S277893

In the

Supreme Court

of the

State of California

ANOTHER PLANET ENTERTAINMENT, LLC,

Petitioner,

v.

VIGILANT INSURANCE COMPANY,

Respondent.

FOLLOWING CERTIFICATION ORDER BY THE
U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, CASE NO. 21-16093

ANSWER BRIEF ON THE MERITS

SUSAN KOEHLER SULLIVAN (156418)
DOUGLAS J. COLLODEL (112797)
GRETCHEN S. CARNER (132877)
BRETT C. SAFFORD (292048)
CLYDE & CO US LLP
355 South Grand Avenue, Suite 1400
Los Angeles, California 90071
Telephone: (213) 358-7600
Facsimile: (213) 385-7650
susan.sullivan@clydeco.us
douglas.collodel@clydeco.us
gretchen.carner@clydeco.us
brett.safford@clydeco.us

JONATHAN D. HACKER (*pro hac vice*)
JENYA GODINA (*pro hac vice*)
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006
Telephone: (202) 383-5300
Facsimile: (202) 383-5414
jhacker@omm.com
jgodina@omm.com

Attorneys for Respondent Vigilant Insurance Company

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ISSUE PRESENTED

The U.S. Court of Appeals for the Ninth Circuit requested that this Court answer the following question:

> 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).

INTRODUCTION

The certified question requires the Court to determine whether inert physical property suffers "direct physical loss or damage" when microscopic viral particles temporarily rest on the property before disintegrating or being wiped away.

The question all but answers itself. In California as elsewhere, insurance policies that cover "direct physical loss or damage" to property are triggered only when the property experiences a distinct, demonstrable, physical alteration. Applying materially identical standards, eleven federal circuits, eight state high courts, scores of state appellate courts, and hundreds of state and federal trial courts have correctly recognized that because viral particles resting on inert physical property do not cause any structural alteration to the property, the temporary presence of such particles does not qualify as "direct physical damage or loss" to the property as a matter of law.

For that reason, insurance policies that cover losses caused by direct physical damage or loss to property do not provide coverage for business losses resulting from the presence of COVID-19 particles on the property. Such policies, of course, have never been held to provide coverage for business losses resulting from the presence of cold or influenza viruses, despite the toll those common viruses take on employees and patrons—and hence business incomes—every winter. The COVID-19 virus causes greater harm *to humans* than do other common viruses, but like other viruses it does not cause any harm *to property*.

Petitioner Vigilant Insurance Company ("Vigilant") issued a commercial property insurance policy to Respondent Another Planet Entertainment ("AP"), covering premises AP uses to conduct its business as an event promoter and venue operator. The policy provides Business Income and Extra Expense coverage only where insured property suffered "direct physical loss or damage," which California courts have consistently construed—since long before the COVID-19 pandemic—as requiring tangible physical change to the property. That conclusion is dictated by the ordinary language of the provision, especially when read alongside the Policy's "period of restoration" clause. That clause makes clear that coverage for property loss or damage applies only when the property must be *replaced* or *repaired*, which by definition is not the case when the property *does not change at all*.

AP's property did not experience any lasting physical change of any kind, categorically foreclosing coverage for the

economic losses AP allegedly incurred during the COVID-19 pandemic. AP's allegations do not establish otherwise. At most, the articles cited in AP's complaint observe only that it can be difficult to keep enclosed premises fully and consistently clear of the COVID-19 virus because viral particles are so easily transmitted between humans and thus can be constantly re-introduced onto physical properties where humans interact. AP's own allegations thus make clear that the presence of viral particles is about *transmission among people*, not *physical damage to property*, as that legal concept has long been understood in California.

The same is true for AP's "physical loss" or "loss of use" theory, which asserts that coverage applies because the presence of viral particles makes an insured unable to fully use its property for certain purposes, even though the property does not suffer direct physical damage. That theory—which is not even encompassed by the Ninth Circuit's question—has also been rejected almost universally in federal and state appellate decisions. As those decisions hold, property does not suffer a "loss" when it is entirely undamaged and remains in the insured's possession. In the insurance context, the concept of "loss" has always overlapped with "damage," but it does the added work of ensuring coverage when property is misplaced or stolen, without suffering "damage." Some courts also have held that "loss" refers distinctly to *total destruction* of property: when a fire burns a house completely to the ground, the house is not merely "damaged," it is a total "loss." And other courts have suggested

that "loss" may encompass property that becomes completely uninhabitable and unusable for any purpose at all.

None of those distinct "loss" concepts applies here. The property remained in AP's possession; it was not completely destroyed; and it remained habitable and usable for various functions with appropriate social distancing and other safety and sanitary measures. The temporary presence of viral particles on inert property does not cause "direct physical loss" of or to the property by any recognized definition of that term.

To escape the plain language of its policy and overwhelming contrary judicial authority, AP takes the unusual tack of starting its argument by adverting to non-record facts and extrinsic evidence of (supposed) subjective intent, none of which is admissible or relevant to the plain meaning of the policy language before the Court. None of the policy terms is ambiguous in any way; indeed, the coverage terms have been the subject of authoritative judicial construction in California for many years, long before the first COVID-19 cases appeared within the State. Under that construction, the phrase "direct physical loss or damage" to property requires a tangible alteration of the property or its complete dispossession. That construction follows directly from the plain meaning of the words and the context in which they appear. Adopting a new and different construction now not only would contravene the plain policy language, it would also create chaos for the application of hundreds of thousands property insurance policies currently providing coverage in the State.

Applied here, the long-settled understanding of "direct physical damage or loss" precludes coverage for business losses resulting from the presence of viral particles, for the reasons summarized above and elaborated in this brief. The COVID-19 pandemic was extraordinary, but the contract interpretation required here is straightforward. This Court should answer the certified question in the negative and make clear that where an easily removable, self-dissipating substance—like microscopic viral particles—causes no structural change to inert physical structures it contacts, there is no "direct physical loss or damage" for property insurance purposes as a matter of law.

STATEMENT OF THE CASE

A. The Vigilant Policy

Vigilant issued a commercial property insurance policy to AP—an operator and promoter of concerts, events, and festivals at several theaters and other entertainment venues in California and Nevada—for the period from May 1, 2019 to May 1, 2020 (the "Policy"). 3-ER-435. The Policy includes two discrete coverage parts: first-party commercial property coverage for specified locations, and third-party commercial general liability coverage. 3-ER-438, 4-ER-679. The Property section of the Policy insures several of AP's premises in California and Nevada. 3-ER-442.

As relevant here, AP seeks coverage under the Business Income and Extra Expense, Dependent Business Premises, Extra Expense, and Building and Personal Property provisions (the "Business Income provisions"). AP also points to mitigation provisions that pertain to the insured's duty to mitigate in the

event of covered loss. As the policy language set forth below illustrates, each of the provisions on which AP relies requires "direct physical loss or damage to property" for coverage to attach.[1]

1. *Business Income Provisions*

The Business Income and Extra Expense provision covers losses from an "actual or potential impairment of operations" that is "caused by or result[s] from direct physical loss or damage … to property." 3-ER-485. The "direct physical loss or damage to property" in turn must be "caused by or result from a covered peril" and "occur at, or within 1,000 feet of, the premises, other than a dependent business premises." *Id*. A "covered peril" includes any "peril not otherwise excluded." 3-ER-456. A "dependent business premises" means a premises operated by others on which the insured depends for purposes such as to "deliver materials or services" or to "attract customers," among others. 3-ER-569. The definition of "property" includes "building," further defined as a "structure" or other physical components of a structure such as additions, alterations, and repairs. 3-ER-566, 583. "Property" also includes "personal property," defined in part as "all your business personal

[1] AP's First Amended Complaint also asserts coverage under the Policy's Civil Authority provision. Because that provision likewise requires "direct physical loss or damage" to property, *see* 3-ER-487-88, AP's claim of Civil Authority coverage falls alongside its claim of Business Income coverage. While Civil Authority coverage is independently foreclosed for the additional reasons set forth in Vigilant's Ninth Circuit brief, those considerations are beyond the scope of the certified question.

property." 3-ER-579. Both "building" and "personal property" exclude "land, water or air, either inside or outside of a structure." 3-ER-566, 579.

Under this provision, Vigilant agrees to pay for "business income loss" incurred "due to the actual impairment of [] operations," as well as "extra expense" incurred "due to the actual or potential impairment of [] operations." 3-ER-485. Both business income loss and extra expense are covered solely to the extent that they are incurred during the "period of restoration," meaning the period beginning "immediately after the time of direct physical loss or damage by a covered peril to property" and continuing until "operations are restored," including the time required to "repair or replace the property." 3-ER-485, 578.

The Dependent Business Premises provision, tracking the language set forth above, extends the Business Income coverage to losses caused by direct physical loss or damage sustained at a business on which AP relies. Specifically, the provision covers "business income loss" and "extra expense" incurred "due to the actual or potential impairment of [] operations" during the "period of restoration" that is "caused by or result[s] from direct physical loss or damage … to property" at a dependent business premises. 3-ER-488.

AP's First Amended Complaint also references the Policy's "Extra Expense" and "Building and Personal Property" provisions. The Extra Expense provision, similar to the Business Income and Extra Expense provision, covers "actual extra expense" incurred "due to the actual or potential impairment of []

operations during the period of restoration" that are "caused by or result from direct physical loss or damage by a covered peril to property." 3-ER-516. The "Building or Personal Property" provision states that Vigilant will "pay for direct physical loss or damage" to AP's "building or personal property." 3-ER-456.

2. *Mitigation Provisions*

AP also cites two portions of the Policy that pertain to the mitigation of covered losses. First, the "Loss Prevention Expenses" provision states that Vigilant will cover "reasonable and necessary costs" an insured incurs "to protect building" or "personal property" from "imminent direct physical loss or damage," but only if the insured notifies Vigilant of "any loss prevention action" within forty-eight hours and, "[t]o the extent possible," provides advance notice of any "intent to incur such cost." 3-ER-458. Finally, AP points to the Policy's delineation of the "Insured's Duties in The Event of Loss or Damage," which do not provide coverage in the first instance, but instead explain that—if covered loss or damage takes place—the insured must, among other obligations, "protect the covered property from further loss or damage." 3-ER-559.

B. AP's Claimed Losses

AP filed suit on October 23, 2020, asserting claims for breach of contract, declaratory relief, breach of the implied covenant of good faith and fair dealing, and fraud.

