

S277893

In the
Supreme Court
of the
State of California

ANOTHER PLANET ENTERTAINMENT, LLC,
Plaintiff and Appellant,

v.

VIGILANT INSURANCE COMPANY,
Defendant and Respondent.

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

**COMBINED APPLICATION FOR LEAVE TO FILE BRIEF AND
BRIEF OF *AMICUS CURIAE* THE LOS ANGELES LAKERS, INC.**

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**APPLICATION FOR LEAVE TO FILE BRIEF BY
AMICUS CURIAE THE LOS ANGELES LAKERS, INC.**

Pursuant to California Rule of Court 8.520(f), Amicus Curiae Los Angeles Lakers, Inc. respectfully requests permission to file the accompanying brief in support of neither party. No party or counsel in the pending appeal was involved in the preparation of the brief. No person or entity other than amicus curiae and its counsel funded the preparation of the brief.

I. INTEREST OF AMICUS APPLICANT

The Los Angeles Lakers, Inc. owns and operates the Los Angeles Lakers basketball team. The Lakers are one of the most successful and storied teams in professional sports, winning a record-tying 17 NBA championships. Each year, hundreds of thousands of fans attend Lakers home games to cheer on the team and to celebrate its success with their fellow fans. The Lakers earn hundreds of millions of dollars in annual revenue from home games, both during the regular season and the playoffs.

To protect against unexpected harm, the Lakers purchased an insurance policy that covers the costs to remediate, repair, or replace “direct physical loss or damage” to specified covered buildings and personal property, including the arena where the Lakers play their home games, and lost business income due to “direct physical loss or damage.” During the onset of the COVID-19 pandemic, before any government shutdowns, athletes, employees, and fans carried COVID-19 into the arena. The harms to the arena caused by the virus required significant amounts of money to remediate and resulted in millions of dollars of lost

business income and extra expense from the cancellation of home games. The Lakers have so far been denied coverage for that direct physical loss or damage to their property.

The Lakers are currently engaged in litigation with their insurer over whether the COVID-19 virus caused “direct physical loss or damage” to their insured property. That litigation raises many of the same questions that this Court will address in this case. Because of the significant overlap between the two cases, the Lakers’ case has been stayed pending the outcome of this one. This Court’s resolution of the certified question will therefore affect the Lakers’ insurance coverage litigation, which gives the Lakers a significant interest in this case.

II. THE PROPOSED BRIEF WILL ASSIST THE COURT.

The Lakers seek to submit a brief that would present the Court with an approach to resolving the certified question that is different from the approaches advocated by the parties.

Whether the COVID-19 virus can cause “direct physical loss or damage” has been the subject of extensive litigation. In these cases, insurers and insured parties often both take positions that are at odds with the plain language of a “direct physical loss or damage” provision. This case is no exception. The insurer here contends that courts at the pleading stage should make the scientific determination that the COVID-19 virus can *never* cause “direct physical loss or damage” because it does not affect the structure of property. But “physical damage” is not limited to structural damage, and courts have recognized that all kinds of perils that do not cause structural damage—like noxious fumes

and chemicals—can cause physical damage within the meaning of an insurance policy. For their part, policyholders often argue that the mere presence (or possible presence) of COVID-19 on their premises causes “physical damage.” But that approach fails to recognize that “physical damage” requires the existence of harm to the insured property that renders the property unsafe or requires it to be remediated, repaired, or replaced before it can be put to its former use.

In their amicus brief, the Lakers will propose to the Court a different test for determining whether COVID-19 causes direct physical loss or damage. Consistent with the precedent, the Lakers ask the Court to hold that a party can establish a claim for direct physical loss or damage if it can demonstrate that the COVID-19 virus physically affected insured property (such as through infiltration, contamination, or chemical reaction), rendering the property unsafe or unfit for use for a period of time or requiring repair, replacement, or remediation to restore the property to its pre-damaged condition. The Lakers respectfully submit that their discussion of this proposed standard will aid the Court in resolving the question certified in this appeal.

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PRELIMINARY STATEMENT

The parties to this appeal present the Court with a false dichotomy. On the one hand, Respondent Vigilant Insurance Company takes the position that the COVID-19 virus can *never* trigger insurance coverage for direct physical loss or damage to property because the virus does not cause any permanent structural change to property. On the other hand, Petitioner Another Planet Entertainment, LLC (“AP”) argues that the mere presence or potential presence of the COVID-19 virus, without more, can in some cases cause direct physical loss or damage.¹

As is often the case, the correct answer lies somewhere between those two extremes. Amicus Los Angeles Lakers, Inc. submits this brief to offer the Court a third way that honors the reasonable expectations of the parties, the plain meaning of a standard “direct physical loss or damage” provision found in many insurance contracts, and the precedent. Amicus respectfully submits that the Court should apply the standard endorsed by courts in non-COVID contexts for decades, under which coverage is triggered if a party can prove that a covered peril caused insured property, then in a satisfactory state, to become unsafe or unsatisfactory for future use or required repairs, replacement, or remediation to correct the damage and restore the property to pre-loss condition. Under that test, the COVID-19 virus can cause direct physical loss or damage, but only if an insured party can show that the virus physically affected specific property (such as

¹ Although COVID-19 refers to the disease and SARS-CoV-2 refers to the virus itself, because the certified question does not draw any distinction, this brief will refer to both as COVID-19.

through infiltration, contamination, or chemical reaction), rendering it unsafe or requiring remediation or repair to restore the property to its former condition.

