No. S277893

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ANOTHER PLANET ENTERTAINMENT, LLC,

Petitioner,

v.

VIGILANT INSURANCE COMPANY,

Respondent.

Review of a Question of California Law
Certified by the United States
Court of Appeals for the Ninth Circuit
in Case No. 21-16093

APPLICATION OF ROSS STORES, INC. FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER ANOTHER PLANET ENTERTAINMENT, LLC

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 8.520(f) of the California Rules of Court, Ross Stores, Inc. respectfully applies for this Court's permission to file the accompanying *amicus curiae* brief in support of Petitioner Another Planet Entertainment, LLC concerning the question of California law that the United States Court of Appeals for the Ninth Circuit certified to this Court in Petitioner's pending appeal against Respondent Vigilant Insurance Company.

RULE 8.520(f)(4) DISCLOSURE

Pursuant to Rule 8.520(f)(4) of the California Rules of Court, Ross states that no party or counsel for any party authored any portion of the accompanying *amicus curiae* brief, or made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity other than Ross and its counsel made a monetary contribution intended to fund the preparation or submission of the brief.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Headquartered in Dublin, California, Ross operates Ross Dress for Less, the largest off-price apparel and home fashion chain in the United States with more than 1,700 locations in 41 states, the District of Columbia, and Guam. Ross also operates dd's DISCOUNTS, a more moderately-priced apparel and home fashion chain with more than 300 locations in 22 states. Between the two chains, Ross currently has 458 locations in California.

Ross, which has had a loyal customer base since its founding, recorded $16 billion in sales in 2019, the year before the onset of the COVID-19 pandemic. However, beginning in March 2020, Ross was forced to close most of its stores and non-retail locations due to the presence of the COVID-19 virus in and around those locations. As a result, Ross's sales and earnings declined significantly in 2020.

Ross sought insurance coverage from its "all risks" and "stock throughput" insurers for certain of its COVID-19-related losses. When the insurers failed to pay, Ross filed suit against them in Alameda County Superior Court. That case, captioned *Ross Stores, Inc. v. Zurich American Insurance Co.*, No. RG20084158, is currently pending before Judge Evelio Grillo, who has stayed all proceedings until this Court answers the certified question in this matter.

While the language of Ross's "all risks" and "stock throughput" policies is different from and much broader than that of the "open peril" policy issued to Another Planet, Ross is well-positioned to advocate for the insurability of COVID-19-related losses and explain to this Court why the actual or potential presence of COVID-19 on an insured's premises constitutes or causes "direct physical loss or damage" to property under standard form commercial property insurance policies like Another Planet's.

In the attached brief, Ross seeks to fulfill the classic role of *amicus curiae*, to "assist the court by broadening its perspective on the issues raised by the parties." *Bily v.*

Arthur Young & Co. (1992) 3 Cal.4th 370, 405, fn.14. Ross's brief and its analysis of California law will also "facilitate informed judicial consideration of a wide variety of information and points of view that may bear on important legal questions." *Id.*

Moreover, as a leader in the retail industry, Ross offers "a different perspective from the principal litigants," which in turn will help this Court make a more "informed" decision "enriche[d]" by a "wide variety" of "points of view." *Connerly v. State Pers. Bd.* (2006) 37 Cal.4th 1169, 1177. Ross has an interest in ensuring that California retailers recover losses insured under property policies purchased to protect against the risks of physical loss or damage.

Finally, Ross seeks to bring the Court's attention to longstanding California precedent about insured physical loss or damage, omitted from the parties' briefs in this appeal, to demonstrate why some California lower courts and federal courts purporting to apply California law have erred in concluding that the presence of the COVID-19 virus cannot trigger coverage under property insurance policies.

CONCLUSION

For the foregoing reasons, Ross respectfully requests that the Court grant this application and permit Ross to file the accompanying *amicus curiae* brief in support of Petitioner Another Planet.

DATE: August 2, 2023

Respectfully submitted,

COVINGTON & BURLING LLP

By: */s/ David B. Goodwin*
David B. Goodwin

Attorneys for Amicus Curiae *Ross Stores, Inc.*

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[PROPOSED] BRIEF *AMICUS CURIAE* OF ROSS STORES, INC. IN SUPPORT OF PETITIONER ANOTHER PLANET ENTERTAINMENT, LLC

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INTRODUCTION AND SUMMARY OF ARGUMENT

The issue underlying the certified question could affect every California business that buys insurance. Before the pandemic, California courts gave insurance policy language its ordinary and popular meaning, typically derived from dictionary definitions, testing that meaning in the context of the entire insurance policy; and if an insurer wished to restrict coverage, it had to use clear, conspicuous, and unambiguous language. Applying those rules, pre-pandemic cases uniformly rejected the interpretation of "physical loss or damage" that Vigilant offers, concluding that the same legal and technical reading of the insurance policy language that Vigilant urges is contrary to "common sense."

But with the pandemic, insurers convinced some California courts, and most federal courts purporting to apply California law, to abandon those rules—even though every single one is set forth in the Civil Code. Some California courts looked instead to a legal treatise written for insurance specialists to find the meaning of "direct physical loss or damage," and then sought to justify that legalistic interpretation by a "contextual" reading that referenced a single word at the other end of the insurance policy while ignoring the contrary wordings located immediately after the insuring agreement. Courts also disregarded the policyholder's factual allegations on demurrers and based decisions on facts outside of the record. Now, Vigilant urges this Court to follow those cases, telling the Court that the lower court decisions that disregarded California's

substantive and procedural rules have become a "wall of precedent."

Vigilant exaggerates about its "wall," but its underlying arguments are more troubling. The fundamental question for this Court is not just the meaning of "direct physical loss or damage": Does that phrase retain the meaning that California courts gave to it in pre-pandemic cases, or does it take on a constricted legalistic meaning in a post-pandemic world? The Court must also decide whether the statutory rules of contract interpretation that have applied to insurance coverage cases in California for more than a century continue to govern. If they do—and the Court should hold that they do—then this Court can and should answer the certified question "yes."

ARGUMENT

I. Under Pre-Pandemic Law and the Plain Insurance Policy Language, the COVID-19 Virus Is a Peril That Can Cause "Direct Physical Loss or Damage"

For more than 60 years, property insurance policies have protected policyholders against the risks of "physical loss or damage."[1] For example, if a fire destroys the roof of a retail store, raining debris onto the floor and threatening to

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[1] *See* H. Walter Croskey et al., *Cal. Prac. Guide: Ins. Litig.* (Rutter Group, rev.ed. 2023), ¶¶ 1:59–1:59.1 ("Croskey"); Richard P. Lewis et al., *Couch's "Physical Alteration" Fallacy: Its Origins and Consequences* (2021) 56 Tort, Trial & Ins. Prac. L.J. 621, 624 ("Lewis").

cause the structure to collapse, the building has clearly suffered both physical damage (the burnt roof and debris) and physical loss (the store cannot operate safely until the debris is removed and the roof is replaced).

But physical loss or damage is not limited to instances of visible damage and imminent collapse. As pre-pandemic California courts recognized, any risk or peril can cause physical loss or damage under "all risks" and "open peril" property policies.[2] To take a pertinent example, property insurers paid claims arising from the 2003 Severe Acute Respiratory Syndrome (SARS) outbreak, according to press reports.[3] Then, in response to the "the specter of [a future] pandemic," the Insurance Services Office ("ISO"), which drafts standard form insurance policies, disseminated an "Exclusion for Loss Due to Virus or Bacteria" to avoid similar

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[2] An "open peril" policy like Another Planet's policy ("the Policy") is less expansive than a classic "all risks" policy, Croskey, *supra*, ¶ 1:59.1, but the two types of policies are "analogous" in that both are triggered by any risk or peril that can cause physical loss or damage unless the risk or peril is expressly excluded. *See Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 751, fn.2.