As alleged in AP's First Amended Complaint ("FAC"), beginning in March 2020, civil authorities throughout the United States began issuing "Closure Orders" in order to "curtail the

spread of SARS-CoV-2." 3-ER-401 ¶58. These orders generally required citizens to "stay home" or "shelter in place," imposed travel restrictions and quarantines, and required "the suspension of non-essential business operations," such that AP "and many other businesses" could no longer "use their insured locations and properties for their intended purpose." *Id.* Tracking the language of the Policy, the FAC alleges that "the Closure Orders substantially impaired the use and function" of unspecified insured "premises" as well as premises "upon which [AP] depends." 3-ER-407-08 ¶86. The FAC further alleges that AP's "compliance with the Closure Orders also were mitigation efforts," entitling AP to coverage for those expenses under the Policy's mitigation provisions. *Id.*

The FAC contains extensive allegations about the physical properties of the SARS-CoV-2 virus, its ubiquitous nature, and the means by which it is transmitted among humans, including via aerosolized droplets. 3-ER-397-401. The FAC pairs those allegations with conclusory assertions as to their legal import—namely, that "SARS-CoV-2 causes a distinct, demonstrable, physical alteration to property," such that "it constitutes 'direct physical loss or damage' to property as that phrase is used in the Policy." 3-ER-405 ¶73; *see* 3-ER-380-81 ¶5 ("The presence of SARS-CoV-2 physically alters the air in which it is found and the surfaces of property on which it lands."). The FAC alleges that "SARS-CoV-2 has been present at and in its properties, or would have been present but for its efforts to reduce, prevent, or otherwise mitigate its presence on its properties." 3-ER-405 ¶76;

see 3-ER-408 ¶87 ("SARS-CoV-2 particles attached to and damaged, or but for the Closure Orders would have attached to and damaged, Another Planet's insured premises, as well as the surrounding vicinity"); 3-ER-380-81 ¶5 (similar); 3-ER-406 ¶78 (asserting that "SARS-CoV-2 has been present at numerous dependent business premises"). The FAC does not, however, include any allegations that viral droplets caused any structural alterations to any AP property that they touched, or that the droplets' former presence on any such property remains detectable in any way.

The FAC also alleges that the presence of the COVID-19 virus diminished its ability to make full use of its property, and that as a result, AP suffered "substantial financial losses, including lost profits, lost commissions, and lost business opportunities." 3-ER-380-81 ¶5. These claimed losses were allegedly exacerbated "[g]iven the widespread nature of SARS-CoV-2 and COVID-19, its spread through community transfer, and the fact that concerts are one of the most dangerous sources of SARS-CoV-2." 3-ER-405 ¶77.

C. Procedural History

Vigilant moved to dismiss AP's original complaint, and the U.S. District Court for the Northern District of California granted the motion to dismiss with leave to amend. 4-ER-785. The district court reasoned that AP's allegations could not survive dismissal because, among other deficiencies, AP could not plead that anything "specific about [its] properties … caused them to shut down"; instead, its losses stemmed from the "generalized

danger of people spreading the virus to one another," which led to "generally applicable closure[] orders [that] prevented nearly all businesses from operating." 4-ER-785-86. The court granted AP leave to amend "in an abundance of caution" despite finding it "difficult to imagine" that AP could successfully state a claim for coverage. 4-ER-787.

In response, AP filed the FAC, making a second attempt to plead a viable claim. 3-ER-379-426. The FAC primarily recycled the allegations of the original complaint while appending superfluous new details regarding SARS-CoV-2's scientific properties, updated statistics as to the spread of COVID-19, and references to additional coverages under the Policy (all of which require "direct physical loss or damage" for coverage to attach). *Id.* Vigilant again moved to dismiss. 3-ER-356-78.

The district court granted Vigilant's motion to dismiss, this time without leave to amend. The court explained that the FAC, like the original complaint, failed to state a claim because it plausibly alleged only that "the closure orders—and not [the] virus's alleged presence at [AP's] facilities—caused it to shut down." 1-ER-3. AP's new reliance on other provisions of the Policy that still required "direct physical loss of damage" was unavailing for the same reasons. 1-ER-4. The court accordingly ordered the case dismissed with prejudice. *Id.*

AP appealed. After briefing and oral argument, the Ninth Circuit issued an order certifying to this Court the question set forth above, *supra* at 11. This Court granted the request.

LEGAL STANDARD

AP—as the insured—bears the burden of alleging and then proving facts sufficient to establish its entitlement to coverage. *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 16 (1995). The interpretation of insurance policies is a question of law. *Id.* at 18. The "ordinary rules of contractual interpretation apply," and the policy's terms must be given their "ordinary and popular sense." *Palmer v. Truck Ins. Exch.*, 21 Cal. 4th 1109, 1115 (1999) (quotation omitted). "[L]anguage in a contract must be interpreted as a whole, and in the circumstances of the case, and cannot be found to be ambiguous in the abstract …. Courts will not strain to create an ambiguity where none exists." *Waller*, 11 Cal. 4th at 18-19.

Only when "the standard rules of contract interpretation … fail[] to resolve" any ambiguity does the court "interpret the provision in favor of protecting the insured's reasonable expectations." *Yahoo Inc. v. Nat'l Union Fire Ins. Co.*, 14 Cal. 5th 58, 69 (2022). And only if that rule, too, fails to "resolve a claimed ambiguity" should courts "resort to the rule that ambiguities are to be resolved against the insurer." *Id.* (quoting *Boghos v. Certain Underwriters at Lloyd's of London*, 36 Cal. 4th 495, 501 (2005)). Thus, courts "may not ... rewrite a policy to bind the insurer to a risk that it did not contemplate and for which it has not been paid." *Safeco Ins. Co. v. Gilstrap*, 141 Cal. App. 3d 524, 533 (1983). If the policy language is "clear and explicit, it governs." *Palmer*, 21 Cal. 4th at 1115 (quotation omitted).

This case arises in the procedural context of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), "the federal judiciary's equivalent of a demurrer." *11601 Wilshire Assocs. v. Grebow*, 64 Cal. App. 4th 453, 457 (1998). While the standards are not identical, both require courts to assume the truth of facts alleged in the complaint to evaluate the legal sufficiency of the claims, while refusing to "assume the truth of contentions, deductions or conclusions of law." *Aubry v. Tri-City Hosp. Dist.*, 2 Cal. 4th 962, 966-67 (1992); *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007).[2]

ARGUMENT

I. "DIRECT PHYSICAL LOSS OR DAMAGE" REQUIRES A DISTINCT, DEMONSTRABLE ALTERATION TO PROPERTY

A. The Ordinary Meaning Of "Direct Physical Loss Or Damage" Entails A Tangible Physical Alteration To The Property

California courts have long recognized that "property insurance is insurance of *property*," not insurance for business income. *Simon Mktg., Inc. v. Gulf Ins. Co.*, 149 Cal. App. 4th 616, 622-23 (2007) (emphasis in original). "Given this premise, the threshold requirement for recovery under a contract of property insurance is that the insured property has sustained physical loss or damage." *Id.* The phrase "direct physical loss or damage" has served as the cornerstone of coverage in modern commercial

[2] For that reason, this Court has no need to take judicial notice of the immaterial facts AP proffers in its request for judicial notice, such as that "[a]ir is a physical substance made of gases and aerosolized particles," AP Req. for Jud. Not. at 4.

property policies for decades. *See generally* 10A Couch on Insurance § 148:1 (3d ed. 2022 update).

The familiar words in the phrase "direct physical loss or damage" "all have commonly understood meanings." *Inns-by-the-Sea v. Cal. Mut. Ins. Co*, 71 Cal. App. 5th 688, 699 (2021). "'Physical' is defined as 'having material existence: perceptible especially through the senses and subject to the laws of nature," and "'[d]irect' is defined as 'proceeding from one point to another in time or space without deviation or interruption,' 'stemming immediately from a source,' and 'characterized by close logical, causal, or consequential relationship.'" *Id.* at 699-700 (quoting Merriam-Webster's Online Dictionary (2021)). "'Damage' is defined as 'loss or harm resulting from injury to property," while "'[l]oss' is often used to refer to 'destruction' and 'ruin.'" *Id.* at 700, 705 n.18 (alterations omitted) (quoting Merriam-Webster's Online Dictionary (2021)). Furthermore, "the words 'direct physical' … modify both 'loss of' and 'damage to.'" *Ward Gen. Ins. Servs., Inc. v. Emps. Fire Ins. Co.*, 114 Cal. App. 4th 548, 554 (2003); *accord, e.g.*, *Apple Annie, LLC v. Oregon Mut. Ins. Co.*, 82 Cal. App. 5th 919, 929 (2022), *review denied* (Dec. 14, 2022).

Since long before the COVID-19 pandemic, California law has recognized that the ordinary meaning of the foregoing terms—particularly the modifier that the loss or damage "be 'physical'"— requires "an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to

make it [satisfactory]." *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779 (2010) (quotation omitted). In other words, for loss or damage to property to qualify as "direct" and "physical", there must be a "distinct, demonstrable, physical alteration" of the property. *Id.* (quoting 10A Couch on Insurance § 148:46 (3d ed. 2010)). This long-settled understanding accords with the standard applied in other jurisdictions as well. *See*, *e.g.*, *Conn. Dermatology Grp., PC v. Twin City Fire Ins. Co.*, 288 A.3d 187, 195-97 & n.12 (Conn. 2023) (collecting dictionary definitions and agreeing with "overwhelming majority of federal and state courts" in reaching same conclusion as to plain meaning of "direct physical loss or damage" and other "similar" constructions).

B. The Policy's "Period Of Restoration" Provision Reinforces The Requirement Of A Tangible Alteration To Property

The structure of the Policy reinforces the plain meaning of "direct physical loss or damage" as requiring a distinct, demonstrable alteration of the property's physical state. Like most property insurance policies, AP's Policy limits coverage for business income and extra expense to losses incurred during the "period of restoration," which is defined as the time required to "repair or replace the property." 3-ER-578. As countless courts have recognized, that language confirms that "for a harm to constitute a physical loss of or damage to the property, it must be one that requires the property to be repaired, rebuilt, or replaced—that is, it must alter the property's tangible characteristics." *Colectivo Coffee Roasters, Inc. v. Soc'y Ins.*, 974

N.W.2d 442, 447 (Wis. 2022); *see*, *e.g.*, *United Talent Agency v. Vigilant Ins. Co. ("UTA")*, 77 Cal. App. 5th 821, 833-34 (2022) (collecting cases).

