Supreme Court of California
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S277893

Appeal No. 21-16093

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANOTHER PLANET ENTERTAINMENT, LLC,
Plaintiff-Appellant,

v.

VIGILANT INSURANCE COMPANY,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
No. 3:20-cv-07476-VC
The Honorable Vince Chhabria, District Judge

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DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), defendant-appellee Vigilant Insurance Company states that it is a wholly-owned subsidiary of Federal Insurance Company. Federal Insurance Company is a wholly-owned subsidiary of Chubb INA Holdings Inc., which is 80% owned by Chubb Group Holdings Inc. and 20% owned by Chubb Limited. Chubb Group Holdings Inc. is a wholly-owned subsidiary of Chubb Limited. Chubb Limited is the ultimate parent and the only publicly traded company. No publicly held corporation owns 10% or more of Chubb Limited's stock.

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STATEMENT REGARDING ORAL ARGUMENT

Defendant-appellee Vigilant Insurance Company believes that oral argument is unnecessary in this case. The appeal involves the application of well-established insurance principles to unambiguous policy language and factual allegations not in dispute. The facts and legal arguments relevant to the appeal are adequately presented in the briefs and record on file in the suit. Appellate decisions from this Court and others supporting affirmance are uniform and completely overwhelming. Vigilant Insurance Company accordingly believes that the Court's decisional process would not be significantly aided by oral argument.

INTRODUCTION

This case is one of thousands of similar lawsuits throughout the country seeking coverage under property insurance policies for economic losses related to the COVID-19 pandemic. Courts have overwhelmingly dismissed such claims at the pleading stage where policy language conditions coverage on "direct physical loss or damage to" property, because state and local orders restricting business operations to prevent the spread of the coronavirus do not, as a matter of law, cause either "direct physical loss" or "direct physical damage" to property. A trio of recent decisions from the California Court of Appeal—*Inns by the Sea v. California Mutual Insurance Co*., 71 Cal. App. 5th 688 (2021), *review denied*, S272450 (Mar. 9, 2022); *Musso & Frank Grill Co. v. Mitsui Sumitomo Insurance USA Inc*., 77 Cal. App. 5th 753 (2022), *pet. for review filed*, S274791 (Cal. May 27, 2022); and *United Talent Agency v. Vigilant Insurance Co.*, 77 Cal. App. 5th 821 (2022), *depublication request denied*, S275146 (Cal. July 20, 2022) ("UTA")—affirmed the dismissal of allegations materially indistinguishable from those at issue here. The claims likewise fail under the logic of a fourth California Court of Appeal decision, *Marina Pacific Hotel & Suites, LLC v. Fireman's Fund Insurance Co.*, -- Cal. Rptr. 3d --, 2022 WL 2711886 (Cal. Ct. App. 2022)—a lone outlier that found in favor of insureds, but pursuant to a rationale that compels dismissal here. Moreover, multiple decisions of this Court have affirmed the

dismissal of essentially identical suits, as have more than 100 decisions from federal and state appellate courts nationwide. The district court correctly dismissed the complaint here for substantially the same reasons adopted by those courts.

Defendant-appellee Vigilant Insurance Company ("Vigilant") issued a commercial property insurance policy to plaintiff-appellant Another Planet Entertainment ("AP"), covering premises AP uses to conduct its business as an event promoter and venue operator. The policy provides Business Income and Extra Expense coverage only where insured property suffered "direct physical loss or damage," which California courts have consistently construed—since long before the COVID-19 pandemic—as requiring tangible physical change to the property. AP's property did not undergo any physical change of any kind, categorically foreclosing coverage for the economic losses AP allegedly incurred during the COVID-19 pandemic.

AP also seeks coverage under the policy's Civil Authority provision, but that provision, too, requires "direct physical loss or damage." It also applies only where a government order both prohibited access to the insured premises and was issued to address property damage. AP cannot allege either of those essential predicates either.