That proposed standard is consistent with the plain text of a “direct physical loss or damage” provision. “Direct” means that the loss or damage must be caused by the peril at issue. The term “physical” means that the harm to property must be tangible or material. “Damage” means a change in the property’s condition that renders it unsafe or unsatisfactory for use or requires repair, replacement, or remediation. And “loss” means that the insured party must be deprived of the use of the property. Putting those terms together, the COVID-19 virus can cause “direct physical loss or damage” to property if it is shown that the virus physically affected insured property (such as through infiltration, contamination, or chemical reaction), rendering the property unsafe or unfit for use or requiring repair, replacement, remediation to restore it to a useable condition.

Amicus’s proposed standard comports not only with the plain text of a standard insurance policy but also with the reasonable expectations of the parties. A party that purchases property insurance would reasonably expect to be covered for amounts spent remediating and restoring its property to a useable condition after it is contaminated by a life-threatening virus. That is what courts have long recognized in analogous contexts, such as where smoke or dangerous chemicals force an owner to engage in costly remediation efforts to make an insured property useable again. By the same token, if the COVID-19 virus contaminates an

insured's property and renders it unsafe or unusable for a time absent remediation measures, the insured would reasonably expect to be covered for the cost of those measures, as well as the business income lost during that time.

To be clear, the standard proposed by Amicus will not bankrupt the insurance industry. Not every insured party will be able to satisfy its elements. For example, an insured party could not make out a property-damage claim merely because its business was closed by government orders related to the COVID-19 virus. Instead, a party would be covered only if it can demonstrate that the virus infiltrated or contaminated its property in a manner that caused it to be unsafe or required remediation before the property could be used again.

Amicus's own coverage case provides a good example. There, Amicus alleged that the COVID-19 virus was present at its insured arena because players, staff, and fans who entered the arena during their infectious period, but well before any government shutdown orders, later tested positive. Amicus further alleged that the virus infiltrated and contaminated the arena, reacted at a molecular level with the surfaces of various fixtures in the arena, contaminated the arena's air-filtration systems, and rendered the arena unsafe and unfit for use during that time. And Amicus alleged that significant sums of money were spent to remediate or replace the contaminated fixtures and air systems before the arena could return to hosting events, and significant sums of money were lost due to cancellation of home games during that time. If Amicus were able to establish those facts, it should be entitled to coverage

for property damage, just like a property owner who can show that it engaged in remediation efforts following contamination by a foreign agent like smoke, fumes, or a chemical spill.

Amicus takes no position on whether AP satisfies the proposed standard. It simply offers its proposed standard as a counterpoint to the parties' proposals in this important appeal.

ARGUMENT

THE COVID-19 VIRUS CAN CAUSE PROPERTY DAMAGE WITHIN THE MEANING OF A COMMERCIAL INSURANCE POLICY IF IT PHYSICALLY INFILTRATES OR CONTAMINATES INSURED PROPERTY AND REMEDIATION IS REQUIRED TO RESTORE THE PROPERTY TO A USEABLE CONDITION.

A. By Its Plain Text, “Direct Physical Loss or Damage” Encompasses Damage Caused by a Virus That Renders Property Unsafe Requiring Remediation.

The question presented in this appeal is whether an insured party with a policy covering “direct physical loss or damage” to property would reasonably expect coverage for property damage caused by a virus such as COVID-19. *See Bank of the W. v. Super. Ct.* (1992) 2 Cal.4th 1254, 1265 (insurance contract is interpreted to protect the reasonable expectations of the insured). The answer to that question is “yes.” If a foreign physical agent like a virus infiltrates, contaminates, or reacts with property and causes it to become unsafe such that remediation or repair is required before the property can be used for its intended purpose, that would fall squarely within the plain meaning of a “direct physical loss or damage” to property. Under those circumstances, an insured party would reasonably expect that amounts spent restoring its property

to a useable condition, and business income lost during the time necessary to repair and remediate the damage, would be covered by its insurer.

The plain meaning of the phrase “direct physical loss or damage” supports that conclusion. A “physical” effect is any one that involves matter—no matter the size or the permanence of the effect.² “Direct” means “[h]aving no intervening persons, conditions, or agencies; immediate.”³ “Loss” means “[t]he condition of being deprived” of something,⁴ while “damage” means “[d]estruction or a loss in value, usefulness, or ability resulting from an action or event.”⁵ Under a plain-text reading, the full phrase encompasses any situation where a peril has an immediate, physical, and detrimental effect on property that destroys or diminishes its usefulness until the property is repaired, replaced, or remediated. *See Verveine Corp. v. Strathmore Ins. Co.* (Mass. 2022) 184 N.E.3d 1266, 1275.

² *Physical*, *Black’s Law Dictionary* (11th ed. 2019) (“[o]f, relating to, or involving the material universe and its phenomena”); 11 *Oxford English Dictionary* 744 (2d ed. 1989) (“pertaining to or connected with matter” as opposed to “psychical, mental, spiritual”).

³ *Direct*, *American Heritage Dictionary* (5th ed.), <https://ahdictionary.com/word/search.html?q=direct> (last visited July 27, 2023).

⁴ *Loss*, *American Heritage Dictionary* (5th ed.), <https://ahdictionary.com/word/search.html?q=loss> (last visited July 27, 2023).

⁵ *Damage*, *American Heritage Dictionary* (5th ed.), <https://ahdictionary.com/word/search.html?q=damage> (last visited July 27, 2023).

