the only effective way to keep as many people as possible safe.[51] Thus, Another Planet's closures of its music venues were mitigative measures meant to keep people out and reduce any additional damage to people *and property*: reducing and mitigating covered losses that the venues otherwise would have sustained. Had Another Planet *not* closed its venues and instead allowed people to gather, SARS-CoV-2 would have been present, causing "direct physical loss [and] damage" to its property.

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[50] *See, e.g.*, Wash. Post, *What We Know About Delays in Coronavirus Testing* (Apr. 18, 2020), https://www.washingtonpost.com/investigations/2020/04/18/timeline-coronavirus-testing/ [App'x Doc. 35].

[51] *See, e.g.*, Robert F. Service, *Coronavirus Antigen Tests: Quick and Cheap but Too Often Wrong?*, Science (May 22, 2020), https://www.science.org/content/article/coronavirus-antigen-tests-quick-and-cheap-too-often-wrong [App'x Doc. 36].

A. Another Planet Is Entitled to Reimbursement for Losses Incurred from Avoiding and Mitigating Further Property Loss and Damage.

"An insurer is liable . . . [i]f a loss is caused by efforts to rescue the thing insured from a peril insured against." Cal. Ins. Code § 531. This statute codifies "the duty implied in law on the part of the insured to labor for the recovery and restitution of damaged or detained property and it contemplates a correlative duty of reimbursement separate from and supplementary to the basic insurance contract." *Young's Mkt. Co. v. Am. Home Assurance Co.*, 4 Cal. 3d 309, 313 (1971). When an insured prevents a threatened loss, it "acts for the benefit of the insurer," giving rise to the insurer's duty "to reimburse the insured for prevention and mitigation expenses." *Southern Cal. Edison Co. v. Harbor Ins. Co.,* 83 Cal. App. 3d 747, 757 (1978); *see also AIU*, 51 Cal. 3d at 832-33 & n.15 (rejecting argument that actions "prophylactic in nature" "cannot be the subject of insurance").

The Policy itself also requires Another Planet to prevent imminent loss, and expressly covers costs to do so. *See* 3-E.R.-458. Under those provisions, Another Planet is required to "[t]ake every reasonable step to protect the covered property from further loss or damage." 3-E.R.-559.

Had Another Planet not closed its properties, SARS-CoV-2 would have been present on and in the property and its airspace. By closing its venues, Another Planet avoided covered property loss and damage, as well as potential third-party claims. *See Globe Indem. Co. v. State*, 43 Cal. App. 3d 745, 748 (1974) (fire suppression costs incurred to prevent fire from spreading to others' property covered mitigation); *accord AIU*, 51 Cal. 3d at 833 (environmental response costs "incurred largely to prevent damage previously confined to the insured's property from spreading . . . are 'mitigative'"); *Watts Indus., Inc. v. Zurich Am. Ins. Co.*, 121 Cal. App. 4th 1029, 1041 (2004) (measures to keep lead from seeping out of landfill "at least partly remedial and mitigative, rather than entirely prophylactic, for they address harm which is already occurring, not just harm that might occur" (citing *AIU*, 51 Cal. 3d at 843)).

B. That the Government Mandated Mitigation Does Not Relieve Insurers of Their Duty to Pay for Mitigation Loss.

In the COVID-19 Pandemic, the need to mitigate damage grew to a societal level. SARS-CoV-2's threat to public health was so serious, and efforts to contain it so futile, that we could not depend on individual businesses to develop and implement

effective measures to prevent the virus from spreading. So state and local government officials and agencies issued shut-down orders, mandating the closure of all but "essential" businesses, and commanding all but "essential" workers to stay home. Businesses whose operations entailed large gatherings (as Another Planet's do) were among the first ordered to close. *See* 3-E.R.-401-03.