The COVID-19 pandemic is extraordinary, but the contract interpretation

required here is straightforward. Since the pandemic began, state and federal appellate decisions have almost universally rejected coverage for COVID-19-related business losses, under exactly the same circumstances. AP's effort to escape those precedents rests on false distinctions and misrepresentations of the actual language of the policy. For these and the other reasons set forth below, the district court's decision should be affirmed.

STATEMENT OF THE ISSUES

I. Whether coverage under an insurance policy's Business Income and Extra Expense provision and similar provisions applies where the insured does not and cannot allege facts establishing "direct physical loss of or damage to" covered property.

II. Whether coverage under an insurance policy's Civil Authority provision applies where the insured does not and cannot allege facts establishing that a government authority prohibited access to the insured premises because of "direct physical loss of or damage" to other property nearby.

III. Whether an insured is entitled to "mitigation damages" where the insured does not and cannot allege facts establishing that it faced an imminent loss resulting from "direct physical loss of or damage to" covered property.

III. Whether the district court properly dismissed claims of bad faith and fraud that fall alongside the insured's failed claim of coverage and which were not

adequately pleaded.

STATEMENT OF THE CASE

A. The Vigilant Policy

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

AP seeks coverage under two categories of provisions within the Policy's Property section: (1) Business Income and Extra Expense; Dependent Business Premises; Extra Expense; and Building and Personal Property coverage (the "Business Income provisions") and (2) Civil Authority coverage. AP also points to mitigation provisions that pertain to the insured's duty to mitigate in the event of covered loss. As the policy language set forth below illustrates, each of the provisions on which AP relies requires "direct physical loss or damage to property" for coverage to attach.

1. *Business Income Provisions*

The Business Income and Extra Expense provision covers losses from an

"actual or potential impairment of operations" that is "caused by or result[s] from direct physical loss or damage … to property." 3-ER-485. The "direct physical loss or damage to property" in turn must be "caused by or result from a covered peril" and "occur at, or within 1,000 feet of, the premises, other than a dependent business premises." *Id*. A "covered peril" includes any "peril not otherwise excluded." 3-ER-456. A "dependent business premises" means a premises operated by others on which the insured depends for purposes such as to "deliver materials or services" or to "attract customers," among others. 3-ER-569. The definition of "property" includes "building," further defined as a "structure" or other physical components of a structure such as additions, alterations, and repairs. 3-ER-566, 583. "Property" also includes "personal property," defined in part as "all your business personal property." 3-ER-579. Both "building" and "personal property" exclude "land, water or air, either inside or outside of a structure." 3-ER-566, 579.

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

property" and continuing until "operations are restored," including the time required to "repair or replace the property." 3-ER-485, 578.

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

AP also references the Policy's "Extra Expense" and "Building and Personal Property" provisions. The Extra Expense provision, similar to the Business Income and Extra Expense provision, covers "actual extra expense" incurred "due to the actual or potential impairment of [] operations during the period of restoration" that are "caused by or result from direct physical loss or damage by a covered peril to property." 3-ER-516. The "Building or Personal Property" provision states that Vigilant will "pay for direct physical loss or damage" to AP's "building or personal property." 3-ER-456.

2. *Civil Authority Coverage*

As an alternative to the foregoing provisions, AP also argues that it is entitled to coverage under the Policy's "Civil Authority" provision. The Civil

Authority provision covers "business income loss" or "extra expense" incurred "due to the actual impairment of [] operations" that is "directly caused by the prohibition of access to: your premises; or a dependent business premises, by a civil authority," but only where (1) the civil authority prohibition is "the direct result of direct physical loss or damage to property away from such premises or such dependent business premises by a covered peril," and (2) the damaged property is within one mile of the premises or another pre-identified distance, "whichever is greater." 3-ER-487-88. The Extra Expense coverage includes its own identical Civil Authority provision. 3-ER-517.

3. *Mitigation Provisions*

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

covered property from further loss or damage." 3-ER-559.

B. AP's Claimed Losses

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

As alleged in AP's First Amended Complaint ("FAC"), beginning in March 2020, civil authorities throughout the United States began issuing "Closure Orders" in order to "curtail the spread of SARS-CoV-2." 3-ER-401 ¶58.[1] These orders generally required citizens to "stay home" or "shelter in place," imposed travel restrictions and quarantines, and required "the suspension of non-essential business operations," such that AP "and many other businesses" could no longer "use their insured locations and properties for their intended purpose." *Id.* Tracking the language of the Policy, the FAC alleges that "the Closure Orders substantially impaired the use and function" of unspecified insured "premises" as well as premises "upon which [AP] depends," thereby allegedly triggering Civil Authority coverage. 3-ER-407-08 ¶86. The FAC further alleges that AP's "compliance with the Closure Orders also were mitigation efforts," entitling AP to coverage for those

[1] In particular, AP cites California's Executive Orders N-25-20 and N-33-20; the California Order of the State Public Health Officer issued on March 19, 2020; "similar orders" issued by officials of Alameda and San Francisco Counties; Nevada Emergency Directive 003; and the Covid-19 Risk Mitigation Initiative issued by the Nevada Health Response on March 17, 2020. 3-ER-402-03.

expenses under the Policy's mitigation provisions. *Id.*

The FAC contains extensive allegations about the physical properties of the SARS-CoV-2 virus, its ubiquitous nature, and the means by which it is transmitted, including via aerosolized droplets. 3-ER-397-401. The FAC pairs those allegations with conclusory assertions as to their legal import—namely, that "SARS-CoV-2 causes a distinct, demonstrable, physical alteration to property," such that "it constitutes 'direct physical loss or damage' to property as that phrase is used in the Policy." 3-ER-405 ¶73; *see* ER-380-81 ¶5 ("The presence of SARS-CoV-2 physically alters the air in which it is found and the surfaces of property on which it lands."). As to whether SARS-CoV-2 was ever actually detected on a covered premises, the FAC is equivocal, alleging only that "SARS-CoV-2 has been present at and in its properties, *or would have been present* but for its efforts to reduce, prevent, or otherwise mitigate its presence on its properties." 3-ER-405 ¶76 (emphasis added); *see* 3-ER-408 ¶87 ("SARS-CoV-2 particles attached to and damaged, or but for the Closure Orders would have attached to and damaged, Another Planet's insured premises, as well as the surrounding vicinity"); 3-ER-380-81 ¶5 (similar); 3-ER-406 ¶78 (asserting without factual support that "SARS-CoV-2 has been present at numerous dependent business premises").

As a result of its inability to fully use its property, AP alleges that it suffered "substantial financial losses, including lost profits, lost commissions, and lost

business opportunities." 3-ER-380-81 ¶5. These losses were exacerbated "[g]iven the widespread nature of SARS-CoV-2 and COVID-19, its spread through community transfer, and the fact that concerts are one of the most dangerous sources of SARS-CoV-2." 3-ER-405 ¶77.

The FAC also contains conclusory allegations that "Vigilant acted in bad faith," including by purportedly "failing to conduct a full and thorough investigation" of AP's claim; "wrongfully … denying coverage"; and "unreasonably failing and refusing to honor its promises." 3-ER-414 ¶107.

C. Procedural History

Vigilant moved to dismiss AP's original complaint, and the district court granted the motion to dismiss with leave to amend on February 25, 2021. 4-ER-785. The district court reasoned that AP's allegations could not survive dismissal because, among other deficiencies, AP could not plead that anything "specific about [its] properties … caused them to shut down"; instead, its losses stemmed from the "generalized danger of people spreading the virus to one another," which led to "generally applicable closure[] orders [that] prevented nearly all businesses from operating." 4-ER-785-86. AP was likewise not entitled to Civil Authority coverage, the court held, because the closure orders "were clearly passed in response to the virus in the community at large, not in specific response to the presence of the virus at properties within a mile of [AP's] facilities." 4-ER-786.

The court accordingly granted Vigilant's motion to dismiss, permitting leave to amend "in an abundance of caution" despite finding it "difficult to imagine" that AP could successfully state a claim for coverage. 4-ER-787.

On March 11, 2020, AP filed the FAC, making a second attempt to plead a viable claim. 3-ER-379-426. The FAC primarily recycled the allegations of the original complaint while appending superfluous new details regarding SARS-CoV-2's scientific properties, updated statistics as to the spread of COVID-19, and references to additional coverages under the policy (all of which require "direct physical loss or damage" for coverage to attach). *Id.* Vigilant again moved to dismiss. 3-ER-356-78.

On June 21, 2021, the district court granted Vigilant's motion to dismiss, this time without leave to amend. The court explained that the FAC, like the original complaint, failed to state a claim because it plausibly alleged only that "the closure orders—and not [the] virus's alleged presence at [AP's] facilities—caused it to shut down." 1-ER-3. AP's reliance on new provisions of the policy that still required "direct physical loss of damage" was unavailing for the same reasons. 1-ER-4. AP's renewed claim of Civil Authority coverage fared no better because it "remain[ed] clear that those closure orders were not passed as a direct result of property damage at nearby properties," notwithstanding a reference to property damage in one of the orders, which was irrelevant because it did not establish the

required causal relationship. 1-ER-3-4. The court accordingly ordered the case dismissed with prejudice. 1-ER-4.

SUMMARY OF THE ARGUMENT

I. AP has not plausibly alleged coverage under the Policy's Business Income provisions, which condition coverage on the existence of "direct physical loss or damage" to covered property. That policy language has been widely recognized by courts in California and elsewhere—including this Court and the California Court of Appeal—as requiring a tangible alteration to property, rather than mere reduction in the ability to use property. AP fails to plead any such tangible alteration to property stemming from the COVID-19 pandemic and resulting governmental orders.

AP does not allege facts establishing that its alleged losses were caused by the virus's presence on the insured property. Accordingly, it cannot prevail under any of the four decisions rendered to date by California Courts of Appeal. Furthermore, even if its complaint were construed as adequately alleging the physical presence of the virus, the complaint still does not state a claim for coverage: in *UTA*, the California Court of Appeal joined the overwhelming consensus of courts in holding that the mere presence of COVID-19 on property does not establish the *tangible alteration* to property required for commercial property coverage to attach. Though *Marina Pacific* later disagreed with *UTA*'s

holding under California demurrer standards, it acknowledged that *UTA*'s outcome is correct under the federal pleading standards that apply here. And even on its own terms, *Marina Pacific* is an outlier decision at odds with an overwhelming body of precedent. This Court should follow *UTA*, not *Marina Pacific*.

II. AP likewise does not and cannot allege facts justifying coverage under the Civil Authority provision. AP has not identified any nearby "direct physical loss or damage" to property that caused the civil authority orders in question, and those orders did not prohibit access to the insured premises. This Court and the California Court of Appeal have already rejected claims identical to that asserted by AP, and there is no reason for a different result here.

III. AP is not entitled to "mitigation damages." In the absence of covered loss, AP could not have engaged in any relevant mitigation. Because AP cannot allege "direct physical loss or damage," it cannot recover for uncovered losses by recasting them as "mitigation damages."

IV. AP's remaining bad-faith and fraud claims were properly dismissed. AP's claim of bad faith falls alongside its claim for coverage, and AP falls far short of the heightened pleading requirements for fraud claims.

STANDARD OF REVIEW

This Court reviews a dismissal order de novo. *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). To withstand a motion to dismiss, a complaint "must

contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted). A complaint cannot survive if it merely "tenders naked assertions devoid of further factual enhancement." *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)) (internal quotations and alterations omitted). A court need not accept "legal conclusion[s] couched as … factual allegations." *Twombly*, 550 U.S. at 555 (quotation omitted). Likewise, a court need not accept "allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

All agree that California law governs this case. AP's Opening Brief ("OB") at 26; *see* Cal. Civ. Code § 1646. Under California law, AP—as the insured—bears the burden of alleging (and later proving) facts sufficient to establish its entitlement to coverage. *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 16 (1995).[2] The interpretation of insurance policies is a question of law. *Id.* at 18. The "ordinary rules of contractual interpretation apply," and the policy's terms must be

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[2] AP's citation to *Travelers Casualty & Surety Co. v. Superior Court*, 63 Cal. App. 4th 1440, 1454 (1998), for the proposition that an insured "has no burden of proof" under an all-risk policy (OB27) is taken out of context. While such policies cover all perils not otherwise excluded, an "all-risk" policy is not an "all loss" policy, *Garvey v. State Farm Fire & Cas. Co*., 48 Cal. 3d 395, 408 (1989), and the insured thus retains the burden of bringing itself within the policy's coverage grant. *See UTA*, 77 Cal. App. 5th at 829.

given their "ordinary and popular sense." *Palmer v. Truck Ins. Exch.*, 21 Cal. 4th 1109, 1115 (1999) (quotation omitted). "[L]anguage in a contract must be interpreted as a whole, and in the circumstances of the case, and cannot be found to be ambiguous in the abstract …. Courts will not strain to create an ambiguity where none exists." *Waller*, 11 Cal. 4th at 18-19. Only if the ordinary rules of construction "do not resolve a claimed ambiguity" does the Court "resort to the rule that ambiguities are to be resolved against the insurer." *Minkler v. Safeco Ins. Co. of Am.*, 49 Cal. 4th 315, 321 (2010). Thus, courts "may not ... rewrite a policy to bind the insurer to a risk that it did not contemplate and for which it has not been paid." *Safeco Ins. Co. v. Gilstrap*, 141 Cal. App. 3d 524, 533 (1983). If the policy language is "clear and explicit, it governs." *Palmer*, 21 Cal. 4th at 1115 (quotation omitted).

ARGUMENT

I. THERE IS NO COVERAGE UNDER THE POLICY'S BUSINESS INCOME PROVISIONS BECAUSE THERE WAS NO "DIRECT PHYSICAL LOSS OF OR DAMAGE TO" AP'S PREMISES

AP contends that its insured property suffered "direct physical loss or damage" in one of two ways: either (1) because the pandemic and governmental shutdown orders deprived AP of the full economic use of its properties, OB35 ("'physical loss' can occur if property is not usable for its intended purpose"), or (2) because the presence of the virus effected a demonstrable physical alteration to

insured property, *id.* ("SARS-CoV-2 physically alters and damages surfaces by attaching to them and turning them into fomites"). Neither theory has merit.

A. The Policy Requires An Actual, Physical Change To Trigger Coverage

AP first suggests the policy's requirement of "direct physical loss or damage" is satisfied merely because its property was "not usable for its intended purpose." OB35. That argument is foreclosed by uniform precedents of this Court and the California Courts of Appeal.

1. *This Court's Precedent Establishes That, Under California Law, The Ordinary Meaning Of "Direct Physical Loss or Damage" To Property Entails A Tangible Physical Alteration To The Property*

This Court has already analyzed the precise policy language at issue here in the context of this pandemic. In *Mudpie, Inc. v. Travelers Casualty Insurance Co. of America*, 15 F.4th 885 (9th Cir. 2021)—which AP inexplicably omits from its brief—a California children's store sought property insurance coverage for losses attributed to the COVID-19 pandemic. As here, the policy there conditioned Business Income and Extra Expense coverage on "direct physical loss of or damage to property at the described premises." *Mudpie*, 15 F.4th at 890 (emphasis omitted). Drawing on pre-pandemic precedents interpreting similar provisions, such as *MRI Healthcare Center of Glendale, Inc. v. State Farm General Insurance Co.*, 187 Cal. App. 4th 766 (Cal. Ct. App. 2010), this Court observed that "California courts have carefully distinguished 'intangible,' 'incorporeal,' and

'economic' losses from 'physical' ones," *Mudpie*, 15 F.4th at 892. The Court went on to conclude that, consistent with the "ordinary and popular" meaning of the phrase, "California courts would construe the phrase 'physical loss of or damage to' as requiring an insured to allege physical alteration of its property"—specifically, a "distinct, demonstrable, physical alteration of the property." *Id.* (quoting *MRI Healthcare*, 187 Cal. App. 4th at 779).[3] *Mudpie* therefore rejected the contention that the temporary "loss of use" of a property for a particular purpose—absent any demonstrable physical alteration—could satisfy this standard. *Id.*

This commonsense reading of the policy language was reinforced, the Court explained, by the policy's "period of restoration" language, which is materially indistinguishable from the language in AP's Policy. The fact that coverage was defined with reference to the time required to "repair[], rebuil[d], or replace[] property," the Court reasoned, demonstrated that the policy "contemplates providing coverage only if there are physical alterations to the property." *Mudpie*, 15 F.4th at 892; *compare* 3-ER-578 (defining "period of restoration" with reference to the time required to "repair or replace the property"). "To interpret the

[3] The *Mudpie* Court also left open the possibility that a "permanent dispossession of property" could qualify as a direct physical loss. *Id.* at 891 n.5, 892 (citing *Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, 2018 WL 3829767 (C.D. Cal. 2018)).

Policy to provide coverage absent physical damage would render the 'period of restoration' clause superfluous." *Mudpie*, 15 F.4th at 892.

Mudpie squarely forecloses AP's argument that mere diminution in use of insured property constitutes a direct physical loss of or damage to that property.

2. *Multiple Decisions Of The California Court Of Appeal Have Confirmed* Mudpie

This Court's holding and analysis in *Mudpie* has been repeatedly and consistently confirmed by decisions of the California Courts of Appeal. Each of these decisions embraced the same California authorities on which this Court relied and agreed that the ordinary meaning of "direct physical loss or damage" mandates a tangible physical alteration, not mere partial loss of use, for coverage to attach.

First, in *Inns by the Sea*, the Fourth District Court of Appeal rejected the "loss of use" theory of coverage for pandemic-related losses, holding that "the inability to use physical property to generate business income, standing on its own, does not amount" to a disruption of operations "caused by direct physical loss of property within the ordinary and popular meaning of that phrase." 71 Cal. App. 5th at 705. Like *Mudpie*, *Inns by the Sea* further agreed that the policy's period of restoration "implies that the 'loss' or 'damage' that gives rise to Business Income coverage has a *physical* nature that can be *physically* fixed, or if incapable of being *physically* fixed because it is so heavily destroyed, requires a complete move to a new location." *Id.* at 707.

The Second District reached the same outcome in *Musso & Frank*. Citing *Mudpie* and *Inns by the Sea* approvingly, the *Musso & Frank* court held that "[a]t this point, there is no real dispute. Under California law, a business interruption policy that covers physical loss and damages does not provide coverage for losses incurred by reason of the COVID-19 pandemic." 77 Cal. App. 5th at 760.[4]

Soon after, another division of the Second District joined this chorus in *UTA*, where Vigilant was also a defendant and which involved the same policy form at issue in this case. "It is now widely established," the *UTA* court emphasized, "that temporary loss of use of a property due to pandemic-related closure orders, without more, does not constitute direct physical loss or damage." 77 Cal. App. 5th at 830-31 (emphasis omitted). *UTA* reasoned that longstanding California case law, together with the policy's "period of restoration" language, made clear that "allegations of loss of use"—including allegations that the SARS-CoV-2 virus "cause[d] physical loss" by rendering property "inherently dangerous" such that it "cannot be used"—"are insufficient to establish 'direct physical loss or damage' entitling [the insured] to coverage." *Id.* at 830, 834-35; *see id.* at 833

[4] AP contends that the *Musso & Frank* decision is distinguishable because the insured in that case "affirmatively stated that its losses were caused by public health orders, not damage to its property, and its policy included a virus exclusion." OB38-39 n.4. Those purported distinctions had no bearing on the *Musso & Frank* court's central holding and are thus irrelevant here.

(citing *Simon Mktg., Inc. v. Gulf Ins. Co.*, 149 Cal. App. 4th 616, 623 (2007); *MRI Healthcare*, 187 Cal. App. 4th at 779; *Doyle v. Fireman's Fund Ins. Co.*, 21 Cal. App. 5th 33, 38 (2018)). As detailed below, *see infra* § I.B, *UTA* also laid to rest AP's alternative argument that its allegations of the physical effects of the virus on property suffice for coverage. On July 20, 2022, the California Supreme Court denied a request to depublish the *UTA* decision and declined to grant review in the matter on its own motion. *See United Talent Agency v. Vigilant Ins. Co.*, No. S275146 (Cal. July 20, 2022).

Most recently, a different California Court of Appeal panel broke with the near-uniform nationwide consensus and allowed a COVID-19 coverage claim to proceed beyond the pleading stage. *See Marina Pacific*, 2022 WL 2711886. As relevant to AP's "loss of use" argument, however, the court agreed with all the foregoing decisions and held that "direct physical loss or damage" cannot be satisfied by mere loss of use of property alone. *Id.* at *7.[5]

The consistent confirmation of *Mudpie* by California Court of Appeal decisions conclusively resolves the "loss of use" issue. Indeed, this Court has already held as much with respect to *Inns by the Sea* itself. *See Baker v. Or. Mut.*

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[5] The *Marina Pacific* court separately held that the alleged *presence* of COVID-19 on property can suffice to plead "direct physical loss or damage" under California demurrer standards. *See id.* at *9, *11. That distinct ruling is both irrelevant and incorrect, for the reasons explained below, *infra* at 25-28.

Ins. Co., 2022 WL 807592, at *1 (9th Cir. 2022); *Rialto Pockets, Inc. v. Beazley Underwriting Ltd.*, 2022 WL 1172134, at *1 (9th Cir. 2022). The point is only further solidified by *Musso & Frank*, *UTA*, and *Marina Pacific*—not to mention the more than 100 other state and federal appellate decisions (and many hundreds of trial court decisions) holding that mere loss of use alone does not trigger coverage because such policies insure the policyholder's "*property*, not its ideal *use* of that property." *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327, 335 (7th Cir. 2021).[6]

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[6] *See*, *e.g.*, *10012 Holdings, Inc. v. Sentinel Ins. Co.*, 21 F.4th 216 (2d Cir. 2021); *Uncork & Create LLC v. Cincinnati Ins. Co.*, 27 F.4th 926 (4th Cir. 2022); *Terry Black's Barbecue, L.L.C. v. State Auto. Mut. Ins. Co.*, 22 F.4th 450 (5th Cir. 2022); *Santo's Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398 (6th Cir. 2021); *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141 (8th Cir. 2021); *Goodwill Indus. of Cent. Okla., Inc. v. Phila. Indem. Ins. Co.*, 21 F.4th 704 (10th Cir. 2021); *Gilreath Fam. & Cosm. Dentistry, Inc. v. Cincinnati Ins. Co.*, 2021 WL 3870697 (11th Cir. 2021); *N. State Deli, LLC v. Cincinnati Ins. Co*., -- S.E.2d --, 2022 WL 2432157 (N.C. Ct. App. 2022); *MAC Prop. Grp. LLC v. Selective Fire & Cas. Ins. Co.*, -- A.3d ---, 2022 WL 2196396 (N.J. Super. Ct. App. Div. 2022); *Colectivo Coffee Roasters, Inc. v. Society Ins.*, 974 N.W.2d 442 (Wis. 2022); *Commodore, Inc. v. Certain Underwriters at Lloyd's London*, -- So.3d--, 2022 WL 1481776 (Fla. Dist. Ct. App. 2022); *GPL Enter., LLC v. Certain Underwriters at Lloyd's*, 2022 WL 1638787 (Md. Ct. Spec. App. 2022); *Jesse's Embers, LLC v. W. