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Supreme Court of California
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S278481

IN THE SUPREME COURT OF CALIFORNIA

JOHN'S GRILL, INC. ET AL.,
Plaintiffs & Appellants,

v.

THE HARTFORD FINANCIAL SERVICES GROUP, INC. ET AL.,
Defendants & Respondents.

AFTER A DECISION BY THE COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION FOUR
CASE NO. A162709

OPENING BRIEF ON THE MERITS

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IN THE SUPREME COURT OF CALIFORNIA

JOHN'S GRILL, INC. ET AL.,
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OPENING BRIEF ON THE MERITS

Issues Presented

1. Did the Court of Appeal improperly apply the illusory-coverage doctrine – which has traditionally been employed as an interpretive tool to ensure that an *exclusion* is not read so broadly as to withdraw virtually all coverage – to erase an express *condition* of coverage based on its conclusion that this *particular* insured would be unlikely to satisfy the condition, even though the condition does not withdraw all coverage?

2. Did the Court of Appeal err in finding that "simply wiping and cleaning surfaces" of imperceptible and evanescent viral "particulates" is enough to trigger coverage under a provision that conditionally covers "[d]irect physical loss or direct physical damage to Covered Property caused by . . . virus, including the cost of removal of the . . . virus"?

Introduction

John's Grill, a restaurant in San Francisco, purchased a property insurance policy that generally excludes coverage for virus-related losses. The policy contains an exception that provides limited coverage for viruses, but only when the virus is "the result of" a specific cause identified in the policy, and only when the virus causes physical loss or damage to the covered property. In holding that this policy potentially covers COVID-19-related business losses, the Court of Appeal struck the first condition under the illusory coverage doctrine, rewriting the policy to provide unconditional coverage for virus-related loss or damage regardless of the cause. The court eliminated the second requirement by interpreting the phrase "loss or damage" to encompass wiping down surfaces even when the virus caused no physical loss or damage. Both holdings were error, and each error independently warrants reversal.

As to the first error, the policy provides limited coverage only when fungi, rot, bacteria, or virus is "the result of" a "specified cause of loss" listed in the policy (the "Limited Coverage"). (2AA 395-397.) These specified causes are all perils traditionally covered by property insurance, such as wind, water damage, and vandalism. Plaintiffs concede that their alleged losses do not result from any of these causes.

That should have ended the matter, and in the superior court it did. But the Court of Appeal struck the specified-cause condition from the contract. The court focused narrowly on the ways that a virus might affect John's Grill, and decided the specified-cause requirement rendered the Limited Coverage

illusory because defendant Sentinel Insurance Company had not shown "a realistic prospect" that plaintiffs would benefit from the virus coverage. (*John's Grill, Inc. v. The Hartford Financial Services Group, Inc.* (2022) 86 Cal.App.5th 1195, 1224, as mod. Jan. 23, 2023, review granted Mar. 29, 2023, No. S278481.)

That is not how the illusory coverage doctrine works. Courts cannot rewrite policy language simply because every single provision in the policy will not benefit every insured. The policy is clear that the Limited Coverage does not apply in the absence of a specified cause, and California courts routinely enforce conditions on coverage. Because the specified-cause provision is a precondition for coverage, the policy does not appear to give coverage and then unexpectedly take it away. There is no coverage in the first instance. Put differently, there is no illusion, so the illusory coverage doctrine does not apply.

In addition, the doctrine does not apply because plaintiffs still received material coverage under the policy. In addition to all the coverage the policy as a whole provides, the Limited Coverage itself also covers loss or damage from fungi, wet rot, dry rot, and bacteria – perils that plaintiffs concede could result at John's Grill from specified causes of loss like water damage. And, as the Court of Appeal acknowledged, the specified causes could result in virus damage that would be covered for businesses under this policy. But the court narrowed its inquiry to focus only on whether this *particular* policyholder would likely benefit from a *specific* combination of perils and causes. That, too, was error.

It makes no sense to base the illusory coverage doctrine on a fact-specific analysis of the likelihood that each provision in a policy would benefit the individual insured. Property insurance contracts cover a wide variety of risks, many of them unlikely to affect every insured. Applying the Court of Appeal's test would mire courts in endless fact-specific analysis of illusory coverage claims, such as whether a particular business had enough of an electronic footprint to warrant electronic vandalism coverage. A court should not eliminate a clearly stated precondition of coverage based on its own assessment that the coverage would otherwise be unlikely to provide enough of a benefit to the specific policyholder.

For all these reasons, the Court of Appeal was wrong to rewrite the policy to eliminate the specified-cause condition. This Court should reverse on that ground, and it need go no further. Plaintiffs acknowledge that they have not satisfied the condition, so there is no coverage under the policy.

But there is also a second, and independent, reason for reversal. Plaintiffs did not suffer any physical loss or damage to their covered property, which is also necessary to trigger coverage.

The policy's basic coverage grant applies only when there is "direct physical loss of or physical damage to Covered Property." (2AA 292.) The application of this standard to the COVID-19 pandemic is before this Court in *Another Planet Entertainment, LLC v. Vigilant Insurance Co.*, No. S277893; in a nutshell, this common coverage term requires " 'a distinct, demonstrable,

physical alteration' of the property" under long-standing California law. (*MRI Healthcare Center of Glendale, Inc. v. State Farm General Ins. Co.* (2010) 187 Cal.App.4th 766, 779.) No such alteration occurred here, as even the court below acknowledged.

The Court of Appeal thought a different standard should apply to the Limited Coverage, however, because it defines "loss or damage" to include "[d]irect physical loss or direct physical damage to Covered Property caused by 'fungi', wet rot, dry rot, bacteria or virus, *including the cost of removal of the . . . virus*." (2AA 396, italics added.) The court thought this language "capacious" enough to cover "simply wiping and cleaning surfaces," even in the absence of any accompanying physical impact on the property. (*John's Grill*, *supra*, 86 Cal.App.5th at pp. 1212, 1215.)

That misconstrues the plain language and surrounding context of the provision. The "cost of removal" is "includ[ed]" when there is "[d]irect physical loss or direct physical damage," and is expressly limited to the cost of removing "*the* . . . virus" that "caused" "[d]irect physical loss or direct physical damage to Covered Property." (2AA 396, italics added.) The surrounding context likewise shows that the covered loss or damage must have a physical nature. The "including the cost of removal" phrase cannot be viewed in isolation to cover wiping down tables in the absence of any physical loss or damage.

While it is possible for viruses to cause physical loss or damage to property, the *coronavirus* did not cause any physical loss or damage to plaintiffs' property. Nor did the virus result

from one of the specified causes of loss. The Court of Appeal erred on two grounds, and its judgment should be reversed.

Statement of Facts and Procedural History

John's Grill is a San Francisco restaurant owned by plaintiffs John's Grill, Inc. and John Konstin. (1AA 18-19.) Plaintiffs allege John's Grill suffered economic losses when its operations were reduced during the initial months of the COVID-19 pandemic. (1AA 82-83.)

A. The Policy

Plaintiffs bought a "Spectrum Business Owner's Policy" from Sentinel Insurance Company, Ltd. that was effective during the relevant period in 2020. (1AA 15-19; see generally 2AA 262-483 [certified copy of the policy].) In their amended complaint, plaintiffs sought to recover under certain provisions of the policy, including those that cover lost business income. (1AA 85-86.)

As plaintiffs allege, the policy is a "standard insurance product[ ] sold by [Sentinel] in markets throughout the country." (1AA 89.) Its provisions appear "not just in [plaintiffs'] Policy but in countless other policies sold by [Sentinel] in California and elsewhere in the nation." (1AA 89.) Because it aims to cover the insurance needs of many kinds of businesses, the policy includes coverage provisions that may benefit some policyholders more than others. (See, e.g., 2AA 273-274 [listing "Identity Recovery Coverage," "Electronic Vandalism," "Business Income for Cloud S[ervice] Interruption," and "Fraudulent Transfer Coverage"], capitalization omitted; 2AA 282 [summarizing coverage limits for

"Fine Arts," "Laptop Computers," "Outdoor Signs," and "Unauthorized Business Car Use"].)

The provisions most relevant here are contained in the policy's "Special Property Coverage Form" (2AA 290-316), which includes the general grant of coverage, and the "Limited Fungi, Bacteria or Virus Coverage" (the "Endorsement"), which contains the Virus Exclusion and Limited Coverage (2AA 395-397).

1. The Special Property Coverage Form

The Special Property Coverage Form contains this basic grant of coverage:

> We will pay for *direct physical loss of or physical damage to* Covered Property at the premises described in the Declarations (also called "scheduled premises" in this policy) caused by or resulting from a Covered Cause of Loss.

(2AA 292, § A, italics added.) "Covered Causes of Loss" means "risks of direct physical loss," except where excluded (in section B) or limited (in subsection A.4). (2AA 293, § A.3.)

Because the policy covers risks of direct physical loss unless excluded or limited in the policy (2AA 293), it is an "open peril" policy, as distinct from a "named peril" policy. (See *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 751, fn. 2; Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2022) ch. 6B-C(1), ¶ 6:250.) And because open peril policies cover causes of direct physical loss unless excluded or limited, these policies tend to have many exclusions and limitations, and there are many exceptions or carve-outs to those exclusions and limitations. For instance, earthquakes, nuclear

hazards, and government action are all listed in the exclusions, so damage from those perils is not generally covered. (2AA 307.) But each of those exclusions contains limited exceptions where coverage is added back in – for nuclear hazards, for instance, there is an exception to the exclusion if "physical loss or physical damage by fire results," in which case the policy covers that fire damage. (2AA 307, § B.1.c.)