[3] *See* Todd C. Frankel, *Insurers Knew the Damage a Viral Pandemic Could Wreak on Businesses. So They Excluded Coverage.*, Wash. Post (Apr. 2, 2020), https://www.washingtonpost.com/business/2020/04/02/insurers-knew-damage-viral-pandemic-could-wreak-businesses-so-they-excluded-coverage.

losses in the future.[4] Property insurers adopted that exclusion enthusiastically: At the outset of the COVID-19 pandemic, 83% of commercial property policies in the United States were subject to the ISO or similarly broad virus exclusions.[5] But Vigilant did not include the ISO exclusion in the Policy, presumably because Vigilant could charge higher premiums if its policy provided broader coverage than the vast majority of "open peril" policies.

Now, in an attempt to avoid the consequences of its underwriting decisions, Vigilant asks this Court to hold that the actual or potential presence of similarly dangerous perils—the COVID-19 virus (SARS-CoV-2) and the resulting disease (COVID-19)—cannot cause physical loss or damage as a matter of law. Vigilant claims the language of the Policy's insuring agreement, "direct physical loss or damage," has a single meaning, "distinct, demonstrable, physical alteration," that the COVID-19 virus and COVID-19 cannot satisfy no matter what the policyholder may allege. Answering Br. at 11–12.

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[4] *See* Insurance Services Office, *ISO Circular: "New Endorsements Filed to Address Exclusion of Loss Due to Virus or Bacteria,"* at 1 (July 6, 2006), https://www.propertyinsurancecoveragelaw.com/files/2020/03/ISO-Circular-LI-CF-2006-175-Virus.pdf.; 3ER389–390 ¶¶ 26–27 (containing the text of the ISO exclusion).

[5] *See* Nat'l Ass'n of Ins. Comm'rs, *Business Interruption/Businessowner's Policies (BOP)*, Ctr. for Ins. Pol'y & Rsch. (Feb. 1, 2023), https://content.naic.org/cipr-topics/business-interruptionbusinessowners-policies-bop.

The Court should reject Vigilant's argument. As Section I of this brief explains, Vigilant's narrow definition of "direct physical loss or damage" is inconsistent with pre-pandemic case law and the ordinary and popular meaning of that phrase when read in the context of the entire Policy.

A. Pre-Pandemic California Cases Consistently Held That "Physical Loss or Damage" Can Occur When a Fortuitous Peril Makes Property Unsafe or Unusable

Before the COVID-19 pandemic, California courts uniformly held that a fortuitous event that (1) causes property to become unsafe or unsatisfactory for normal use, or (2) physically changes property, causes "physical loss or damage."

In the earliest California decision on the issue, the insurer raised the same argument that Vigilant advances here: that coverage for "physical loss or damage" is limited to instances in which "tangible injury to the physical structure itself could be detected." *Hughes v. Potomac Ins. Co.* (1962) 199 Cal.App.2d 239, 248–249 (abrogated on other grounds). *Hughes* rejected that interpretation as contrary to "[c]ommon sense." *Id.* at 248. *Hughes* held that a house suffered "physical loss" when a landslide caused an otherwise undamaged house to hang over a newly formed cliff. *Id.* at 248–249. Although the home's "paint remain[ed] intact and its walls still adhere[d] to one another," physical loss or

damage had occurred because the structure was no longer "a safe place in which to dwell or live." *Id.*[6]

Following *Hughes*, California courts continued to find physical loss or damage when external forces rendered property "uninhabitable or unsuitable for its intended use." *Inns*, 71 Cal.App.5th at 703. For example, *Strickland v. Federal Insurance Co.* (1988) 200 Cal.App.3d 792 held that physical loss or damage had occurred to an unsafe but structurally undamaged house. *Id.* at 799–801. Although the house had neither "collapsed" nor become "uninhabitable," the court held that it would "unquestionably defeat[] the purpose for which the insurance was purchased" to require the insureds to live in a home "below accepted standards of safety." *Id.* at 800, 803. Likewise, in *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, the court found physical loss or damage when 80,000 pounds of almonds were intermingled with a tiny quantity of wood chips, rendering the almonds unsafe for their intended use as a breakfast cereal ingredient. *Id.* at 865. As in *Hughes* and *Strickland*, the court concluded that physical loss or damage had occurred because, although

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[6] *Inns-by-the Sea v. California Mutual Insurance Co.* (2021) 71 Cal.App.5th 688, the first Court of Appeal decision to address COVID-19 insurance coverage issues, characterized *Hughes* as the "central relevant California opinion" concerning the meaning of physical loss or damage. *Id.* at 701.

physically unchanged, the almonds were no longer safe for their intended use. *Id.* at 874.

Consistent with those earlier decisions, *MRI Healthcare Center of Glendale, Inc. v. State Farm General Insurance Co.* (2010) 187 Cal.App.4th 766 explained that "direct physical loss" can occur if "some external force" has "caused 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 so." *Id.* at 779–780. Likewise, in *Sierra Pacific Power Co. v. Hartford Steam Boiler Inspection & Insurance Co.* (9th Cir. 2012) 665 F.3d 1166 (California law), the Ninth Circuit recognized that direct physical loss occurs when accidental perils cause insured property to "become unsatisfactory." *Id.* at 1172.

California courts held that physical loss also occurs when property is stolen or temporarily seized even though its structure is unaltered. For example, in *EOTT Energy Corp. v. Storebrand International Insurance Co.* (1996) 45 Cal.App.4th 565, the court found coverage when otherwise undamaged insured property—diesel fuel gas—was stolen "by the physical act of disengaging the fuel meters." *Id.* at 569–570, 573. *American Alternative Insurance Corp. v. Superior Court* (2006) 135 Cal.App.4th 1239 reached a similar result when the insured's aircraft was temporarily seized but not "physically injur[ed]." *Id.* at 1246–1248. The lack of physical damage to the aircraft itself was irrelevant because the

seizure had been caused by a "fortuitous 'accident'" that resulted in the "'physical loss of'" the aircraft. *Id.* at 1249.[7]

In other contexts, California courts similarly found physical loss or injury without physical alteration or, indeed, any change visible to the naked eye. *See, e.g.*, *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 842 (environmental contamination—often measured in parts per million or parts per billion—can be property damage); *Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.* (1996) 45 Cal.App.4th 1, 98 (same; releases of individual asbestos fibers).[8]

Vigilant gives this pre-pandemic California authority short shrift. Instead, Vigilant relies on two types of inapposite pre-pandemic decisions: (1) cases in which coverage was unavailable because the court found that the property was intangible and thus not susceptible to *physical* loss or damage, *see, e.g.*, *Ward Gen. Ins. Servs., Inc. v. Emps. Fire Ins. Co* (2003) 114 Cal.App.4th 548, 556 (data); *Simon*

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[7] The opinions in *EOTT* and *American Alternative* were written by the late Justice H. Walter Croskey, the original author of the leading treatise on California insurance law.

[8] *AIU* and *Armstrong* address third-party liability policies, which differ from property policies in some respects. *See Garvey v. State Farm Fire & Cas. Co.* (1989) 48 Cal.3d 395, 406. But the definition of "property damage" in the liability policies at issue in those two cases—"physical injury to tangible property or loss of use thereof"—is consistent with the ordinary meaning of "physical loss or damage" in property policies. *See* Section I.B *infra*. These cases are therefore instructive on the issues before the Court, contrary to Vigilant's assertion at pages 38–39 of the Answering Brief.

Mktg., Inc. v. Gulf Ins. Co. (2007) 149 Cal.App.4th 616, 623–624 (business contracts and related litigation expenses); and (2) cases in which tangible property was harmed by inherent vice rather than an external force, *see, e.g.*, *MRI Healthcare*, 187 Cal.App.4th at 780 (failure of MRI machine to turn back on).

Vigilant thus is simply wrong when it contends in its Answering Brief, at pages 24–25, that pre-pandemic authority supports its position. To the contrary, pre-pandemic case law established that physical loss or damage can occur when a fortuitous peril either physically changes the property *or* makes property unsafe or unusable without any structural alteration. To conclude otherwise would be contrary to "[c]ommon sense." *Hughes*, 199 Cal.App.2d at 248.