Indeed, to "interpret the Policy to provide coverage absent physical damage would render the 'period of restoration' clause superfluous," because the need for restoration is by definition triggered only by physical damage requiring repair. *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885, 892 (9th Cir. 2021). To make sense of the period of restoration provision, then, coverage for "direct physical loss or damage" to property must itself apply only to the kind of loss or damage that requires replacement or repair to correct, i.e., destruction, structural alteration, or dispossession. *See UTA*, 77 Cal. App. 5th at 833-34.

C. This Straightforward Interpretation Of The Policy Accounts For The Distinct Meanings Of "Loss" And "Damage"

According to AP, the policy language cannot require a physical alteration to property, because the Policy covers *both* "damage" and "loss," and requiring a physical alteration would make the term "loss" superfluous. AP Br. 69. Not so.

As many courts have recognized, "loss" differs from "damage" in that "the common usage of the term 'damage' is a lesser harm than 'loss.'" *Cherokee Nation v. Lexington Ins. Co.*, 521 P.3d 1261, 1267 (Okla. 2022). When a house is completely leveled by fire or earthquake, for example, one normally does not say the house was "damaged"—it is more precise to say it was a complete "loss." "Direct physical loss" also applies when a policyholder is "deprived of property without any damage to it,

say a portable grill or a delivery truck stolen without a scratch." *Santo's Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398, 404 (6th Cir. 2021).

In other words, a policyholder may suffer *either* "direct physical damage" to property (i.e., some tangible physical alteration) *or* "direct physical loss" to property (i.e., destruction or dispossession). Beyond those related but discrete meanings, the mere fact of "some overlap" between the terms "damage" and "loss" "does not make an insurance policy ambiguous." *Santo's*, 15 F.4th at 405 (quotation omitted).

II. THE TEMPORARY PRESENCE OF VIRAL DROPLETS DOES NOT ESTABLISH THE PHYSICAL ALTERATION OF PROPERTY REQUIRED FOR "DIRECT PHYSICAL LOSS OR DAMAGE"

AP's principal theory of coverage—and the only theory considered by the Ninth Circuit when it certified its question, *see infra* at 42—is that the temporary presence of COVID-19 viral particles on surfaces and in the air within insured property causes "direct physical loss or damage" because the particles physically alter the property they touch. According to AP, when viral particles rest on an inert object, the object is transformed into a "fomite" until the virus is removed. AP Br. 41-56. That coverage theory of direct physical loss or damage has been rejected as a matter of law by every federal circuit court to consider it[3] and by all but one state appellate decision outside

[3] *See Legal Sea Foods, LLC v. Strathmore Ins. Co.*, 36 F.4th 29, 35-36 (1st Cir. 2022); *Farmington Vill. Dental Assocs., LLC v. Cincinnati Ins. Co.*, 2022 WL 2062280, *1 (2d Cir. 2022); *Ferrer & Poirot, GP v. Cincinnati Ins. Co.*, 36 F.4th 656, 660 (5th Cir.

California.[4] As that "overwhelming majority" of courts has concluded, the mere presence of COVID-19 particles on property

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2022); *Brown Jug, Inc. v. Cincinnati Ins. Co.*, 27 F.4th 398, 404 (6th Cir. 2022); *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327, 335 (7th Cir. 2021); *Sagome, Inc. v. Cincinnati Ins. Co.*, 56 F.4th 931 (10th Cir. 2023); *Dukes Clothing, LLC v. Cincinnati Ins. Co.*, 35 F.4th 1322, 1328 (11th Cir. 2022).

[4] Eight state high court decisions have held that the temporary presence of viral particles on property does not qualify as direct physical loss or damage because there is no lasting alteration to the property. *See Schleicher & Stebbins Hotels, LLC v. Starr Surplus Lines Ins. Co.*, -- A.3d --, 2023 WL 3357980, at *1 (N.H. 2023); *Cajun Conti LLC v. Certain Underwriters at Lloyd's, London*, -- So.3d --, 2023 WL 2549132, at *5 (La. 2023); *Conn. Dermatology*, 288 A.3d at 199; *Tapestry, Inc. v. Factory Mut. Ins. Co.*, 286 A.3d 1044, 1060-61 (Md. 2022); *Neuro-Commc'ns Servs., Inc. v. Cincinnati Ins. Co.*, -- N.E.3d --, 2022 WL 17573883, at *6 (Ohio 2022); *Sullivan Mgmt., LLC v. Fireman's Fund Ins. Co.*, 879 S.E.2d 742, 745 (S.C. 2022); *Colectivo*, 974 N.W.2d at 447; *Verveine Corp. v. Strathmore Ins. Co.*, 184 N.E.3d 1266, 1276 (Mass. 2022). Many intermediate appellate decisions in other states agree—too many to cite exhaustively. *See, e.g.*, *Sweet Berry Café, Inc. v. Soc'y Ins., Inc.*, 193 N.E.3d 962, 974 (Ill. App. Ct. 2022); *AC Ocean Walk, LLC v. Am. Guarantee & Liab. Ins. Co.*, 2022 WL 2254864, at *13 (N.J. Super. Ct. App. Div. 2022); *UTA*, 77 Cal. App. 5th at 838; *see also* Univ. of Pa. Carey Law School COVID Coverage Litigation Tracker, https://perma.cc/VT7J-UBSL (collecting all appellate rulings in COVID-19 coverage cases).

Only three appellate decisions in the entire country have reached a contrary conclusion: the sharply divided 3-2 decision of the Vermont Supreme Court in *Huntington Ingalls Industries, Inc. v. Ace American Insurance Co.*, 287 A.3d 515 (Vt. 2022), and the two decisions issued by the same panel in *Marina Pacific Hotel & Suites, LLC v. Fireman's Fund Insurance Co.*, 81 Cal. App. 5th 96, 109 (2022) and *Shusha, Inc. v. Century-National Insurance Co.*, 87 Cal. App. 5th 250 (2022), *review granted*, S278614 (Apr. 19, 2023).

does not cause physical loss or damage "because it does not alter the appearance, shape, color, structure, or other material dimension of the property." *Colectivo*, 974 N.W.2d at 447 (quotation omitted).

A. Temporary "Contamination" By A Readily Removable Substance Like COVID-19 Viral Particles Does Not Constitute "Direct Physical Loss Or Damage" As A Matter Of Law

Where easily removable, self-dissipating substances like viral particles cause no structural changes to the objects they contact, the presence of such a substance does not cause "direct physical loss or damage" for property insurance purposes. Businesses have always suffered economic losses during cold and flu season when cold and flu viruses pervade their properties and make employees and customers ill, but nobody has ever claimed property damage coverage for such losses. The SARS-CoV-2 virus has a more severe effect on *people* than do these common viruses, but no different effect on *property*.

1. *AP Does Not And Cannot Allege That Viral Particles Cause Any Physical Changes To Property*

AP rests much of its argument on its allegation that the COVID-19 virus itself has "physical" existence and that it can be present on surfaces inside structures. AP Br. 42-43. The point is true but irrelevant. What AP must establish, but cannot, is that those physical viral particles cause physical alterations to the property they touch. Because the mere temporary presence of an easily removed foreign substance—a water spill, a wafting odor, or microscopic aerosolized droplets—does not distinctly and demonstrably alter the property itself, it does not qualify as

direct physical damage or loss under the plain policy language implemented in California's longstanding *MRI Healthcare* standard. *See supra* Part I.

AP invokes semantic wordplay to conjure the impression that there *is* a physical change within the meaning of *MRI Healthcare*. As AP observes, when viral particles contaminate an inert surface—say, a door handle, a sink, or a countertop—the surface may become a vector of transmission known as a "fomite." AP Br. 46-47. But when an object becomes a "fomite," the object itself has not physically changed in any way. The word "fomite" is merely a label used to describe an object where viral particles rest and can be transferred to other humans who touch the object. *See Fomite*, Merriam-Webster's Online Dictionary (2023) ("fomite: an object (such as a dish, doorknob, or article of clothing) that may be contaminated with infectious agents (such as bacteria or viruses) and serve in their transmission"), https://perma.cc/F5QJ-5UFE; *Fomite*, Dictionary.com (2023) (defining "fomites" as "surfaces, as clothing or door handles, that can become contaminated with pathogens when touched by the carrier of an infection, and can then transmit the pathogens to those who next touch the surfaces"), https://perma.cc/T2E4-E3LJ.

As one dictionary reference observes, "Doorknobs are often cited as the classic fomites, although there's nothing unusual about spreading disease via such fomites as toys, towels, elevator buttons, light switches, and remote controls." *Id.* A doorknob that becomes a fomite, however, is no more physically altered than a doorknob that becomes wet—the former has viral particles

on it, the latter has water particles on it. In either case, once the viral or water particles evaporate or are wiped away, the doorknob remains exactly the same doorknob it was before. As the New Hampshire Supreme Court recently held, "the mere adherence of molecules to surfaces does not alter the property in a distinct and demonstrable manner," because "[p]roperty that has been changed in a distinct and demonstrable way will not be changed back simply by the passage of time." *Schleicher*, 2023 WL 3357980, at *7.

The scientific articles set forth in the FAC and cited in AP's brief confirm as much: they address only the prevalence and transmissibility of the virus. AP Br. 43-47. None suggests that viral particles cause the kind of tangible change to inert property that could be categorized as a "distinct, demonstrable, physical alteration" of that property. *MRI Healthcare*, 187 Cal. App. 4th at 779 (quotation omitted). AP proffers no articles or allegations showing, for example, that after viral particles present on a physical object dissipate or are wiped away, the object differs distinctly and demonstrably from its state prior to the virus's presence, or even that the former presence of the virus remains subsequently detectable on the object. At most, AP's scientific articles explain how property can "become a vector for transmission of a virus that poses a risk to human health," but that indisputable fact is irrelevant "because the policies insure property, not people." *Schleicher*, 2023 WL 3357980, at *7.