Notably, while some “physical” change to the property is required, the change need not be structural or visible to the naked eye. The requirement that loss or damage be “physical” is meant to limit coverage to tangible damage to property (such as damage that renders property physically unsafe, physically unusable, or physically contaminated), as opposed to damage to intangible or incorporeal rights appurtenant to the property that do not physically affect the property itself. For example, while courts have held that physical loss or damage can arise from contamination by foreign agents like smoke, fumes, or chemical spills, legal injuries appurtenant to property, such as a defect in the title to property or a void manufacturer’s warranty on a product, do not constitute physical loss or damage. *See Com. Union Ins. Co. v. Sponholz* (9th Cir. 1989) 866 F.2d 1162, 1163; *HRG v. Graphic Arts Mut. Ins. Co.* (Mass. App. 1988) 527 N.E.2d 1179, 1181; *Glenn Falls Ins. Co. v. Covert* (Tex. Civ. App. 1975) 526 S.W.2d 222, 223. Title and warranty defects are not physical injuries because they do not impair the physical condition of the property itself.

Other provisions in a standard property insurance contract support the plain-text reading described above. *See Aydin Corp. v. First State Ins. Co.* (1998) 18 Cal.4th 1183, 1191 (“[T]he provisions of an insurance policy, like the provisions of any other contract, must be construed in the context of the policy as a whole.”). For example, AP’s insurance contract (as well as the one in Amicus’s coverage case and many other cases) contains a standard “period of restoration” clause. That clause sets the time period during

which business income losses from business interruption are covered. Here, the period during which business income losses are covered begins “immediately after the time of direct physical loss or damage by a covered peril to property” and runs “until your operations are restored, with reasonable speed, to the level which would generate the business income amount that would have existed if no direct physical loss or damage occurred, including the time required to . . . repair or replace the property.” *See Another Planet Entertainment Br. 19*; *see also Marina Pac. Hotel & Suites, LLC v. Fireman’s Fund Ins. Co.* (2022) 81 Cal.App.5th 96, 99–100 (referencing similar standard period-of-restoration clause). The “period of restoration” for business interruption coverage in these cases also includes time that business is interrupted “to comply with any ordinance or law.” *Los Angeles Lakers, Inc. v. Fed. Ins. Co.* (C.D. Cal. Oct. 6, 2021) No. 21-cv-02281, ECF No. 39, ¶ 43.

By tying the concept of “direct physical loss or damage” to the time it takes to repair the insured property, the period-of-restoration clause makes clear that “direct physical loss or damage” occurs when a property is physically damaged to the point that it requires remediation, repair, or replacement before it can be restored to its former use. *See Huntington Ingalls Indus., Inc. v. Ace Am. Ins. Co.* (Vt. 2022) 287 A.3d 515, 528 (“The existence of a need for remediation therefore enforces the allegation that damage has occurred.”); *Verveine*, 184 N.E.3d at 1275 (a standard period-of-restoration provision “clearly implies that the property has not experienced physical loss or damage in the first place unless there needs to be active repair or remediation measures to

correct the claimed damage or the business must move to a new location”). Business interruption losses run from the time covered property is infiltrated or contaminated by the virus through the time the property is remediated or repaired to the satisfaction of government regulators to permit resumption of pre-loss activity.

B. The Precedent Holds that Any Peril that Physically Harms Property and Requires Remediation Can Cause “Direct Physical Loss or Damage.”

The plain-text reading of “direct physical loss or damage” finds further support in the precedent. For more than seven decades, courts, including those in California, have interpreted the phrase “direct physical loss or damage” broadly to cover all kinds of perils that physically affect property, impair its usability, and require remediation or repair. In the words of one California court, “direct physical loss or damage” means “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 repairs be made to make it so.” *MRI Healthcare Ctr. Of Glendale, Inc. v. State Farm Gen. Ins. Co.* (2010) 187 Cal.App.4th 766, 779 (quoting *AFLAC Inc. v. Chubb & Sons, Inc.* (Ga. Ct. App. 2003) 581 S.E.2d 317, 319).⁶ Amicus proposes a similar standard here: The

⁶ The *MRI* decision later qualified this principle to require a distinct, demonstrable physical alteration of the property. While physical alteration is a type of physical damage, it is by no means the only type of physical damage, as the precedents cited in this section demonstrate. Infiltration or contamination by hazardous or dangerous substances, odors, fumes, or chemicals; adjoining physical perils that prevent the property from being used safely;

COVID-19 virus causes “direct physical loss or damage” if it physically affects property in a manner that renders it unusable or unsafe or requires remediation to restore it to its former condition.

The precedent recognizes that a wide variety of perils can cause direct physical loss or damage to property if they physically affect property, even temporarily and non-structurally, in a manner that requires remediation to return the property to a useable state. Indeed, even perils that do not physically change the insured property have been held to cause physical loss or damage. As a renowned insurance commentator has observed:

[W]hen an insurance policy refers to physical loss of or damage to property, the “loss of property” requirement can be satisfied by *any* “detriment,” and a “detriment” can be present *without there having been a physical alteration of the object*.