B. The Pre-Pandemic Cases Are Consistent with the Ordinary and Popular Meaning of the Policy Language

The pre-pandemic California decisions are fully consistent with the ordinary and popular meaning of the insurance policy language. The Policy's business income insuring agreement covers losses arising from the "actual or potential impairment of operations…caused by or result[ing] from direct physical loss or damage by a covered peril to property." 3ER485.[9]

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[9] Quotations from the Policy omit the bolding of defined terms in the original.

In other words, if (1) a "covered peril" (2) "direct[ly]" causes "physical loss or damage," which (3) in turn causes or results in an "actual or potential impairment of operations," then (4) the Policy will pay the resulting business income loss.

Vigilant concedes that a "covered peril" includes any "peril not otherwise excluded." Answering Br. at 16; 3ER456.[10] Neither the COVID-19 virus nor COVID-19 is excluded by any other provisions of the Policy, so they are "covered perils."

The certified question focuses instead on the second prong of the coverage analysis: whether the presence of these "covered perils" can cause "direct physical loss or damage."[11] That issue turns on what the Policy's plain language requires when properly construed. *See AIU*, 51 Cal.3d at 822.

1. The Plain Policy Language

Under the statutory rules of contract interpretation, a court must determine the "ordinary and popular sense" of the insurance policy language, Civ. Code, § 1644, giving meaning to every word in the policy and avoiding any interpretation that would render policy language superfluous or redundant.

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[10] The Policy defines a "covered peril" as "a peril covered by the Form(s) shown in the Property Insurance Schedule Of Forms...applicable to the lost or damaged property." 3ER569.

[11] The certified question actually asks whether the COVID-19 virus can "constitute" "direct physical loss or damage." *Another Planet Ent., LLC v. Vigilant Ins. Co.* (9th Cir. 2022) 56 F.4th 730, 734. Section III *infra* proposes revising the certified question to track standard "open peril" policy language, including the language in Vigilant's Policy.

Civ. Code, §§ 1641, 1652; *see Yahoo Inc. v. Nat'l Union Fire Ins. Co.* (2022) 14 Cal.5th 58, 69.

As a first step "to ascertain the ordinary sense of words, courts in insurance cases regularly turn to general dictionaries." *Stamm Theatres, Inc. v. Hartford Cas. Ins. Co.* (2001) 93 Cal.App.4th 531, 539; *see also E.M.M.I Inc. v. Zurich Am. Ins. Co.* (2004) 32 Cal.4th 465, 471–472. As to "direct physical loss or damage," dictionaries define "direct" as "marked by absence of an intervening agency." *Direct*, Merriam-Webster, https://www.merriam-webster.com/dictionary/direct. "Physical" means "having material existence" or "perceptible." *Physical*, Merriam-Webster, https://www.merriam-webster.com/dictionary/physical. "Loss" includes the "detriment or disadvantage involved in being deprived of something," *Loss*, Oxford English Dictionary, www.oed.com/view/Entry/110406, as well as "the act or fact or being unable to keep or maintain something," *Loss*, Merriam-Webster, https://www.merriam-webster.com/dictionary/loss. And "damage" means "[i]njury, harm," including "physical injury" that "impairs [an item's] value or usefulness." *Damage*, Oxford English Dictionary, www.oed.com/view/Entry/47005.

Read together, and giving independent meaning to each word, insured property sustains: (1) "direct physical damage" if a fortuitous peril harms the property's physical characteristics without any intervening cause, and (2) "direct

physical loss" if the peril deprives the policyholder of its ability to use its property for normal purposes because the property has been rendered unsafe or unusable. These plain meanings accord with the "common sense" interpretation of "physical loss or damage" in the pre-pandemic cases above.

The interpretation of "direct physical loss or damage" in the first pandemic-era case, *Inns*, is not to the contrary. *Inns* acknowledged that a peril can cause "physical damage" even if it "does not physically alter any building or item of personal property but makes the real property uninhabitable." 71 Cal.App.5th at 700; *see also id.* at 701–703 (citing pre-pandemic cases where noxious substances, odors, and other perils that do not cause structural alteration "rendered real property uninhabitable or unable to be used as intended").[12] *Inns* added that "physical loss" requires a "distinct,

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[12] Among the types of pre-pandemic cases finding physical loss or damage not mentioned in *Inns* are those involving an insured structure that is not altered but cannot be used because of a fortuitous peril. *See, e.g.*, *Morrison-Knudsen Co. v. Phx. Ins. Co. of Hartford* (8th Cir. 1949) 172 F.2d 124, 127 (siphon with undamaged exterior but blocked interior suffered physical damage); *Abbey Co. v. Lexington Ins. Co.* (9th Cir. 2008) 289 F.App'x 161, 164 (same; shipping channel); *British Celanese Ltd. v. A.H. Hunt (Capacitors), Ltd.* (Queen's Bench Div.) [1969] 1 W.L.R. 959 (same; plugged tubes); *Widdows v. State Farm Fla. Ins. Co.* (Fla.Dist.Ct.App. 2006) 920 So.2d 149, 150 (same; blocked toilet); *see also* Lewis, *supra*, at 628, fns.36–41 (citing numerous other decisions finding physical loss or damage without "physical alteration").

demonstrable, physical alteration," *id.* at 706, but such an alteration "could include damage that is *not structural*, but instead is caused by a noxious substance or an odor." *Id.* at 706, fn.19 (italics added).[13]

2. Vigilant Fails to Give "Physical Loss" a Different Meaning from "Physical Damage"

Although Vigilant recites some dictionary definitions set out by *Inns*, Answering Br. at 24, Vigilant does not explain how those definitions support, let alone compel, the "distinct, demonstrable, physical alteration" reading that it urges. Vigilant also gives "physical loss" the same meaning as "physical damage," contravening the rule that each word in an insurance policy must be given meaning. *See Fireman's Fund Ins. Co. v. Superior Court* (1997) 65 Cal.App.4th 1205, 1215 ("words separated by the disjunctive 'or' are presumed to have independent meanings") (citing *Producers Dairy Delivery Co. v. Sentry Ins. Co.* (1986) 41 Cal.3d 903, 916–917); *Boghos v. Certain Underwriters at Lloyd's, London* (2005) 36 Cal.4th 495, 503 (interpretation rules "disfavor constructions of contractual provisions that would render other provisions surplusage").

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[13] In arriving at these definitions, *Inns* appears to have inverted its constructions of "physical damage" and "physical loss." This may have occurred because *Inns* was attempting to harmonize its ruling with *MRI Healthcare*. The latter case, though, did not involve an insurance policy that covered "physical loss *or damage*." *See* Section I.C.2 *infra*.

For that very reason, *Coast Restaurant Group, Inc. v. AmGUARD Insurance Co.* (2023) 90 Cal.App.5th 332 rejected the construction that Vigilant advocates here, explaining that "'loss' must mean something different from 'damage.'" *Id.* at 343. After considering dictionary definitions similar to those set forth above, *Coast Restaurant* concluded that an insured restaurant suffered a "direct physical loss" when the policyholder was deprived of its ability to use "the physical space of the property and the physical objects (chairs, tables, etc.) in that space" in a particular way. *Id.* at 340–341 (citing in part to the pre-pandemic opinion *American Alternative*, discussed above).

In sum, any argument by Vigilant that the ordinary and popular meaning of the insurance policy language supports its position would be entirely groundless.[14]

C. Vigilant's Pre-Pandemic Authorities Do Not Support Its Reading

Vigilant's primary interpretation argument is based not on plain meaning but on three other grounds. First, Vigilant cites to an insurance treatise that opines on "direct physical

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[14] Vigilant also claims that whether property suffers "physical loss" when the presence of the virus makes an insured unable to use its property is not "encompassed by the Ninth Circuit's question." Answering Br. at 13. But the certified question asks whether the "actual or potential presence of the COVID-19 virus on insured's premises" can "constitute 'direct physical loss or damage to property.'" *Another Planet*, 56 F.4th at 734. The meaning or scope of "direct physical loss" related to the presence of the COVID-19 virus is therefore well within the certified question.

loss or damage." Second, Vigilant relies on *MRI Healthcare*. Third, Vigilant says that a "contextual" reading of the Policy eliminates any interpretation of the policy language other than a legal and technical one. Each argument fails.