Countless other courts have made the same point: an "allegation that Coronavirus particles 'altered' objects like

doorknobs … into 'vectors of disease' by landing on, adhering to, and being subject to becoming dislodged from them does not satisfy the requirement of 'physical loss or damage'," because it is impossible to establish that the property was "structurally altered by its contact with Coronavirus particles." *Tapestry*, 286 A.3d at 1060; *see*, *e.g.*, *Brown Jug*, 27 F.4th at 401 (COVID-19 viral particles do not "alter the appearance, shape, color, structure, or other material dimension of the property" (quotation omitted)); *Verveine*, 184 N.E.3d at 1276 ("Evanescent presence of a harmful airborne substance that will quickly dissipate on its own, or surface-level contamination that can be removed by simple cleaning, does not physically alter or affect property."). The Second District Court of Appeal put the point succinctly: "While the impact of the virus on the world ... can hardly be overstated, its impact on physical property is inconsequential: deadly or not, it may be wiped off surfaces using ordinary cleaning materials, and it disintegrates on its own in a matter of days." *UTA*, 77 Cal. App. 5th at 835 (quotation omitted). Because the virus "injures people, not property," property insurance policies have no application to business losses associated with those human injuries. *Santo's*, 15 F.4th at 403.

2. *The Lack Of Any Repair Or Replacement Of Property Due To COVID-19 Particles Confirms The Absence Of Any Physical Change To Property*

The fact that COVID-19 viral particles do not cause the kind of the structural alteration contemplated by "direct physical loss or damage" is confirmed by the absence of any allegation that AP was required to repair or replace the property where viral

particles were present. As many courts have held, the mere presence of virus does not qualify as physical damage because it "does not necessitate structural repairs or remediation; it can be removed from a surface with a disinfectant." *Colectivo*, 974 N.W.2d at 448 (quotation omitted); *see UTA*, 77 Cal. App. 5th at 839 (collecting cases).

Cleaning property to remove viral particles from surfaces does not constitute a "repair" of broken property any more than does mopping up spilled water or brushing off a dusty tabletop. As the Louisiana Supreme Court recently observed, the ordinary meaning of the term "repair," considering its context in reference to "tangible" property and alongside terms such as "replace," is "to restore by replacing a part or putting together *what is torn or broken*." *Cajun Conti*, 2023 WL 2549132, at *4 (emphasis added) (quoting Merriam-Webster's Online Dictionary (2022)). Under that ordinary meaning, a "layperson would not say that cleaning or sterilizing tables, plates or silverware is a 'repair.'" *Id.* at *3. The same is true for cleaning or sterilizing AP's insured properties—cleaning is just cleaning, not the correction of a structural change to the property.

Nor does an insured "repair" property by installing barriers or reconfiguring spaces to reduce human interaction and viral transmissions. Obviously, *moving* undamaged property is not equivalent to *fixing* damaged property. "[J]ust as the properties were not physically altered in any way by the COVID-19 pandemic, the plaintiffs' activities designed to prevent the transmission of the coronavirus on the properties were not

'repairs' in any ordinary sense of the word." *Conn. Dermatology*, 288 A.3d at 201; *see*, *e.g.*, *Brown Jug*, 27 F.4th at 404 ("[R]emediation measures, such as cleaning and reconfiguring spaces[] to reduce the threat of COVID-19 … are precisely the sorts of losses we have previously determined are not tangible, physical losses, but economic losses." (quotation omitted)). Such efforts again only underscore the point that the virus harms people, not property.

AP itself tacitly confirms that sanitation measures do not constitute repairs of broken property. According to AP, such measures *do not work* to eliminate the virus's threat: "[E]ven such measures, including frequent cleanings, cannot be assured to eliminate or exclude SARS-CoV-2 from a premises" (AP Br. 48), because "disinfecting property works only until the next infected person … enters the room and causes the space to be infiltrated anew with SARS-CoV-2" (*id.* at 76-77). AP asserts that it was only the "mobilization of scientists," greater "knowledge," and the "speedy development of safe and effective vaccines" that "have allowed society to reengage in person-to-person interactions and commerce." AP Br. 56. None of those measures has anything to do with making repairs to correct a structural change to property.

AP's own argument, then, confirms that there *is no* structural change subject to "repair." And because there is no structural change to the insured property, there is no direct

physical loss or damage to the property, and no property insurance coverage.

3. *The COVID-19 Virus's Presence In Air Does Not Provide A Separate Basis For Coverage*

AP also relies heavily on its allegation that the COVID-19 virus purportedly "changes the physical composition of the air," emphasizing that "[a]irspaces are property and covered by insurance policies" and that "household cleaners cannot remove SARS-CoV-2 from the air." AP Br. 44, 52-53. Its reliance on alleged harm to the "air" is misplaced for two reasons.

First, AP's Policy *does not cover* damage to "air" inside a covered structure. The Policy expressly defines the covered "[p]roperty" to include "building" and "personal property," (alongside other categories irrelevant here), 3-ER-583, and then specifies that the term "[b]uilding" "does not mean[] land, water *or air*, either inside or outside of a structure," 3-ER-566 (emphasis added). AP inexplicably ignores this policy language, which makes its air-related arguments categorically irrelevant to this case.

Second, and in any event, AP's arguments lack merit on their own terms. Just as the COVID-19 viral particles cause no lasting changes to inert property, they likewise cause no lasting changes to the air inside a building. Regular air circulation removes aerosolized particles just like regular surface cleaning. The fact that, as with any cold or flu virus, *new* particles may be *reintroduced* by human interactions, as AP alleges, does not show that the air itself has been permanently altered; it instead

reconfirms that the COVID-19 virus harms people, not property. *See Tapestry*, 286 A.3d at 1060.

As the Supreme Court of Maryland explained, an insured cannot establish direct physical loss or damage to insured property merely by pointing to "the entry of Coronavirus particles into the air, which particles then travel among and mix with the many other kinds of particles already traveling in the same air until they are further dispersed or ultimately deposited onto a surface." *Id.* To be sure, viral particles may "become dislodged and reenter[] circulation in the air, thus posing a health risk to humans," but such effects "do[]not constitute damage to property in the absence of a physical or structural alteration of the property." *Id.* That analysis is unassailable, and it precludes coverage here.

B. AP's Counterarguments Are Unavailing

AP raises three further arguments in defense of its position that viral particles actually cause physical alterations to the objects they temporarily rest upon. None has merit.

1. *AP's Argument About The Efficacy Of Cleaning Rests On A False Legal Premise*

AP contends that even if COVID-19 particles cause no structural alterations to property they touch because they disintegrate or are easily removed, the particles at least cause alterations *while they exist*, because their very presence "modifies" the property. AP Br. 50. But by "modifies," AP means only the pointlessly truistic fact that an object *with* particles on it can be said to differ from an object *without* particles on it, in the same way that a clean window differs from a dirty window. That

kind of "modification" is not the kind of *structural* alteration required to constitute direct physical damage under the law of California and other jurisdictions.

As discussed above, courts have consistently recognized that property suffers direct physical damage only when it undergoes an alteration that can be corrected only by a *repair*, not merely by the brief passage of time or the swipe of a cloth. If AP were right, then property that becomes wet, dusty, or dirty always suffers direct physical loss or damage until it is cleaned, which would work a radical and unprecedented expansion in the scope of property insurance coverage.

For the same reasons, AP does not advance its cause by asserting that the efficacy of cleaning was not understood at earlier stages of the pandemic and that "household cleaners are not equally effective across all surfaces or materials." AP Br. 50-51. Those assertions have no bearing on this case. To establish coverage, AP must allege and prove facts showing that viral particles cause the kind of structural alterations to property that can be corrected only by repair or replacement of the property. AP alleges no such facts. It does not contend, for example, that COVID-19 particles have some special penetrating or adhesive properties that make them unique among all viruses in their power to physically alter inert property they rest upon. The articles AP cites offer no such claims—they state only that COVID-19 particles are hard to eliminate because they are frequently *reintroduced* by human interactions. As already shown, those articles merely confirm that the COVID-19 virus

presents a problem of transmission among people, not damage to property. *See supra* at 31.

2. *AP Cites Inapposite Cases Involving Commercial General Liability Insurance*

In support of the proposition that "contamination constitutes physical damage" (AP Br. 49), AP cites two cases involving commercial general liability ("CGL") policies: *AIU Insurance Co. v. Superior Court*, 51 Cal. 3d 807 (1990), which addressed coverage for liability arising from invasive environmental contamination, *id.* at 813-14, and *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.*, 45 Cal. App. 4th 1 (1996), which addressed coverage for liability arising from asbestos damage, *id.* at 37. As courts addressing COVID-19 coverage arguments have repeatedly explained, *Armstrong* and *AIU* have no relevance to first-party coverage for alleged property damage.

As a general matter, "cases involving CGL coverage are of limited benefit in determining the scope of property insurance coverage" because the "cause of loss in the context of property insurance is wholly different from that in a liability policy, and a liability insurer agrees to cover the insured for a broader spectrum of risks than in property insurance." *UTA*, 77 Cal. App. 5th at 837 (quotation omitted). Indeed, in stark contrast to commercial property policies, the *AIU* and *Armstrong* policies both *expressly included* the third party's "loss of use" of its property as a component of covered "property damage." *AIU*, 51 Cal. 3d at 815 n.3; *Armstrong*, 45 Cal. App. 4th at 88. These decisions do not address, let alone provide guidance concerning,

the meaning of "direct physical loss or damage" under the first-party property Policy here, which does *not* define "damage" to include "loss of use" alone. *See Inns by the Sea*, 71 Cal. App. 5th at 701 n.16 (explaining that "*Armstrong* is not a persuasive precedent" in this context because "it dealt with insurance coverage under a third party commercial general liability (CGL) policy with different policy language and posing distinct coverage issues").

The decisions are further distinguishable because the environmental and asbestos contaminants in those cases permeated the property itself and "required specialized remediation" or "specific remediation or containment to render them harmless." *UTA*, 77 Cal. App. 5th at 838. By contrast, viral particles rest on the surface of inert property and either disintegrate or are easily removed. AP's reliance on *AIU* and *Armstrong* is unavailing.

3. *The Flawed Outlier Decisions In* Huntington Ingalls *and* Marina Pacific *Offer No Basis To Depart From The Majority View*

In the face of literally hundreds of federal and state appellate and trial court decisions rejecting coverage for COVID-19-related business losses, AP relies heavily on just two outlier decisions finding potential coverage in this context: the Vermont Supreme Court's closely divided decision in *Huntington Ingalls* and the Second District Court of Appeal's decision in *Marina*

Pacific. They are outliers for a reason—their reasoning is flawed and this Court should not follow it.