On top of the core property coverage, subsection A.5 of the Special Property Coverage Form describes "additional coverages," which cover potential losses that might accompany direct physical loss or physical damage to property, such as debris removal (2AA 294-295, § A.5.b), and fire department service charges (2AA 297, § A.5.d).

Plaintiffs originally sought coverage under several "additional coverages," including Business Income and Extra Expense, contained in a separate income/expense endorsement. (1AA 83-86; 2AA 392-393.) Like the core property coverage, this requires that the business suspension "be caused by direct physical loss of or physical damage to property." (2AA 392-393, § A.1.)

2. The Endorsement

The "Limited Fungi, Bacteria or Virus Coverage" Endorsement expressly "modifies insurance provided under the . . . [¶] Special Property Coverage Form." (2AA 395, capitalization omitted.) Like other policy provisions, this Endorsement is a

"standard insurance product[ ] sold by [Sentinel] in markets throughout the country." (1AA 89, ¶ 91.)[1]

The Endorsement begins with a broad exclusion (the "Virus Exclusion"), which bars coverage for loss or damage caused directly or indirectly by fungi, rot, bacteria, or virus (2AA 395). These perils are added to the other exclusions (like earthquakes and nuclear hazards) set out in section B of the policy, so they are excluded from the policy's main grant of coverage. (2AA 395.) But the Endorsement also contains a narrow exception to the exclusion, which adds to the "Additional Coverage" section some coverage when the fungi, rot, bacteria, or virus itself results from certain defined causes. (2AA 396-397.) These two provisions are adjacent and cross-reference each other, with the Virus Exclusion first in the policy. (2AA 395-396.)

i. The Virus Exclusion

The Virus Exclusion bars coverage for "loss or damage caused directly or indirectly by . . . [¶] [p]resence, growth, proliferation, spread or any activity of 'fungi', wet rot, dry rot, bacteria or virus." (2AA 395, § A.2.i.) "Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." (2AA 395.)

[1] Though plaintiffs allege that they paid an "additional premium" for the coverage provided in the Endorsement (1AA 89), the policy itself makes clear that premiums are set according to the declarations page, which simply provides a "total annual premium" for all insurance "stated in this policy." (2AA 270.)

The Virus Exclusion does not apply in three situations: First, "if 'fungi', wet rot, dry rot, bacteria or virus *results in* a 'specified cause of loss' to Covered Property," the policy "will pay for the loss or damage caused by that 'specified cause of loss.' " (2AA 395, § A.2.i.2, italics added.) That is, if fungi, etc. cause one of the traditional perils covered by property insurance policies (such as when wet rot results in water damage) that traditional peril is still eligible for coverage even though it was caused by fungi, rot, bacteria, or virus.

Second, if " 'fungi', wet or dry rot, bacteria or virus results from fire or lightning," the Virus Exclusion does not apply and so any claims would be handled under the policy's main coverage grant, not under the Limited Coverage. (2AA 395, § A.2.i. Exclusion (1).)

Plaintiffs do not rely on either of those first two provisions, but only on the third provision: The Virus Exclusion does not apply "[t]o the extent that coverage is provided in the . . . Limited Coverage." (2AA 395, § A.2.i. Exclusion (2).)

ii. The Limited Coverage

The Limited Coverage directly follows the Virus Exclusion in the Endorsement. (2AA 396-397, § B.1.) It states:

> a. The coverage described in 1.b. below *only applies when the "fungi", wet or dry rot, bacteria or virus is the result of one or more of the following causes* that occurs during the policy period and only if all reasonable means were used to save and preserve the property from further damage at the time of and after that occurrence.

(1) A "specified cause of loss" other than fire or lightning;

(2) Equipment Breakdown Accident occurs to Equipment Breakdown Property, if Equipment Breakdown applies to the affected premises.

(2AA 396, § B.1.a, italics added.)

The Limited Coverage thus depends on two express conditions precedent: *First*, the fungi, rot, bacteria, or virus at issue must result from a "specified cause of loss" (e.g., windstorm, hail, water damage) or an Equipment Breakdown Accident during the policy period.[2] *Second*, "all reasonable means" must have been used to "save and preserve the property from further damage." (2AA 396, § B.1.a.)

The policy defines "Specified Cause of Loss" to mean: "Fire; lightning; explosion, windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; [and] water damage." (2AA 316.) These specified causes of loss mirror the traditional perils defined in "named peril" policies. (5 New Appleman on Insurance (Law Library ed. 2023) § 41.02.) The policy uses the specified-cause requirement in several other places to carve out exceptions to otherwise applicable exclusions where traditionally

[2] "Equipment Breakdown Accident" is separately defined in the policy. (2AA 295.) For simplicity, Sentinel focuses on the specified cause of loss part of the condition – but Equipment Breakdown Accidents are yet another way plaintiffs could meet the precondition in the Limited Coverage.

covered perils have contributed to the loss. (See, e.g., 2AA 294, 308-309.) For instance, coverage for "collapse" is generally excluded, but not when the "risks of collapse" are caused by a specified cause of loss. (2AA 294, § A.5.a.)

When both the specified cause of loss and the preservation of property conditions are satisfied, the Limited Coverage pays for "loss or damage" caused by the virus (or other peril) under subsection B.1.b:

> b. We will pay for loss or damage by "fungi", wet rot, dry rot, bacteria and virus. As used in this Limited Coverage, the term loss or damage means:
>
> (1) Direct physical loss or direct physical damage to Covered Property caused by "fungi", wet rot, dry rot, bacteria or virus, including the cost of removal of the "fungi", wet rot, dry rot, bacteria or virus;
>
> (2) The cost to tear out and replace any part of the building or other property as needed to gain access to the "fungi", wet rot, dry rot, bacteria or virus; and
>
> (3) The cost of testing performed after removal, repair, replacement or restoration of the damaged property is completed, provided there is a reason to believe that "fungi", wet rot, dry rot, bacteria or virus are present.

(2AA 396, § B.1.b.)

This Limited Coverage section also includes a subsection (B.1.f.) pertaining to Business Income and Extra Expense coverages that might accompany loss or damage caused by fungi, rot, bacteria, and virus (referred to as "Time Element Coverage,"

a commonly used insurance term that refers to coverage for losses during the time the property cannot be used). (2AA 396-397; see *Firenze Ventures LLC v. Twin City Fire Ins. Co.* (N.D.Ill. 2021) 532 F.Supp.3d 607, 614-615.) The Court of Appeal discussed these provisions in its opinion, although they are not central to the current proceeding. (*John's Grill*, *supra*, 86 Cal.App.5th at pp. 1217-1220.) Section B.1.f states that it applies "only if the suspension of 'operations' satisfies all the terms and conditions of the applicable" coverage in the lost business income and extra expense provisions in the policy. (2AA 396.) These income and expense provisions provide for coverage only "due to the necessary suspension of operations" during a "period of restoration" to "repair[ ], rebuil[d], or replac[e]" the "direct physical loss or physical damage caused by or resulting from a Covered Cause of Loss." (2AA 392-393, 315.) To obtain this coverage, the insured must show the business suspension was "caused by direct physical loss of or physical damage to the property." (2AA 392.)

B. Procedural History

Plaintiffs allege that John's Grill "was forced to close its doors to the public because of a series of orders issued by civil authorities" related to the coronavirus pandemic. (1AA 65.) Plaintiffs filed a claim with Sentinel, which denied the claim because "the coronavirus did not cause property damage at [their] place of business or in the immediate area" and, even if it had, loss or damage caused by a virus is excluded under the policy.

(1AA 177.) Plaintiffs sued in April 2020 to recover under the policy. (1AA 12-39.)[3]

1. Proceedings in the Superior Court

In their amended complaint, plaintiffs alleged the government orders issued by state and local authorities "prohibited on-premises dining at John's Grill due to [the coronavirus] pandemic." (1AA 65; 1AA 82 ["The Closure Orders . . . prohibit[ed] customers from accessing and otherwise patronizing John's Grill for purposes of on-premises dining."].) As a result, plaintiffs claimed to have lost business income. (1AA 65; 1AA 85 ["John's Grill's lost income has been caused by the Closure Orders, which were issued due to droplets containing the Coronavirus being on surfaces and objects in the immediate area of John's Grill."].) Plaintiffs also alleged that John's Grill "would have had to close and suspend its operations" even without the government orders, "due to the worsening pandemic-level presence of the Coronavirus in, on, and around" its property. (1AA 83.)

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[3] Plaintiffs sued Sentinel, The Hartford Financial Services Group, Inc. ("HFSG"), and Norbay Insurance Services, Inc. (1AA 62.) The superior court entered a judgment of dismissal after sustaining a demurrer for Sentinel and dismissing Norbay, and granting HFSG's motion to quash for lack of jurisdiction. (4AA 755-758, 765, 771-775, 778-779; *John's Grill*, *supra*, 86 Cal.App.5th at p. 1203, fn. 3.) Plaintiffs did not appeal the order dismissing Norbay, and the Court of Appeal affirmed the order granting HFSG's motion to quash. (*Id.* at pp. 1203, fn. 3, 1205.) The only issue before this Court is whether the superior court properly sustained Sentinel's demurrer.

While the amended complaint focused on the business income plaintiffs allegedly lost during the shutdown, plaintiffs also alleged that the Limited Coverage entitled them to coverage for "direct physical loss or damage, including the cost[ ] of testing for virus in the Scheduled Premises and other extra expense." (1AA 101.) They summarily alleged that they incurred physical damage and loss from the coronavirus, but they did not allege any facts to show their property had been in any way physically altered by the virus, or that they incurred any costs to remove the virus from their premises. They also made no attempt to allege that the virus was the result of a specified cause of loss, an express condition precedent to the Limited Coverage; instead, they argued that the specified-cause condition is "unconscionable, void as against public policy, inequitable, [and] renders the Limit[ed] Virus Coverage illusory, or otherwise unenforceable." (1AA 101.)