1. California Courts Do Not Find the Ordinary and Popular Meaning of Insurance Policy Language in a Legal Treatise for Insurance Professionals

Vigilant's proposed "distinct, demonstrable, physical alteration" requirement is taken verbatim from a treatise written by and for insurance professionals and from pandemic-era cases that cite to that treatise. *See* Steven Plitt et al., 10A *Couch on Insurance* (3d ed. 2016) § 148:46 (cited in, *e.g.*, *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.* (9th Cir. 2021) 15 F.4th 885, 891–892); Answering Br. at 25, 48, 49.[15]

The treatise incorrectly stated that its interpretation of "physical loss or damage" was the "widely held" rule. In fact, when that treatise section first appeared, not a single state had adopted such a reading. *See* Lewis, *supra*, at 625–626. Indeed, no California court construing "physical loss or damage" adopted that interpretation until after the outset of the pandemic. *See id*. at 624–629.[16]

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[15] *See Couch on Insurance, 3d*, Thomson Reuters, https://store.legal.thomsonreuters.com/law-products/Treatises/Couch-on-Insurance-3d/p/100028099 (touting treatise's authors as "experts in the insurance field").

[16] Pre-pandemic California decisions cited to *Couch* section 148:46 for the different and noncontroversial

And correctly so. Under California law, insurance policy language must be construed as a "layman would read it and not as it might be analyzed by an attorney or an insurance expert." *E.M.M.I.*, 32 Cal.4th at 471; *accord Hartford Cas. Ins. Co. v. Swift Distrib., Inc.* (2014) 59 Cal.4th 277, 288. A layperson who is not an insurance lawyer or expert would not look to a treatise written for insurance professionals to find the ordinary and popular meaning of insurance policy language. Instead, a layperson would look to popular dictionaries, which do not require the meaning that Vigilant advocates. *See* Section I.B.1 *supra*.

But even assuming *arguendo* that the policy language has two meanings—(1) the plain language meaning and (2) the insurance specialist meaning in the *Couch* treatise and the cases relying on that publication—that would not help Vigilant. Insurance policy language that has more than one reasonable meaning is ambiguous, and any ambiguities in the insurance policy that remain after a contextual reading must be construed in favor of coverage and against the insurer-drafter. *Haynes v. Farmers Ins. Exch.* (2004) 32 Cal.4th 1198, 1204–1205. As one Court of Appeal put it:

> [T]he insurance industry draftsmen…had it within their power to make clear the full scope of the coverage offered as well as any limitations they wished to place thereon. Their failure to do so cannot justify our rejection of an insured's

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proposition that "physical loss" does not encompass loss of intangible property. *See, e.g.*, *Simon Mktg.*, 149 Cal.App.4th at 623–624.

> objectively reasonable expectations as to coverage which arise from the words chosen by the drafters.

Lebas Fashion Imports of USA, Inc. v. ITT Hartford Ins. Grp. (1996) 50 Cal.App.4th 548, 567, fn.13.

2. *MRI Healthcare* Does Not Reject the Pre-Pandemic Cases Interpreting "Physical Loss or Damage"

Saying almost nothing about the pre-pandemic California cases discussed above that construe "physical loss or damage," Vigilant instead relies heavily on *MRI Healthcare*. *See* Answering Br. at 24–25. That case is inapposite.

The insured in *MRI Healthcare* sought coverage for an MRI machine that failed to turn back on after a technician had "ramped down" the machine. 187 Cal.App.4th at 770. A layperson would understand that the insured had suffered a "physical loss": the machine physically did not work. But that loss was not "accidental" because the machine had been intentionally turned off, knowing it might not restart. The machine's failure to turn back on thus did not constitute "*accidental* direct physical loss," as the trial court found. *Id.* at 776.

The appellate court agreed. *Id.* at 778. However, the court also addressed "direct physical loss." *Id.* at 770–771, 778–780, 782. In doing so, it recast "physical loss" to mean "physical damage," and then held that no "physical loss" (so defined) had occurred. *Id.* at 778–780.

But *MRI Healthcare* says nothing about the meaning of "direct physical loss *or damage*" as a complete phrase. Because the policy there did not also cover "physical damage" in the disjunctive, *MRI Healthcare* did not need to give "physical loss" a different meaning from "physical damage," as this Court must in answering the certified question. Vigilant and the cases it cites that rely on *MRI Healthcare* fail to recognize that distinction.

Additionally, *MRI Healthcare* articulated two readings of "accidental direct physical loss." The first required that "some *external force* must have acted upon the insured property to cause a physical change in the condition of the property." *Id.* at 780. The second referred to "a distinct, demonstrable, physical alteration" of property. *Id.* at 779. *MRI Healthcare* thus did not adopt the latter as the *only* reading of the limited insuring agreement at issue, let alone as the interpretation of broader insuring agreements covering "direct physical loss *or damage*." Moreover, *MRI Healthcare* cited the *Couch* treatise to explain that "physical loss" excludes "losses that are intangible or incorporeal." *Id.* But that quotation is *dictum* because *MRI Healthcare* did not involve an argument that the MRI machine was intangible.

In short, *MRI Healthcare* provides no basis for disregarding sixty years of California authority finding coverage for "physical loss or damage" without requiring a "distinct, demonstrable, physical alteration" of property.

3. Vigilant's "Contextual" Argument Fails to Read the Insuring Agreement in the Context of the Entire Policy

Vigilant's final contract interpretation argument is a "contextual" one: citing a definition in a different section of the Policy to argue that "direct physical loss or damage" must involve some "distinct, demonstrable, physical alteration" of property. Vigilant's concept is correct—the ordinary and popular meaning of insurance policy language must be tested by reading it in context, *see State of California v. Cont'l Ins. Co.* (2012) 55 Cal.4th 186, 195—but Vigilant errs by failing to read the policy language in the context of the *entire* Policy.

a) The "Period of Restoration" Definition Does Not Narrow the Meaning of "Physical Loss or Damage"

Like most property insurance forms, the Policy does not define "direct physical loss or damage" at all, let alone define it with reference to the word that Vigilant invokes, "repair." *See* 3ER456; 3ER485. Instead, the word "repair" only appears in the definition of "period of restoration," the time period during which a business income loss is measured. That period begins when the "direct physical loss or damage" starts, and continues until the insured's "operations are restored,…*including* the time required to:...*repair or replace* the property…." 3ER578 (italics added). Vigilant contends that the word "repair" in this definition means that "direct physical loss or damage" requires a "distinct, demonstrable,

physical alteration" of property, under the assumption that "repair" would otherwise not be necessary.

As a *factual* matter, Vigilant's argument does not help its cause, even assuming *arguendo* that "repair" modifies "direct physical loss or damage." A layperson would understand that the process of removing the COVID-19 virus from premises—scrubbing, disinfecting, and taking steps to prevent or limit recurrence, such as purchasing ventilation systems—*is* making a "repair" to the premises.[17] To that end, Another Planet alleged both that the COVID-19 virus can be "repaired" through "regular disinfection" and "air filtration," and that Another Planet undertook such "repairs." 3ER398–399 ¶ 53. Those allegations must be accepted as true and cannot be ignored on motions directed to the pleadings. *See Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6; *Shields v. Credit One Bank, N.A.* (9th Cir. 2022) 32 F.4th 1218, 1220.

But Vigilant is not right in suggesting that "repair" modifies "direct physical loss or damage." An ordinary layperson reading the Policy would not look at a definition about the timing of business income losses to significantly limit the meaning of words in an insuring agreement in a different section of the Policy, nearly 100 pages away. That

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[17] *Repair*, Merriam-Webster, https://www.merriam-webster.com/dictionary/repair ("to restore to a sound or healthy state").

would not restrict coverage in the requisite "conspicuous, plain and clear" manner. *Haynes*, 32 Cal.4th at 1204.[18]

Moreover, Vigilant ignores the rest of the "period of restoration" definition, which states that the period "will continue until your operations are restored, with reasonable speed, to the level which would generate the business income amount that would have existed if no direct physical loss or damage occurred." 3ER578. The "repair" language merely clarifies that definition, confirming that the loss period "*includ[es]* the time required to [perform repairs]." *Id*. In other words, Another Planet need not complete a "repair" to end the "period of restoration"; it only needs to "restore[]" its operations to pre-accident levels. Therefore, "the 'period of restoration' only provides one method of calculating the duration of coverage, and does not purport to define the scope of coverage." *Coast Rest.*, 90 Cal.App.5th at 341 (rejecting the same "contextual" argument that Vigilant raises here).