The decision in *Huntington Ingalls* was expressly driven by what the court described as Vermont's "extremely liberal pleading standards." 287 A.3d at 537. Given those standards, the court held that a "bare bones" allegation that the virus "adheres" to property sufficed to plead a distinct, demonstrable, alteration to property. *Id.* at 534-35. But as the dissent correctly responded, an allegation that a substance "adheres" to property is not equivalent to an allegation that the substance demonstrably altered the property, when the substance at issue is as evanescent as viral droplets: "No matter what verb insured uses, whether 'adheres,' 'attaches,' or even 'on,' a fomite does not physically change property." *Id.* at 540 (Carroll, J., dissenting). For example, the dissent observed, dust particles "adhere" or "attach" to surfaces, but "a reasonable person can understand that if he or she wipes away dust from a coffee table, the table is not somehow 'repaired' in the process." *Id.* The same is true for viral particles—wiping them off a doorknob does not "repair" the doorknob in any ordinary sense of the term. "As a matter of law," then, "human-generated droplets containing SARS-CoV-2 cannot cause 'direct physical loss or damage to property.'" *Id.* at 537.

The Second District Court of Appeal decision in *Marina Pacific* suffers from the same defects.[5] The insured there

[5] The same defects also pervade *Shusha*, which was issued by the same panel that decided *Marina Pacific* and adopted the reasoning of the earlier decision (and which is now on review in

likewise alleged only that viral particles attach to surfaces, but it used science-y words to say it: the particles "bond[] to surfaces through physicochemical reactions involving cells and surface proteins, which transform the physical condition of the property." 81 Cal. App. 4th at 108. The fancy language does not mask the reality: the property's physical condition can be described as temporarily "transformed" only in the legally meaningless sense that particles are now attached to it. The long-settled legal standard for direct physical damage requires more, i.e., an allegation that the property is so infiltrated by the particles as to constitute a structural change that can be corrected only by a "repair" to the property.

For these reasons, neither *Huntington Ingalls* nor *Marina Pacific* affords a sound basis to depart from the near-perfect consensus of appellate decisions holding that the temporary presence of COVID-19 particles does not cause any structural alteration to property and thus does not trigger coverage for "direct physical loss or damage" to property.

III. AP'S DISTINCT "DIRECT PHYSICAL LOSS" THEORY LACKS MERIT

As an alternative theory of coverage, AP tries to draw a stark distinction under California law between "direct physical *damage*" to property and "direct physical *loss*." According to AP, while "direct physical damage" may require a structural alteration of property, a "direct physical loss" occurs whenever

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this Court). *See Shusha*, 87 Cal. App. 5th at 265 ("We see no reason to deviate from our decision in *Marina Pacific* . . . .").

the insured is deprived of the ability to *use* its property fully, even though the property itself is entirely undamaged.

The Ninth Circuit's opinion certifying a question to this Court did not contemplate this coverage theory, which the Ninth Circuit already rejected in *Mudpie, Inc. v. Travelers Casualty Insurance Co. of America*. As *Mudpie* explained, coverage for mere "loss of use" of undamaged property is squarely contrary to *MRI Healthcare*'s holding that the "ordinary and popular" meaning of the phrase "direct physical loss of or damage to" property requires a "distinct, demonstrable, physical alteration of the property." 15 F.4th at 892 (quoting *MRI Healthcare*, 187 Cal. App. 4th at 779). As *MRI Healthcare* emphasized, the "ordinary meaning" of the term "physical" "exclude[s] alleged losses that are intangible or incorporeal," which thereby precludes coverage when "the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property." *Id.* at 891 (quotation omitted).

California appellate courts have overwhelmingly agreed that under *MRI Healthcare*, limitations on the use of undamaged property that remains in the insured's possession do not qualify as a "*direct physical* loss." *See Starlight Cinemas, Inc. v. Mass. Bay Ins. Co.*, 91 Cal. App. 5th 24, 38 (2023); *Tarrar Enters., Inc. v. Associated Indem. Corp.*, 83 Cal. App. 5th 685, 688 (2022); *Apple Annie*, 82 Cal. App. 5th at 934-35; *UTA*, 77 Cal. App. 5th at 826, 834; *Musso & Frank Grill Co. v. Mitsui*, 77 Cal. App 5th 753, 758-60 (2022); *Inns by the Sea*, 71 Cal. App. 5th at 708; *see also John's Grill, Inc. v. Hartford Fin. Servs. Grp., Inc.*, 86 Cal. App.

5th 1195, 1201 (2022), *review granted*, S278481 (Mar. 29, 2023) (describing consensus).[6] As these and other courts recognize, economically detrimental limitations on the use of property might be described as a "*constructive* loss" of property, but the policy language only covers "direct *physical* loss"—allowing coverage based on constructive loss of property would render "superfluous" the "modifier 'physical' before 'loss.'" *Cajun Conti*, 2023 WL 2549132, at *3. It is accordingly "unreasonable to read 'direct physical loss of ... property' in a property insurance policy to include constructive loss of intended use of property." *Hill & Stout, PLLC v. Mut. of Enumclaw Ins. Co.*, 515 P.3d 525, 528 (Wash. 2022). In short: "A loss of use simply is not the same as a physical loss." *Santo's*, 15 F.4th at 402.

For these reasons, the "constructive loss" or "loss of use" coverage theory has been rejected even more frequently than the "evanescent viral particles alter property structures" (i.e., "physical presence") theory. The eight state high court decisions cited above reject both theories, *see supra* note 4, and four more have rejected the loss-of-use theory alone.[7] Likewise, the seven

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[6] The panel that decided both *Marina Pacific* and *Shusha* declined to reach the issue in both cases, *see Marina Pacific*, 81 Cal. App. 5th at 108 (declining to address question); *Shusha*, 87 Cal. App. 5th at 264 & n.8 (same), but two members of the same panel later joined a decision endorsing the "wall of precedent" squarely rejecting the "loss of use" theory of coverage. *Starlight Cinemas*, 91 Cal. App. 5th at 38 (quotation omitted).

[7] *See Rose's 1, LLC v. Erie Ins. Exch.*, 290 A.3d 52, 64 (D.C. 2023); *Cherokee Nation*, 521 P.3d at 1265; *Hill & Stout*, 515 P.3d at 527; *Wakonda Club v. Selective Ins. Co. of Am.*, 973 N.W.2d 545, 547 (Iowa 2022).

federal circuit decisions cited above reject both theories, *see supra* note 3, and four more have rejected the loss-of-use theory alone.[8] Not *one* state high court or federal circuit court has applied a loss-of-use theory to justify coverage in the COVID-19 context.[9]

In urging this Court to—again—break from the nationwide consensus, AP proposes a narrow version of the loss-of-use theory, based on dicta in the *Huntington Ingalls* decision, which would treat only a loss of use caused by a *health or safety hazard* to be a covered "physical loss." AP invokes *Huntington Ingalls*' concession that "inability to use property alone does not establish

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[8] *See Wilson v. USI Ins. Serv. LLC*, 57 F.4th 131, 138 (3d Cir. 2023); *Uncork & Create LLC v. Cincinnati Ins. Co.*, 27 F.4th 926, 928 (4th Cir. 2022); *Mudpie*, 15 F.4th at 892; *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141, 1144 (8th Cir. 2021).

[9] State intermediate appellate courts are also nearly unanimous in holding that reduced ability to use property for certain purposes does not qualify as direct physical loss or damage to that property. *See, e.g.*, *Mac Prop. Grp. LLC & The Cake Boutique LLC v. Selective Fire & Cas. Ins. Co.*, 278 A.3d 272, 295 (N.J. Super. Ct. App. Div. 2022); *N. State Deli, LLC v. Cincinnati Ins. Co.*, 875 S.E.2d 590, 593 (N.C. Ct. App. 2022); *Ind. Repertory Theatre v. Cincinnati Cas. Co.*, 180 N.E.3d 403, 411 (Ind. Ct. App. 2022); *Musso & Frank*, 77 Cal. App. 5th at 760.

Only two appellate decisions in the country have reached a contrary result and remain standing: *Coast Restaurant Group, Inc. v. AmGUARD Ins. Co.*, 90 Cal. App. 5th 332 (2023), *depublication request filed* (May 11, 2023), which addressed the question only in dicta before ruling in favor of the insurer on the basis of a policy exclusion, *see id.* at 340-46, and *Ungarean v. CNA*, 286 A.3d 353 (Pa. Super. Ct. 2022), which itself was contradicted by a different decision of the same court issued the same day, *see MacMiles, LLC v. Erie Ins. Exch.*, 286 A.3d 331 (Pa. Super. Ct. 2022).

a 'direct physical loss,'" and that there is accordingly "no coverage when, for instance, the government orders a cessation of use of untouched or otherwise safe or saleable property." AP Br. 65-66 (citing *Huntington Ingalls*, 287 A.3d at 530-31). In that situation, AP admits, the reduction in use does *not* represent a "loss" that is "direct" and "physical."[10]

AP says the situation is different, however, when the reduction in use is "causally linked to a physical event" with significant enough impact on the property to "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." AP

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[10] AP thus disagrees with the Fourth District Court of Appeal's recent decision in *Coast Restaurant Group*, *see supra* note 9. As the *Starlight Cinemas* court more recently recognized, the *Coast* decision is riddled with errors. *See* 91 Cal. App. 5th at 38-39. For one thing, its textual analysis effectively writes the modifier "physical" out of the phrase "direct physical loss or damage." *See id.* at 39. The *Coast* court also relied heavily on a case involving the government's *physical seizure* of an aircraft. *See Am. Alt. Ins. Corp. v. Superior Court*, 135 Cal. App. 4th 1239, 1246 (2006). As other courts have recognized in dismissing the relevance of *American Alternative*, the actual seizure of property is an obvious "loss" of the property itself, which has nothing to do with reduced ability to *use* property that remains in one's possession. *See Starlight Cinemas*, 91 Cal. App. 5th at 38-39; *Kevin Barry Fine Art Assocs. v. Sentinel Ins. Co.,* 513 F. Supp. 3d 1163, 1170 (N.D. Cal. 2021). The *Coast* court also misconstrued the "repair, rebuild, or replace" language of the period of restoration provision, dismissing it because it does not expressly "define the scope of coverage." 90 Cal. App. 5th at 341. As another court held, that argument "misses the point": the period of restoration provision makes clear the *kind* of "damage" covered by the Policy, i.e., a lasting structural alteration that only a "repair" can correct. *Inns by the Sea*, 71 Cal. App. 5th at 707-08.