3 Allan D. Windt, *Insurance Claims & Disputes* § 11:41 (6th ed. 2013) (emphasis added).

For instance, the Colorado Supreme Court held that gasoline vapors that rendered a church unusable and dangerous constituted a “direct physical loss.” *W. Fire Ins. Co. v. First Presbyterian Church* (Colo. 1968) 437 P.2d 52, 55 (en banc). Although “loss of use” alone does not constitute direct physical loss, the court explained, direct physical loss occurred because the gasoline vapors turned a building that was in a satisfactory state

and other non-structural physical harms all constitute physical loss or damage. The insurance treatise cited in *MRI*, has likewise explained that “physical damage” can be found without any “physical alteration of the property” when the property has been rendered uninhabitable by a fortuitous force. *See* 10A Couch on Insurance (3d ed. 2010) § 148:46.

into one that was unsatisfactory for future use or necessitated repairs to make it safe. *Id.*; see also *Hughes v. Potomac Ins. Co.* (1962) 199 Cal.App.2d 239, 248–49 (“physical loss” because policyholder’s home was unsafe for occupancy after a landslide deprived it of support); *Arbeiter v. Cambridge Mut. Fire Ins. Co.* (Mass. Super. Ct. Mar. 15, 1996) 1996 WL 1250616, at *2 (oil fumes present in house constituted physical damage to the house); *Am. Alliance Ins. Co. v. Keleket X-Ray Corp.* (6th Cir. 1957) 248 F.2d 920, 925 (release of radon dust and gas made the policyholders’ building unsafe to work in and unusable for its purpose); *Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.* (8th Cir. 1986) 787 F.2d 349, 352 (business income coverage where danger of collapse required abandonment of grocery store); *Murray v. State Farm Fire & Cas. Co.* (W. Va. 1998) 509 S.E.2d 1, 16–17 (concluding that a home rendered dangerously unlivable by the presence of falling rocks had suffered a “direct physical loss to the property”).

Similarly, the discharge of ammonia gas can cause direct physical loss or damage. See *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.* (D.N.J. Nov. 24, 2014) 2014 WL 6675934, at *5–7. According to the *Gregory* court, even a “property’s temporary and non-structural loss of function is recognized as direct physical loss or damage.” *Id.* at *5. The ammonia discharge constituted direct physical loss or damage because it rendered the once satisfactory property into one that was unsatisfactory and in need of repair. *Id.* at *6. The ammonia fumes caused direct physical loss because “property can sustain physical loss or damage without experiencing structural alteration,” and “the heightened ammonia

levels rendered the facility unfit for occupancy until the ammonia could be dissipated.” *Id.* at *5–6; *see also Mellin v. N. Sec. Ins. Co.* (N.H. 2015) 115 A.3d 799, 805–06 (odor of cat urine from neighboring apartment constitutes “direct physical loss” if plaintiff could show “distinct and demonstrable alteration to the unit”); *Hetrick v. Valley Mut. Ins Co.* (Pa. Comm. Pl. May 28, 1992) 1992 WL 524309, at *3 (finding coverage for loss of use of a house if an outside oil spill made the house uninhabitable); *Farmers Ins. Co. of Or. v. Trutanich* (Or. Ct. App. 1993) 858 P.2d 1332 (pervasive fumes from methamphetamine laboratory caused physical damage); *Or. Shakespeare Festival Ass’n v. Great Am. Ins. Co.* (D. Or. June 7, 2016) 2016 WL 3267247, at *5–6 (smoke from wildfires, making operations hazardous to human health, caused a “direct physical loss”), *vacated by joint stipulation*, 2017 WL 1034203; *Matzner v. Seaco Ins. Co.* (Mass. Super. Ct. Aug. 12, 1998) 9 Mass. L. Rptr. 41, 1998 WL 566658, at *4 (“carbon monoxide contamination constitutes ‘direct physical loss of or damage to’ property”).⁷ By the same logic, a virus that infiltrates and physically affects property in a manner that renders it unsafe or

⁷ *See also Cook v. Allstate Ins. Co.* (Madison Cnty. Nov. 30, 2007) 2007 Ind. Super. LEXIS 32, at *6–10 (infestation of house with brown recluse spiders constituted “direct physical loss” to the house; “physical condition that renders property unsuitable for its intended use constitutes a ‘direct physical loss’ even where some utility remains and, in the case of a building, structural integrity remains”); *Yale Univ. v. CIGNA Ins. Co.* (D. Conn. 2002) 224 F. Supp. 2d 402, 413 (citing “the substantial body of case law” “in which a variety of contaminating conditions have been held to constitute ‘physical loss or damage to property’” and holding that contamination, not mere presence, of asbestos and lead in buildings suffices).

unusable absent remediation measures causes “direct physical loss or damage” within the meaning of a standard commercial insurance policy.

Notably, the precedent also holds that the presence of a peril need not be permanent or outwardly perceptible. For example, a Massachusetts court held that contamination by carbon monoxide (an odorless, invisible gas) that rendered a property unusable constituted “direct physical loss of or damage to property.” *Matzner*, 1998 WL 566658 at *4. The court based its holding on “what an objectively reasonable insured . . . would expect to be covered”—*i.e.*, that a peril that rendered the property unsatisfactory until remediation would trigger coverage for the cost of remediation. *Id.* at *3.

In the COVID-19 context, courts in other jurisdictions have adopted standards similar to the one that Amicus proposes here. For instance, the Supreme Court of Vermont held that allegations that the COVID-19 virus infiltrated and physically changed property in a manner that required non-standard means of remediation sufficiently alleged a claim for “direct physical damage.” *Huntington Ingalls Indus., Inc.*, 287 A.3d at 533. Similarly, the Supreme Judicial Court of Massachusetts acknowledged that “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,’” although the court sustained a motion to dismiss based on the particular allegations before it. *Verveine*, 184 N.E.3d at 1276; *accord SAS*

Int'l, Ltd. v. Gen. Star Indem. Co. (1st Cir. 2022) 36 F.4th 23, 27. Amicus respectfully submits that this Court should adopt a similar standard, which would comport with decades of precedent in the insurance context.