Finally, interpreting "direct physical loss or damage" based on the reference to "repair" in the "period of restoration" definition would improperly lead to

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[18] *See Jauregui v. Mid-Century Ins. Co.* (1991) 1 Cal.App.4th 1544, 1550 ("[T]he insurer does not meet its stringent obligation to alert a policyholder to limitations on anticipated coverage by hiding the disfavored language in an inconspicuous portion of the policy."); *see also Haynes*, 32 Cal.4th at 1204–1205 (language did not limit coverage because there was "nothing in the heading to alert a reader that it limits [relevant] coverage, nor anything in the section to attract a reader's attention to the limiting language").

inconsistencies between different coverage provisions in the Policy. For example, Another Planet's "civil authority" coverage is also triggered by "direct physical loss or damage," but the duration of coverage does not depend on the "period of restoration." *See* 3ER487–488. Instead, civil authority coverage lasts for 30 days or until Another Planet's civil authority losses end, whichever is shorter. 3ER488.

Under Vigilant's reading, the phrase "direct physical loss or damage" as used in the civil authority insuring agreement would not have the same meaning as those same words when used in the business income insuring agreement—the latter would require "repair," whereas the former would not. Such an inconsistency would violate the contract interpretation canon that the same term—"direct physical loss or damage"—must have the same meaning wherever used in the insurance policy. *See Palmer v. Truck Ins. Exch.* (1999) 21 Cal.4th 1109, 1116.[19] To avoid this

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[19] Even absent this contract interpretation canon, no reasonable insured would expect "physical loss or damage" in the civil authority insuring agreement to be subject to a "repair" requirement. As a practical matter, an ordinary policyholder could not know whether a particular civil authority order closing businesses in the community was motivated by an occurrence that involved "repair" rather than some other type of peril. If Vigilant meant to eliminate coverage for losses from civil authority orders closing businesses where the orders were motivated by unsafe transitory conditions but a "repair" does not take place, such as dangerous air quality levels or leaks of natural gas or other harmful substances, Vigilant had to say so in unambiguous language, which it did not do.

inconsistency, a court construing "direct physical loss or damage" in either the civil authority or business income insuring agreement should not read that language by reference to the "period of restoration" definition.

b) Other Policy Provisions Show That "Physical Loss or Damage" Does Not Require Structural Alteration

Vigilant errs further when it stops its "contextual" analysis with the reference to "repair" in the "period of restoration" definition. "An insurance policy, like any other contract, must be construed *in its entirety*, with each clause lending meaning to the other." *Producers Dairy*, 41 Cal.3d at 916–917 (italics added). Vigilant's reading of "direct physical loss or damage" thus must be tested in the context of the *entire* Policy to determine whether that reading is consistent with the remaining Policy provisions. Vigilant's proposed reading fails that test.

For example, just pages away from the "direct physical loss or damage" insuring agreement is an exclusion for "loss or damage caused by or resulting from the mixture of *or contact between* property and a pollutant." 3ER473 (italics added). The Policy defines "pollutant" to include "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor," or "fumes." 3ER582. The "pollutants" exclusion then specifies various exceptions, including "any solid, liquid or gas used to suppress fire" and "water," but adds that those exceptions "do not apply to loss or damage involving…*viruses or pathogens*." 3ER473 (italics added).

These provisions preclude Vigilant's interpretation of "direct physical loss or damage." In Vigilant's view, "any…irritant or contaminant," such as smoke or fumes, could not cause "direct physical loss or damage" in the first place if its presence was not "severe and pervasive" enough at the insured property. Answering Br. at 52. Moreover, Vigilant asserts repeatedly that viruses like the COVID-19 virus can *never* cause "direct physical loss or damage," except, perhaps, to living or organic property like livestock or food. *Id*. at 15, 29, 32–34, 36, 37, 41, 60, 64. But if Vigilant were right, the express exclusions for "pollutants"—and the carve-out for "viruses" from certain exceptions to the exclusion—would be superfluous. Such a reading is impermissible. *See* Civ. Code, § 1641.

In fact, the reference to these perils in the exclusion means that the Policy would have provided coverage for the excluded perils absent the exclusions. *See Am. Bldg. Maint. Corp. v. Indem. Ins. Co.* (1932) 214 Cal. 608, 613 ("The very fact that the defendant insurance company thought it necessary to issue a rider in order to eliminate this coverage indicates a belief on its part that loss arising from the [excluded peril] was included in the policy."); *Century Transit Sys., Inc. v. Am. Empire Surplus Lines Ins. Co.* (1996) 42 Cal.App.4th 121, 129 ("The very purpose of an exclusion is to withdraw coverage which, but for the exclusion, would

otherwise exist.").[20] Likewise, the carve-out for "viruses" would have been unnecessary if viruses could not be covered in the first place. Thus, a contextual reading precludes Vigilant's interpretation of "direct physical loss or damage."

As a further example, Vigilant fails to consider the insuring agreement for "direct physical loss or damage to electronic data processing property caused by or resulting from a technology peril." 3ER500. The Policy defines "electronic data processing property" to include "electronic data"—something that, according to *Ward General,* 114 Cal.App.4th at 556, is intangible but which, under this insuring agreement, can experience "direct physical loss or damage." 3ER500. The Policy defines "technology peril" as "a peril not otherwise excluded," and specifies that such perils include "malicious programming" (except with respect to electronic data). 3ER587; 3ER592. Thus, a computer virus, which typically does not cause structural alteration to electronic equipment, is a "covered peril" that can cause "direct physical loss or damage" insured under the Policy. That scenario does not comport with the reading of the coverage grant that Vigilant urges this Court to adopt.

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[20] Vigilant may argue in response that exclusions cannot create coverage. But the statutory rules of contract interpretation have no exception for insurance policy exclusions. Thus, this Court has looked to the language of exclusions to understand the meaning of insuring agreements. *See LaJolla Beach & Tennis Club, Inc. v. Indus. Indem. Co.* (1994) 9 Cal.4th 27, 42.

At a minimum, the juxtaposition of "repair" in the "period of restoration" definition 100 pages after the "direct physical loss or damage" insuring agreement, and the express reference to "viruses" and other substances that cannot cause "direct physical loss or damage" (under Vigilant's reading) in the other policy provisions shortly after the insuring agreement, creates an ambiguity that must be resolved in favor of coverage. *See MacKinnon v. Truck Ins. Exch.* (2003) 31 Cal.4th 635, 648, 655.

II. The Post-March 2020 Cases on Which Vigilant Relies Are Inapposite or Contrary to California Law

At bottom, Vigilant's argument is based on cases rejecting coverage, not on the policy language itself. Answering Br. at 49. But insurance coverage is not governed by common law principles. *See Am. Cyanamid Co. v. Am. Home Assurance Co.* (1994) 30 Cal.App.4th 969, 978. Instead, coverage turns on the specific policy language, *AIU*, 51 Cal.3d at 822, read in accordance with the statutory rules of contract interpretation, *MacKinnon*, 31 Cal.4th at 647–648. Thus, the answer to the certified question turns on this Court's reading of the Policy using the interpretive principles discussed above, not on whether more cases have rejected or found coverage.

Nonetheless, it may be helpful for the Court to understand why certain pandemic-era cases rejected coverage and why they are not persuasive in answering the certified question. Those cases fall into two categories: (A) cases that are irrelevant to the certified question; and (B) cases that

reached results contrary to California's rules of policy interpretation or to California's rules of procedure and evidence.