Insureds are entitled to reimbursement for mitigating covered losses even if they undertook the mitigation voluntarily or if the government ordered that action be taken. In *AIU*, this Court held that general liability insurers owed coverage for cleanup costs incurred by the government to prevent the spread of contaminants from the insured's property. 51 Cal. 3d at 830-33. That mitigation was compulsory, too. Although Another Planet's claim involves first-party coverage, the government orders nonetheless caused loss to prevent the spread of SARS-CoV-2.[52]

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[52] Though there are many differences between first-party and third-party coverages, in all cases, when an insured acts to prevent or reduce a covered loss, it is entitled to reimbursement for that action. *E.g.*, *Gowans v. Northwestern Pac. Indem. Co.*, 489 P.2d 947, 621-22 (Or. 1971) (insured entitled to reimbursement for reward paid to recover stolen jewelry under

C. Stopping the Spread Was Not Limited to Protecting People, as Opposed to Property.

Insurers, including Vigilant, have argued that the government issued closure orders to protect people, not property. *See* Vigilant Br., 2022 WL 3347003, at *22-*25 (Aug. 5, 2022). This is a distinction without a difference. Properties needed to be closed because allowing people inside could inject the airspace with SARS-CoV-2 (to wit, "direct physical damage") and thereby harm people. Moreover, this Court considered and rejected a similar argument in *AIU*. 51 Cal. 3d at 842-43 ("It is immaterial whether motivations other than protection of property—for example, protection of the health of persons living near hazardous waste sites—also contribute to the agencies' pursuit of statutory relief."). Indeed, at least one order to which Another Planet's venues were subject, that of Nevada Governor Steve

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first-party coverage); *Metalmasters, Inc. v. Liberty Mut. Ins. Co.*, 461 N.W.2d 496, 501 (Minn. Ct. App. 1990) (when policy limited business interruption coverage to a defined period, "[i]f the mitigation efforts take longer than the interruption period, then the business interruption clause cannot limit coverage to that period, since the activity is in the interest of the insurer"); *see also Papa v. Miss. Farm Bureau Cas. Ins. Co.*, 573 So. 2d 761 (Miss. 1990) (man who jumped from bridge to avoid being hit by a car entitled to coverage for resulting injuries under policy covering "bodily injury . . . through being struck by an automobile").

Sisolak, was issued explicitly because of "the ability of the novel coronavirus that causes COVID-19 to survive on surfaces for indeterminate periods of time, [which] renders some property unusable" and contributes to "damage . . . and property loss." *See* 3-E.R.-403.

In sum, infected people could not be identified because of asymptomatic transmission and insufficient testing. Allowing them to enter premises would ensure the continuing presence of SARS-CoV-2, creating a never-ending need to clean surfaces, filter or ventilate the air, and keep people out in order to protect human health, as well as to comply with the Policy and common law mitigation duties. Another Planet shut down its venues to stop SARS-CoV-2's spread to other insured property and to protect property that had already been damaged from further damage. Even though shutting down was compulsory, Another Planet is still entitled to the losses suffered in mitigating further harm to people and property.

CONCLUSION

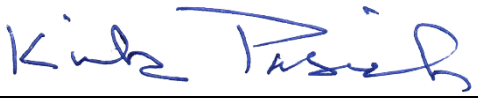
Another Planet and thousands of other California businesses reasonably expected that the "all-risk" insurance that they purchased would protect them in the event of a pandemic.

SARS-CoV-2 causes "direct physical damage" when it is present in and on property. It also causes "direct physical loss" when it renders property unsafe to use. Because of SARS-CoV-2's unique properties, widespread mitigation was necessary to protect people's lives—and that meant protecting property from further damage and loss.

This Court now can return California insurance law to its bedrock principles. Another Planet urges it to answer the certified question in the affirmative.

DATED: April 3, 2023

PASICH LLP

By: 

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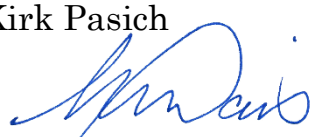
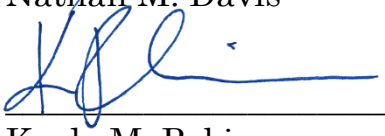


Nathan M. Davis



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CERTIFICATE OF COMPLIANCE WITH RULE 8.520

I, the undersigned, Nathan M. Davis, declare that:

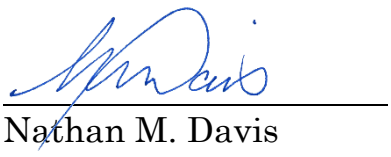
1. I am an attorney licensed to practice in all courts of the state of California and a partner at the law firm of Pasich LLP, attorneys of record for petitioner Another Planet Entertainment, LLC.

2. This certificate of compliance is submitted in accordance with rule 8.520 of the California Rules of Court.

3. This brief was produced with a computer. It is proportionately spaced in 13-point Century Schoolbook typeface. The brief contains 13,988 words, including footnotes.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at Los Angeles, California, on April 3, 2023.



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