C. The Insurance Industry Has Acknowledged that a Virus Like COVID-19 Can Cause “Direct Physical Loss or Damage” to Property.

As early as 2006, the insurance industry acknowledged that policies covering “direct physical loss or damage” to property could encompass harm caused by a viral outbreak. That admission is significant because “[i]f the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it.” Cal. Civ. Code § 1649; *see also Burch v. Premier Homes, LLC* (2011) 199 Cal.App.4th 730, 741–42 (“Unless a court can to a certainty and with sureness by a mere reading of the document, determine which is the correct interpretation . . . extrinsic evidence becomes admissible as an aid to interpretation.”).

The Insurance Services Office, Inc. (“ISO”) is an insurance industry trade organization that develops model policy provisions. In 2006, the ISO developed a broad form virus-exclusion provision and circulated a statement to state insurance regulators on behalf of its insurance company members and clients. In that statement, the ISO acknowledged the need for a virus exclusion given the potential exposure created by property damage clauses:

When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property (for example, the milk), cost of decontamination (for example, interior building surfaces), and business interruption (time element) losses. Although building and personal property could arguably become contaminated (often temporarily) by such viruses and bacteria, the nature of the property itself would have a bearing on whether there is actual property damage.

Insurance Services Office, Inc., New Endorsements Filed to Address Exclusion of Loss due to Virus or Bacteria (July 6, 2006).⁸ The ISO thus proposed a new virus exclusion to protect its members given the “specter of [a] pandemic or hitherto unorthodox transmission of infectious material,” after which insurers without a virus exclusion “may face claims.” *Id.*

The upshot is that insurers themselves understood that a virus can cause “direct physical loss or damage” to property and that the only way to exclude coverage for virus-related property damage is to include in a policy a specific exclusion for damage caused by a virus. The insurers also understood that the remediation costs to remedy physical damage caused by a virus are potentially covered. The fact that AP’s policy does not include a virus exclusion is strong evidence that property damage caused by a virus falls within the scope of that policy.

⁸ Available at <https://www.propertyinsurancecoveragelaw.com/files/2020/03/ISO-Circular-LI-CF-2006-175-Virus.pdf>.

D. The COVID-19 Virus Can Cause “Direct Physical Loss or Damage.”

Under the standard proposed by Amicus, some—but not all—insureds would be able to establish a claim for direct physical loss or damage to property on account of COVID-19. It would *not* be sufficient, for example, if an insured party merely showed that it was required to temporarily close its business due to government orders related to COVID-19 or that the virus was present on its premises. Such showings would be insufficient because they would not demonstrate that property was physically affected by the virus or that there was any need to remediate or replace the property to return it to a useable condition. Nor can an insured party establish a claim for physical loss or damage from COVID-19 if it cannot show that the virus was actually present on their insured premises in the first place. *See, e.g., Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.* (9th Cir. 2021) 15 F.4th 885, 889 (“[Plaintiff] did not allege that COVID-19 was present in its storefront premises during the relevant period.”); *Selane Prods., Inc. v. Cont’l Cas. Co.* (9th Cir. Oct. 1, 2021) 2021 WL 4496471, at *1 (“[Plaintiff] did not allege that SARS-CoV-2 was present on its property to cause any damage.”).

Nevertheless, *some* insureds can establish a claim for direct physical loss or damage from COVID-19 if they can demonstrate that the virus physically affected their property in a manner that required remediation to return the property to a useable condition. While such a showing will not be possible in every case, it would be possible in some cases.

1. *The COVID-19 Virus Can Cause Physical Changes to Property.*

The scientific evidence shows that the COVID-19 virus can physically change and damage the property with which it comes into contact. Such physical changes can occur when the virus bonds to a surface through a process called “adsorption,” changing the surface in at least two ways: (1) the surface roughness is measurably increased;⁹ and (2) the property exposed to the virus becomes more hydrophobic—that is, more likely to repel water.¹⁰ COVID-19 can also come into contact with other particulates in the air, triggering physical changes that extend the time during which the virus remains infectious and dangerous.¹¹

COVID virus particles have protein clubs or spikes protruding from their outer surfaces that allow these virus particles to bond and chemically interact with human cells, air, and surfaces of property more effectively than other viruses. These virus particles are released into the air when infected persons

⁹ Lei Xie et al., *A Nanomechanical Study on Deciphering the Stickiness of SARS-CoV-2 on Inanimate Surfaces*, 12 ACS Applied Materials & Interfaces 58360 (Dec. 18, 2020).

¹⁰ *Id.*; Edris Joonaki et al., *Surface Chemistry Can Unlock Drivers of Surface Stability of SARS-CoV-2 in a Variety of Environmental Conditions*, 6 Chem. 2135 (Sept. 2020).