A. Most Cases That Reject Coverage Are Inapposite to the Certified Question

Most of the cases that Vigilant and other courts rely on were decided on grounds that do not apply to the certified question. These include cases with (1) insurance policies that have a broad "virus" exclusion; and (2) complaints that fail to allege a causal connection between the peril (the COVID-19 virus) and the claimed physical loss or damage.

1. Cases with ISO Exclusions or the Equivalent

The first category involves insurance policies that have other provisions that eliminate coverage. Most often, the insurance policies are subject to the ISO "Exclusion for Loss Due to Virus or Bacteria" or the equivalent.[21] As noted, Vigilant did not include any such exclusion in the Policy. 3ER392; *see also* 3ER389–391.

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[21] Vigilant's cases involving such a virus exclusion, which either played a role in the courts' decision or affected how the plaintiffs pleaded their allegations, include: *In re Garden Fresh Rests., LLC* (S.D.Cal. Sept. 20, 2022) 2022 WL 4356104, at *2; *Mudpie,* 15 F.4th at 893; and *Musso & Frank Grill Co. v. Mitsui Sumitomo Ins. USA Inc.* (2022) 77 Cal.App.5th 753, 761. Recent Ninth Circuit cases were decided on similar grounds. *See, e.g.*, *JC SC LLC v. Travelers Indem. Co. of Conn.* (9th Cir. Apr. 14, 2023) 2023 WL 2945304, at *2; *Disc. Elecs., Inc. v. Wesco Ins. Co.* (9th Cir. Feb. 15, 2023) 2023 WL 2009935, at *2.

2. Cases with No Alleged Causal Connection Between the Virus and the Physical Loss or Damage

The second category involves plaintiffs that did not plead a direct causal connection between the peril (the COVID-19 virus) and the loss or damage. Some plaintiffs failed to allege the presence of COVID-19 on-site, or they pleaded that their business closures were due to civil authority orders only, without any connection to the virus itself. *See, e.g.*, *Musso*, 77 Cal.App.5th at 756 (plaintiff alleged that closure order alone was the peril[22]); *Apple Annie, LLC v. Or. Mut. Ins. Co.* (2022) 82 Cal.App.5th 919, 937 (plaintiff "did not allege that the presence of the virus on the premises triggered coverage"); *Starlight Cinemas, Inc. v. Mass. Bay Ins. Co.* (2023) 91 Cal.App.5th 24, 38 ("Starlight did not allege that the COVID-19 virus was present in its theaters or that there was any physical alteration of its property as a result of either the virus or the government orders."). These plaintiffs typically were attempting to plead around the ISO virus exclusion.

In other cases, the insured had no virus exclusion but still failed to plead a causal connection. For instance, *Inns* recognized that the COVID-19 virus could, like "smoke, ammonia, odor, or asbestos," cause physical loss or damage. 71 Cal.App.5th at 703. Yet the court rejected coverage

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[22] *See also Musso* App. Br. (Aug. 26, 2021) 2020 WL 4169380, at *28–38; *Musso* Compl. (May 1, 2020) 2020 WL 2096329, ¶ 59.

because the insured had not alleged that it closed its business due to physical damage caused by the virus. *Id.* at 703–704. Other cases likewise involved evidence that the losses were unconnected to the presence of the virus. *See, e.g.*, *Best Rest Motel, Inc. v. Sequoia Ins. Co.* (2023) 88 Cal.App.5th 696, 707–711 (affirming summary judgment for insurer because evidence suggested non-virus-exposed rooms were available to rent and losses were actually caused by a slowdown in tourism).

Another Planet, however, pleaded that its losses resulted from the presence of the virus at its locations. 3ER381; 3ER401; 3ER410. The "causation" defense therefore does not apply here.

B. Vigilant's Other Cases Contravene California's Contract Interpretation and Pleading Rules

Vigilant's other cases are inapposite because they turn on a misapplication of California contract interpretation law or the rules governing pleadings. These include cases that (1) improperly consider the financial effect on insurers of a ruling in favor of coverage; (2) substitute the court's assumptions about the COVID-19 virus for the factual allegations in the complaint when ruling at the pleadings stage; (3) treat the issue as one of common law precedent or give a legal and technical meaning to the policy language instead of giving that language its plain meaning; or (4) impose requirements for coverage not found in the insurance policy.

1. Cases That Considered the Financial Implications to the Insurer

Some courts have indicated that their rulings were informed by concern that a finding of coverage would have a detrimental financial effect on insurers. *See, e.g.*, *Musso*, 77 Cal.App.5th at 761, fn.2 (asserting that a ruling in favor of coverage would "dramatically affect the insurers' financial obligations"). In addition, insurance industry *amici curiae* frequently tout such considerations in opposing coverage.

That an insurer may regret the financial consequences of the contractual bargain it struck plays no role under California law, however. As this Court has explained, the insurer and the policyholder "were generally free to contract as they pleased," and the courts "may not rewrite what they themselves wrote…simply in order to adjust for chance." *Aerojet-Gen. Corp. v. Transp. Indem. Co.* (1997) 17 Cal.4th 38, 75. Instead, courts must leave "whatever 'gains' and 'losses' there may be to lie where they have fallen." *Id.* at 76.

Moreover, any claim now of a severe financial impact of a ruling in favor of coverage would be significantly overstated. First, many COVID-19-related cases have been resolved.[23] Second, due to "suit limitation" provisions in property policies, *see* Ins. Code, § 2071, new California coverage actions are

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[23] *See* Ben Zigterman, *How COVID Coverage Litigation Is Shaping Up in 2023*, Law360 (July 7, 2023), https://www.law360.com/articles/1696877.

unlikely to be filed if the Court answers the certified question in the affirmative. Third, hypothetical loss figures provided by industry lobbyists are greatly overblown because they include policies with express virus exclusions.[24]

2. Cases That Do Not Apply California Law When Ruling on Pleadings Motions

In many instances, plaintiffs in COVID-19-related insurance coverage actions support their pleading that the virus caused "direct physical loss or damage" with detailed factual allegations and citations to scientific authorities. Another Planet did just that in its complaint. *See, e.g.*, 3ER396–399. However, many of the courts that reject coverage improperly disregard the pleaded facts and rely instead on their own views of the nature and effects of the COVID-19 virus.

As this Court has frequently held, however, the record on a demurrer or motion for judgment on the pleadings is confined to the facts pleaded in the complaint, which must be presumed to be true, and facts that are properly the subject of judicial notice. *See, e.g.*, *Evans*, 38 Cal.4th at 6; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; Code Civ. Proc., § 430.30; *see also Shields*, 32 F.4th at 1220 (same).

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[24] *See* note 5 *supra*; Alwyn Scott and Suzanne Barlyn, *U.S. Insurers Use Lofty Estimates to Beat Back Coronavirus Claims,* Reuters Bus. News (June 12, 2020), https://www.reuters.com/article/us-health-coronavirus-insurance-claims-a/u-s-insurersuse-lofty-estimates-to-beat-back-coronavirus-claims -idUSKBN23J0T6.

Plaintiffs of course do not plead that the COVID-19 virus is incapable of causing "direct physical loss or damage." As a result, the courts that state, as a factual matter, that COVID-19 cannot cause "direct physical loss or damage" are not relying on the allegations in the insured's complaint to determine whether the insured can satisfy whatever interpretation of the insurance policy language the court has chosen to adopt. Nor can those courts properly take judicial notice of facts concerning the effects of the presence of the COVID-19 virus on property since the merits of the insurance industry's position are disputed. *See, e.g.*, 3ER397–399 ¶¶ 51–54 (citing scientific studies concerning nature of COVID-19 and COVID-19 virus and virus's interaction with property, including duration of physical presence); *see also Scott v. JPMorgan Chase Bank, N.A.* (2013) 214 Cal.App.4th 743, 760–761 ("judicial notice…cannot be taken of matters shown to be reasonably subject to dispute"); *United States v. Corinthian Colls.* (9th Cir. 2011) 655 F.3d 984, 999 (same, under Federal Rule of Evidence 201).