Br. 65-66 (quoting *Huntington Ingalls*, 287 A.3d at 532). In that scenario, AP says, the reduction in the insured's ability use the property becomes a loss that is "physical," thereby triggering coverage.

AP acknowledges that the *Huntington Ingalls* court did not actually hold that this novel and narrower "physical" loss-of-use theory would apply to a temporary loss of use caused by the fleeting presence of viral droplets. AP Br. 67. The court had no need to reach that point given its holding that under Vermont's exceedingly liberal pleading standards, the conclusory allegation that the droplets themselves cause "direct physical *damage*" to property sufficed to state a claim. *Id.* But AP contends that viral droplets—unlike government closure orders—also cause "direct physical *loss*" to property under *Huntington Ingalls* because they are a "physical event" that makes property "unusable for its intended purpose" by posing "a danger to human health or safety." AP Br. 59. That contention cannot be reconciled with either the plain policy language or the cases AP cites from outside the COVID-19 context.

A. AP's "Physical Event" Loss-Of-Use Theory Cannot Be Reconciled With The Policy Language Requiring Physical Alteration Or Dispossession Of Property

Even cursory inspection shows AP's "physical event" loss of use theory to be yet another flawed word game that cannot escape the plain policy language requiring structural alteration of the property ("damage") or its complete destruction/dispossession ("loss"). AP's claimed distinction between loss of use based on

closure orders (concededly not covered) and loss of use based on a physical hazard (assertedly covered) seeks to leverage the modifier "physical" before "loss." According to AP, any reduction in use caused by a "physical" event qualifies as a "physical loss," whereas a reduction in use caused by a government order would be "*non*-physical loss" of some kind.

The logical error is self-evident: the word "physical" modifies "loss to property," not the *cause* of the loss. In other words, the modifier does not require that a "physical event" cause the "loss," but that the "loss" *to the property* be a "physical" one, i.e., not a constructive or intangible loss. As *MRI Healthcare* and decisions in every other jurisdiction have held, for the "physical" modifier of "loss" to have meaning, the *property itself* must either experience tangible alteration or be removed from the insured's possession. If the property is not physically damaged or physically lost, but simply cannot be used fully as intended, the "loss" cannot be described as "physical," but only as constructive or intangible at most. The point is underscored by the period of restoration provision, which specifies the "loss" must be of the kind that requires repair or replacement. A limitation on use is not a problem that can be corrected by repair or replacement, further confirming that a mere limitation on use of unharmed property cannot constitute the kind of "physical loss" that triggers coverage. *See supra* at 25-26.

AP resists that conclusion by attacking *MRI Healthcare* itself, insisting that its textual analysis "collapsed the distinction between 'loss' and 'damage.'" AP Br. 71. No, it does not. As

discussed above and as recognized by the consensus authority nationwide adopting the same formulation, the *MRI Healthcare* standard is fully consistent with the distinction between "loss" and "damage." *See supra* at 26-27. To reiterate, they are overlapping but discrete terms: "loss" can differ from "damage" in referring both to the dispossession of undamaged property or the complete destruction of property. And neither concept applies when a "physical event" merely reduces the insured's ability to use its property for some reason, but without causing the kind of damage, destruction, or dispossession that can be corrected only by repair or replacement of the property.[11]

AP also seeks to undermine the *MRI Healthcare* standard in a lengthy aside attacking its reliance on the widely respected

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[11] AP further contends that the policy language in *MRI Healthcare* is distinguishable because it "granted coverage only for '*accidental* direct physical loss.'" AP Br. 70 n.45. That use of that term has no relevance to the ordinary meaning of the terms "direct," "physical," and "loss." As in the *MRI Healthcare* policy, the terms "direct" and "physical" modify the term "loss," and to give them meaning, they must have the effect of limiting coverage to losses to property that are tangible and require repair to correct. For this reason, the "force" of *MRI Healthcare*'s analysis is not "diminish[ed]" by this immaterial difference in policy language. *Apple Annie*, 82 Cal. App. 5th at 935; *see Starlight Cinemas*, 91 Cal. App. 5th at 39 n.11 (rejecting similar "attempt[] to distinguish *MRI Healthcare*"). In any event, because "[t]he concept underlying property insurance rests on fortuity," *MRI Healthcare*, 187 Cal. App. 4th at 780, and "fortuity" functions "as part of the very definition of insurance," 10A Couch on Insurance § 148:46 n.9 (3d ed. 2022 update), the Policy at issue here likewise incorporates the notion of "accidental" loss, further undermining AP's effort to distinguish *MRI Healthcare* on this basis.

Couch on Insurance treatise, which subsequent California courts have also "repeatedly cited" in rejecting loss-of-use coverage theories. *Inns by the Sea*, 71 Cal. App. 5th at 706; *see* AP Br. 69-75.[12] AP is upset with Couch for having construed the phrase "direct physical loss or damage" to property to require a "distinct, demonstrable, physical alteration" of the property, 10A Couch on Insurance § 148:46 (3d ed. 2010), because—says AP—that construction was "not supported by much authority before COVID-19 coverage litigation commenced." AP Br. 72.

The objection is absurd. Contrary to AP's submission, courts have not been applying the *Couch treatise itself*—they have been applying the *plain policy language*. And in doing so, they have been construing the "ordinary and popular meaning" of "the words 'direct' and 'physical'" on their own terms, *Inns by the Sea*, 71 Cal. App. 5th at 705-06, pursuant to a "careful and conscientious examination" of the language and overall policy structure, *Apple Annie*, 82 Cal. App. 5th at 936. That many courts have cited Couch signals only their *agreement* with the straightforward textual reading it enunciates. Even if, as AP complains, that reading had not yet achieved "widespread acceptance" when Couch's formulation was "originally published," the "wall of precedent" that has since emerged shows that "such acceptance has now been achieved." *Apple Annie*, 82 Cal. App. 5th at 935; *see UTA*, 77 Cal. App. 5th at 833 (rejecting critique of

[12] Even *Huntington Ingalls* cited Couch in construing the phrase "direct physical loss or damage." *See* 287 A.3d at 528 n.10.

Couch on same grounds); *Starlight Cinemas*, 91 Cal. App. 5th at 39-40 (same); *In re Garden Fresh Rests., LLC*, 2022 WL 4356104, at *10 (S.D. Cal. 2022) (following *UTA* to reject Couch critique); *United Dental Ctrs., Ltd. v. Pac. Emps. Ins. Co.*, 2023 WL 2742631, at *3 n.4 (S.D. Ind. 2023) (rejecting Couch critique under Indiana precedent).

In any event, what matters now is not how many courts have cited Couch to support their reasoning, but whether the essentially uniform nationwide consensus interpretation of the policy language is *correct on its merits*. It is, for all the reasons set forth in this brief and in the hundreds of judicial decisions endorsing that interpretation. And the consensus plain-language formulation forecloses coverage based merely on the insured's inability to fully use property that is physically undamaged.[13]

B. AP's Reliance On Non-COVID-19 Physical Damage And Invasive Contamination Cases Is Misplaced

AP also errs in seeking support for its "physical event" loss-of-use theory in cases from other contexts that involve *not* mere loss of use, but physical damage to or dispossession of property.

AP's leading example is *Hughes v. Potomac Insurance Co. of District of Columbia*, 199 Cal. App. 2d 239 (1962), where a

[13] It bears noting that even on its own terms, the standard AP proposes recognizes that the "physical event" causing the loss must impact the property enough to require that it be "rebuilt, repaired, or replaced." AP Br. 65. For all the reasons discussed above, AP does not and cannot allege facts establishing that COVID-19 viral droplets cause the kind of lasting alteration to property that requires rebuilding, repair, or replacement. Again, cleaning is just cleaning—it is not repair or reconstruction.

landslide rendered the insured house's foundation unstable, thereby physically imperiling the house itself. According to AP, *Hughes* establishes that a "threat to human safety alone, regardless of any 'tangible injury' to the property, was 'physical loss or damage' of the property." AP Br. 62-63. AP is wrong. As the Fourth District Court of Appeal recognized decades ago, the actual "loss of the backyard" in *Hughes* was "[q]uite clearly" a "physical loss of tangible property," leaving only the further question of "whether the insured 'dwelling' included the ground under the building." *Ward Gen. Ins. Servs.*, 114 Cal. App. 4th at 558. That question was easily answered: "It goes without question that [insured's] 'dwelling building' suffered real and severe damage when the soil beneath it slid away and left it overhanging a 30-foot cliff." *Hughes*, 199 Cal. App. 2d at 249.

In short, *Hughes* did not involve the "loss of use of otherwise undamaged property." *UTA*, 77 Cal. App. 5th at 833. "To the contrary, the undermined ground beneath both houses placed the structures at serious risk." *Id.* COVID-19 particles, by contrast, "carry great risk to people but no risk at all to a physical structure." *Id.*; *see Inns by the Sea*, 71 Cal. App. 5th at 701-02 (rejecting insured's reliance on *Hughes*); *Apple Annie*, 82 Cal. App. 5th at 934 n.11 (same); *Mudpie*, 15 F.4th at 891 (same).

AP similarly errs in analogizing the presence of COVID-19 particles to contamination by "mold, asbestos, mudslides, smoke, oil spills, or similar elements," AP Br. 48, and citing non-California cases finding coverage for property damage caused by such invasive contaminants, *id.* at 59-61 (citing, e.g., *Mellin v. N.*

Sec. Ins. Co., 115 A.3d 799, 805 (N.H. 2015); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co.*, 2014 WL 6675934 (D.N.J. 2014); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52 (Colo. 1968); *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332, 1335 (Or. Ct. App. 1993)). As courts have consistently recognized, these cases have no bearing on coverage for COVID-19-related business losses.

For one thing, such cases invariably involve physical agents that cause tangible alterations to property—asbestos fibers that physically deteriorate, mold that grows inside drywall, oil that permeates the soil, or smoke that stains walls and furniture. *See Schleicher*, 2023 WL 3357980, at *8 (distinguishing cases as involving "allegations of persistent contamination"). Contamination of that kind is covered as direct physical damage to property, not on a theory of pure loss of use unaccompanied by any physical effects. And to the extent such contamination is *not* severe and pervasive, but can be quickly and easily remediated without special measures—i.e., surface mold that can be wiped away, small oil spills that can be quickly soaked up before permeating any soil, or smoke that can be blown away by opening doors and windows before it saturates any structures and leaves permanent stains and odors—there would be no direct physical loss or damage to property.