¹¹ Jérôme F. L. Duval et al., *Chemodynamic Features of Nanoparticles: Application to Understanding the Dynamic Life Cycle of SARS-CoV-2 in Aerosols and Aqueous Biointerfacial Zones*, 290 Advances Colloid & Interface Sci. 1 (Feb. 27, 2021); Leonardo Setti et al., *SARS-Cov-2RNA Found on Particulate Matter of Bergamo in Northern Italy: First Evidence*, 188 *Envtl. Res.* 1 (May 30, 2020).

breathe, talk, cough, sneeze, or sing, and virus-laden “clouds” containing clusters of virus particles can travel 20 to 27 feet.¹²

Because the COVID-19 virus travels via airborne particles, it can damage building systems. Without proper modifications and added equipment in place, aerosols containing the virus recirculate through building systems, such as air circulation and plumbing systems, contaminating those systems and spreading the virus to other surfaces and fixtures throughout the building.¹³ Scientists have studied the spread of the virus through aerosols in indoor settings through air circulation and ventilation systems and confirmed the physical damage that the virus can cause to those systems. For example:

- The CDC has concluded that a restaurant’s air conditioning system triggered the transmission of the coronavirus, spreading it to people who sat at separate tables downstream of the restaurant’s airflow.¹⁴

¹² Kevin P. Fennelly, *Particle Sizes of Infectious Aerosols: Implications for Infection Control*, 8 *Lancet Respiratory Med.* 914 (July 24, 2020); Lydia Bourouiba, *Turbulent Gas Clouds and Respiratory Pathogen Emissions: Potential Implications for Reducing Transmission of COVID-19*, 323 *JAMA* 1837 (Mar. 26, 2020).

¹³ Gil Correia *et al.*, *Airborne Route and Bad Use of Ventilation Systems as Non-Negligible Factors in SARS-CoV-2 Transmission*, 141 *Med. Hypotheses* 1 (Apr. 21, 2020).

¹⁴ See Jianyun Lu *et al.*, *COVID-19 Outbreak Associated with Air Conditioning in Restaurant, Guangzhou, China, 2020*, 26 *Emerging Infectious Diseases* 1628 (July 2020); see also Keun-Sang Kwon *et al.*, *Evidence of Long-Distance Droplet Transmission of SARS-CoV-2 by Direct Air Flow in a Restaurant in Korea*, 35 *J. Kor. Med. Sci.* 1 (Nov. 23, 2020).

- A study detected coronavirus inside the HVAC system connected to hospital rooms of patients sick with COVID-19. The study found the virus in ceiling vent openings, vent exhaust filters, and ducts located over 180 feet from the rooms of the sick COVID-19 patients.¹⁵
- A study detected a cluster of COVID-19 cases associated with a shopping mall in Wenzhou, China, likely resulting from virus contamination of common objects though virus aerosols in a confined space.¹⁶

The COVID-19 virus can also cause physical damage to objects and surfaces. Small viral droplets can remain airborne almost indefinitely under most indoor conditions and, like smoke, can travel long distances with air currents. Whatever their size, however, virus-containing droplets eventually encounter physical objects and infiltrate their surfaces. When this occurs, droplets containing the virus adhere to those surfaces through a series of physical, chemical, and electrostatic reactions in a process called adsorption.

Adsorption occurs when a solid substance attracts to its surface molecules of gases or solutions with which it comes into contact. Adsorption occurs through both physical and chemical reactions. Physical adsorption resembles the condensation of

¹⁵ Karolina Nissen *et al.*, *Long-Distance Airborne Dispersal of SARS-CoV-2 in COVID-19 Wards*, 10 *Sci. Rep.* 19589 (Nov. 11, 2020).

¹⁶ See Jing Cai *et al.*, *Indirect Virus Transmission in Cluster of COVID-19 Cases, Wenzhou, China, 2020*, 26 *Emerging Infectious Diseases* 1343 (June 2020).

gases to liquids and depends on the physical force of attraction between the solid surface and the viral molecules. In chemical adsorption, gases are bound to a solid surface by chemical forces that are specific for each surface and each gas.

Viral particles adsorbed to a host surface form chemical bonds with the surface. For example, the carboxyl amino groups found on SARS-CoV-2 spike proteins can form hydrogen bonds with substances containing oxygen or hydroxyls, such as wood, cotton, or glass. Certain positively charged amino acid structures, which are also found on coronavirus spike proteins, bind with negatively charged metallic surfaces.¹⁷ Porous objects like fabrics represent a special case because they entrap viral particles, making them hard to access, inactivate, or remove.

The chemical bonds formed between the COVID-19 virus and a contaminated surface distinguishes the virus from materials that are merely deposited onto a surface, such as dust, where no such chemical bond is formed. Once such a chemical bond is formed, the virus is difficult to detach from the property surface. For example, significant contamination of objects such as ceilings, fans, sinks, toilets, door handles, and floors have been reported even after thorough disinfection.

When viral spike proteins bind with a property surface through physical and chemical adsorption, the surface physically changes in several ways. *First*, the chemical composition of the

¹⁷ Edris Joonaki *et al.*, *Surface Chemistry Can Unlock Drivers of Surface Stability of SARS-CoV-2 in a Variety of Environmental Conditions*, 6 Chem 2135 (Sept. 2020).

surface changes based on the chemical reactions between the surfaces and the viral particles' spike proteins. *Second*, when these physical and chemical reactions occur through adsorption, surface roughness is measurably increased.¹⁸ *Third*, property exposed to SARS-CoV-2 also becomes more hydrophobic—that is, more likely to repel water—after interaction with the coronavirus's spike proteins.¹⁹ *Fourth*, when viral particles become physically and chemically adsorbed into the surfaces of buildings, fixtures, systems, and other property, those surfaces are altered from safe surfaces to dangerous surfaces through which the deadly virus spreads.