Most courts that have found, as a factual matter, that the COVID-19 virus cannot cause "direct physical loss or damage" rely instead on facts recited in judicial opinions in other cases. But a fact in one case is not part of the record in a different case, and such a fact does not become subject to judicial notice for its truth merely because it appears in a court opinion or record. *See, e.g.*, *O'Neill v. Novartis Consumer Health, Inc.* (2007) 147 Cal.App.4th 1388, 1405

(refusing to take judicial notice of the truth of facts recited in a federal appellate opinion); *Kilroy v. California* (2004) 119 Cal.App.4th 140, 145–148 (same; California state court ruling); *Lee v. City of Los Angeles* (9th Cir. 2001) 250 F.3d 668, 688–689 (federal court cannot take judicial notice of the truth of facts in court records). Thus, courts that rely on facts recited in judicial opinions in other cases contravene California and federal pleading rules.

The most notable California case to have committed that error is *United Talent Agency v. Vigilant Insurance Co.* (2022) 77 Cal.App.5th 821, cited so often in Vigilant's brief that Vigilant uses *passim* in the Table of Authorities.[25] *United Talent* not only engaged in *sua sponte* appellate fact-finding in affirming a judgment entered after a demurrer was sustained without leave to amend, but it also relied heavily on facts recited in judicial opinions in other cases. Making matters worse, *United Talent*'s citations did not support the

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[25] Other cases that have improperly relied on facts in other judicial opinions include, *e.g.*, *Schleicher & Stebbins Hotels, LLC v. Starr Surplus Lines Ins. Co.* (N.H. May 11, 2023) 2023 WL 3357980, at *7 (citing *Sandy Point Dental, P.C. v. Cincinnati Insurance Co.* (7th Cir. 2021) 20 F.4th 327, 335 and *Verveine Corp. v. Strathmore Insurance Co.* (Mass. 2022) 184 N.E.3d 1266, 1276 for statements about cleaning of COVID-19 virus); *AC Ocean Walk, LLC v. Am. Guarantee & Liab. Ins. Co.* (N.J.Super.Ct. App.Div. June 23, 2022) 2022 WL 2254864, at *13 (same); *Colectivo Coffee Roasters, Inc. v. Soc'y Ins.* (Wis. 2022) 974 N.W.2d 442, 448 (citing *Uncork & Create LLC v. Cincinnati Insurance Co.* (S.D.W.Va. 2020) 498 F.Supp.3d 878, 883–884 for statement that COVID-19 virus "can be removed from a surface with a disinfectant").

conclusions that it drew, which highlights the misplaced reasoning of the cases on which Vigilant relies.

To take just one example, *United Talent* cited a federal case for the supposed fact, not pleaded in the complaint, that it would "'strain credulity to say that'" countertops with the COVID-19 virus on them could be "'damaged or physically altered as a result.'" 77 Cal.App.5th at 835 (quoting *Unmasked Mgmt., Inc. v. Century-Nat'l Ins. Co.* (S.D.Cal. 2021) 514 F.Supp.3d 1217, 1226). *Unmasked Management* in turn cited two sources supposedly saying that the COVID-19 virus does not damage countertops. The first was *O'Brien Sales & Marketing, Inc. v. Transportation Insurance Co.* (N.D.Cal. 2021) 512 F.Supp.3d 1019, which relied on a University of Arizona newsletter published two weeks into the pandemic. *Id.* at 1024. But the newsletter said no such thing. It noted that certain chemical compounds had been effective in cleaning *other* viruses, but added that it was premature to determine whether such compounds would be effective for COVID-19, and it specifically advised its readers not to touch surfaces lest they contract the COVID-19 virus.[26] *Unmasked*'s other source was *Uncork & Create*, which cited

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[26] *See* Dawn H. Gouge et al., *People Unite Against the Threat of COVID-19*, Univ. of Ariz. Agric., Life & Veterinary Scis. & Coop. Extension (Mar. 30, 2020), https://acis.cals.arizona.edu/community-ipm/home-and-school-ipm-newsletters/ipm-newsletter-view/ipm-newsletters/2020/03/30/people-unite-against-the-threat-of-covid-19.

no authority at all for its statements about the nature of the COVID-19 virus. 498 F.Supp.3d at 883.

The assumption in cases such as *United Talent* that a court can venture outside of the record is contrary to well-established California law and should not influence this Court's answer to the certified question. *See Marina Pacific Hotel & Suites, LLC v. Fireman's Fund Ins. Co.* (2022) 81 Cal.App.5th 96, 111 (refusing to "disregard…allegations when evaluating a demurrer, as the court did in *United Talent*, based on a general belief that surface cleaning may be the only remediation necessary to restore contaminated property to its original, safe-for-use condition"); *Shusha, Inc. v. Century-Nat'l Ins. Co.* (2022) 87 Cal.App.5th 250, 265 (insured need not "provide authority at the pleading stage to support its position that contamination with the COVID-19 virus caused damage to the surfaces in its premises").

3. Other Cases That Disregard the Ordinary and Popular Meaning of the Policy Language

Nearly every pandemic case rejecting coverage parrots the "distinct, demonstrable, physical alteration" standard with little analysis. *See, e.g.*, *United Talent*, 77 Cal.App.5th at 832–833; *Apple Annie,* 82 Cal.App.5th at 927; *Mudpie,* 15 F.4th at 892. But, as explained in Section I.B *supra*, the ordinary and popular meaning of "direct physical loss or damage" read in the context of the entire Policy does not support that interpretation. In some instances, courts have emphasized the "physical damage" standard so strongly that

they forget that coverage for "physical loss" also exists. *See, e.g.*, *Santa Ynez Band of Chumash Mission Indians of Santa Ynez Rsrv. Cal. v. Lexington Ins. Co.* (2023) 90 Cal.App.5th 1064, 1072 ("If there is alteration of property without physical damage, then there is no proof of an economic loss that can be compensated under the policy. The ordinary meaning of the term 'physical damage to property' does not include a virus on the property.").

The reading of "direct physical loss or damage" in those decisions is also problematic because that interpretation has started to affect cases involving losses that, before the pandemic, plainly would have been covered. For example, in *Wong v. Stillwater Insurance Co.* (2023) ___ Cal.App.5th ____, 309 Cal.Rptr.3d 908, the court determined that viable embryos at a fertility center that *likely* thawed due to storage failures did not suffer "direct physical loss" because the policyholder could not *prove* that the embryos suffered a "physical alteration." *Id.* at 922–923. Although the insureds provided their doctor's testimony that the embryos should be considered "irreversibl[y] compromised, no longer viable, and lost," the court found that testimony insufficient to create a fact dispute that would have precluded summary judgment because the doctor also testified that there was "no way to know" if the embryos actually sustained physical damage. *Id.* at 921–922. In a pre-pandemic world, where courts focused on the plain policy language in its proper context, the physical loss would have been covered. There was an external physical

force—the temperature increase in the embryo storage tank—that rendered the embryos unusable for their intended purpose of creating a viable pregnancy.

Likewise, a Florida court recently relied on the physical alteration standard in COVID-19 pandemic cases to hold that insureds were not entitled to coverage for their aircraft that have been lost in Russia following Russia's invasion of Ukraine. *Zephyrus Aviation Capital, LLC v. Berkshire Hathaway Int'l Ins. Ltd.* (June 30, 2023) No. CACE23002230, at 2–3. The court determined that there was no physical change in the aircraft even though the plaintiffs were completely dispossessed of their property. *Id.* at 1, 3. As noted, Justice Croskey wrote a unanimous pre-pandemic opinion finding coverage under an identical scenario. *See Am. Alt.*, 135 Cal.App.4th 1239.

No reasonable insured would expect to lose coverage in cases like these. This Court can and should correct misguided lower courts in its response to the certified question.

4. Other Cases Attempt to Graft Nonexistent Extra-Contractual Limitations Requiring Permanent Changes to Property

United Talent and certain federal cases attempt to justify their rulings by imposing requirements for coverage that are not rooted in any policy language and are often at odds with pre-pandemic California law and the plain meaning of the phrase "direct physical loss or damage." Principally, those courts have come up with a requirement that insured property must be permanently changed or forever

dispossessed before a "physical loss" can occur. *See, e.g.*, *Santa Ynez*, 90 Cal.App.5th at 1073 (insured needed to show "that its carpeting, gaming tables, gambling devices, and playing cards had to be replaced or could not be used again"); *Mudpie*, 15 F.4th at 892 (insured did not allege that it "was permanently dispossessed of its property").