Sentinel demurred, arguing that the Virus Exclusion barred plaintiffs' claims (2AA 245-253), and the superior court sustained Sentinel's demurrer (4AA 744.) The court first found that the Virus Exclusion's "plain and unambiguous language excludes coverage for losses caused directly or indirectly by a virus," including the coronavirus. (4AA 744-745.) It then concluded that the Limited Coverage did not apply because plaintiffs failed to allege that the virus causing their losses resulted from a specified cause of loss. (4AA 745-747.) The court rejected plaintiffs' illusory coverage argument (4AA 745-746), observing that the Limited Coverage was not illusory because

Sentinel did assume an obligation and there was a possibility of coverage. (4AA 746.)

2. Proceedings in the Court of Appeal

The Court of Appeal reversed. (*John's Grill*, *supra*, 86 Cal.App.5th at p. 1201.) The court first discussed with apparent approval the majority view "that ' "direct physical loss of or damage to" property' requires a ' "distinct, demonstrable, physical alteration of the property" ' and cannot be synonymous with mere ' "loss of use." ' " (*Id.* at p. 1209.) The court seemed to agree that the presence of coronavirus at the covered property is " 'not sufficient to trigger coverage when direct physical loss of or damage to property is required' [citation], and thus whatever cleaning or detoxification efforts may be undertaken do not qualify as 'restoration' under standard first party insurance policies because of the absence of any 'physical' alteration of property." (*Id.* at pp. 1209-1210.)

Yet the court held that the Limited Coverage "contains an affirmative grant of coverage specifically for 'loss or damage' caused by a virus," and "a special definition of 'loss or damage' that includes '[d]irect physical loss or direct physical damage to' property, but is broad enough to encompass pervasive infiltration of virus particulates onto the surfaces of covered property, which is what is alleged here." (*John's Grill*, *supra*, 86 Cal.App.5th at p. 1201.) The court read the phrase "loss or damage" in the Limited Coverage to encompass the cost of removing a virus, such as "simply wiping and cleaning surfaces," even absent direct physical loss or damage to the property. (*Id.* at pp. 1215, 1217-

1219.) The court acknowledged that plaintiffs had not alleged any such costs, but concluded that plaintiffs should be given the chance to amend their complaint. (*Id.* at p. 1216.)

The court then turned to the specified-cause condition, acknowledging that plaintiffs must also plead that any conditions to coverage have been met. (*John's Grill*, *supra*, 86 Cal.App.5th at p. 1216.) The court recognized that the plain text of the Limited Coverage applies "only if the virus is the 'result of' one of a number of listed causes, none of which John's Grill has alleged." (*Id.* at pp. 1201-1202.) But the court decided that this condition of coverage is "unenforceable under the illusory coverage doctrine." (*Id.* at pp. 1202, 1220-1224.) The court acknowledged that the specified causes might result in other perils (such as "wet rot resulting from water damage") that would be covered for John's Grill, and might even result in virus damage for other businesses, like pet stores. (*Id.* at pp. 1221, 1223.) Yet the court still found the virus provision illusory "[b]ecause Sentinel has not proffered enough to demonstrate a realistic prospect of John's Grill ever benefitting from the Limited Virus Coverage." (*Id.* at p. 1224.)

Standard of Review

This Court reviews de novo "the judgment of the Court of Appeal reversing the superior court's order[ ] sustaining [a] defendant['s] demurrer[ ]." (*Betancourt v. Storke Housing Investors* (2003) 31 Cal.4th 1157, 1162-1163.) While this Court must accept material factual allegations as true, it does not " 'assume the truth of contentions, deductions or conclusions of

law.' " (*Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.* (2017) 2 Cal.5th 505, 512.)

Insurance policies are contracts "to which the ordinary rules of contractual interpretation apply." (*County of San Diego v. Ace Property & Casualty Ins. Co.* (2005) 37 Cal.4th 406, 415, internal quotation marks omitted.) "The fundamental goal" of contract interpretation is to give effect to the parties' intent (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264; see also Civ. Code, § 1636), which is "ascertained from the writing alone, if possible" (Civ. Code, § 1639), such that "if the language is clear and explicit," the contract language governs (Civ. Code, § 1638; see also *Ace Property*, *supra*, 37 Cal.4th at p. 415). "If there is ambiguity, however, it is resolved by interpreting the ambiguous provisions in the sense the promisor (i.e., the insurer) believed the promisee understood them at the time of formation." (*AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 822, citing Civ. Code, § 1649.)

A term is ambiguous only if it " 'is capable of two or more constructions, both of which are reasonable' " (*Foster-Gardner, Inc. v. Nat. Union Fire Ins. Co.* (1998) 18 Cal.4th 857, 868), not simply because its meaning is subject to disagreement (*Ace Property*, *supra*, 37 Cal.4th at p. 415). Nor is a provision ambiguous just because "a word or phrase isolated from its context is susceptible of more than one meaning." (*Id.*, internal quotation marks omitted.) Instead, " ' "[l]anguage in a contract must be construed in the context of that instrument as a whole." ' " (*Palmer v. Truck Ins. Exchange* (1999) 21 Cal.4th 1109,

1118.) The Court must interpret policy terms " 'in context' [citation], and give effect 'to every part' of the policy with 'each clause helping to interpret the other.' " (*Id.* at p. 1115; see also Civ. Code, § 1641.)

Argument

At this stage, plaintiffs seek coverage only under the Limited Coverage provision. (See, e.g., Ans. to Petn. Rev. at p. 5.) They concede they do not satisfy the specified-cause precondition of that coverage (1AA 101, ¶ 159; 4AA 746; Pls.' App. Br. at p. 26), but argue that requirement should be stricken from the contract because it would render the Limited Coverage illusory. But the illusory coverage doctrine cannot be applied to strike an express, unambiguous condition from a contract. The contract should be enforced as written; this Court should reverse.

There is also an independent reason for reversal, related to the issue before this Court in *Another Planet*. The relevant policy language covers only "loss or damage," defined to require some *physical* component. The Court of Appeal's conclusion that "loss or damage" includes the mere cost of removing a virus from property by "simply wiping and cleaning surfaces" ignores the plain language and surrounding context of the Limited Coverage. (*John's Grill*, *supra*, 86 Cal.App.5th at p. 1215; see *post*, at § II.B.) The Limited Coverage does not apply to plaintiffs' claimed losses, so the policy's broad Virus Exclusion does. (See *post*, at § II.D.)

I. The illusory coverage doctrine does not apply to eliminate an express precondition to coverage

Under California law, an agreement is illusory and unenforceable when one of the parties assumes no obligation. (*Asmus v. Pacific Bell* (2000) 23 Cal.4th 1, 15-16; *Harris v. TAP Worldwide, LLC* (2016) 248 Cal.App.4th 373, 385.) In the insurance context, the courts have applied the illusory coverage doctrine in two ways: (1) as a tool to resolve ambiguities in a policy exclusion (see, e.g., *Safeco Ins. Co. of America v. Robert S.* (2001) 26 Cal.4th 758, 764-766); and (2) to prevent a total failure of consideration where the enforcement of a policy exclusion would mean the policyholder had no coverage at all under the policy (see, e.g., *Maryland Casualty Co. v. Reeder* (1990) 221 Cal.App.3d 961, 978).

The policy in this case is not illusory. As a preliminary matter, the policy covers a wide range of physical loss and damage from typical property perils, like windstorms and water damage. As relevant to the limited extension of that coverage to fungi, rot, bacteria, and virus, the specified-cause provision at issue is a *condition* contained within the coverage grant itself, not an *exclusion* located in a different portion of the policy. The illusory coverage doctrine has generally been applied only to exclusions, not conditions where coverage is not even triggered until the condition is satisfied. (*Post*, at § I.A.) But even assuming the doctrine did potentially apply to a condition, it was inapplicable here. The express policy condition was unambiguous (*post*, at § I.B), and did not result in a failure of consideration because plaintiffs still received material coverage (*post*, at § I.C).

A. This Court should give effect to the specified-cause condition in the parties' written contract

California law has long recognized that "an insurance company is not precluded from imposing conditions precedent to the effectiveness of insurance coverage." (*Thompson v. Occidental Life Ins. Co.* (1973) 9 Cal.3d 904, 912.) Sentinel did just that in agreeing to provide "limited" coverage for virus, fungi, rot, and bacteria only when those perils result from certain specified causes (and when physical loss or damage results (see *post*, at § II.B)).

1. *California courts enforce conditions in insurance policies*

"While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply." (*Yahoo Inc. v. National Union Fire Ins. Co. etc.* (2022) 14 Cal.5th 58, 67, internal quotation marks omitted; accord, *Montrose Chemical Corp. v. Superior Court* (2020) 9 Cal.5th 215, 230.)

As with any contract, courts enforce explicit conditions on insurance policy coverage. (*Thompson*, *supra*, 9 Cal.3d at p. 912; *Scottsdale Ins. Co. v. Essex Ins. Co.* (2002) 98 Cal.App.4th 86, 94-95; see *Forecast Homes, Inc. v. Steadfast Ins. Co.* (2010) 181 Cal.App.4th 1466, 1475-1476, 1478 [it would "turn the law of contract interpretation on its head" to refuse to enforce coverage condition as written]; *North American Capacity Ins. Co. v. Claremont Liability Ins. Co.* (2009) 177 Cal.App.4th 272, 287-291; *Hacketthal v. Nat. Casualty Co.* (1987) 189 Cal.App.3d 1102, 1109; see also *Nat. Ins. Underwriters v. Carter* (1976) 17 Cal.3d

380, 386 [“ ‘[a]n insurance company has the right to limit the coverage of a policy issued by it and when it has done so, the plain language of the limitation must be respected’ ”].) The policy here, for instance, sets out as general conditions of coverage that the insured must provide prompt notice of any physical loss or damage, and may not misrepresent any material facts in connection with their claims. (2AA 288, 311.) If the insured fails to satisfy those conditions to coverage – if an insured fails to give prompt notice, for instance – the claim is not covered.