COVID-19 viral particles fall into the latter category. "While saturation, ingraining, or infiltration of a substance into the materials of a building or persistent pollution of a premises requiring active remediation efforts is sufficient to constitute

'direct physical loss of or damage to property,' evanescent presence is not." *Verveine*, 184 N.3.3d at 1276 (distinguishing *Gregory Packaging*, *Western Fire*, and *Trutanich*). AP's misplaced reliance on coverage for asbestos damage illustrates the point. Courts in such cases have "deemed 'physical injury' to be present because asbestos causes a physical alteration to property." *Sandy Point*, 20 F.4th at 333; *see UTA*, 77 Cal. App. 5th at 838 (distinguishing asbestos cases on the same basis, including that they are "necessarily tied to a location, and require specific remediation"). And AP itself concedes that "[u]nlike asbestos or gas-emanating drywall, SARS-CoV-2 does not inhere in materials used to build a structure." AP Br. 75. As the concession indicates, AP does not and cannot allege facts showing that COVID-19 viral particles are capable of infusing inert property so as to physically alter its structure in a manner requiring "repairs" to correct.

The invasive contamination cases are also irrelevant because they generally involve physical forces that made property entirely "unusable or uninhabitable" for any purpose. *Schleicher*, 2023 WL 3357980, at *8. The New Hampshire Supreme Court made that point in *Schleicher*, where it held that its own precedent in *Mellin* does not justify coverage for COVID-19-related business losses, confirming AP's misreading of the case. As *Schleicher* explains, *Mellin* involved an odor of cat urine so pervasive and persistent as to render the property uninhabitable,

which is unlike the temporary presence of COVID-19 virus. *Id.*[14] In contrast to the contaminants in *Mellin* and AP's other cases, the "presence of the virus does not render a property useless or uninhabitable, even though it may affect how people interact with and within a particular space." *UTA*, 77 Cal. App. 5th at 838. Even buildings with a confirmed presence of the virus remain inhabitable and usable for many purposes, especially with precautions such as social distancing and mask wearing. *See id.*

For this reason, numerous decisions have concluded that cases involving "uninhabitability" do not support coverage in the COVID-19 context. *See*, *e.g.*, *Santo's*, 15 F.4th at 404-05 (distinguishing these cases as involving "property that became practically useless for anything" and hence "a significant step removed from today's dispute"); *Sandy Point*, 20 F.4th at 334 (distinguishing case in which gas infiltration "made physical entry impossible, thus barring all uses by all persons").

IV. AP'S RELIANCE ON EXTRINSIC EVIDENCE IS MISPLACED

It is telling that AP does not begin its argument by addressing the policy language, as is customary for contract analysis. Tacitly conceding the weakness of its textual arguments, AP opens with a protracted discussion of extrinsic evidence that it insists generates ambiguity in the particular

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[14] *Schleicher* explains that *Mellin* is inapposite for the further reason that the court in that case "did not hold that the odor of cat urine in the property was necessarily sufficient" to plead a "distinct and demonstrable alteration" to property, but instead simply "remanded the case for the application of that standard." 2023 WL 3357980, at *7.

"circumstances of *this* case" (AP Br. 26) by addressing whether insureds could have "reasonably expected" coverage under their property damage policies for losses unconnected to any actual property damage. AP Br. 26-41.

As a threshold matter, none of the evidence from outside the four corners of AP's property policy is relevant here: extrinsic evidence "is not admissible to flatly contradict the express terms of an agreement." *Supervalu, Inc. v. Wexford Underwriting Managers, Inc.*, 175 Cal. App. 4th 64, 75 (2009) (quotation omitted); *see Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 37 (1968) (extrinsic evidence that is not "relevant to prove a meaning to which the language of the instrument is reasonably susceptible" is inadmissible). Accordingly, as this Court recently confirmed in *Yahoo Inc. v. National Union Fire Insurance Co.*, an insured's objectively reasonable expectations become relevant only if the insured *first* establishes an ambiguity in the policy language that cannot be resolved through "standard rules of contract interpretation." 14 Cal. 5th at 71-72; *see Gen. Reinsurance Corp. v. St. Jude Hosp.*, 107 Cal. App. 4th 1097, 1108 (2003) ("[T]he insured's expectations ... cannot be relied upon to create an ambiguity where none exists."). Where, as here, the policy language is "clear and explicit, it governs." *Palmer*, 21 Cal. 4th at 1115 (quotation omitted).

Even setting aside their inadmissibility, however, none of the materials AP cites support its contentions.

A. AP Derives No Support From General Statements Regarding The Potential Effect Of Pandemics On The Insurance Industry

AP cites a 2018 "white paper" posted on the website for an entity called the Insurance Library Association of Boston stating that "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." AP Br. 33 (quoting 3-ER-385-86). From this untested hearsay pronouncement, AP leaps to the conclusion that a virus like COVID-19 must cause "direct physical loss or damage," because it could not cause losses to the insurance industry community any other way. But AP evidently did not read its own article—it actually addresses a pandemic's potential effects on the *life insurance industry*, observing that a "flu pandemic causes a marked increase in life insurance claim expenses due to the increase in mortality of policyholders," and that macroeconomic impacts of a pandemic would be greater on life insurers because "[c]ompared to their counterparts in health or property and casualty, life insurers are often more exposed to market forces, with investments in more long-term and riskier asset classes." Narges Dorratoltaj et al., *What The 1918 Flu Pandemic Can Teach Today's Insurers*, Verisk (Mar. 29, 2018), https://perma.cc/94QQ-4EW3. The article does not say a word—not one—suggesting that evanescent viral particles cause direct physical loss or damage to property.

Even less illuminating—if that is possible—are AP's citations to annual reports filed by Chubb Limited, Vigilant's

parent company. AP cites identical excerpts from Chubb's 2017 and 2019 Annual Reports, which each state in full: "We have substantial exposure to losses resulting from natural disasters, man-made catastrophes such as terrorism or cyberattack, and other catastrophic events, including pandemics. This could impact a variety of our businesses, including our commercial and personal lines, and *life and accident and health (A&H) products*." Chubb Limited, 2017 Annual Report, Form 10-K at 18, https://perma.cc/EP2V-DEAS (emphasis added); *see* A-80 (Chubb Limited, 2019 Annual Report, Form 10-K at 19). On its face, that comment addresses a variety of broad societal threats and calls out risks to many different policy lines, including the same life insurance policies just discussed. Again, nowhere do these statements assert that COVID-19 viral particles cause distinct alterations to property.

The same is true of the general comment in the latter report about worldwide business conditions: "[T]he 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." A-10 (2019 Annual Report at 3). There are innumerable ways in which the financial health of a large insurance company like Chubb could be impacted by the pandemic and the resulting impact on consumer activity. These include a slowdown in consumer-facing business, including high-net-worth personal lines; impacts to particular categories of insurance, such life insurance, travel and leisure insurance, and workers' compensation; and negative impacts to investments,

among many others. In other words, the pandemic could and did have myriad effects on Chubb's business without the COVID-19 virus ever triggering coverage under Chubb's commercial property policies (even setting aside the financial impact of the wave of litigation on that question initiated by insureds like AP).

Indeed, like the article discussed above, the annual reports AP cites nowhere represent that Chubb's *property insurance business in particular* could be impacted by a pandemic. They instead expressly reference other types of coverage that could be affected, again including Chubb's life insurance products. As Chubb's 2022 Annual Report states in describing the COVID-19 pandemic's actual effect on its business, Chubb's "consumer businesses … had slowed during the COVID pandemic," though its "global consumer operations picked up as the year went on, recovering from the pandemic's effects on consumer behavior." Chubb Limited, 2022 Annual Report at 7, 34, https://perma.cc/4QX4-C7BS. It also confirmed that "[t]he vast majority of our property and liability coverages do not provide coverage for pandemic claims," but observed that "we are subject to the potential of aggregation of loss from coverages provided in our life, A&H, and workers' compensation portfolios." *Id.* at 74.

Chubb's annual reports thus not only are irrelevant extrinsic evidence, they do nothing whatsoever to show that Chubb "knew that policies *like the Vigilant policy*"—as opposed to life insurance and accident and health policies—"would respond to pandemic-related claims." AP Br. 35 (emphasis added). AP's reliance on these materials borders on frivolous.

B. The Absence Of A Virus Exclusion Is Irrelevant

AP next contends that coverage should apply because the Policy does not contain a specific exclusion for virus-related losses promulgated by the Insurance Services Office ("ISO"). As the *Inns by the Sea* court explained, this argument "improperly attempts to rely on the absence of an exclusion to create an ambiguity in an otherwise unambiguous insuring clause," contravening the settled rule of California law that "coverage is defined in the first instance by the insuring clause, and when an occurrence is clearly not included within the coverage afforded by the insuring clause, it need not also be specifically excluded." 71 Cal. App. 5th at 709 (alteration and quotation omitted).

None of the authority AP cites is to the contrary. The two cases AP cites for the proposition that an absence of particular exclusionary language has any relevance, *Pardee Construction Co. v. Insurance Co. of the West*, 77 Cal. App. 4th 1340 (2000), and *Fireman's Fund Insurance Cos. v. Atlantic Richfield Co.*, 94 Cal. App. 4th 842 (2001), are inapposite because they did not "deal with the absence of an *exclusion* in a policy," but instead "discuss[ed] the significance of missing language *in the insuring clause itself*," *Inns by the Sea*, 71 Cal. App. 5th at 709-10.

AP's citation to *Montrose Chemical Corp v. Admiral Insurance Co.*, 10 Cal. 4th 645 (1995), is equally misplaced. This Court in *Montrose* simply approved of the use of "interpretative materials" illuminating the meaning of "standardized industry provisions" to aid the interpretive process in some cases. *Id.* at 670-71 (quotation omitted). That statement might be relevant to

widely accepted interpretive materials addressing a common industry understanding of a standardized phrase like "direct physical loss or damage." It in no way relates to—much less supports—AP's effort to cite the absence of particular exclusions to cast light on the meaning of the insuring agreement in the first instance.

