No. S277893

IN THE
SUPREME COURT
OF THE
STATE OF CALIFORNIA

ANOTHER PLANET ENTERTAINMENT, LLC,

Petitioner,

v.

VIGILANT INSURANCE COMPANY,

Respondent.

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

CONSOLIDATED ANSWER TO BRIEFS OF *AMICI CURIAE*

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Pursuant to California Rule of Court 8.520(f)(7), Respondent Vigilant Insurance Company ("Vigilant") submits this consolidated answer to multiple briefs of amici curiae.[1]

INTRODUCTION

The amicus briefs filed in support of Another Planet ("AP") largely parrot AP's arguments. Like AP, its amici cannot overcome the plain language of the Vigilant Policy ("Policy") or the overwhelming, ever-expanding body of precedent establishing that commercial property policies providing coverage for "direct physical loss or damage" to property do not apply to business losses stemming from the COVID-19 pandemic. A unanimous Nevada Supreme Court recently became the ninth state high court to "join a striking majority" of courts "across the country" holding that the "fact that the COVID-19 virus was present in or on [insured] property does not establish that there was any physical harm to the property as required" for coverage. *Starr Surplus Lines Ins. Co. v. JGB Vegas Retail Lessee, LLC*, -- P.3d --, 2023 WL 5989929, at *10, *13 (Nev. 2023). Even more recently, another Second District Court of Appeal decision expanded the consensus, holding that "the ephemeral presence of a virus on the

[1] Vigilant's consolidated answer responds to the briefs filed by the California Medical Association ("CMA"); California Pizza Kitchen, Inc., et al. ("CPK"); Los Angeles Lakers, Inc. ("the Lakers"); Major League Baseball and National Hockey League ("MLB/NHL"); Ross Stores, Inc. ("Ross"); San Manuel Band of Mission Indians and San Manuel Entertainment Authority ("San Manuel"); United Policyholders ("UP"); and Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation of California ("Santa Ynez").

surface of the property does not 'alter' or 'cause a physical change in the condition of the property.'" *Endeavor Operating Co. v. HDI Glob. Ins. Co.*, -- Cal. App. 5th --, 2023 WL 6155983, at *11 (Cal. Ct. App. 2023) (quoting *United Talent Agency v. Vigilant Ins. Co.*, 77 Cal. App. 5th 821, 830 (2022) ("*UTA*")).

The contrary arguments in AP's amici briefs are riddled with errors. Many of the most obvious do not bear extended discussion, including:

• Amici repeatedly assert that Vigilant's interpretation of the Policy creates "surplusage" between "direct physical loss" and "direct physical damage," Ross Br. 30; San Manual Br. 25, when in fact the terms plainly have distinct meanings, as countless courts have held, Vigilant Br. 26-27.

• Amici heavily rely on the flawed outlier decision in *Coast Restaurant Group, Inc. v. AmGUARD Insurance Co.*, 90 Cal. App. 5th 332 (2023), *see* San Manuel Br. 15, 22-26, 31-33, 36; Ross Br. 31, 38, 56, which is contrary to a wall of precedent and has accordingly been repeatedly rejected by other California Courts of Appeal, Vigilant Br. 45 n.10; *see Endeavor*, 2023 WL 6155983, at *7-8.

• Amici rely heavily on decisions involving commercial general liability policies, Ross Br. 25, 27, 43, which have no application here, Vigilant Br. 38-39.

• Amici repeatedly invoke the Policy's nature as an "all risk" policy as if that label alone automatically creates coverage, CPK Br. 2, 34; MLB/NHL Br. 21; Ross Br. 20; San Manuel Br. 16-21, 30-35, without recognizing that the Policy only covers "all

risks" *that result in "direct physical loss or damage." See Garvey v. State Farm Fire & Cas. Co.*, 48 Cal. 3d 395, 408 (1989) ("'all-risk' policy" is not an "'all-loss' policy"); *see also Endeavor*, 2023 WL 6155983, at *10 (rejecting reliance on "self-serving labels" such as "broad all-risk coverage" because "the phrases have no meaning tied to the policy itself").

• Amici assert an untenable theory of California pleading standards under which a complaint seeking coverage necessarily survives demurrer unless the complaint affirmatively (and perversely) pleads a lack of coverage. Ross Br. 49 (arguing that courts cannot deem policyholder's allegations insufficient as matter of law because plaintiffs "do not plead" the legal conclusion "that the COVID-19 virus is incapable of causing 'direct physical loss or damage'").

• Amici attempt to evade the overwhelming weight of authority against them through flawed distinctions that do not withstand scrutiny, including for example that Vigilant improperly cites cases involving policy exclusions, Ross Br. 44, when *every decision Vigilant cites* independently addresses coverage in the first instance rather than rejecting coverage solely because of an exclusion.

The foregoing errors are self-evident, fully anticipated by Vigilant's Answer Brief on the Merits, or both. This brief focuses on four other arguments—the four most prominent grounds on which amici collectively urge this Court to break from the nationwide consensus and find coverage for COVID-19-related business losses. Those arguments, too, are demonstrably wrong.

First, in construing the policy's requirement of "direct physical loss," amici rely heavily on cases in which physical forces or substances very different from the COVID-19 virus rendered buildings completely uninhabitable. According to amici, those cases justify coverage for AP's diminished ability to *use* its property. But reduced ability to use is not the same as the complete inability to inhabit. Because COVID-19 never rendered AP's (or anyone else's) property uninhabitable, policyholders never suffered anything akin to the kind of dispossession of property that occurred in the uninhabitability cases, as countless courts have concluded in rejecting the application of those cases to this context.

Second, in construing the phrase "direct physical damage," amici try but fail to avoid the long-settled plain-language interpretation of that phrase as requiring a "distinct, demonstrable, physical alteration" to property. *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779 (2010) (quotation omitted). Amici seek to distinguish, rewrite, or discredit the *MRI Healthcare* standard, but they cannot escape the insurmountable consensus of California appellate decisions correctly rejecting amici's non-plain-meaning construction.

Third, some of AP's amici actually accept the *MRI Healthcare* standard on its own terms and contend that it is satisfied here because viral particles *do* cause a demonstrable physical alteration to property. They do not. Amici focus mainly on the molecular effects of some physical matter touching and

temporarily bonding with other physical matter, which does not cause the kind of tangible, *structural* alteration to property that qualifies as "direct physical damage." Amici also invoke pandemic-related preventative measures, but if anything, those measures only confirm that the property itself is not physically altered in the relevant sense when viral particles are temporarily present on its surface.

Fourth, and finally, amici rely on unpersuasive and inadmissible extrinsic evidence to urge this Court to depart from the unambiguous ordinary meaning of the phrase "direct physical loss or damage." Amici misunderstand the circumstances in which extrinsic evidence is admissible. Even more importantly, all of the extrinsic evidence they cite is consistent with or affirmatively reinforces the Policy's plain meaning.

For these and the other reasons set forth below and in Vigilant's Answer Brief, this Court should reject amici's arguments and answer the certified question in the negative, confirming that coverage for "direct physical loss or damage" is not triggered by the temporary presence of COVID-19 viral particles on insured property.

ARGUMENT

I. AMICI MISCONSTRUE CASES INVOLVING PERSISTENT PHYSICAL FORCES THAT RENDER PROPERTY UNINHABITABLE

Amici's central argument for finding coverage for COVID-19-related business interruption claims relies on a body of case law in which physical forces different from the COVID-19 virus (1) rendered property completely unusable as "property" at all—

in the case of buildings, by rendering them completely uninhabitable—and/or (2) permeated or otherwise altered the structure of a building in a manner requiring remediation or repair. CPK Br. 21-24, 29-32; Lakers Br. 20-23; MLB/NHL Br. 23, 25; Ross Br. 22-26; San Manuel Br. 38-39; UP Br. 25. As courts have repeatedly concluded in the COVID-19 context, these cases do not justify coverage in this context because COVID-19 particles have neither of those effects on property. Vigilant Br. 50-54.[2]

A. Amici Misread Cases In Which Insureds Sustained "Direct Physical Loss" Because Properties Became Uninhabitable

Amici first rely on cases in which physical forces or substances rendered property useless or uninhabitable, such that it ceased to function as the relevant form of "property" at all. Those cases have no application here. Most of the cases cited by amici involve insured buildings that were rendered completely

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[2] Both of these overlapping categories of cases involve a form of "harm" to property—the first category involves "physical loss" of property, while the second involves quintessential "physical damage" to property. *See JGB Vegas*, 2023 WL 5989929, at *6 (observing that the "uninhabitability" cases invariably involve "physical impact culminating in harm to the property"). These cases thus do *not* involve substances that "harm people not property." CPK Br. 36. And while "harm to people and property" obviously are not *always* "mutually exclusive," MLB/NHL Br. 21, coverage potentially applies only when a substance that harms people *also* harms property (in the requisite sense, i.e., it causes "direct physical loss or damage" to property). *See Simon Mktg., Inc. v. Gulf Ins. Co.*, 149 Cal. App. 4th 616, 622-23 (2007) (it is "self-evident" that "insurance of property" requires harm *to property* for coverage to attach).

inaccessible and unusable for any purpose. *See, e.g.*, *Or. Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, 2016 WL 3267247, at *9 (D. Or. 2016) ("smoke that infiltrated [a] theater" rendered it "uninhabitable"); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co.*, 2014 WL 6675934, at *6 (D.N.J. 2014) (facility was "unfit for occupancy" due to toxic ammonia gas); *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699, 709 (E.D. Va. 2010) (home "rendered uninhabitable by the toxic gases released" by drywall), *aff'd*, 504 F. App'x 251 (4th Cir. 2013). Amici also cite a handful of cases in which the insured property was not a building, but instead a piece of business *personal* property that lost all utility. *See, e.g.*, *Wakefern Food. Corp. v. Liberty Mut. Fire Ins. Co.*, 968 A.2d 724, 734 (N.J. Super. App. Div. 2009) (policyholder sustained direct physical loss when insured electrical grid lost all function as an electrical grid); *Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc.*, 78 Cal. App. 4th 847, 874 (2000) (policyholder sustained "physical loss of … stock" when adulterated almonds lost all functionality as "stock" before ultimately having to be destroyed). As the Connecticut Supreme Court recently observed, all of these cases are "analogous to the stolen property cases"—which are likewise subject to coverage as involving "direct physical loss"—because they effectively involve a total dispossession of the property. *See Conn. Dermatology Grp., PC v. Twin City Fire Ins. Co.*, 288 A.3d 187, 202 (Conn. 2023).