Chemical changes also occur when SARS-CoV-2 is released into the air within buildings. The same spike proteins that become adsorbed on various solid surfaces can also react with particulate matter in ambient air, such as minerals, soot or plastics. Chemical bonding and electrostatic interaction between viral spike proteins and ambient particulate matter causes a physical change in the air upon exposure to the coronavirus. The adsorption of virus spike

¹⁸ Lei Xie *et al.*, *A Nanomechanical Study on Deciphering the Stickiness of SARS-CoV-2 on Inanimate Surfaces*, 12 ACS Applied Materials & Interfaces 58360 (Dec. 18, 2020).

¹⁹ Edris Joonaki *et al.*, *Surface Chemistry Can Unlock Drivers of Surface Stability of SARS-CoV-2 in a Variety of Environmental Conditions*, 6 Chem 2135 (Sept. 2020); Lei Xie *et al.*, *A Nanomechanical Study on Deciphering the Stickiness of SARS-CoV-2 on Inanimate Surfaces*, 12 ACS Applied Materials & Interfaces 58360 (Dec. 18, 2020).

proteins by airborne particulates extends the time during which these particles remain infectious and dangerous.²⁰

For all these reasons, it is now well accepted that the COVID-19 virus can cause physical changes to property. And those physical changes can plainly be categorized as “damage” because a contaminated surface can transmit the virus to humans, making the surface dangerous and unusable. In fact, the virus can remain on an infected surface for several weeks.²¹ A CDC report found that the virus was present on surfaces in a cruise ship seventeen days after the ship was vacated.²²

As a result, some insured parties will be able to establish that the COVID-19 virus caused physical damage to their insured property. The presence of the virus on fixtures and in building systems physically alters the underlying building, such that remedial measures may be necessary to make the property safe. If a party can establish that the COVID-19 virus was present on its premises and that the virus caused a physical alteration to its property, it would satisfy the first element of a claim for “direct

²⁰ Jérôme F. L. Duval *et al.*, *Chemodynamic Features of Nanoparticles: Application to Understanding the Dynamic Life Cycle of SARS-CoV-2 in Aerosols and Aqueous Biointerfacial Zones*, 290 *Advances Colloid & Interface Sci.* 1 (Feb. 27, 2021); Leonardo Setti *et al.*, *SARS-Cov-2RNA Found on Particulate Matter of Bergamo in Northern Italy: First Evidence*, 188 *Envtl. Res.* 1 (May 30, 2020).

²¹ Shane Riddell *et al.*, *The Effect of Temperature on Persistence of SARS-CoV-2 on Common Surfaces*, 17 *Virology J.* 1 (Oct. 7, 2020).

²² Leah F. Moriarty *et al.*, *Public Health Responses to COVID-19 Outbreaks on Cruise Ships — Worldwide*, February–March 2020, 69 *MMWR* 347 (Mar. 27, 2020).

physical loss or damage” to property—namely, that the damage caused by the virus was “physical.”

To take one example, Amicus made the following detailed allegations regarding the presence of COVID-19 and the physical damage that the virus caused to its insured arena:

- In March 2020, numerous individuals who had been present at the insured arena tested positive for the virus.
- Viral particles were released into the air by infected persons in the arena who were breathing, shouting, engaged in physical exertion and athletic activities, singing, coughing, and speaking. The virus was contained in respiratory droplets and aerosols that circulated throughout the arena through indoor airflow and ventilation and air circulation systems. The viral particles were adsorbed into airborne particulates when chemical reactions caused the viral spike proteins to bond chemically with those particles.
- The coronavirus damaged the property by: (i) merging with particulates through chemical reactions, thereby contaminating ventilation and other building systems with infectious particles; and (ii) forming chemical bonds with surfaces to which it attached, thereby increasing roughness and the hydroscopic property of those surfaces and turning the useful properties into conduits for the deadly virus that are known as fomites.
- The presence of the virus physically damaged the insured property because: (i) viral particles bonded with airborne particles, which contaminated building systems such as vents, ductwork, and HVAC; (ii) viral particles bonded with fixtures such as fabric seats, playing surfaces, equipment, locker rooms and training rooms, counters, railings, stairs and flooring, and other frequently touched areas, damaging the objects and transforming the property surfaces into virus-contaminated fomites through which the virus spread.

- The physical damage caused by the presence of the virus at the arena made it unusable for hosting games with fans in attendance for months, so that physical alterations and building system changes could be made to the property to make it safe for fans to attend.

Los Angeles Lakers, Inc. v. Fed. Ins. Co. (C.D. Cal. Oct. 6, 2021) No. 21-cv-02281, ECF No. 39, ¶¶ 4–5, 53–87, 91, 109–115. If proven, those allegations would establish both that the COVID-19 virus was present at Amicus’s insured property and that it physically damaged that property.

2. *Remediation, Repair, and Replacement of Property Is Often Necessary to Restore Property Damaged by the COVID-19 Virus to Its Former Condition.*

Vigilant asks this Court to decide at the pleading stage that COVID-19 can never cause physical loss or damage to property as a matter of law because COVID-19 can simply be wiped away and removed like dust through simple cleaning. Not only is this a disputed factual issue that is inappropriate to resolve at the pleading stage, but the assertion is against the weight of scientific evidence. COVID-19 is unlike other viruses because once it causes physical damage to property, that damage cannot be remediated with routine cleaning. Based on its spike protein structure and strong adsorption to property, the coronavirus is “much more resilient to cleaning than other respiratory viruses so tested.”²³ For instance, a 2021 study found that the hospital’s “approach to

²³ Nevio Cimolai, *Environmental and Decontamination Issues for Human Coronaviruses and Their Potential Surrogates*, 92 J. Med. Virology 2498 (June 12, 2020).

droplet/contact containment,” which involved rigorous disinfection procedures performed by trained hospital workers using advanced disinfectants and was in accordance with World Health Organization guidelines, “was not highly effective” when it came to removing the virus.²⁴

Accordingly, an insured party whose property is damaged by COVID-19 may need to take extraordinary steps to remediate that damage, including extensive professional decontamination and replacing contaminated fixtures and air filtration systems with new fixtures and systems that are resistant to the virus. That is no different from an insured party whose property is infiltrated by chemical fumes or other foreign agents and who is required to take costly steps to remediate that damage. In all of those cases, the insured party would reasonably expect that its insurer would cover the costs necessary to restore the property to its intended use.