In any event, the fact that an exclusion for virus-related losses exists and has been incorporated into some commercial property policies does not imply that COVID-19 particles can cause "direct physical loss or damage" to property. Courts have found that a virus *can* cause physical damage to insured property in certain circumstances, such as when a virus kills or sickens insured livestock. *See*, *e.g.*, *Curtis O. Griess & Sons, Inc. v. Farm Bureau Ins. Co. of Neb.*, 528 N.W.2d 329, 331 (Neb. 1995). And as the Massachusetts Supreme Judicial Court observed, specific virus exclusions "would have independent significance where, for example, personal property, such as food, becomes physically contaminated or infected with a virus, requiring its destruction or some form of remediation." *Verveine*, 184 N.E.3d at 1278 (citing cases). The ISO virus exclusion would operate to exclude such losses from coverage. But the fact that some viruses can cause damage to living or organic property, and that insurers may opt to use policy exclusions to eliminate coverage for such damage, does not establish that the COVID-19 virus causes physical damage to inert property that it alights upon.[15]

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[15] Ironically, AP concedes that using the ISO exclusion would not be effective in preventing litigation over the meaning of "direct physical loss or damage." AP Br. 38 n.8. Its contention

It is equally irrelevant that Vigilant theoretically could have written an even narrower coverage grant, as AP observes. AP Br. 26. It is always possible for an insurance policy to include even more terms, clauses, and provisos to make some very specific point even "clearer." But contrary to AP's suggestion, there was no need for Vigilant to construct a "byzantine maze of policy provisions" (AP Br. 30) in order to avoid covering purely economic losses causally connected to a deadly virus, but not causally connected to any property damage. As hundreds of courts have concluded, the Policy language here unambiguously accomplishes precisely that goal.

C. AP's Resort To The Policy's Liability Section Is Unavailing

AP's final effort to escape the language of its Property coverage fares no better. AP points to the "Biological Agents" exclusion in the Policy's Liability section, which defines Biological Agents to include viruses. According to AP, the exclusion implies that "Vigilant understood that viruses could cause property damage." AP Br. 40 (internal quotation marks and alterations omitted).

This argument fails twice over. *First*, for all the same reasons that the absence of the ISO virus exclusion has no bearing on the meaning of the insurance clause, the absence of a "Biological Agents" exclusion in the property section of the Policy

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that it was somehow necessary to include certain policy language, while also maintaining that the language in question would have no effect, is thus self-defeating.

is likewise irrelevant. *Second*, courts have routinely recognized that it is inappropriate to "cross wires between different definition sections of the Policy" in this manner, since business income coverage and commercial general liability sections "protect entirely different interests." *Michael Cetta, Inc. v. Admiral Indem. Co.*, 506 F. Supp. 3d 168, 181 (S.D.N.Y. 2020); *see UTA*, 77 Cal. App. 5th at 837 (in CGL context, "insurer agrees to cover the insured for a broader spectrum of risks than in property insurance" (quotation omitted)); *see also Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 487 F. Supp. 3d 834, 843 n.8 (N.D. Cal. 2020), *aff'd*, 15 F.4th 885; *Garvey v. State Farm Fire & Cas. Co.*, 48 Cal. 3d 395, 408 (1989).

The Policy here reflects those important differences. The term "property damage" in the Policy's Liability section contrasts markedly with the Property section's requirement of "direct physical loss or damage": it lacks the key modifiers "direct" and "physical," and its definition expressly includes "loss of use of tangible property that is not physically injured." 4-ER-662. For these reasons, the fact that the Liability section of the Policy contains a "Biological Agents" exclusion says nothing about the meaning of "direct physical loss or damage" in the separate Property section. *See Garvey*, 48 Cal. 3d at 406 ("[T]he operation of the exclusion clauses … [is] different in the separate policy portions and should be treated as such.").

V. AP IS NOT ENTITLED TO MITIGATION REIMBURSEMENT

Finally, AP contends that it is entitled to recover the losses that resulted from the suspension of its business as necessary

mitigation expenses. That contention is meritless. The duty to mitigate, as set forth in Insurance Code § 531 and incorporated in the Policy section setting forth the "Insured's Duties in The Event of Loss or Damage," is obviously limited to mitigation of *covered* losses, and thus cannot create coverage where none otherwise exists. *See Grebow v. Mercury Ins. Co.*, 241 Cal. App. 4th 564, 574-75 (2015) ("The duty to mitigate arises in case of a loss to which th[e] insurance may apply" (quotation omitted)); *S. Cal. Edison Co. v. Harbor Ins. Co.*, 83 Cal. App. 3d 747, 757 (1978) (addressing the "duty of preventing a threatened insurable loss and mitigating such loss when it does occur"); 3 New Appleman on Insurance Law § 20.06 (2023 update) ("Because the duty to preserve or protect property is tantamount to a duty to mitigate damages, the duty on the part of the insured applies only after a covered loss occurs"); *see also* 3-ER-559 (articulating obligation, "in the event of loss or damage," to "[t]ake every reasonable step to protect the covered property from further loss or damage").

In other words, the duty to mitigate arises only when the actions taken by the insured are "for the benefit of the insurer" because they "minimize[] insurable loss." *S. Cal. Edison Co.*, 83 Cal. App. 3d at 757. It has no application where, as here, no loss covered by the Policy would have taken place regardless of the measures undertaken by the insured. Because, for the reasons set forth above, AP cannot plead that any of its losses resulted from "direct physical loss or damage," as required by every affirmative coverage provision on which it relies, it cannot recover its losses by recasting them as "mitigation damages."

See Always Smiling Prods., LLC v. Chubb Nat'l Ins. Co., 2022 WL 4102315, at *6 (C.D. Cal. 2022) ("California Insurance Code § 531 does not apply" because "plaintiff has not alleged any possible 'damaged or detained property' resulting from COVID-19); *Selane Prods., Inc. v. Cont'l Cas. Co.*, 2021 WL 4496471, at *2 (9th Cir. 2021) (rejecting reliance on § 531).

CONCLUSION

For the foregoing reasons, this Court should answer the certified question in the negative and hold that where an easily removable, self-dissipating substance such as the COVID-19 virus does not cause structural changes to the inert physical property it contacts, the substance does not cause "direct physical loss or damage" for property insurance purposes as a matter of law.

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Respectfully submitted,
/s/ *Jonathan D. Hacker*

Susan Koehler Sullivan
Douglas J. Collodel
Gretchen S. Carner
Brett C. Safford
CLYDE & CO US LLP
355 S. Grand Avenue, Suite 1400
Los Angeles, CA 90071
Telephone: (213) 358-7600
Facsimile: (213) 385-7650
susan.sullivan@clydeco.us
douglas.collodel@clydeco.us
gretchen.carner@clydeco.us
brett.safford@clydeco.us

Jonathan D. Hacker
Jenya Godina
O'MELVENY & MYERS LLP
1625 Eye St., NW
Washington, DC 20006
Telephone: (202) 383-5300
Facsimile: (202) 383-5414
jhacker@omm.com
jgodina@omm.com

Attorneys for Respondents Vigilant Insurance Company

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Dated: June 5, 2023

By: /s/ *Jonathan D. Hacker*
Jonathan D. Hacker
Attorney for Respondent
Vigilant Insurance Company

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County of Los Angeles)
)

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I, Kirstin Largent , declare that I am not a party to the action, am over 18 years of age and my business address is: 626 Wilshire Blvd., Suite 820, Los Angeles, California 90017; ca@counselpress.com

On 6/5/2023 declarant served the within: Answer Brief on the Merits **upon:**

Copies FedEx USPS

ELECTRONICALLY SERVED VIA TRUEFILING:
Kirk Pasich
10880 Wilshire Boulevard, Suite 2000
Los Angeles, California 90024-3109
kpasich@pasichllp.com

Attorney for Petitioner
Another Planet Entertainment, LLC

Copies FedEx USPS

ELECTRONICALLY SERVED VIA TRUEFILING:
Nathan M. Davis
10880 Wilshire Boulevard, Suite 2000
Los Angeles, California 90024-3109
ndavis@pasichllp.com

Attorney for Petitioner
Another Planet Entertainment, LLC

Copies FedEx USPS

ELECTRONICALLY SERVED VIA TRUEFILING:
Kayla Michelle Robinson
10880 Wilshire Boulevard, Suite 2000
Los Angeles, California 90024-3109
krobinson@Pasichllp.com

Attorney for Petitioner
Another Planet Entertainment, LLC

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Jenya Godina O'Melveny & Myers LLP 5705157	jgodina@omm.com	e-Serve	6/5/2023 12:59:32 PM
Scott DeVries Hunton Andrews Kurth LLP 2166205	sdevries@huntonak.com	e-Serve	6/5/2023 12:59:32 PM
Travis Pantin University of Connecticut School of Law 5519293	travis.pantin@uconn.edu	e-Serve	6/5/2023 12:59:32 PM
Kirk Pasich Pasich LLP 94242	kpasich@pasichllp.com	e-Serve	6/5/2023 12:59:32 PM
Lisa Law Pasich LLP	llaw@pasichllp.com	e-Serve	6/5/2023 12:59:32 PM
Yosef Itkin Hunton Andrews Kurth 287470	yitkin@huntonak.com	e-Serve	6/5/2023 12:59:32 PM

Nathan Davis Pasich LLP 287452	ndavis@pasichllp.com	e-Serve	6/5/2023 12:59:32 PM
Kayla Robinson Pasich LLP 322061	krobinson@pasichllp.com	e-Serve	6/5/2023 12:59:32 PM
Mark Plevin Crowell & Moring LLP 146278	mplevin@crowell.com	e-Serve	6/5/2023 12:59:32 PM
John Hazelwood Cohen Ziffer Frenchman & McKenna LLP 5785712	jhazelwood@cohenziffer.com	e-Serve	6/5/2023 12:59:32 PM
Ryan Anderson Guttilla Murphy Anderson 224816	randerson@gamlaw.com	e-Serve	6/5/2023 12:59:32 PM
Robert Wallan Pillsbury Winthrop Shaw Pittman LLP 126480	robert.wallan@pillsburylaw.com	e-Serve	6/5/2023 12:59:32 PM
Brook Roberts Latham & Watkins LLP 214794	brook.roberts@lw.com	e-Serve	6/5/2023 12:59:32 PM
Rani Gupta Covington & Burling LLP 296346	rgupta@cov.com	e-Serve	6/5/2023 12:59:32 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

6/5/2023

Date

/s/Court Services

Signature

Hacker, Jonathan (456553)

Last Name, First Name (PNum)

O'Melveny & Myers LLP

Law Firm