Courts have consistently held that these cases do not apply in this context because COVID-19 viral particles effect no

comparable physical dispossession of insured property. The "presence of the virus does not render a property useless or uninhabitable, even though it may affect how people interact with and within a particular space." *UTA*, 77 Cal. App. 5th at 838; *see Schleicher & Stebbins Hotels, LLC v. Starr Surplus Lines Ins. Co.*, 2023 WL 3357980, at *8 (N.H. 2023). Put differently, viral particles do not "create a situation in which the *properties* would pose an imminent danger to anyone who entered them," but rather "any danger would be created by *people* who gathered within the buildings." *Conn. Dermatology*, 288 A.3d at 202 (emphasis added); *see Hill & Stout, PLLC v. Mut. of Enumclaw Ins. Co.*, 515 P.3d 525, 533 (Wash. 2022) (distinguishing same line of cases because nothing "*physically* prevented use of the property or rendered it useless"; nor was the property "rendered unsafe or uninhabitable because of a dangerous physical condition"). As these decisions recognize, far from being rendered uninhabitable, insured buildings *remained accessible and usable for many purposes throughout the course of the pandemic*. Among countless other examples, stores continued to function normally, with social distancing and masking requirements in place; restaurants maintained takeout operations or allowed limited capacity dining; hotels continued to operate with reduced occupancy; and office buildings were continuously used by essential personnel. Not one of the amici has even attempted to identify any building that was rendered uninhabitable by the COVID-19 pandemic.

Amici's misplaced invocation of uninhabitability cases

fundamentally misunderstands the nature of commercial property insurance. In their view, coverage applies because AP lost "the ability to *use* its property for *normal* business purposes." Ross Br. 57 (emphasis added); *see* MLB/NHL Br. 13 (arguing for coverage because an "external force … rendered their properties unusable for their intended purpose (hosting fans to watch sports)"); UP Br. 23 (coverage applies whenever property "usable for an insured purpose" becomes "unusable for *that* purpose"). Commercial property insurance covers losses from reduced business operations, however, only when the reduced operations *results from* "direct physical loss or damage" to property. It is circular to say that "reduced operations" itself constitutes the "loss" of property that caused the reduced operations.

The uninhabitability cases discussed above confirm as much. According to amici, those cases involved mere diminished ability to use property as the result of a physical force or substance. Not so. As discussed above, the insured property in each case lost *all* functionality to the point that the insured was effectively physically dispossessed of the property in question, amounting to "direct physical loss." With respect to buildings, such physical dispossession took place only when the building was rendered completely uninhabitable, not when it lost some particular function that the insured would have preferred to retain in order to maintain its ordinary operations. That is because, contrary to UP's unsupported assertion (UP Br. 23), commercial property policies like AP's insure buildings *as buildings*—not for one particular purpose or for some maximally

beneficial use identified by an insured. Accordingly, only actual uninhabitability, not partial loss of use, can qualify as "direct physical loss" of a building and serve as a predicate for business income coverage.[3] Because the presence of COVID-19 did not cause buildings to become nonfunctional, amici cannot say they suffered "direct physical loss" merely because they experienced reduced ability to make maximally beneficial *use* of their buildings.

Unable to contend seriously that any buildings were rendered "uninhabitable" by COVID-19, amici suggest that it is enough to assert that a "direct physical loss" of property occurs whenever property becomes "unsafe" in some way. CMA Br. 9; CPK Br. 18; Lakers Br. 12; MLB/NHL Br. 14; Ross Br. 29; San Manuel Br. 19; UP Br. 27. But "unsafe" in the sense used by amici is not synonymous with "uninhabitable." When COVID-19 particles are present on inert property, the property can be easily cleaned and thus may be safely used with simple sanitation measures. It is *human-to-human interactions* that made social gatherings unsafe, not the property itself. As noted, even at the height of the pandemic, buildings continued to be used by many people for many purposes, subject to various precautions to minimize risks from human-to-human interactions, such as mask-wearing, hand-washing, and social distancing.

For similar reasons, amici err in contending that the

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[3] By contrast, business personal property may be insured for a more specific purpose, such as "stock," and is accordingly "physically lost" whenever it ceases to be able to fulfill that particular purpose, as in *Shade Foods*.

potential spread of COVID-19 particles through HVAC systems makes the property itself "unsafe." CMA Br. 5; Lakers Br. 29; UP Br. 38. Under the cases invoked by AP and amici, the property must become uninhabitable or useless. The risk of viral particles traveling through an HVAC system never rendered any building uninhabitable or useless—at most, it simply counseled in favor of precautions like reduced occupancy or mask-wearing. Again, the risk of infection was not from the *property*, but from interactions with *other human beings*.

Amicus CMA underscores the point by citing statistics showing that essential workers "experienced a far higher degree of infection … than that experienced in the general population." CMA Br. 7. Of course they did: essential workers were more likely to become infected with COVID-19 not because of the physical condition of property at their workplace, but because they were unable to stay isolated at home and had the most *interactions with other people*. The very fact that essential workers continued to interact with other people at their *still-operating workplaces* proves conclusively that the presence of COVID-19 particles did not render those properties uninhabitable or useless.

B. Amici Misread Cases Involving "Direct Physical Damage" By Physical Forces That Structurally Permeate Property And Require Intensive Remediation

Some of the cases discussed above involving physical forces and substances such as noxious gases and smoke are distinguishable for an additional reason: the forces or substances

in those cases actually did cause distinct, demonstrable physical alterations to property requiring specialized property-specific remediation efforts. *See, e.g.*, *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, 2002 WL 31495830, at *8 (D. Or. June 18, 2002) ("visible mold which may not be removable" within structure of house, requiring repair and remediation efforts, qualified as "'distinct and demonstrable' damage"); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 54 (Colo. 1968) (finding coverage where gasoline fumes seeped into building's structure, including the "foundation," "halls[,] and rooms"); *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002) (finding coverage for contamination of property's structure with asbestos fibers "in such quantity" that their effect is "comparable to that of fire, water or smoke," requiring specialized abatement); *Cyclops Corp. v. Home Ins. Co.*, 352 F. Supp. 931, 937 (W.D. Pa. 1973) (vibrations structurally altered insured electric motor by "weakening and loosening" fit of wheel and axle in a manner that "necessitated repair"). As Vigilant has explained, *see* Vigilant Br. 27-41, and as further detailed below, *see infra* § III, COVID-19 viral particles have no comparable effect on property. "While saturation, ingraining, or infiltration of a substance into the materials of a building or persistent pollution of a premises requiring active remediation efforts is sufficient to constitute 'direct physical loss of or damage to property,' evanescent presence is not." *Verveine Corp. v. Strathmore Ins. Co.*, 184 N.E.3d 1266, 1276 (2022); *see Endeavor*, 2023 WL 6155983, at *11 (explaining that "the presence of SARS-

CoV-2 is *unlike* the presence of other substances—such as unpleasant odors, dangerous chemical contamination, or asbestos—that permeate the property and require substantial effort to remove"); *UTA*, 77 Cal. App. 5th at 838 (distinguishing cases involving "infiltration of asbestos" requiring "specialized remediation").

MLB/NHL assert that some of these cases involved substances that, like COVID-19, dissipated on their own without the need for specific remediation. MLB/NHL Br. 25. But in the two cases they cite—*Oregon Shakespeare* and *Gregory Packaging*—the buildings were rendered completely uninhabitable as a result of wildfire smoke and ammonia fumes. *See supra* at 15. Coverage was accordingly proper on the basis of "direct physical *loss*," which has no application here because COVID-19 did not render buildings uninhabitable, as explained above. Further, MLB/NHL mischaracterize *Gregory Packaging*, where the infiltration of the property by ammonia fumes *did* require intensive, specialized remediation. 2014 WL 6675934, at *2-4 (describing efforts by "remediation company" hired by insured "to dissipate the ammonia from the building" after being directed by fire department to "hire an outside environmental clean-up service"). *Gregory Packaging* is thus doubly irrelevant: it involved a substance that *both* rendered a building completely uninhabitable (constituting "direct physical loss") *and* demonstrably altered property in a manner requiring property-specific remediation (constituting "direct physical damage"). COVID-19 particles have neither effect.

II. AMICI'S EFFORTS TO RESIST OR DILUTE THE REQUIREMENT OF A DISTINCT, DEMONSTRABLE, PHYSICAL ALTERATION TO PROPERTY ARE UNAVAILING

As Vigilant has explained, Vigilant Br. 23-25, courts across the country have recognized that outside the context of the total physical dispossession or uninhabitability cases (*see supra* § I.A), the ordinary meaning of the unambiguous phrase "'direct physical loss of or damage to' property requires some 'distinct, demonstrable, physical alteration of the property,'" *Verveine*, 184 N.E.3d at 1275 (quoting 10A Couch on Insurance § 148:46 (3d ed. 2016)), as confirmed by "period of restoration" provisions that contemplate damage or loss that requires the property to be *rebuilt*, *repaired*, or *replaced*, *see, e.g.*, *Inns by the Sea v. Cal. Mut. Ins. Co.*, 71 Cal. App. 5th 688, 707 (2021). Virtually "[e]very appellate court that has been asked to review COVID-19 insurance claims has agreed with this definition for this language or its equivalent," *Verveine*, 184 N.E.3d at 1275, and the standard has been consistently applied by California courts at least since *MRI Healthcare*, *see Endeavor*, 2023 WL 6155983, at *10 ("The California courts are in accord that the phrase 'direct physical loss or damage to property' means a 'distinct, demonstrable, physical alteration' of the insured property." (quotation omitted) (collecting cases)); *Apple Annie, LLC v. Or. Mut. Ins. Co.*, 82 Cal. App. 5th 919, 935 (2022) (citing "wall of precedent" among California Courts of Appeal applying *MRI Healthcare* standard). That standard forecloses coverage for claims of business interruption predicated on the purported effect of COVID-19 viral

particles on insured property. Vigilant Br. 27-29, 41-44. To avoid that outcome, amici contend that the *MRI Healthcare* standard does not apply in this context, which they say is governed by a watered-down "direct physical loss or damage" standard. Amici are incorrect.

A. Amici Misread *MRI Healthcare*

Several amici distort the *MRI Healthcare* decision in order to divine a more favorable standard for "direct physical loss or damage" that contravenes the plain text's ordinary meaning. For example, the Lakers pluck out of context the court's statement that "a direct physical loss 'contemplates 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 take it so.'" Lakers Br. 19 (quoting *MRI Healthcare*, 187 Cal. App. 4th at 779). From there, the Lakers leap to the conclusion that changes that do not involve a distinct, demonstrable, physical alteration to property may qualify as "direct physical loss or damage." *Id.* at 20. What the Lakers ignore, however, is that both immediately before and after the sentence they cite, the *MRI Healthcare* court explained the specific nature of the "actual change" it was referring to: a change that is "distinct, demonstrable," and "physical." *MRI Healthcare*, 187 Cal. App. 4th at 779 (quoting Couch § 148:46). Coverage thus applies only when *that kind* of change renders property "unsatisfactory." Coverage does not apply under *MRI Healthcare* when for example, property becomes "unsatisfactory"

merely because it becomes wet—a more fundamental structural change is required.[4]

Ross attempts a similar maneuver, contending that *MRI Healthcare* "articulated two readings" of the policy language, only one of which requires a "distinct, demonstrable, physical alteration" of property. Ross Br. 35. *MRI Healthcare* did no such thing: as just explained, it engaged in a straightforward analysis of the ordinary meaning of the policy language and repeatedly reiterated that a "distinct, demonstrable, physical alteration" was a foundational requirement for coverage. *See, e.g.*, *MRI Healthcare*, 187 Cal. App. 4th at 779 ("For loss to be covered, there must be a 'distinct, demonstrable, physical alteration' of the property." (quoting Couch § 148:46)).

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[4] Notably, the Lakers equivocate as to their theory, sometimes arguing that a change "rendering [property] unsafe *or* requiring remediation" is enough (Lakers Br. 13 (emphasis added)), and other times contending that the policy language requires a change "causing [property] to become unsafe *such that* remediation or repair is required" (*id.* at 15 (emphasis added)). Neither construction is correct: the Lakers not only omit the "distinct, demonstrable physical alteration" requirement, they also misunderstand the requisite "remediation," as discussed *infra* § III.B. The Lakers' analysis also is flawed from the outset because they mistakenly begin the interpretive exercise with the policyholder's "reasonable expectations." Lakers Br. 15. As this Court recently confirmed in *Yahoo Inc. v. National Union Fire Insurance Co.*, 14 Cal. 5th 58 (2022), that is the wrong order of operations: only when "the standard rules of contract interpretation … fail[] to resolve" any ambiguity does the court "interpret the [policy] provision in favor of protecting the insured's reasonable expectations," *id.* at 69.

B. The *MRI Healthcare* Standard Applies To COVID-19

Some amici seek to dodge the application of *MRI Healthcare*'s analysis altogether, insisting that the "distinct, demonstrable, physical alteration" standard it articulated simply does not apply in the context of COVID-19 claims at all. Ross Br. 35; San Manuel Br. 25, 36; UP Br. 23-24. A "wall of precedent" in the California Courts of Appeal and elsewhere has held to the contrary, *Apple Annie*, 82 Cal. App. 5th at 935, and amici proffer no persuasive reason this Court should reject that consensus.

It is true that the policy in *MRI Healthcare* insured "accidental direct physical loss" rather than "direct physical loss or damage." Ross Br. 35; UP Br. 24. But that minor textual difference is irrelevant. As one California Court of Appeal explained in rejecting a similar attempt to distinguish the decision, "the *MRI Healthcare* holding … focus[ed] on the fact coverage was provided only for a direct 'physical' loss, which the court concluded contemplated an actual change in the property." *Starlight Cinemas, Inc. v. Mass. Bay Ins. Co.*, 91 Cal. App. 5th 24, 39 n.11 (2023). The decision's analysis of the plain meaning of the policy terms "direct," "physical," and "loss" apply with equal force to the policy language here. That the more common construction "direct physical loss or damage" breaks out "damage" from "loss" does nothing to undermine the requirement of a "distinct, demonstrable, physical alteration" articulated in *MRI Healthcare*. Instead, the "direct physical loss or damage" construction simply underscores that property can suffer either "damage" (through distinct, demonstrable, physical alterations to

property) or "loss" (through complete destruction or total physical dispossession of property, *see supra* § I.A)—scenarios the *MRI Healthcare* court had no occasion to consider under the facts of that case. Vigilant Br. 26-27.

C. The *MRI Healthcare* Standard Applies To The Vigilant Policy

Some amici contend that certain provisions within the Vigilant Policy negate the requirement of a "distinct, demonstrable, physical alteration" as to this *particular* Policy. Amici misread the provisions they cite.

1. San Manuel and Ross contend that Policy provisions for electronic data-related coverage recognize that intangible property can suffer "direct physical loss or damage." San Manuel cites a provision covering for "direct physical loss or damage" to "electronic *data*," San Manuel Br. 13 (emphasis added) (quoting 3-ER-501-04, 570), and Ross cites a provision covering "direct physical loss or damage to *electronic data processing property* caused by or resulting from a technology peril," which is defined to include perils such as "malicious programming" (although not with respect to "electronic data"); Ross Br. 42 (emphasis added) (quoting 3-ER-500, 587, 592). Contrary to amici's submission, these provisions do not establish that tangible property need not suffer a "distinct, demonstrable alteration" for coverage to apply.

Under the Policy's plain terms, coverage for "direct physical loss or damage" to "electronic data" is triggered when its actual storage medium is physically damaged or destroyed, causing a physical loss of the electronic data. Similarly, "malicious programming"—e.g., an engineered computer virus—can render

"electronic data processing property" such as a hard drive completely inoperable, just as a noxious substance can render a building completely uninhabitable. Indeed, San Manuel's own authority involves exactly that scenario. *See Lambrecht & Assocs., Inc. v. State Farm Lloyds*, 119 S.W.3d 16, 25 (Tex. App. 2003) (finding coverage for data lost due to destruction of hard drive by computer virus). Such effects on property fall comfortably within the definition of "direct physical loss" that Vigilant has always embraced. *See supra* § I; Vigilant Br. 51-54.

Further, subject to particular policy requirements, when data is erased or made wholly unrecoverable, the owner is physically dispossessed of it—data thus may suffer "direct physical loss" in the same way tangible property can. Likewise, data or code that becomes corrupted—literally rewritten—by a "technology peril" is physically altered in the same way tangible property is. In short, the Policy's use of the phrase "direct physical loss or damage" in the electronic data context in no way suggests the phrase has anything but its ordinary meaning in the physical property context.

2. Ross contends that the Policy's "pollutants exclusion" shows that the Policy does not require a physical alteration to property as a condition of coverage. Ross Br. 40-41. Ross is incorrect.

The pollutants exclusion bars coverage for "loss or damage caused by or resulting from the mixture of or contact between property and a pollutant" and identifies "loss or damage involving viruses or pathogens" as falling outside the exclusion's purview.

Obviously, "contact between property and a pollutant" can either (1) cause a distinct, demonstrable structural alteration qualifying as "direct physical loss or damage" (as when a noxious gas permeates a building's structure to a degree requiring specialized remediation) or (2) render a property completely destroyed or unusable for any purpose, amounting to "direct physical loss" (as when a noxious gas renders a building uninhabitable), *see supra* § I. And, as even Ross admits, Ross Br. 41, Vigilant has repeatedly explained that a virus *can* cause "direct physical loss or damage" to property in some circumstances. The pollutants exclusion's acknowledgment of "loss or damage involving viruses or pathogens" is thus entirely consistent with Vigilant's and *MRI Healthcare*'s plain-meaning interpretation of the Policy's coverage language. *See also infra* § IV.B.3.[5]

D. Amici's Attacks On The Couch Treatise Are Irrelevant And Wrong

Amici's remaining strategy for undermining the *MRI Healthcare* standard is to recycle the same attacks on the widely respected Couch on Insurance treatise that have been repeatedly rejected by California Courts of Appeal. Vigilant Br. 48-50; *see Endeavor*, 2023 WL 6155983, at *8, *10 n.12; *UTA*, 77 Cal. App. 5th at 833; *Starlight Cinemas*, 91 Cal. App. 5th at 39-40; *Apple Annie*, 82 Cal. App. 5th at 935. As those decisions recognize, the "distinct, demonstrable, physical alteration standard" set forth in

[5] San Manuel's reliance on the fact that the Policy "recognizes physical loss or damage" caused by "microorganisms or gases," San Manuel Br. 14, is misplaced for the same reasons.

Couch and adopted by *MRI Healthcare* has achieved "widespread acceptance by … courts" based on "careful and conscientious examination" of the policy language, not just on wooden recitation of Couch. *Apple Annie*, 82 Cal. App. 5th at 935-36 (quotation omitted). The courts have been perfectly clear: the policy language controls, not Couch. Amici's critiques of Couch in any event are meritless on their own terms.

1. UP contends that Couch's analysis of "direct physical loss or damage" is wrong because it originally cited *Great Northern Insurance Co. v. Benjamin Franklin Federal Savings & Loan Ass'n*, 793 F. Supp. 259 (D. Or. 1990), *aff'd*, 953 F.2d 1387 (9th Cir. 1992), a decision UP claims was subsequently "rejected" (UP Br. 44) in *Farmers Insurance Co. of Oregon v. Trutanich*, 858 P.2d 1332 (Or. App. 1993). UP utterly misconstrues *Trutanich*. That decision did not reject *Benjamin Franklin*, but *distinguished* it as "inapposite" on the very same ground that controls here: whereas the property in *Trutanich* "had been physically damaged," the property in *Benjamin Franklin* had remained "physically intact and undamaged." 858 P.2d at 1335 n.4.; *see Inns by the Sea*, 71 Cal. App. 5th at 702 (holding *Trutanich* inapplicable to COVID-19 related business losses).

2. UP asserts that Couch's "lead author," Steven Plitt, later disavowed the "distinct, demonstrable physical alteration" standard. *See* UP Br. 46-47. Even if true, the views of a single commentator obviously could not supplant the careful textual analysis of countless subsequent judicial decisions. But UP mischaracterizes Plitt's views in any event. Each of the three

Plitt-authored articles UP cites to support that proposition is in fact entirely consistent with the "distinct, demonstrable physical alteration" standard prescribed by the ordinary meaning of the policy language.

For example, the *Claims Journal* article cited by UP begins by expressly *reaffirming* the Couch formulation, reiterating that the "widely accepted definition" of "[p]hysical damage" is "'a distinct demonstrable, and physical alteration' of its structure or appearance." Steven Plitt, *Direct Physical Loss in All-Risk Policies: The Modern Trend Does Not Require Specific Physical Damage, Alteration*, Claims Journal (Apr. 15, 2013), at 2. The article then goes on to describe the category of uninhabitability cases discussed *supra* § I.A, which do find "direct physical loss or damage" when the property is not physically altered, but only when it is completely uninhabitable or unusable—a standard that *also* forecloses coverage here. As the article explains, the pervasive presence of asbestos can render a "structure uninhabitable and unusable," thereby amounting to direct physical loss, but *no* "covered loss" occurs when "the asbestos was not in a form or quantity to make the building unusable." *Id.* at 2. The other two Plitt-authored articles cited by UP make the same point: the uninhabitability cases show that "physical loss" may occur when a substance makes property "useless," Steven Plitt, *All-Risk Coverage for Stigma Claims Involving Real Property*, 35 No. 9 Ins. Litig. Rep. 253 (June 5, 2013), at 2, "unfit for human occupancy," or "otherwise unusable," John K. DiMugno et al., *Catastrophe Claims: Insurance Coverage for*

Natural and Man-Made Disasters § 8:6 (2023 update). The Plitt articles thus flatly *reject* amici's contention that mere *reduced* ability to *use* property constitutes "direct physical loss" of the property. *See supra* at 17-18.

3. UP asserts that the Couch formulation "conflicts with other major insurance treatises." UP Br. 47 (citing Allan D. Windt, *Insurance Claims & Disputes* § 11:41 (6th ed. 2013); 5f-142f *Appleman on Insurance Law & Practice Archive* § 3092 (1970 & 2012 Supp.); and Peter J. Kalis et al., *Policyholder's Guide to the Law of Insurance Coverage* § 13.04 (2012 & 2022 Supp.)); *see also* Lakers Br. 20 (citing Windt § 11:41). No, it does not. Just like the Plitt articles, none of these treatises recognizes "direct physical loss or damage" in the absence of a distinct, demonstrable alteration to property outside the context of cases of complete physical dispossession or uninhabitability. The Windt treatise, for example, cites only the familiar body of case law in which properties were rendered "unusable or uninhabitable." Windt § 11:41 (quotation omitted). Appleman, for its part, cites cases involving total physical dispossession of property, *see Intermetal Mexicana, S.A. v. Ins. Co. of N. Am.*, 866 F.2d 71, 73 (3d Cir. 1989); physical damage of property by debris, requiring specialized removal, *see Healy Tibbitts Constr. Co. v. Emps. Surplus Lines Ins. Co.*, 72 Cal. App. 3d 741, 754 (1977); and coverage for mitigation steps taken by an insured to avoid otherwise-inevitable physical destruction of property, *see Hampton Foods, Inc. v. Aetna Cas. & Sur. Co.*, 787 F.2d 349, 352 (8th Cir. 1986). *See* Appleman § 3092. All of those scenarios

involve physical dispossession or physical alteration, neither of which results from viral particles. The *Policyholder's Guide* treatise likewise cites only uninhabitability cases alongside other cases involving distinct, demonstrable alteration of property or its destruction. *See* Kalis § 13.04 (citing, *inter alia*, *Hampton Foods*, 787 F.2d at 351). Amici accordingly derive no support from these treatises, which comport with the plain meaning of the Policy and do not support coverage for COVID-19-related claims. *See Starlight Cinemas*, 91 Cal. App. 5th at 40 (rejecting argument that Windt treatise undermines the Couch/*MRI Healthcare* formulation).

4. Finally, Ross complains that "the ordinary and popular meaning of insurance policy language" cannot be found "in a legal treatise for insurance professionals." Ross Br. 32 (capitalization omitted). But like all treatises, Couch distills principles from case law. That case law, in turn, analyzes the *plain and ordinary meaning* of policy language in accordance with settled principles of contract interpretation. There is accordingly nothing esoteric or technical about Couch's formulation; rather, as courts have recognized over and over again in the COVID-19 context, Couch simply expresses, in concise and accurate terms, the ordinary meaning of the phrase "direct physical loss or damage."[6]

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[6] Ross errs in suggesting that *MRI Healthcare*'s citation to Couch was mere "dictum." Ross Br. 35. As explained *supra* § II.A, the "distinct, demonstrable physical alteration" requirement was central to *MRI Healthcare*'s analysis of the coverage question before it. It is irrelevant that "*MRI Healthcare* did not involve an argument that the MRI machine was intangible," Ross Br. 35, because the relevant question was

III. VIRAL PARTICLES TEMPORARILY PRESENT ON PROPERTY DO NOT CAUSE PHYSICAL ALTERATIONS REQUIRING REPAIRS TO THE PROPERTY

Apart from distorting the "distinct, demonstrable physical alteration" standard or seeking to avoid it outright, a few of AP's amici actually address the standard on its own terms, contending that it is satisfied here because the COVID-19 virus *does* cause physical alterations that require "repairs" to property. Amici are wrong. They rely on the chemical effect that occurs when some physical matter (viral particles) comes into temporary contact with some other physical matter (*e.g.*, doorknobs). It is the same chemical effect that occurs when, for example, water particles come into contact with a doorknob, so the *dry* doorknob becomes a *wet* doorknob. That temporary "alteration" of the property does not qualify as the kind of *structural alteration requiring repair* that constitutes "direct physical damage." Amici also cite preventative measures taken in response to the pandemic, but those measures likewise did not qualify as property "repairs" within the meaning of the Policy.

A. The Temporary Effects Of Viral Contact Do Not Qualify As "Direct Physical Loss Or Damage"

In an effort to identify alterations to property that could qualify as "direct physical loss or damage," amici point to a variety of supposed "changes" that property undergoes as a result

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whether the *loss or damage to property* was tangible or corporeal, not whether the *property itself* was intangible. *See MRI Healthcare*, 187 Cal. App. 4th at 780.

of contact with COVID-19 viral particles. None of these effects constitutes direct physical damage to property.

1. Amici's principal argument is that property is altered in the "chemical bonding" that necessarily occurs when viral particles come into contact with physical property. San Manuel Br. 24; *see* Santa Ynez Br. 19 (emphasizing "physical-chemical alteration caused by virus coating" on surfaces). The Lakers set forth the most jargony description of this bonding process, arguing that "the virus bonds to a surface through a process called 'adsorption,'" rendering the surface "more hydrophobic" and "measurably increas[ing]" its "surface roughness." Lakers Br. 27. The Lakers dwell for pages on the technicalities of these effects, emphasizing the "protein clubs or spikes" on COVID-19 particles that allow them to "bond and chemically interact" with the surfaces of property via their "carboxyl amino groups," affecting the "chemical composition" of surfaces. *Id.* at 27, 30-31.[7]

While this technical description conjures a façade of complexity, the analysis remains very simple: none of these purported effects on property is a *distinct, demonstrable alteration* with any lasting effect on the actual structure of property. Instead, what amici describe is just the ordinary interaction between physical matter. When one form of physical

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[7] UP also argues that "COVID-19 molecules" alter the "chemical (and thus physical) composition of air," UP Br. 27, but as Vigilant has explained, purported effects on air do not provide a basis for coverage under the Policy because the term "building" is defined as not including "air, either inside or outside of a structure." Vigilant Br. 35 (quoting 3-ER-566).

matter interacts with another, one can always dial up the magnification on their microscopic interactions to a point where *some* molecular effect can be identified. Otherwise walls would never become wet and windows would never become dirty. But such temporary effects have no significance for purposes of property insurance coverage—what matters is whether the property is in *a different physical state after the substance is no longer present on the property*.[8] And no insured has ever identified any way in which property on which COVID-19 viral particles were present has been left tangibly altered once those particles have dissipated or been wiped away. Nor has any case relied on a "microscopic chemical reaction" theory to find direct physical damage *outside* the COVID-19 context. In fact, courts have consistently recognized that "the mere adherence of molecules to surfaces does not alter the property in a distinct and demonstrable manner." *Schleicher*, 2023 WL 3357980, at *7; *see*

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[8] In an effort to argue that fleeting changes can qualify as "direct physical damage," Ross misreads the significance of the Policy's 24-hour "waiting period" deductible. *See* Ross Br. 55 (quoting 3-ER-492). The existence of that deductible does not "necessarily mean[] that covered losses of less than 24 hours' duration could occur" (*id.*) because the waiting period refers to *business income losses*. For example, if a fire that burned for any period of time caused damage to a building, the insured would be entitled to recover both (1) the direct costs of the damage to the building, *and* (2) the business income losses it incurred as a result of the fire throughout the period beginning twenty-four hours after the fire took place and ending once the damage was repaired. Nothing about that waiting period suggests that ephemeral changes to property lasting less than twenty-four hours qualify as "direct physical damage."

Endeavor, 2023 WL 6155983, at *3, *11 (allegations that COVID-19 viral particles are "adsorbed" to surfaces by "form[ing] a 'weak' 'noncovalent chemical bond' that 'is relatively hard to detach'" are insufficient to plead "direct physical loss or damage"); *Tapestry, Inc. v. Factory Mut. Ins. Co.*, 286 A.3d 1044, 1065-66 (2022) (rejecting argument that allegations of COVID-19 particles adhering to surfaces via "physicochemical reactions involving cells and surface proteins" suffice to state a coverage claim and instead following "the majority of other appellate decisions"); *see also* Vigilant Br. 27-28 (collecting cases).

Amici CMA and San Manuel essentially concede the point in arguing that property was physically altered because COVID-19 particles were "constantly reintroduced." CMA Br. 7; San Manuel Br. 19. By their own account, the property *itself* does not change—the virus is simply reintroduced by humans because it is so easily transmissible. In other words, even if "routine cleaning does not remove the *rapidly redepositing* SARS-CoV-2 from the property," the property itself "is neither lost nor changed due to presence of the virus in the interim." *JGB Vegas*, 2023 WL 5989929, at *8 (emphasis added; quotation omitted); *see Tapestry*, 286 A.3d at 1059 (even if COVID-19 viral particles are "introduced into the air every time a new infected person enters the store," no coverage because insured could not demonstrate that "the air … was 'damaged'").

2. As an alternative theory of "physical alteration," amici again resort to the notion that property was "changed" from "safe to unsafe"—or, in other words, that ordinary surfaces within

buildings were "changed" into dangerous "fomites." MLB/NHL Br. 14; Lakers Br. 33. For the reasons explained *supra* at 18-19, amici's reliance on these labels is misplaced. The "unsafe" designation, like the "fomite" designation, does not establish any actual alteration to the physical structure of the property. A wet floor may be "unsafe," too, but it is not physically damaged if the water can be mopped up without lasting effect. Likewise, it may be true in an empty semantic sense that "property contaminated with SARS-CoV-2 is different from property not contaminated with SARS-CoV-2," but that difference is irrelevant because "the question is not whether the property is distinct from other property, but whether the property itself has changed." *Schleicher*, 2023 WL 3357980, at *7; *see JGB Vegas*, 2023 WL 5989929, at *8 (that "the virus can spread via harmful 'fomites' once it lands on the surface of property … does not indicate that the property was actually harmed"). As shown above, the degree to which a building is "unsafe" matters for property insurance coverage purposes only when the building becomes so unsafe as to be *uninhabitable and unusable for any purpose*. Because COVID-19 viral particles have no such extreme effect on buildings, their presence does not trigger coverage.

B. Preventative And Remedial Measures Do Not Qualify As "Repairs"

As Vigilant has explained, the Policy's "period of restoration" provision, which defines the time period during which losses can be recovered as "including the time required" to "repair or replace the property" (3-ER-578), makes clear that coverage for "direct physical loss or damage" applies only to the

kind of loss or damage that requires replacement or repair to correct, such as destruction, structural harm, or dispossession. *See supra* at 22; Vigilant Br. 25-26. Amici's focus on preventative and remedial measures fails to give effect to this policy language.

1. Some amici attempt to satisfy the requirement of a "repair or replacement" of property by pointing to miscellaneous preventative measures undertaken by many or most businesses as a cost of doing business during the pandemic. To that end, several amici endorse one dictionary definition of "repair" as meaning "to restore to a sound or healthy state." MLB/NHL Br. 26; San Manuel Br. 30 n.17; Ross Br. 37 n.17. The "sound or healthy state" understanding of "repair," however, "is rooted in a *medical* definition" from Merriam-Webster. *Palm & Pine Ventures, LLC v. Certain Underwriters at Lloyd's London*, 2022 WL 533073, at *5 (E.D.N.C. 2022) (emphasis added). In the "context of the policy," where "'repair' is linked … with 'rebuild' and 'replace,'" the only "reasonable definition" is "to restore by replacing a part or putting together what is torn or broken." *Cajun Conti LLC v. Certain Underwriters of Lloyd's London*, 359 So. 3d. 922, 928 (La. 2023); *see Neuro-Commc'n Servs., Inc. v. Cincinnati Ins. Co.*, 2022 WL 17573883, at *4 (Ohio 2022) ("sound or healthy state" theory "stretches the terms 'repaired, rebuilt, or replaced' too far").

Under the correct definition, none of the measures identified by amici qualify as "repairs." MLB/NHL, for example, tout their decisions to "install special systems to increase external air" as well as to "replace air filtration systems, install

physical dividers, reconfigure physical spaces, and implement specialized disinfection." MLB/NHL Br. 12. Ross similarly contends that "scrubbing, disinfecting, and taking steps to prevent or limit recurrence" qualify as repairs. Ross Br. 37. Courts have consistently rejected identical efforts by policyholders to recast such preventative efforts unrelated to remediating structural damage to property as "repairs." Vigilant Br. 32-34 (collecting cases). As the Nevada Supreme Court recently put it, "social-distancing, plexiglass installation, sanitizing mechanisms, and regular cleaning" are "preventive measures" that "do not aim to repair, rebuild, or replace the property," but instead "aim to redress the way people pose harm to one another by carrying and transmitting the virus at the property." *JGB Vegas*, 2023 WL 5989929, at *8 (quotation and alteration omitted)); *see Conn. Dermatology*, 288 A.3d at 201 (policyholder's "activities designed to prevent the transmission of the coronavirus on the properties were not 'repairs' in any ordinary sense of the word"); *Cajun Conti*, 359 So. 3d at 928 ("A layperson would not say that cleaning or sterilizing tables, plates or silverware is a 'repair.'"); *Roy Kavin, Inc. v. Fed. Ins. Co.*, 2022 WL 16646216, at *3 (C.D. Cal. 2022) ("[I]nstallation of social distancing barriers and the removal of furniture and work stations to promote and ensure proper social distancing … are forward-looking preventative measures, not remediation due to direct physical damage or loss"). While some of the initiatives amici describe may have well been savvy business decisions with the effect of encouraging potential customers to feel comfortable

attending events and interacting in crowds in amici's facilities, upgrading property in such ways does not constitute "repairs" necessitated by any physical alterations to the property.

San Manuel underscores the point in asserting that "repairs" even include a policyholder's "inactions," i.e., "waiting periods to dispel concentrations or a viral presence." San Manuel Br. 30 n.17. Not only would an ordinary person consider "doing nothing" essentially the opposite of "repairing property," but San Manuel's argument does the further service of emphasizing that COVID-19 viral particles dissipate on their own without requiring any actual repairs to property.

2. Other amici go further and try to entirely deny the significance of the "period of restoration" language. These arguments are incompatible with the settled precedent in California holding that the "period of restoration" language reinforces the requirement of distinct, demonstrable alteration to property, *see, e.g.*, *Apple Annie*, 82 Cal. App. 5th at 932 (collecting cases), and in any event are unpersuasive on their own terms.

Some amici contend that the Policy's "period of restoration" does not shed light on the type of damage covered by the Policy because (1) the "period of restoration" definition is set forth "nearly 100 pages" away from the coverage grant and (2) because the "period of restoration" language does not appear in the Policy's Civil Authority coverage. Ross Br. 38; *see* MLB/NHL Br. at 25 n.7. Neither contention has merit. The "period of restoration" definition is conspicuously placed within the Policy's "Property/Business Income Definitions" section, which, needless

to say, is by necessity is located many pages away from those coverage grants that are set forth earlier in the policy. That section is hardly a hidden or obscure place for an important provision that sheds additional light on the nature of the coverage provided by the Policy.

Amici also misunderstand why the "period of restoration" coverage is absent from the Policy's Civil Authority coverage provision. Ross Br. 39; MLB/NHL Br. 24 n.7. That coverage, unlike Business Income coverage, is triggered by a government order forbidding access to the insured property based on physical damage to property *elsewhere*. Losses covered under the Civil Authority provision thus are necessarily limited to those incurred only while the access-prohibiting order is in effect—once that order is lifted and access to the insured's property is restored, it is entirely irrelevant how long it may take to repair or replace the damaged property elsewhere. And it is thus entirely irrelevant that "period of restoration" language does not appear in the Civil Authority coverage.

Ross further argues that the "period of restoration" provision should be ignored because the definition states that it "includ[es]," rather than that it is limited to, the time required to "repair or replace the property." Ross Br. 36 (emphasis and quotation omitted). But the term "including" as used here cannot render the period of restoration entirely open-ended, as Ross suggests. If it did, there would be no need to specify the two categories of "repair or replacement" that qualify: either actual "repair or replace[ment]" or additional "repair or replace[ment]"

necessitated by the need to "tear[] down parts of any property not damage" in order to "comply" with a pre-existing "ordinance or law." 3-ER-578. The only way to make sense of the period of restoration language as a whole is that it conditions coverage on the need to "rebuild or replace" property—language that contemplates a tangible detrimental physical change to property, as courts have consistently recognized. Vigilant Br. 25-26.

Finally, MLB/NHL argue that the "period of restoration" language can be ignored because some policies issued by *other* insurers specify circumstances in which there is coverage when property is *not* repaired or replaced. MLB/NHL Br. 24-25. Even if it were appropriate to look beyond the four corners of this Policy to construe the language here, *but see infra* § IV, MLB/NHL misread the provisions they cite. Those provisions state only that an insured who elects *not* to repair or replace the damaged property may still recover using a different measure of loss, such as the "actual cash value" of the property. *See* MLB/NHL Br. App'x at A0264-65. That provision only confirms that the relevant type of damage to property is one that *creates the need* for repair or replacement in order for the property to be restored to its former condition, even though an insured is not obligated to actually restore its property if it instead prefers an alternate form of compensation.

Amici thus cannot evade the obvious consequences of the "repair or replacement" language for the kind of effects on property that qualify as "direct physical loss or damage." Temporary, easily-remediated, self-eliminating effects do not

qualify. The effect must be a structural alteration that requires repair or replacement of the property, and COVID-19 particles have no such effect.

IV. AMICI RELY ON INADMISSIBLE AND IRRELEVANT EXTRINSIC EVIDENCE

Seeking to distract from the plain policy language unambiguously foreclosing COVID-19-related coverage claims, amici cite an array of legally and factually irrelevant "extrinsic evidence," none of which affects the Policy's plain meaning or justifies any alternative construction, as countless courts have determined. Vigilant Br. 28 n.4.

A. Amici Misstate The Law On The Admissibility Of Extrinsic Evidence

According to amici, California law authorizes—indeed requires—courts interpreting contracts to allow parties to develop and introduce extrinsic evidence concerning the contract's meaning, even when the contract's language is facially unambiguous.[9] Not so: "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible." Cal. Civ. Code § 1639. As this Court established long ago in *Bank of the West v. Superior Court*, 2 Cal.

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[9] San Manuel contends that the Policy is ambiguous simply because a thimbleful of decisions have found potential coverage. *See* San Manuel Br. 32. Under California law, however, a mere "split of authority … does not create an ambiguity." *Kim Seng Co. v. Great Am. Ins. Co. of N.Y.*, 179 Cal. App. 4th 1030, 1039 (2009) (collecting cases). "An agreement is not ambiguous merely because the parties (or judges) disagree about its meaning. Taken in context, words still matter." *Abers v. Rounsavell*, 189 Cal. App. 4th 348, 356 (2010).

4th 1254 (1992), that rule means that where "contractual language is clear and explicit, it governs," *id.* at 1264.

To be sure, certain kinds of extrinsic evidence may be appropriately considered in limited situations. In *Montrose Chemical Corp. v. Admiral Insurance Co.*, 10 Cal. 4th 645 (1995), for example, this Court first concluded that the "express language" of a policy "unambiguously provide[d] potential coverage," and then considered evidence of the "drafting history" of the specific provision at issue for the limited purpose of "evaluating" a public policy argument advanced by insurers. *Id.* at 668, 671. *Montrose* thus did not invoke extrinsic evidence disconnected from the parties' own relationship to override the plain meaning of their agreement and it provides no warrant for doing so here.

Similarly, in *MacKinnon v. Truck Insurance Exchange*, 31 Cal. 4th 635, 653-54 (2003), the Court looked to the "history and purpose" of a particular exclusion to confirm that its interpretation was "consistent with" the "exclusion's historical objective" after applying the ordinary principles of interpretation to construe policy text standing alone. *Id.* at 653-54. And the Court of Appeal in *ACL Technologies, Inc. v. Northbrook Property & Casualty Insurance Co.*, 17 Cal. App. 4th 1773 (1993), recognized that certain types of extrinsic evidence may be used "to explain *special* meanings which the individual parties to a contract may have given certain words." *Id.* at 1793.

These precedents—and others like them—primarily focus on evidence drawn from the parties' own specific drafting and

performance history to give meaning to the language they agreed upon. None of them provides either command or license to scour the universe beyond the parties' own relationship to seek evidence contradicting the meaning of contractual language that is clear on its face.

To the extent consideration of broader evidence is permissible at all, it is only when introduced "to prove a meaning to which the language of the instrument is reasonably susceptible." *Dore v. Arnold Worldwide, Inc.*, 39 Cal. 4th 384, 391 (2006) (quotation omitted). When contract language is *not* reasonably susceptible to more than one meaning—when the language is unambiguous, that is—interpretation is controlled by the foundational *Bank of the West* rule: where "contractual language is clear and explicit, it governs." *Bank of the West*, 2 Cal. 4th at 1264.

No other rule would be workable. Under amici's freewheeling approach to the admissibility of extrinsic evidence, parties could *never* meaningfully bind themselves through written contractual language and demurrers could *never* be sustained on the basis of contractual language alone. Rather, in every disputed contract case, the court would be required to entertain broad fishing expeditions to search for extrinsic evidence potentially suggesting that facially unambiguous language means something other than what it plainly says.

California cases have wisely rejected amici's approach. *See ACL Techs.*, 17 Cal. App. 4th at 1791 n.45, 1793 (rejecting view of admissibility of extrinsic evidence that would "cast[] doubt on the

very possibility of finding meaning in language" and "contradict[] the objective theory" of contracts, under which "[i]t is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that controls interpretation" (quotation omitted)); *George v. Auto. Club of S. Cal.*, 201 Cal. App. 4th 1112, 1122 (2011) (rejecting proposition that "a demurrer can never be sustained to a complaint so long as there is an allegation that unidentified parol evidence exists to support plaintiff's claim"); *Adamo v. Fire Ins. Exch.*, 219 Cal. App. 4th 1286, 1298 (2013) ("There must be 'a showing of ambiguity before extrinsic evidence may be admitted to shed light on that ambiguity.'" (quoting *ACL Techs.*, 17 Cal. App. 4th at 1790-91)).

In any event, the Court here need not make general pronouncements about the nuances of whether and when specific types of extrinsic evidence may be admitted for particular interpretive purposes. In this case, even assuming extrinsic evidence were admissible for any purpose, none of the evidence cited by amici remotely undermines the facially clear meaning of the Policy language.

B. None Of The Materials Cited By Amici Supports Their Interpretation Of The Policy

All of the extrinsic evidence cited by amici is entirely consistent with a plain-language reading of Vigilant's Policy.

1. *Amici Misconstrue The History Of The Word "Loss" In Commercial Property Policies*

CPK and UP dwell at length on the historical evolution of the word "loss" within the phrase "direct physical loss or damage"

in commercial property policies. CPK Br. 19-20; UP Br. 33-35. As they correctly observe, business interruption coverage first arose in the context of fire insurance, which generally covered losses from "damage" or "destruction" of property as a result of fire. CPK Br. 19. When insurers began providing coverage for perils other than fire and eventually began offering "all risk" coverage, it became necessary to expand coverage beyond the "destruction" normally resulting from fire. *Id.* at 20. As amici explain, the word "destruction" was accordingly replaced with "loss," forming the now-familiar construction "direct physical loss or damage" that is the cornerstone of modern commercial property coverage. *See id.*

Based on that history, amici assert that the term "loss" cannot mean the complete "destruction" of property, "because the insurance industry specifically replaced 'destruction' with loss." *Id.* at 21. Instead, say amici, "loss" must have been intended only to encompass purely economic losses like those claimed by policyholders in COVID-19 coverage cases.

That conclusion does not follow. As their own historical account shows, the term "loss" was employed to ensure coverage for *both* the "destruction" typically resulting from fire, as well as for *other* harms that can result from newly covered perils, especially perils that cause the dispossession of property without physical damage. According to their historical authority, the change from "destruction" to "loss" was necessary to allow for coverage of perils that cause property to be physically "remov[ed]," "taken" or "lost," such as "looting," "[b]urglary and

[r]obbery," and "theft." Charles M. Miller, Richard P. Lewis, & Chris Kozak, *COVID-19 and Business-Income Insurance: The History of "Physical Loss" and What Insurers Intended It To Mean*, 57 Tort, Trial & Ins. Prac. L.J. 675, 683-84 (2022). But there is no evidence that the use of "loss" was intended to also encompass purely economic losses unaccompanied by *either* destruction or dispossession of property. To the contrary, amici ignore the key modifiers that cabined the newly expanded coverage: to be covered, a "loss" to or of property must be both "direct" and "physical." *See Ward Gen. Ins. Servs., Inc. v. Emps. Fire Ins. Co.*, 114 Cal. App. 4th 548, 554 (2003) ("[T]he words 'direct physical' modify both 'loss of' and 'damage to.'"). In short, the term "direct physical loss" was substituted for "destruction" not to create open-ended coverage for purely economic losses, but to provide coverage when the insured either suffers the "total ruin" of property or is "deprived of property without any damage to it," as when personal property is "stolen without a scratch." *Santo's Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398, 404 (6th Cir. 2021).

Vigilant has always endorsed that understanding of "direct physical loss." Vigilant Br. 26-27. And because COVID-19 did not cause policyholders to suffer either total destruction or physical dispossession of their property, as necessary to establish "direct physical loss" (nor a distinct, demonstrable, physical alteration to their property, as is necessary to establish "direct physical damage"), they are not entitled to coverage under policies that require "direct physical loss or damage" to property.

2. *It Is Irrelevant That One Policyholder Obtained Coverage Under Different Policies And In Different Circumstances During The 2003 SARS Outbreak*

Several amici invoke the fact that some insurers paid one insured's claims as a result of the outbreak of SARS in 2003—specifically, that the Mandarin Oriental International hotel received a $16 million insurance settlement in connection with SARS-related claims. CPK Br. 25, 27; Ross Br. 20; UP Br. 20. That settlement says nothing about whether the COVID-19 virus causes "direct physical loss or damage" to property under the particular facts and policy language applicable here.

Amici cite nothing indicating that the Mandarin Oriental obtained coverage for losses caused by "direct physical loss or damage" to property, as opposed to other forms of business interruption coverage that were available and in use in insurance policies at that time, such as "notifiable disease coverage." *See* Sheila Simison & Michael Codd, *A Changing World and the Limitations of Traditional Business Interruption Cover,* 12 No. 27 Andrews Ins. Coverage Litig. Rep. 13 (May 3, 2002) (explaining that a "clause[] which provides business interruption cover *in the absence of damage to property* is the Notifiable Disease Clause which usually covers loss of income resulting from an outbreak of a Notifiable Disease occurring at the insured premises or within 25 miles of the premises" (emphasis added)); *New World Harbourview Hotel Co Ltd. V. ACE Ins. Ltd*, [2012] 15 H.K.C.F.A.R. 120, 132 (C.F.A.) (decision of Hong Kong's Court of Final Appeal holding that SARS was a "notifiable disease" triggering coverage under such policies as of "27 March 2003").

Once again, amici's own sources undermine their contentions. The ISO Circular cited by several amici expressly states that, as of July 6, 2006, "property policies have *not* been a source of recovery for losses involving contamination by disease-causing agents." CPK Br. Ex. 3 (ISO Circular July 6, 2006), Amendatory Endorsement at 2 (emphasis added). And CPK cites an article recognizing that recovery for COVID-19 would be "limited" compared to the 2003 SARS outbreak because most modern policies "pay out only if physical damage occurs." CPK Br. Ex. 4. If anything, amici's reliance on alleged SARS outbreak coverage confirms the absence of coverage here.

3. *Amici's Reliance On ISO's Virus Exclusion And The Text Of The 2006 ISO Circular Is Misplaced*

Amici rely heavily on the fact that, in 2006, ISO promulgated a virus exclusion that now appears in many (but far from all) property insurance policies. According to amici, the exclusion demonstrates the industry's understanding that viruses necessarily cause "direct physical loss or damage" to property—otherwise, there would have been no need for the exclusion. *See, e.g.*, CPK Br. 25-29; Lakers Br. 24-25. That argument is incorrect.

As a general matter, courts have consistently held that the existence of an exclusion in *other* policies not before the court says little about the meaning of a policy before the court, where that policy's affirmative coverage provisions already unambiguously foreclose the coverage claim. *See, e.g.*, *Inns by the Sea*, 71 Cal. App. 5th at 709 ("the absence of an available exclusion does not imply the existence of coverage"); *Endeavor*,

2023 WL 6155983, at *10 (same); *Verveine*, 184 N.E.3d at 1277 (same).

More specifically, the ISO virus exclusion does not imply any industry understanding that absent the exclusion, property insurance policies necessarily cover virus-related losses. To the contrary, the 2006 ISO Circular makes clear that the exclusion served *other* purposes: (1) it excludes coverage in those limited circumstances, distinct from those here, where viruses *do* cause direct physical loss or damage to property, and (2) it avoids costly disputes by safeguarding against the kind of non-meritorious coverage claims being asserted here.

First, as Vigilant has already explained, the virus exclusion has a clear purpose: to exclude losses in those circumstances where, unlike here, viruses *do* cause direct physical loss or damage to property. Vigilant Br. 60. As the Supreme Judicial Court of Massachusetts has noted, those circumstances include, "[m]ost obviously," instances when "personal property, such as food, becomes physically contaminated or infected with a virus, requiring its destruction or some form of remediation." *Verveine*, 184 N.E.3d at 1278. A virus that kills or sickens insured livestock likewise causes "direct physical loss or damage" to property. *See, e.g.*, *Curtis O. Griess & Sons, Inc. v. Farm Bureau Ins. Co. of Neb.*, 528 N.W.2d 329, 331 (Neb. 1995). And given that the ISO exclusion encompasses not only "virus" but also any "bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease," it is not difficult to imagine circumstances where, for example, bacteria colonize and

structurally permeate property, requiring structural remediation or disposal and thus qualifying as "direct physical loss or damage" to property. The Circular's references to the "presence" of "[d]isease-causing agents" on "interior building surfaces" and "potential claims" for the "cost of decontamination (for example, interior building surfaces)" are consistent with such scenarios. CPK Br. Ex. 3 (ISO Circular July 6, 2006), Amendatory Endorsement at 1-2.

Thus, contrary to amici's suggestions based on cherry-picked quotations from the Circular, *see, e.g.*, Lakers Br. 25, ISO nowhere suggests that the mere temporary presence of virus particles on surfaces could trigger coverage under property policies. Indeed, the Circular emphasizes that "[a]lthough 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*," and "[a]n allegation of property damage may be a point of disagreement in a particular case." CPK Br. Ex. 3 (ISO Circular July 6, 2006), Amendatory Endorsement at 2 (emphasis added).

At bottom, ISO's exclusion treats virus and bacteria just like all of the other substances for which it has drafted targeted exclusions, such as radiation, asbestos, and mold. As CPK concedes, "[n]one of these substances *necessarily* cause physical alteration to property." CPK Br. 16 (emphasis added). Thus, the existence of a targeted exclusion for them does not dictate that *every* loss related to those substances is one that would have

otherwise been covered by a policy provision that requires "direct physical loss or damage." Where, however, the substance in question *does* cause direct physical loss or damage, such exclusions apply to foreclose claims of coverage. The existence of the ISO virus exclusion is thus entirely consistent with Vigilant's interpretation of the Policy.

Second, as the ISO Circular expressly contemplates, some insurers may have opted to use the virus exclusion as an additional safeguard against baseless claims of coverage. The Circular explains that the purpose of the inclusion was, in part, to address "the concern that insurers employing [property] policies may face claims in which there are efforts to expand coverage and to create sources of recovery … *contrary to policy intent*." CPK Br. Ex. 3 (ISO Circular July 6, 2006), Amendatory Endorsement at 2 (emphasis added); *see also id.* (explaining that "exclusions … can reduce the likelihood of claim disputes and litigation"). Insurers are always free—but certainly not required—to take a "belt and suspenders" approach to be "doubly sure" that they will not be subject to meritless claims for coverage that the policy, properly construed, does not allow. *In re SRC Holding Corp.*, 545 F.3d 661, 670 (8th Cir. 2008).

Thus, nothing about the existence of a virus exclusion nor the language of the 2006 ISO Circular supports amici's interpretation of the Policy as providing coverage for virus-related losses stemming from the mere temporary presence of viral particles on surfaces within properties. On the contrary, as courts have repeatedly recognized, amici's contentions are

precisely the sort of "efforts to expand coverage … contrary to policy intent" that should be rejected as inconsistent with clear policy language. CPK Br. Ex. 3 (ISO Circular July 6, 2006), Amendatory Endorsement at 2.[10]

4. *Amici's References To A Motley Assortment Of Materials Expressing Subjective Views On The Meaning Of Policy Language Does Not Support Their Interpretation Of The Policy*

Finally, UP and CPK cite a hodgepodge of materials such as training presentations and comments by individual insurance company employees that, in amici's view, prove an industrywide understanding that viruses generally cause direct physical loss or damage to property. The materials prove no such thing.

As a threshold matter, the materials amici cite—but largely do not attach to their briefs or otherwise provide to the Court in accessible form—are precisely the type of tangential, subjective extrinsic evidence that is inadmissible to aid in the construction of an insurance policy. *See supra* § IV.A. But even leaving that flaw aside, the materials do not stand for the propositions amici purport to derive from them.

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[10] To the extent UP advances an extrinsic-evidence-based argument rooted in notions of regulatory estoppel on the basis of unspecified ISO communications, *see, e.g.*, UP Br. 30 (vaguely contending that insurers cannot "say what they wish in securing permission to write insurance and then write on a blank slate when it comes to pay on claims"), those arguments fail at the threshold because California does not recognize the doctrine of regulatory estoppel. *See ACL Techs.*, 17 Cal. App. 4th at 1787 n.39. In any event, UP has not identified any such statements that conflict with the plain meaning of the policy language.

a. *Strathmore Memorandum.* UP cites a memorandum sent by Strathmore Insurance Company to ISO seeking an exemption from a rule that would make the virus exclusion mandatory. *See* UP Br. 37-38. The memorandum states that, in Strathmore's view, the risk addressed by the exclusion "will not affect large segments of [its] current book." *Legal Sea Foods, LLC v. Strathmore Ins. Co.*, No. 1:20-cv-10850-NMG (D. Mass. Oct. 20, 2020), ECF No. 36-2, at 2. Strathmore perceived little risk because it had "a niche market of habitational business," and it viewed the risk addressed by the exclusion as primarily affecting "stock"—i.e., business personal property such as food or living animals—with "contagious disease … transmitted to third parties via ingestion or some other direct contact to an insured's products," such as "Hepatitis B exposure via a green onion vector." *Id.* Strathmore's assessment thus confirms the exclusion's obvious purpose of barring coverage in circumstances where, unlike here, viruses cause "direct physical loss or damage" to property such as food or livestock. *See supra* at 51.

It is no surprise that Strathmore contemplated that disease-causing viruses could "spread through a HVAC system"—obviously they can, and just as obviously, many businesses maintain their food stores and livestock in climate-controlled environments. Nowhere does the Strathmore memo suggest that the mere presence of viral particles on inert surfaces amounts to "direct physical loss or damage" to the property. Indeed, if Strathmore *did* share that view, it would have concluded that the businesses it insured would face *massive* exposure in the event of

a pandemic—the *last* thing Strathmore would have done is seek exemption from a mandatory virus exclusion.

b. *FM Global Group Workshop Materials.* UP next cites a policy workshop slide deck purportedly used for training or marketing purposes by the insurer FM Global Group ("FM"). UP Br. 39-40. FM's slide deck defined "physical damage" as an "actual substantive change" that "[r]educes worth or usefulness" and "[p]revents [property] from being used as designed or intended." *See* Br. of Amicus Curiae Cinemark Holdings, Inc., *Tapestry, Inc. v. Factory Mut. Ins. Co.*, Misc. No. 1 (Md. July 13, 2022) ("Cinemark Br."), Ex. D, at FMGLOBAL_C_00057356. It then clarifies that "physical damage" is "NOT" a "change that exists in the mind of people." *Id.*

While FM's description of "physical damage" of course is not controlling over the settled understanding of "direct physical loss or damage" expressed in *MRI Healthcare*, FM's expression is in any event perfectly consistent with the *MRI Healthcare* standard. That standard, too, requires an "actual substantive change" to the property, i.e., a distinct, demonstrable alteration to it. *See supra* § II.A. And fleeting contact by self-disintegrating and/or easily removed viral droplets is not an "actual substantive change" to property in any sense. That point is confirmed by FM's further qualifiers that the "actual substantive change" must reduce the property's "worth or usefulness" by preventing it from being "used as designed or intended." Again, temporary contact with a substance that self-dissipates or is easily removed will not have the kind of lasting effects on property—actually changing

its value—contemplated by those qualifiers. If anything, FM's definition exemplifies one industry participant's understanding that "direct physical loss or damage" does *not* encompass the temporary presence of a substance on property with no continuing detectable effects of any kind.

c. *FM Claims Procedures Manual.* UP also mentions—with no citation—an unidentified FM "claim procedures manual" that allegedly included "communicable disease" as a covered peril, referred to "physical loss or damage resulting from … communicable disease," and assigned "internal coding" for such communicable disease perils. UP Br. 39-40. Even accepting UP's self-serving descriptions, the mystery manual is not remotely inconsistent with Vigilant's position. As Vigilant has repeatedly explained, it is entirely true that viruses and communicable diseases *can* cause direct physical loss or damage, as shown above. *See supra* at 51. And the existence of "internal coding" for communicable diseases is unsurprising given that FM policies expressly include an "Interruption by Communicable Disease coverage extension"—a coverage that, "unlike the primary Time Element coverage, does *not* require 'physical loss or damage to covered property." *Tapestry*, 286 A.3d at 1057-58 (emphasis added).

d. *FM Deposition And "Talking Points."* UP's citation to the deposition of an FM corporate representative is, to be kind, frivolous. When asked whether he "agree[d] that a virus may cause damage to property," the representative responded "*Not viruses that we are aware of at this time.* But that's not to say

that there isn't a virus in the future that cannot cause physical loss or damage to property." Cinemark Br. Ex. C at 297-98 (emphasis added). The testimony thus flatly rejects the position for which UP cites it. Again, Vigilant fully agrees that *some* viruses *can* cause direct physical damage to *some* property, i.e., organic property that is physically altered or must be destroyed due to a virus.

For the same reason, UP derives no support from the unidentified insurer "Talking Points" that its brief references, which supposedly state "that viruses 'typically' do *not* damage property." UP Br. 28 (emphasis added).[11] Indeed they typically do not, as this case illustrates. And when they do, as in livestock cases like *Curtis O. Griess*, there is potential coverage.

e. *FM Motion In Limine.* Like UP, CPK contends that comments by FM are relevant to Vigilant's Policy. CPK cites a motion in limine filed by FM in a pre-pandemic coverage case, where FM argued that a mold infestation in a drug manufacturing plant requiring intensive remediation qualified as physical loss or damage, citing the "uninhabitability" cases discussed *supra* § I. *See* CPK Br. Ex. 5. As Vigilant has explained and as those cases hold, substances like mold do cause "direct physical loss or damage" to property when they cause a

[11] UP appears to be referencing FM's "Talking Points on the 2019 Novel Coronavirus." *See* Cinemark Br. Ex. B. Those "Talking Points" again definitively *contradict* amici's argument: they explain that because "[t]he presence of a communicable disease does *not* constitute physical damage," there is *no* COVID-19-related coverage under FM's policy provisions that "require physical loss or damage to property." *Id.* (emphasis added).

building to become uninhabitable or so infiltrate the structure of property that special remediation is required. *See supra* § I. Mold can also cause "direct physical loss or damage," as FM contends, where "the property covered involves a product to be consumed by humans"—namely, "injectable pharmaceuticals … which were exposed to mold and no longer met industry safety standard," thereby losing all functionality as pharmaceuticals. CPK Br. Ex.5 at 4.

f. *Employee Emails.* Finally, UP cites two sets of email communications—again without proper citation and without appending the referenced communications as exhibits to its brief. UP Br. 41-43. Even accepting these communications as excerpted and quoted by UP without further context, none of them is illuminating. The first, an email chain among employees of American International Group, Inc. ("AIG"), demonstrates only that AIG employees considered the COVID-19 coverage question to be "thorny" and that they subscribed to a definition of "physical damage" similar to that set forth in the FM slide deck discussed above. *See supra* at 56-57. As shown in that discussion, the FM definition does not support coverage for COVID-19-related losses.

The second email UP cites is a message from a single employee of the Cincinnati Insurance Company expressing that one individual's interpretation of "property damage." UP Br. 42. These materials have not been considered even by the courts to which they were properly submitted in litigation against the actual insurance companies in question—and little wonder, since

they are the quintessential type of individual opinion evidence that could have no bearing on a court's interpretation of a contract as a matter of law. *See Jordan v. Allstate Ins. Co.*, 116 Cal. App. 4th 1206, 1218 n.8 (2004) ("statements" by "claims personnel … regarding either the meaning or ambiguity" of policy term were "not relevant" because "the interpretation of a policy of insurance is a question of law"); *Chatton v. Nat'l Union Fire Ins. Co.*, 10 Cal. App. 4th 846, 865 (1992) (statements of insurer's employees are "completely irrelevant to interpret an insurance contract"). Needless to say, they are even less probative in the context of this case.

CONCLUSION

For the foregoing reasons, this Court should reject the arguments advanced by *amici* and answer the certified question in the negative.

Dated: October 5, 2023

Respectfully submitted,
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Dated: Oct. 5, 2023

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Supreme Court of California

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

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

10/5/2023

Date

/s/Court Services

Signature

Hacker, Jonathan (456553)

Last Name, First Name (PNum)

O'Melveny & Myers LLP

Law Firm