The illusory coverage doctrine has typically been applied to exclusions on coverage, not conditions. This matters for three reasons. First, when a condition precedent to coverage is not satisfied, there is no enforceable promise of coverage to begin with, and therefore no illusion of coverage. Second, when an *exclusion* could be read to eliminate coverage extended in a separate policy provision, the remedy is simple: read the exclusion narrowly. By contrast, the Court of Appeal *eliminated* a condition precedent and thereby *created* coverage that was not intended by the parties. Third, and most obviously, when a condition precedent is written into a coverage grant, the insured is provided fair notice of what is required to trigger coverage and cannot reasonably expect to receive coverage if the condition is not satisfied. The decision below is erroneous for this reason alone: It misapplied the doctrine to an express condition on coverage.

2. *The policy expressly conditions the Limited Coverage on a showing that the virus resulted from a specified cause of loss*

The Limited Coverage is expressly conditioned on a showing that the fungi, rot, bacteria, or virus resulted from a "specified cause of loss" other than fire or lightning. (2AA 396, § B.1.) The policy defines "specified cause of loss" to include numerous identified perils that have been traditionally covered by property insurance. (2AA 316.) This specified-cause requirement is located in the same specific provision as the coverage grant. (2AA 396.) The requirement "is conspicuously displayed, clear, and unambiguous." (*Wilson v. Hartford Casualty Co.* (E.D.Pa. 2020) 492 F.Supp.3d 417, 427-428 [interpreting identical policy provision], affd. on other grounds *sub nom. Wilson v. USI Ins. Serv. LLC* (3d Cir. 2023) 57 F.4th 131; see also *Motherway & Napleton, LLP v. Sentinel Ins. Co.* (N.D.Ill., Sept. 27, 2022, No. 1:21-cv-02376) __ F.Supp.3d __ [2022 WL 4545264, at *4] [Sentinel's Limited Coverage provision not ambiguous].)

Enforcing this specified-cause condition does not frustrate the reasonable coverage expectations of the insured.[4] Any

[4] The insured's expectations technically are beside the point, because it is only when "the terms are ambiguous" that the Court considers "the objectively reasonable expectations of the insured." (*Montrose*, *supra*, 9 Cal.5th at p. 230, internal quotation marks omitted; accord, *Forecast Homes*, *supra*, 181 Cal.App.4th at p. 1481 [insured's "lengthy discussion of its reasonable expectations . . . would be relevant only if the [policy] endorsement is ambiguous. It simply is not."]; *Fagundes v. American Internat. Adjustment Co.* (1992) 2 Cal.App.4th 1310, 1316 [" 'In the absence of ambiguities, the rights of the parties

(footnote continues on following page)

policyholder who reads the Limited Coverage can reasonably expect coverage "*only* . . . when the 'fungi', wet or dry rot, bacteria or virus" that causes loss or damage "is the result of . . . [¶] [a] 'specified cause of loss.' " (2AA 396, § B.1.a, italics added.) If, after looking at the definitions of these terms, the policyholder concedes (like plaintiffs) that the cause of his loss did *not* result from a specified cause of loss or Equipment Breakdown Accident, then he has no reasonable expectation of coverage.

This is especially apparent here, where the Limited Coverage grant itself uses the specified-cause term to partially reinstate coverage that would otherwise be barred by the broad Virus Exclusion. As this Court has stressed, the "[l]anguage in a contract must be construed in the context of th[e] instrument as a whole," and each term in an insurance policy must be read "in context . . . , [giving] effect to every part of the policy with each clause helping to interpret the other." (*Palmer*, *supra*, 21 Cal.4th at pp. 1115, 1118, citation and internal quotation marks omitted.)

As the Seventh Circuit recently observed in a similar case, "[w]e do not see how an insured reading the policy holistically . . . would get through the general provision and its exclusions to find . . . coverage[.]" (*Froedtert Health, Inc. v. Factory Mut. Ins. Co.* (7th Cir. 2023) 69 F.4th 466, 472.) So too here. Plaintiffs had no reason to think that, unlike damage from fungi, rot, and bacteria, the policy somehow provided broad coverage for virus damage

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rest on the insurance contract as written.' "].) The policy terms here are clear, and must be enforced.

regardless of the cause. But that is precisely what the Court of Appeal decided. No reasonable insured could read the policy, which broadly *excludes* coverage for loss or damage caused by a virus, and expect that the limited exception to that exclusion would *include* loss or damage caused by a virus even when the preconditions to that coverage had not been met.

B. California courts have applied the illusory coverage doctrine to ambiguous exclusions and not to eliminate unambiguous preconditions on coverage

This Court has only once applied the illusory coverage doctrine in the insurance context, in *Safeco, supra,* 26 Cal.4th 758.[5] In *Safeco*, the court applied the doctrine the way many courts across the country have – to avoid reading an ambiguous policy exclusion so broadly that it would completely eliminate coverage expressly granted in the policy. (*Id.* at pp. 764-765.)

In *Safeco*, a teenager accidentally shot and killed his friend with a gun found in the home. (*Safeco*, *supra*, 26 Cal.4th at p. 761.) The deceased friend's parents brought a wrongful death action against the teenager and his parents, who tendered the

[5] This Court has alluded to illusory coverage when discussing and applying other doctrines, but none of those cases addresses the scope of the illusory coverage doctrine. (See, e.g., *Julian*, *supra*, 35 Cal.4th at p. 760 [efficient proximate cause doctrine]; *State Farm Fire & Casualty Co. v. Von Der Lieth* (1991) 54 Cal.3d 1123, 1135 [same]; *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1078-1080 [addressing evidence on terms of lost insurance policy]; *Bank of the West*, *supra*, 2 Cal.4th at p. 1272, fn. 6 [declining to address illusory coverage argument].)

defense to their homeowner's insurance carrier. (*Ibid.*) The policy covered "an accident resulting in bodily injury," but a separate provision excluded coverage for injury " 'arising out of any *illegal act*.' " (*Id.* at p. 762.) This Court found the phrase "illegal act" was ambiguous because it was "susceptible of two reasonable meanings," the broader of which was the "violation of *any* law, whether civil or criminal" (*id.* at pp. 763-764).

The court refused to adopt that meaning because it would exclude negligent acts from coverage, and therefore would be "so broad as to render the policy's liability coverage practically meaningless." (*Safeco*, *supra*, 26 Cal.4th at p. 764.) *Safeco* stressed that the "homeowners policy promised coverage for liability resulting from the insured's negligent acts," and reasoned "[t]hat promise would be rendered illusory if . . . we were to construe the phrase 'illegal act,' as contained in the policy's [separate] exclusionary clause, to mean violation of any law, whether criminal or civil." (*Id.* at p. 765.) Reading the policy in that fashion effectively would provide no coverage for the very thing the policy insured against, negligence, as negligence is always a potential violation of civil law. (*Ibid.*) The Court thus upheld coverage for the teenager's accidental conduct, even though the conduct could be viewed as "illegal" (and thus excluded) in the broad sense of the word. (*Id.* at pp. 765-767; see also *Smith Kandal Real Estate v. Continental Casualty Co.* (1998) 67 Cal.App.4th 406, 414 ["*If* an exclusion ambiguously lends itself to two or more reasonable constructions, the ambiguity will be

resolved against the insurer and in favor of coverage."], italics added.)

Following *Safeco*, the Courts of Appeal have upheld broad exclusions to insurance coverage if no ambiguity exists in the policy language. (*20th Century Ins. Co v. Schurtz* (2001) 92 Cal.App.4th 1188, 1195-1196 [distinguishing *Safeco* and enforcing a "clear and unambiguous" exclusion for "criminal act[s]"]; *General Reinsurance Corp. v. St. Jude Hospital* (2003) 107 Cal.App.4th 1097, 1107 [distinguishing *Safeco* and enforcing the coverage exclusion because the exclusion was "not ambiguous," and stating that an exclusion phrased "in language that is clear and unambiguous . . . will be given effect"]; *Energy Ins. Mutual Limited v. Ace American Ins. Co.* (2017) 14 Cal.App.5th 281, 306 [distinguishing *Safeco* and refusing to apply illusory coverage doctrine where unambiguous exclusion did not purport to withdraw all coverage extended by the insuring agreement].)

This distinction reflects settled insurance policy interpretation principles. As a tool to interpret ambiguous exclusions narrowly, the illusory coverage doctrine protects the plain meaning of the policy language, resolves ambiguities to promote the parties' mutual intentions, satisfies an insured's reasonable expectations of coverage, and ensures fair notice to the insured of what is covered. (See *Yahoo*, *supra*, 14 Cal.5th at p. 67.)

Thus, when an ambiguous exclusion would (if read broadly) render an explicit coverage grant meaningless, the courts

interpret the exclusion narrowly to avoid eliminating coverage that the insured reasonably expects. (*Yahoo*, *supra*, 14 Cal.5th at p. 67; see *Safeco*, *supra*, 26 Cal.4th at pp. 763-764; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 873-875 [declining to read exclusion's "obscurely worded qualification" in a manner that would render coverage "meaningless," particularly where the insurance agent had represented the specific coverage would be provided]; see also *Bank of the West*, *supra*, 2 Cal.4th at pp. 1264-1265; Civ. Code, § 1636.)