Vigilant echoes these cases. It concedes that property that is "misplaced or stolen," or that "becomes completely uninhabitable and unusable for any purpose at all" can experience "loss." Answering Br. at 13–14. But Vigilant then suggests that a policyholder must also suffer a "total destruction," "complete dispossession," or complete inability to use property. *Id.* Vigilant is incorrect.

First, the Policy does not impose, or even mention, a requirement that a physical loss be permanent. To the contrary, the business income coverage in the Policy is subject to a "waiting period" deductible of 24 hours, 3ER442; 3ER492, which necessarily means that covered losses of less than 24 hours' duration could occur. Moreover, the dictionary definitions of "direct physical loss or damage" do not require permanence. *See* Section I.B.1 *supra*. Indeed, the seized airplane in *American Alternative* was ultimately released back to the insureds. That did not prevent the court from concluding that a "physical loss" had occurred and that the policy covered the expenses incurred to protect the aircraft after the seizure. *Am. Alt.*, 135 Cal.App.4th at 1243, 1249; *see also Thee Sombrero, Inc. v. Scottsdale Ins. Co.* (2018) 28

Cal.App.5th 729, 737–738 (temporary property closure is loss of use of property; liability policy).

Further, covered perils like wildfire smoke or noxious gases do not permanently transform the air or property, but can still cause "physical loss or damage" until the substance clears. *Inns*, 71 Cal.App.5th at 700–701. As in *Coast Restaurant*, Vigilant's Policy "does not distinguish between a partial loss or a total loss." 90 Cal.App.5th at 342. Thus, even if the insured's "deprivation here is less than the insured's deprivation in *American Alternative*, there is still a 'loss' under the policy, although the amount of the loss would be different." *Id.*; *see also Marina Pacific*, 81 Cal.App.5th at 112 ("the duration of exposure may be relevant to the measure of policy benefits; it does not negate coverage").

Second, the Policy does not require complete dispossession. Vigilant nonetheless repeatedly argues for such a rule. *See* Answering Br. at 14 (there must be "complete dispossession"); *id.* (the property must be "uninhabitable and unusable for any purpose at all"). But Vigilant cites no pertinent California authority holding that "physical loss" requires "complete dispossession." Vigilant likewise never identifies language in the Policy imposing such a requirement—let alone the requisite "clear and unmistakable language" that is necessary for Vigilant's reading to govern. *See MacKinnon*, 31 Cal.4th at 648.

Nor does the Policy require complete unusability. Nothing in the dictionary definitions in Section I.B.1 limits

coverage to instances in which the property is completely unusable. Indeed, the ordinary meaning of "damage" includes impairment to the usefulness of property, and "loss" relates to changing conditions, but those words do not require more.[27]

In any event, Another Planet *did* lose the ability to use its property for normal business purposes. Under a business interruption coverage policy, this is exactly the coverage that Another Planet paid to obtain. *See Pac. Coast Eng'g Co. v. St. Paul Fire & Marine Ins. Co.* (1970) 9 Cal.App.3d 270, 275 ("[T]he purpose and nature of 'business interruption'...insurance is to indemnify the insured against losses arising from [its] inability to continue the normal operation and functions of [its] business, industry, or other commercial establishment.").

Making matters worse, insurers argue for these nonexistent requirements to attempt to convince courts to reject properly pleaded allegations. *See* Section II.B.2 *supra*. For example, Another Planet meets even the "distinct, demonstrable physical alteration" standard by alleging that the COVID-19 virus changed previously safe property into infectious property that rendered it unfit for normal use, as the virus created "an imminent and severe risk to human health." 3ER399 ¶ 54. As Another Planet alleged with citations to studies, virus droplets "attach" to surface and

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[27] *See Damage*, Oxford English Dictionary, www.oed.com/view/Entry/47005; *Loss*, Oxford English Dictionary, www.oed.com/view/Entry/110406.

remain suspended in the air. 3ER397–399 ¶¶ 51, 53. Surfaces therefore become "contaminated," and the air and surfaces can infect people who come in contact with them. Together, these allegations show that the COVID-19 virus droplets "physically alter the air and airspace in which they are present and the surfaces of both the real and personal property to which they attach, constituting physical loss or damage." 3ER398–399 ¶ 53.

Because these allegations state a claim under pre-pandemic California law, and even satisfy Vigilant's legalistic pandemic-era reinterpretation of the policy language, Vigilant takes refuge in rhetoric. It contends that Another Planet's allegations about viral particles turning into transmission vectors called "fomites" is "semantic wordplay." Answering Br. at 30. But there is no exception to the rules requiring a court to accept the plaintiff's allegations as true in motions directed to the pleadings for allegations that the defendant contends are "semantic wordplay." If there were, what complaint could survive a defendant's rhetoric in a demurrer or motion to dismiss? Yet, most demurrers are overruled and most other pleading motions are denied.

Vigilant's only response is more hyperbole, that a "doorknob that becomes a fomite" is "no more physically altered than a doorknob that becomes wet" because the "doorknob remains exactly the same doorknob it was before" in both cases when the particles are wiped away. *Id.* at 30–31. This analogy falls flat: Water is not equivalent to a

dangerous disease, and its ability or inability to be "wiped away" does not change the fact that some initial alteration occurred.[28]

The Court should reject Vigilant's attempt to rewrite the main insuring agreement in its Policy to impose extracontractual requirements for coverage.

III. The Court Should Reframe the Certified Question to Conform to the Policy Language

The Ninth Circuit's proposed certified question asks the Court to decide whether the presence of the COVID-19 virus can "constitute" direct physical loss or damage, rather than whether the virus can "cause or result in" direct physical loss or damage. As the Ninth Circuit acknowledges, however, this Court can reframe the certified question as appropriate. *Another Planet*, 56 F.4th at 734.

The certified question does not track the language of Another Planet's Policy and other standard form "open peril" policies, which provide that the loss "must be *caused by or result from* direct physical loss or damage *by* a covered peril to property." 3ER485 (italics added).[29] In addition, the certified

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[28] Vigilant's cited definitions of "fomite" acknowledge that property is transformed by viral particles and becomes "contaminated." Answering Br. at 30. That contamination is a physical alteration to property, both changing the physical composition of the property and rendering it unsafe.

[29] *See also, e.g., Marina Pacific*, 81 Cal.App.5th at 99 (insuring against "physical loss or damage to [the insured property] caused by or resulting from a covered cause of loss")

question supposes that all property policies are the same, referring to "commercial property insurance" generally whereas the Court has before it only the "open peril" form that Vigilant issued to Another Planet. Accordingly, Ross proposes that the Court revise the certified question as follows:

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

(Proposed deletions stricken through; proposed additions underscored.)

CONCLUSION

For the reasons above, and the reasons set forth in Petitioner's briefs, the Court should answer the certified question (whether as originally framed or as revised) in the affirmative.

DATE: August 2, 2023

Respectfully submitted,

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By: */s/ David B. Goodwin*
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(bracketed words in original); *Inns*, 71 Cal.App.5th at 691 (same).

CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies, pursuant to California Rule of Court 8.520(c)(1), that the foregoing Brief *Amicus Curiae* of Ross Stores, Inc. in Support of Petitioner Another Planet Entertainment, LLC was produced using 13-point Century Schoolbook type and contains 10,035 words, including footnotes, which is less than the total number of words permitted by the Rules of Court. Counsel relies upon the word count of the computer program (Microsoft Word) used to prepare this brief.

DATE: August 2, 2023

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- **[PROPOSED] BRIEF *AMICUS CURIAE* OF ROSS STORES, INC. IN SUPPORT OF PETITIONER ANOTHER PLANET ENTERTAINMENT, LLC**

on the interested parties in this action as follows:

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Dawn Halverson

Dawn Halverson

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Supreme Court of California

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8/2/2023

Date

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