Amicus is a case in point. It alleged that extensive repairs to ventilation and air circulation systems in its insured arena were necessary to reduce the airborne spread of the virus. Fixtures, furniture, and other surfaces were also either repaired, coated with protective materials to prevent adsorption of viral particles, or replaced with touchless equipment to prevent further viral contamination and to restore the insured arena to a condition where it would be suitable to host events for large crowds. Venues where the public gathers, such as arenas and restaurants, cannot safely function until high-touch surfaces damaged by the virus,

²⁴ Zarina Brune *et al.*, *Effectiveness of SARS-CoV-2 Decontamination and Containment in a COVID-19 ICU*, 18(5) Int’l J. Env’t Rsrch. & Pub. Health 2479 (Mar. 3, 2021).

such as bathroom sinks, toilets, and door handles, are replaced with fixtures that the COVID-19 virus cannot permeate.

Not every insured party could make a similar showing. Some insured parties did not need to expend money to remediate damage caused by the COVID-19 virus, and some insured properties such as small offices would not necessarily need remediation to restore them to their intended use. Accordingly, whether an insured party can establish a claim for “physical loss or damage” will depend on facts specific to that party.

E. The Standard Advocated by the Parties Is Inconsistent with the Policy Language and the Reasonable Expectations of the Parties.

The standard proposed by Vigilant here and by insurers in other cases cannot be reconciled with either the plain meaning of “direct physical loss or damage” or the precedent. Insurers have sought to apply the phrase “direct physical loss or harm” only to situations where the harm to property caused by the COVID-19 virus is structural or visible. There is no such limitation in the policy language, however. The term “damage” is broad and by its terms is not limited to harms that are structural or perceptible to the naked eye.

The case law bears this out. For instance, *Hughes v. Potomac Insurance Company* (1962) 199 Cal.App.2d 239 shows that property rendered unusable by an external, fortuitous force yet structurally intact is still “damaged” under the common-sense meaning of the term. There, a landslide left a policyholder’s home on the edge of a cliff, but without having changed the home’s structure. *Id.* at 242–43. The insurer denied coverage, arguing,

like Vigilant here, that the home was not “damaged” because “its paint remains intact and its walls adhere to one another.” *Id.* at 248. The Court of Appeals rejected that argument, holding: “Common sense requires that a policy should not be [] interpreted” in such a way that an insured home “might be rendered completely useless to its owners” yet the insurer “would deny that any loss or damage had occurred unless some tangible injury to the physical structure itself could be detected.” *Id.* at 248–49; *see also Strickland v. Fed. Ins. Co.* (1988) 200 Cal.App.3d 792, 799 (physical loss or damage occurs “even in the absence of physical destruction” where a property is “rendered completely useless to its owners”).

Likewise, contaminants and pollutants have triggered coverage for “direct physical loss or damage” even though they do not cause structural damage. *See Gregory Packaging*, 2014 WL 6675934 at *5 (collecting cases). And there is no requirement that damage be visible. *See, e.g., Mellin*, 115 A.3d at 803 (cat odor can qualify as physical damage because “the word ‘physical’” does not require a “restrict[ive]” reading “includ[ing] only tangible changes to the property that can be seen or touched”).

If insurers wanted to restrict the meaning of “damage” to harms that are structural or visible to the naked eye, it was incumbent upon them to include such a limitation in the policies they issue. Here, Vigilant (and most property insurers) chose neither to define “direct physical loss or damage,” nor to exclude coverage for non-structural or non-visible damage, nor to add a virus exclusion, nor to limit coverage for temporary damage. The

Court should not rewrite these commercial policies to add such limitations after the fact.

The position taken by some policyholders, on the other hand, that the mere presence of the COVID-19 virus causes “physical loss or damage” reads the word “damage” out of the policy. The point of property damage coverage is to protect property. Without a showing that the COVID-19 virus actually damaged any property, there is no basis for an insured to reasonably expect coverage for property damage. Mere presence of the virus is therefore not enough. A claim must be tethered to property that is actually damaged.

CONCLUSION

For the foregoing reasons, Amicus respectfully requests that this Court hold that an insured party is covered for “direct physical loss or damage” if it can establish that the COVID-19 virus physically affected tangible insured property (such as through infiltration, contamination, or chemical reaction) rendering the property unsafe or requiring remediation to return the property to its intended use. Regardless of whether AP can establish a claim for “direct physical loss or damage,” the Court should adopt a standard that recognizes that, at least under some circumstances, a party can be covered for direct physical loss or damage to property caused by the COVID-19 virus.

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DATED: August 2, 2023 /s/ Kyle A. Casazza
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Supreme Court of California

Case Name: **ANOTHER PLANET ENTERTAINMENT v. VIGILANT INSURANCE
COMPANY**

Case Number: **S277893**

Lower Court Case Number:

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Date

/s/Kyle Casazza

Signature

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