But where, as here, there is an unambiguous condition on coverage, the condition is enforceable. (See *Scottsdale*, *supra*, 98 Cal.App.4th at pp. 94-95; *Forecast Homes, supra,* 181 Cal.App.4th at p. 1480.) In *Scottsdale*, the court rejected the argument that a contract condition was illusory, finding the policy language "plainly states that meeting [the specified] requirements is a condition of coverage." (*Scottsdale*, at p. 95.) And the court rejected the insured's contention that the condition was unenforceable because it was difficult to perform and that it might be unlikely that the insured would obtain any additional coverage from the policy. (*Id.* at pp. 95-97.) Likewise, in *Forecast Homes*, the court found the coverage condition "clear and unambiguous" and rejected a claim that a strict coverage condition was illusory. (*Forecast Homes*, at pp. 1476, 1483-1484.) The court further emphasized that the contractual condition was not under the insurer's control. (*Id.* at pp. 1483-1484.)

As in *Scottsdale* and *Forecast Homes*, plaintiffs in this case had full notice of the coverage condition. The specified-cause condition was located within the Limited Coverage grant and makes clear the coverage "*only* applies" when the fungi, rot, bacteria, or virus "is the result of" one of a " 'specified cause of loss' " (except fire or lightning). (2AA 396, § B.1.a, italics added.)

Plaintiffs have never suggested that the specified-cause condition is ambiguous; they argue only that it is difficult to satisfy with respect to a virus at their restaurant. (Pls.' App. Br. at p. 30.) Numerous courts have examined the Limited Coverage and found it unambiguous. (See, e.g., *Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.* (N.D.Cal. 2020) 506 F.Supp.3d 854, 862; *Wilson, supra,* 492 F.Supp.3d at pp. 427-428 [specified-cause condition in identical policy "is conspicuously displayed, clear, and unambiguous"].)

The Court of Appeal justified its decision to strike the specified-cause condition in part by noting that the condition was unclear or "indecipherable when applied to viruses." (*John's Grill*, *supra*, 86 Cal.App.5th at p. 1221.) The court observed that causation here could refer to circumstances in which a specified cause of loss is a "vector for transmission of a virus" or it could refer to "[p]athogenic causation – in the sense that, say, cancer may be said to be the 'result of' a toxic carcinogen.' " (*Ibid.*, italics omitted.) But this is not a case where the parties disagree about whether COVID-19 resulted from a specified cause of loss. Plaintiffs concede that it did not. (1AA 101, ¶ 159; 4AA 746.) The court's analysis about different causative meanings is not

relevant, and certainly not justification for striking the condition in its entirety. Under any definition, no specified cause of loss occurred to transmit or pathogenically cause COVID-19, and that should end the inquiry.

C. The Limited Coverage is not an illusory promise because the policy provides material coverage

California courts have also applied the illusory coverage doctrine in the context of evaluating whether an insurance policy is supported by consideration, declining to enforce a contract where a contracting party can receive *no* potential benefit from the agreement. (*Maryland Casualty*, *supra*, 221 Cal.App.3d at p. 978; Civ. Code, §§ 1638, 1639.) In this case, the Court of Appeal analogized the specified-cause condition to an illusory promise made without consideration. (*John's Grill*, *supra*, 86 Cal.App.5th at pp. 1220-1221 & fn. 16.) There was no basis for this conclusion.

An agreement can be illusory if the promisor has given no consideration; in those cases, the contract may be held unenforceable. (*Asmus*, *supra*, 23 Cal.4th at p. 15; *Perdue v. Crocker Nat. Bank* (1985) 38 Cal.3d 913, 923 [contract that is "illusory" is one "lacking in consideration"]; *Peleg v. Neiman Marcus Group, Inc.* (2012) 204 Cal.App.4th 1425, 1438-1439.) Under this theory, a few Courts of Appeal have struck or narrowly interpreted policy exclusions if strict enforcement would mean no coverage whatsoever, and thus a failure of consideration. (See, e.g., *Maryland Casualty, supra,* 221 Cal.App.3d at p. 978 [refusing to enforce alienated premises

exclusion in a manner that would completely eliminate any possibility of coverage]; *SDR Co., Inc. v. Federal Ins. Co.* (1987) 196 Cal.App.3d 1433, 1436-1437 [interpreting broad exclusion narrowly to avoid a finding of no potential coverage for insured].)

But it is black-letter law that "an insurance policy does not afford illusory coverage" where, as here, "some material coverage is afforded." (2 Windt, Insurance Claims and Disputes (6th ed. 2023) § 6:2 [fn. 39 and surrounding text]; see *Medill v. Westport Ins. Corp.* (2006) 143 Cal.App.4th 819, 836 [insurance policy not illusory where there is limited coverage for certain risks]; *St. Mary's Area Water Authority v. St. Paul Fire and Marine Ins. Co.* (M.D.Pa. 2007) 472 F.Supp.2d 630, 632-633 [coverage not illusory because "there was coverage for at least one risk"].)

This is consistent with the basic contract principle that an agreement is enforceable even if each promise is not supported by a separate consideration. (*Brawley v. Crosby Research Foundation* (1946) 73 Cal.App.2d 103, 118-119; accord, *Martin v. World Sav. and Loan Assn.* (2001) 92 Cal.App.4th 803, 809.) Thus, an exclusion will not render the policy illusory when the exclusion withdraws coverage from some risks but not all risks. (See *Blackhawk Corp. v. Gotham Ins. Co.* (1997) 54 Cal.App.4th 1090, 1097; *Scottsdale*, *supra*, 98 Cal.App.4th at pp. 94-95; *Energy*, *supra*, 14 Cal.App.5th at p. 306 [coverage not illusory because exclusion "did not withdraw virtually all of the coverage extended"].)

The Court of Appeal ignored these settled principles and invoked the illusory coverage doctrine to strike the specified-

cause condition because it found it hard to think of situations when a virus, in particular, would result from a specified cause of loss at John's Grill. (*John's Grill*, *supra*, 86 Cal.App.5th at p. 1224.) No other court has resorted to such a myopic view of the Limited Coverage.

To the contrary, courts addressing the purported "illusoriness" of the Limited Coverage have recognized that "no legal authority . . . support[s] the idea that when a provision insures against several perils (physical loss or damage caused by fungi, wet rot, dry rot, bacteria or virus), the coverage is illusory if any one of those perils (virus) is unlikely to affect the covered property of the insured." (*Barbizon School of San Francisco, Inc. v. Sentinel Ins. Co.* (N.D.Cal., Dec. 3, 2021, No. 20-cv-08578-TSH) 2021 WL 5758890, at *8-9; see also *Schwartz v. State Farm Mut. Ins. Co.* (7th Cir. 1999) 174 F.3d 875, 879 ["Because the . . . provision at issue insures at least one risk, we agree . . . that it is not illusory."]; *St. Mary's Area Water*, *supra*, 472 F.Supp.2d at pp. 632-633 ["[I]f there was coverage for at least one risk, the mechanical breakdown endorsement would not be illusory."].)[6] As one court explained,

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[6] In some states, whether coverage is illusory depends on whether the *entire policy* (not a specific endorsement) provides no realistic coverage. (See, e.g., *Lexington Ins. Co. v. American Healthcare Providers* (Ind.Ct.App. 1993) 621 N.E.2d 332, 339 ["Coverage under an insurance policy is not illusory unless *the policy* would not pay benefits under any reasonably expected set of circumstances."], italics added.) Needless to say, there are many risks for which this policy provides coverage. Other states apply the illusory coverage doctrine only if the insured can

(footnote continues on following page)

> the Limited Coverage applies to multiple perils – fungi, wet rot, dry rot, bacteria *and* virus. And there are multiple specified causes of loss. There is no requirement that each peril potentially be the result of each and every specified cause of loss. Nor is there any requirement that every specified cause of loss must result in a peril set out in the additional Limited Coverage.

(*Westside Head & Neck v. Hartford Fin. Servs. Grp*. (C.D.Cal. 2021) 526 F.Supp.3d 727, 733.) Simply put, the Limited Coverage is *one* limited coverage grant, extending to multiple potential perils, not "five separate policies – one for fungi, one for wet rot, one for dry rot, one for bacteria, and one for virus." (*Barbizon*, *supra*, 2021 WL 5758890, at *9; accord, *Brawley*, *supra*, 73 Cal.App.2d at pp. 118-119 [each promise in a contract need not be supported by separate consideration].)

The court below also ignored how coverage *could* be triggered by a virus resulting from a specified cause of loss. As many courts have observed, a Nebraska Supreme Court decision illustrates this in the context of a windstorm (a specified cause of loss) spreading a virus from one livestock pen to another, causing

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identify a particular portion of the insurance premium dedicated to the coverage provision. (See, e.g., *Kabanuk Diversified Investments, Inc. v. Credit Gen. Ins. Co.* (Minn.Ct.App. 1996) 553 N.W.2d 65, 73 [refusing to apply the doctrine where "[n]o evidence was presented that any premium was *specifically allocated* to coverage for non-employee assault or battery claims"], italics added.) As noted below (*post*, at fn. 7), the plain terms of the policy belie plaintiffs' claim they paid a separate premium for the Endorsement, and plaintiffs have never attempted to claim they paid any premium for virus coverage specifically.

physical damage to insured property (the livestock). (See, e.g., *French Laundry Partners, LP v. Hartford Fire Ins. Co.* (N.D.Cal. 2021) 535 F.Supp.3d 897, 903-904, citing *Curtis O. Griess & Sons, Inc. v. Farm Bureau Ins. Co.* (Neb. 1995) 247 Neb. 526; compare *John's Grill*, *supra*, 86 Cal.App.5th at pp. 1223-1224.) In the same way, waterborne viruses can result from "water damage," and a virus could result from other specified causes like "vandalism" or "civil commotion."

The court below discounted various examples of how viruses could result from specified causes as "oddball scenarios," and instead required Sentinel to "demonstrate a realistic prospect of John's Grill" individually "benefitting from the Limited Virus Coverage based on events the parties might reasonably have anticipated during the Policy period." (*John's Grill*, *supra*, 86 Cal.App.5th at pp. 1223-1224.)

This is not the standard anywhere. A promise is not illusory just because "there is small likelihood that any duty of performance will arise." (Rest.2d Contracts, § 2, com. (e) ["a promise to insure against fire a thoroughly fireproof building" would not be illusory]; accord, *Scottsdale*, *supra*, 98 Cal.App.4th at p. 95.) That is particularly true in the context of a very limited extension of coverage. Moreover, Sentinel does not control whether the conditions to coverage occur, and does not know that they cannot occur. (See *Forecast Homes*, *supra*, 181 Cal.App.4th 1483-1484 [policy is not illusory where coverage is conditioned on the existence of some fact or event that is not within the insurer's control].)

The Court of Appeal's test would create a disincentive for companies to extend even limited coverage for remote or speculative risks for fear that those limitations would not be enforced if it were deemed too unlikely for coverage to be triggered. The court's test would also require developing an elaborate set of standards for what evidence suffices to show a "realistic prospect" of each insured benefiting from each specific coverage provision. (*John's Grill*, *supra*, 86 Cal.App.5th at p. 1224.) For insurance contracts, which are inherently conditional promises (conditioned on the occurrence of events), this interpretation of the illusory coverage doctrine would materially change how risks are underwritten, and likely not to the benefit of California policyholders.

It is thus not surprising that more than a dozen courts have rejected the argument that the Limited Coverage is illusory, including numerous decisions applying California law. (See, e.g., *Westside Head & Neck*, *supra*, 526 F.Supp.3d at pp. 733-734; *Barbizon*, *supra*, 2021 WL 5758890, at *8-9; *Hair Perfect Internat., Inc. v. Sentinel Ins. Co., Ltd.* (C.D.Cal., May 20, 2021, No. LA CV20-03729 JAK (KSx)) 2021 WL 2143459, at *9.) Not one other court has agreed with the First District's application of the illusory coverage doctrine to a precondition of coverage like the Limited Coverage.

D. The Endorsement is not an individually negotiated provision to increase coverage

The Court of Appeal seemed to be motivated by a belief that plaintiffs had negotiated the Endorsement as an add-on to

the policy to provide greater coverage, and that enforcing the specified-cause condition as written would eliminate that coverage for viruses. (*John's Grill*, *supra*, 86 Cal.App.5th at pp. 1218-1219 ["What appears to have happened here is that the parties customized the first party insurance John's Grill brought to accommodate additional coverage for losses . . . that may occur in a restaurant environment."].) This reflects two core misunderstandings: The Endorsement is not a customized, negotiated addition to the policy, and it excludes coverage that the policy might otherwise afford for fungi, rot, bacteria, and virus.

1. The Endorsement at issue is not a bespoke addition to the policy. As plaintiffs acknowledged, the Endorsement is a "standard insurance product[ ] . . . appearing not just in the[ir] Policy but in countless other policies . . . in California and elsewhere." (1AA 89.) It was not tailored for John's Grill. Like all standard forms, it was required to be submitted to and approved by the Department of Insurance for marketing in California. (Ins. Code, § 1855.1 et seq.)

The particular business of an insured may be relevant to a policy's meaning if the parties had the mutual intention to tailor the policy to the business, as with bespoke coverage provisions. (See, e.g., *Shade Foods*, *supra*, 78 Cal.App.4th at p. 874 [insured's business relevant to meaning of ambiguous policy term where policy was specially tailored to insured's business needs].) That is not, and is not alleged to be, the case here.

Different policyholders have different insurance needs, and some are more likely to benefit from particular coverage provisions than others. There are likely Sentinel policyholders who will never benefit from the policy's coverage for "Business Income for Cloud S[ervice] Interruption," for example (2AA 273), and others who have no basis to expect to claim coverage for "Fine Arts" or "Unauthorized Business Card Use" (2AA 282). But that does not mean the courts should rewrite those terms to provide coverage that was not included in the policy.

So too with the Limited Coverage. Some insureds may be more likely to benefit from it than others – and most insureds may be more likely to claim coverage for fungi or rot than for bacteria or virus. The fact that a policyholder is unlikely to benefit from coverage as written does not mean that the coverage is illusory or should be rewritten. Insurance is, by definition, the process of sharing and spreading risk. Setting a rule of interpretation that requires an insurer to demonstrate how each provision of a policy provides a material benefit to each insured would be burdensome on insurance companies and courts alike and would limit California policyholders' access to routine, standardized coverages.

The Court of Appeal's rule might cause courts to deem a clause illusory as to some policyholders but not to others, depending on the business circumstances of each insured – the same policy might be deemed illusory as to certain restaurants but not illusory as to farms or pet stores. (*John's Grill*, *supra*, 86 Cal.App.5th at p. 1223 [acknowledging the Limited Coverage

might not be illusory as applied to a "dog kennel or a pet store" with living property]; see *Curtis O. Griess*, *supra*, 247 Neb. at p. 528 [finding a windstorm, one of the specified causes, resulted in virus damage to farm animals].) And indeed, courts would potentially have to draw shifting rules for different provisions or perils in the very same policy – it is unclear whether the specified-cause condition would still exist for fungi or rot, for instance, since it is part of the same Limited Coverage the court found illusory. This Court should reject the Court of Appeal's new hyper-tailored expansion of the illusory coverage doctrine.

2. More broadly, the Court of Appeal seemed to believe the "Limited Fungi, Bacteria or Virus Coverage" Endorsement added extra coverage for virus-related risks. But it does not. The policy generally covers "risks of direct physical loss" unless the loss is excluded or limited in the policy. (2AA 293, § A.3, capitalization omitted.) The Endorsement adds the Virus Exclusion to the list of exclusions, so damage from fungi, rot, bacteria, and virus is generally excluded from coverage under the policy's main grant of coverage – even if the fungi, rot, bacteria, or virus causes physical loss or damage.

While the Endorsement contains a broad Virus Exclusion, it gives back some coverage for situations when the fungi, rot, bacteria, or virus results from certain traditionally covered perils. This type of structure – a general exclusion with a limited exception or carve-out – is common in open peril policies. The exclusions define uncovered perils, while the exceptions to those exclusions clarify what coverage *is* intended where the peril itself

results from a risk traditionally covered by property insurance policies.

Here, the Virus Exclusion generally bars coverage for loss or damage caused directly or indirectly by a virus, except (as relevant here) where the virus (or fungi, etc.) is the result of a specified cause of loss. In that case, the Limited Coverage might apply (subject to its other terms) to cover loss or damage caused *by the virus* (or fungi, etc.) (2AA 396, § B.1.a). Where covered property is physically damaged because of a traditional cause of loss, the Virus Exclusion will not completely eliminate coverage just because a virus (or fungi, etc.) resulted and contributed to that loss. (See, e.g., *Q Clothier New Orleans, L.L.C. v. Twin City Fire Ins. Co.* (5th Cir. 2022) 29 F.4th 252, 261, fn. 5.)

This means the Endorsement as a whole is not an add-on provision requested by insureds who want to buy additional coverage to protect against virus risks. Rather, the Virus Exclusion limits the coverage potentially available under the main coverage grant, and the Limited Coverage gives back a portion of that eliminated coverage in situations where one of the traditionally covered causes results in loss or damage from fungi, rot, bacteria, or virus (and physical loss or damage results (see *post*, at § II)). It also covers some ancillary costs like testing when there is physical loss or damage.

The Court of Appeal erred by viewing the Limited Coverage out of context, without considering its place in the Endorsement, and the policy, as a whole. (*Froedtert Health*, *supra*, 69 F.4th at p. 474 [explaining "fatal error" of policyholder in attempting to rely

on a coverage provision "in isolation without reading the policy as a whole" and to "consider each grant of coverage and its applicable exclusions"].) The Court of Appeal was thus wrong to stress that insurers "take in premium[s]" for adding this sort of coverage (*John's Grill*, *supra*, 86 Cal.App.5th at p. 1222), and to use that notion to hold that each term in the Limited Coverage must provide an independent benefit to each insured.[7]

* * *

In sum, the decision below is based on an improper and unwarranted expansion of the illusory coverage doctrine to an unambiguous condition of coverage. The Court of Appeal took a policy that generally *excludes* coverage for loss or damage caused by a virus, but contains a *conditional* exception, and transformed it into a policy that provides *unconditional* coverage for loss or damage caused by a virus regardless of the cause of the virus. That decision is wrong, and could have far-reaching consequences for contract and insurance law. This Court should reverse.

[7] Plaintiffs allege they paid "an additional premium" for the Limited Coverage. (1AA 89.) But the superior court took judicial notice of plaintiffs' policy (4AA 744), and the policy itself shows there was a single annual premium for all coverages including the Limited Coverage. (2AA 270.) An allegation will be disregarded if it is contradicted by a judicially noticed document. (*Hill v. Roll Internat. Corp.* (2011) 195 Cal.App.4th 1295, 1300.) Further, plaintiffs do not allege, nor could they, that there were separate premiums for each of the different perils: fungi, dry rot, wet rot, bacteria, and virus.

II. Plaintiffs did not and cannot allege physical loss or damage

If this Court agrees the Limited Coverage is not illusory – and therefore enforces the specified-cause condition that the court below struck – then it need go no further. Plaintiffs acknowledge that they did not satisfy the condition, so there is no coverage. But even if plaintiffs *had* shown the virus resulted from one of the specified causes, or if they were excused from doing so, there would still be no coverage because plaintiffs did not suffer "loss or damage to Covered Property," which is necessary to trigger coverage.

A. The foundational trigger for property insurance coverage is a physical alteration of covered property

"[T]he threshold requirement for recovery under a contract of property insurance is that the insured property has sustained physical loss or damage." (*Simon Marketing v. Gulf Ins. Co.* (2007) 149 Cal.App.4th 616, 623.)

This understanding is reflected in the standard property insurance policy language requiring "direct physical loss of or physical damage" before any coverage is triggered. (2AA 292.) Interpreting this provision according to its plain meaning, California courts have made clear there must be a " 'distinct, demonstrable, physical alteration of the property.' " (*MRI Healthcare*, *supra*, 187 Cal.App.4th at p. 779; see *United Talent Agency v. Vigilant Ins. Co.* (2022) 77 Cal.App.5th 821, 830.)

The coronavirus does not physically harm or otherwise cause a demonstrable physical alteration to inert property. (See,

e.g., *United Talent*, *supra*, 77 Cal.App.5th at p. 838 ["[W]e agree with the majority of the cases finding that the presence or potential presence of the virus does not constitute direct physical damage or loss."]; *Apple Annie, LLC v. Oregon Mutual Ins. Co.* (2022) 82 Cal.App.5th 919, 934-935.) Even though "the COVID virus has a physical presence, and thus [the insured] may have suffered economic loss from the physical presence of the COVID virus," the insured has not suffered " 'direct physical loss of or damage to [its] property.' " (*Apple Annie*, at pp. 934-935.) The Court of Appeal itself acknowledged this point: "[I]f 'a sick person walked into one of Plaintiffs' restaurants and left behind COVID-19 particulates on a countertop, it would strain credulity to say that the countertop was damaged or physically altered as a result.' " (*John's Grill*, *supra*, 86 Cal.App.5th at pp. 1209-1210, quoting *Unmasked Management, Inc. v. Century-National Ins. Co.* (S.D.Cal. 2021) 514 F.Supp.3d 1217, 1226.)

Consistent with these conclusions, most courts have rejected the claim that property damage or loss results from the alleged presence of viral particles on inert property. (*United Talent*, *supra*, 77 Cal.App.5th at p. 838; *Apple Annie*, *supra*, 82 Cal.App.5th at pp. 934-935; *Best Rest Motel, Inc. v. Sequoia Ins. Co.* (2023) 88 Cal.App.5th 696, 705, fn. 10, review den., June 14, 2023.) "[I]f the virus can be quickly cleaned up with commonly available disinfectants, and there is no evidence that surfaces where fomites once were remain dangerous, it follows there is no physical loss of or damage to property." (*Best Rest*, at p. 705, fn. 10.) Only a few California courts have allowed claims to proceed,

but even those courts accepted that physical loss or damage requires a physical alteration of property. (See, e.g., *Marina Pacific Hotel and Suites, LLC v. Fireman's Fund Ins.* (2022) 81 Cal.App.5th 96, 109.)

The application of the physical loss or damage requirement is now before this Court in *Another Planet Entertainment, LLC v. Vigilant Ins. Co.*, No. S277893. Sentinel agrees with Vigilant, and the vast majority of courts to have addressed this issue, that the "[e]vanescent presence of a harmful airborne substance that will quickly dissipate on its own, or surface-level contamination that can be removed by simple cleaning, does not physically alter or affect property." (*Verveine Corp. v. Strathmore Ins. Co.* (Mass. 2022) 184 N.E.3d 1266, 1276.) Should this Court join that consensus, its decision should also dispose of the second issue in this case because – contrary to the Court of Appeal's reasoning – the Limited Coverage's "loss or damage" trigger also requires some direct physical impact on covered property.

B. The policy does not provide coverage for the cost of removal without direct physical loss or damage

The Court of Appeal recognized, and apparently endorsed, the long line of authority holding the requirement of direct physical loss or physical damage generally demands "some form of physical alteration of property" and that " 'the alleged presence of COVID-19 in or on the covered property [is] not sufficient to trigger coverage when direct physical loss of or damage to property is required.' " (*John's Grill*, *supra*, 86 Cal.App.5th at

pp. 1209-1210.) But it found that the Limited Coverage expanded the definition of loss or damage, for purposes of that coverage, based on the following policy language:

> b. We will pay for loss or damage by "fungi", wet rot, dry rot, bacteria and virus. As used in this Limited Coverage, the term loss or damage means:
>
> (1) *Direct physical loss or direct physical damage* to Covered Property caused by "fungi", wet rot, dry rot, bacteria or virus*, including the cost of removal* of the "fungi", wet rot, dry rot, bacteria or virus;
>
> (2) The cost to tear out and replace any part of the building or other property as needed to gain access to the "fungi", wet rot, dry rot, bacteria or virus; and
>
> (3) The cost of testing performed after removal, repair, replacement or restoration of the damaged property is completed, provided there is a reason to believe that "fungi", wet rot, dry rot, bacteria or virus are present.

(2AA 396, § B.1.b, italics added.)

The second and third items above require obvious physical alteration of the property, and the Court of Appeal did not suggest otherwise. The second item ("tear out and replace") contemplates physical destruction. The third item ("testing") is covered only for "the damaged property," and wiping a countertop with Lysol cannot sensibly be described as "removal, repair, replacement or restoration of the damaged property."

But the court focused on the first item in the definition above, and reasoned that even though it defined the term "loss or damage" to mean "[d]irect physical loss or direct physical

damage” (2AA 396), the phrase is actually more expansive because it “includes the costs of ‘removal’ of ‘virus’ – a phrase capacious enough to include cleaning the surfaces of the property.” (*John’s Grill*, *supra*, 86 Cal.App.5th at p. 1212.)

That was error. The phrase “including the cost of removal” simply clarifies that *if* a virus (or fungi, rot, or bacteria) causes direct physical damage, *then* the policy will pay for that direct physical loss and also will pay for the cost to remove the virus (or fungi, rot, or bacteria).

1. Interpretation starts with the plain language of text. Here, the text expressly links the “cost of removal” to the requirement of “[d]irect physical loss or direct physical damage” by making clear that the cost covered is the “cost of removal of *the* . . . virus” that caused the “[d]irect physical loss or direct physical damage.” (2AA 396, § B.1.b, italics added.) This provision uses the word “the” in the second part of the sentence to refer to *the* virus (or the fungi, rot, or bacteria) that causes *direct physical loss or physical damage*, and in interpreting insurance policies, courts “ ‘must give significance to every word . . . , when possible, and avoid an interpretation that renders a word surplusage.’ ” (*SantaFe Braun, Inc. v. Insurance Company of North America* (2020) 52 Cal.App.5th 19, 24; *Advanced Network, Inc. v. Peerless Ins. Co.* (2010) 190 Cal.App.4th 1054, 1063-1064.)

As this Court has stressed, “use of the definite article ‘the’ . . . refers to *a specific* person, place, or thing.” (*Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1396, italics added; *Honchariw v. County of Stanislaus* (2013) 218 Cal.App.4th 1019,

1034-1035.) The policy will cover removal of "the" virus (or fungi, etc.) that caused direct physical loss or direct physical damage – but the policy does not cover "removal of virus" alone without the predicate property damage or loss.

That reading is confirmed by the policy language, which provides the "cost of removal" is "includ[ed]" in the component of "[d]irect physical loss or direct physical damage." (2AA 396.) In other words, it is "contain[ed] as a part of" direct physical loss or direct physical damage for purposes of the "loss or damage" definition. (Black's Law Dict. (11th ed. 2019); see also *Chickasaw Nation v. United States* (2001) 534 U.S. 84, 89 ["To 'include' is to 'contain' or 'comprise as part of a whole' "], quoting Webster's Ninth New Collegiate Dict. (1985) p. 609.) Because the "cost of removal of the . . . virus" is contained as part of the "[d]irect physical loss or direct physical damage" covered in subsection B.1, it does not independently constitute "loss or damage" as defined in the Limited Coverage.

The phrase "cost of removal" cannot be viewed in isolation, as the Court of Appeal did, to extend coverage to any removal of a virus even when unrelated to direct physical loss or damage. If a menu featured a turkey sandwich "including lettuce and tomato," for instance, the restaurant could not serve just the lettuce and tomato and call it a turkey sandwich – it's not a turkey sandwich without the core ingredients of bread and turkey. The core ingredient of "physical loss or damage" under California law is a " 'distinct, demonstrable, physical alteration' " to property. (*MRI Healthcare*, *supra*, 187 Cal.App.4th at pp. 778-779.) The cost of

removal is included as part of that whole, but cannot stand alone to trigger coverage. The Court of Appeal erred by reading "including the cost of removal" as a separate component of the Limited Coverage.

2. The surrounding context of the Limited Coverage provision confirms there must be direct physical loss or direct physical damage before removal of the virus (or fungi, etc.) that caused the loss or damage can be covered. As noted, the Limited Coverage defines "loss or damage" to include three components, and all three involve physical harm to property. Subsection B.1 expressly incorporates the "[d]irect physical loss or direct physical damage" of the main grant of coverage – thus requiring *physical* alteration of the property – with the additional "cost of removal" of the virus that caused the loss or damage. (2AA 396, § B.1.b(1).) Subsections B.1.b(2) and (3) address additional costs associated with physical harm: finding and removing the potentially hidden agent, as well as associated property repair and replacement. (2AA 396, § B.1.b(2) [the "cost to tear out and replace any part of the . . . property as needed to gain access to the 'fungi', wet rot, dry rot, bacteria or virus"], § B.1.b(3) [the "cost of testing performed after removal, repair, replacement or restoration of the damaged property is completed" in order to confirm that the agent is no longer present].)

These components are all costs that *accompany* direct physical loss or direct physical damage when that physical loss or damage is caused by fungi, rot, bacteria, or virus. When a tree limb falls through a roof, there is no special need to clarify that

coverage for "direct physical loss or direct physical damage" caused by the branch includes the cost of removing it from the property. But when mold or other fungi (resulting from a specified cause of loss) spread inside a property's walls causing further damage, the Limited Coverage lets policyholders know their insurance will cover not only the surface repair and replacement, but also the costs associated with making sure the fungi are completely removed.

3. Looking at the policy even more broadly, the basic grant of coverage requires direct physical loss of or physical damage (2AA 292), and "[o]rdinarily, an exception to a policy exclusion does not create coverage not otherwise available under the coverage clause." (*Hurley Construction Co. v. State Farm Fire & Casualty Co.* (1992) 10 Cal.App.4th 533, 540; *Old Republic Ins. Co. v. Superior Court* (1998) 66 Cal.App.4th 128, 145, disapproved on other grounds by *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815; see *Aydin Corp. v. First State Ins. Co.* (1998) 18 Cal.4th 1183, 1192, fn. 3.) The policy generally requires *physical* loss or damage and the Virus Exclusion separately bars coverage for loss or damage caused by a virus (or other listed peril). Though the Limited Coverage reinstates some of that excluded coverage, it simply clarifies the *associated* costs like testing will also be covered in certain circumstances, along with the underlying physical loss or damage.

4. This conclusion is consistent with common sense and an insured's reasonable expectations. Most restaurants clean and disinfect their premises on a daily or even hourly basis, but no

reasonable restaurant owner would expect to receive insurance coverage every time a waiter wipes a countertop or doorknob simply because there may be virus or bacteria on the surface. Courts should reject an interpretation of policy language that is "unreasonable" when "its full implications are considered" and that would lead to an " 'absurd result[ ].' " (*MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 650.)

In sum, the Court of Appeal was wrong to isolate "including the cost of removal" and view it as stand-alone coverage. Both the text and context of the Limited Coverage provision show the cost of removal is covered only when it accompanies physical loss or damage.

C. The cause of plaintiffs' alleged losses was not the presence, or removal, of the virus

Even if the Limited Coverage did apply when an insured merely wiped down surfaces, plaintiffs never alleged that they incurred such costs. They've never claimed that they should be compensated for the costs of cleaning, but rather for the business income they lost when they had to suspend on-premises dining.

As their amended complaint makes clear, plaintiffs' theory of coverage was that they lost business income as a result of the government orders requiring them to suspend on-premises dining. (See, e.g., 1AA 65 ["*The Closure Orders* prohibited on-premises dining at John's Grill due to the . . . pandemic. *As a result*, John's Grill suffered substantial financial losses . . . ."], italics added; 1AA 68-69; 1AA 82, ¶ 64 ["*The Closure Orders* created direct physical damage or loss within the meaning of the

Policy by prohibiting customers from accessing and otherwise patronizing John's Grill for purposes of on-premises dining."], italics added.)

Plaintiffs also alleged that "even if the Closure Orders had *not* been issued, John's Grill would have had to close and suspend its operations due to worsening pandemic-level presence of the Coronavirus in, on, and around the Insured Premises." (1AA 83, italics added.) But they did not allege that this "presence" caused any physical alteration to their property, or that they had to suspend operations while the property was "repaired, rebuilt or replaced." (2AA 315-316, § G.12 [Period of Restoration].)[8] Nor did they allege that they incurred costs to gain access to, remove, or test for the virus. (2AA 396.) They wanted Sentinel to pay for the income they lost when they had to suspend on-premises dining, not the costs of repairing damaged property or removing the virus that supposedly caused the damage.

Plaintiffs failed to allege that the presence of the virus caused the loss that they seek to have covered. (*Inns-by-the-Sea v. Cal. Mutual Ins. Co.* (2021) 71 Cal.App.5th 688, 704 [affirming demurrer due to "lack of causal connection between the alleged physical presence of the virus on [hotel's] premises and the suspension of [its] operations"]; *Best Rest*, *supra*, 88 Cal.App.5th at p. 708.) Whether or not coronavirus could ever cause loss or

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[8] For this reason, they do not trigger "Time Element Coverage" under subsection B.1.f. of the Limited Coverage (2AA 396-397). (See *ante*, at pp. 21-22.)

damage that would be covered by this policy, it was not what caused the alleged losses here.

D. Because the Limited Coverage does not apply, the Virus Exclusion necessarily does

As described above, the Limited Coverage is an exception to the broader Virus Exclusion. Where, as here, the conditions of the Limited Coverage are not satisfied, the Virus Exclusion necessarily precludes coverage for "loss or damage caused directly or indirectly by . . . [¶] [p]resence, growth, proliferation, spread or any activity of 'fungi', wet rot, dry rot, bacteria or virus." (2AA 395.) Plaintiffs specifically allege that their losses were caused by either the "pandemic-level presence of the Coronavirus in, on, and around" their property or the "Closure Orders" that were intended to stop the virus's spread, or both. (1AA 82-83.) Thus, as the superior court held, their claims run headlong into the Virus Exclusion.

Dozens of courts have agreed with the superior court that this exact "Virus Exclusion unambiguously forecloses coverage of . . . alleged losses due to either COVID contamination or the Closure Orders." (*Protégé Restaurant Partners LLC v. Sentinel Ins. Co., Ltd.* (N.D.Cal., Sept. 28, 2021, No. 20-cv-03674-BLF) 2021 WL 4442652, at *2, affd. mem. on other grounds (9th Cir., Oct. 25, 2022, No. 21-16814) 2022 WL 14476377; see *Lulu's Fashion Lounge LLC v. Hartford Fire Ins. Co.* (E.D.Cal. 2022) 598 F.Supp.3d 888, 897, app. pending ["No California court has found

the virus exclusion used here to be ambiguous."].)[9] These decisions join dozens more that have found that similar "virus exclusions clearly . . . preclude coverage for the losses and expenses alleged by" businesses forced to shut down due to the coronavirus and related closure orders. (*Mashallah, Inc. v. West Bend Mut. Ins. Co.* (7th Cir. 2021) 20 F.4th 311, 320.)[10]

Because plaintiffs' alleged losses were "directly or indirectly caused by a . . . [¶] virus" (2AA 395) and the Limited Coverage exception does not apply, the Virus Exclusion bars coverage.

Conclusion

Plaintiffs did not and cannot state a claim for coverage under their property insurance policy. This Court should reverse the judgment of the Court of Appeal to the extent that it overturned the superior court's order sustaining Sentinel's demurrer, and affirm the judgment in all other respects.

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[9] See also, e.g., *Westside Head & Neck*, *supra*, 526 F.Supp.3d at p. 731; *Franklin EWC*, *supra*, 506 F.Supp.3d at pp. 857-858.

[10] See, e.g., *Mudpie, Inc. v. Travelers Casualty Ins. Co. of America* (2021) 15 F.4th 885, 893; *Musso & Frank Grill Co., Inc. v. Mitsui Sumitomo Ins. USA Inc.* (2022) 77 Cal.App.5th 753, 761, review den. Aug. 10, 2022. These other decisions address a different virus exclusion found in other policies, but both exclusions apply equally to losses caused directly or indirectly by COVID-19. (*Q Clothier*, *supra*, 29 F.4th at p. 261, fn. 5 [relying on *Mudpie*'s analysis to hold that Sentinel's Virus Exclusion "unambiguous[ly] exclu[des] . . . the losses claimed" as a result of COVID-19 and related government orders].)

Respectfully Submitted,

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The Hartford Financial Services Group, Inc. & Sentinel Insurance Company, Ltd.

Certificate of Word Count

(Cal. Rules of Court, rule 8.520(c)(1))

The text of this petition consists of 13,068 words as counted by the Microsoft Word program used to generate this petition.

Dated: June 27, 2023

/s/ Anna-Rose Mathieson
Anna-Rose Mathieson

Proof of Service

I, Stacey Schiager, declare as follows:

I am employed in the County of San Francisco, State of California, am over the age of eighteen years, and am not a party to this action. My business address is 96 Jessie Street, San Francisco, CA 94105. On June 27, 2023, I served the following document:

Opening Brief on the Merits

On June 27, 2023, I caused the above-identified document to be electronically served on all parties and the Court of Appeal via TrueFiling, which will submit a separate proof of service.

Additionally, on June 27, 2023, I served the above-identified document by mail. I enclosed a copy of the document in an envelope and deposited the sealed envelope with the U.S. Postal Service, with the postage fully prepaid. The envelope was addressed as follows:

Clerk for Hon. Ethan P. Schulman
San Francisco Superior Court
400 McAllister Street, Dept. 304
San Francisco, CA 94102
Trial Judge

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on June 27, 2023,

/s/ Stacey Schiager
Stacey Schiager

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 6/27/2023 by Florentino Jimenez, Deputy

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **JOHN'S GRILL v. THE HARTFORD FINANCIAL SERVICES GROUP**
Case Number: **S278481**
Lower Court Case Number: **A162709**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **Annarose.Mathieson@calg.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

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BRIEF	S278481_Hartford Opening Brief

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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.

6/27/2023

Date

/s/Kathryn Parker

Signature

Mathieson, Anna-Rose (231770)

Last Name, First Name (PNum)

Complex Appellate Litigation Group LLP

Law Firm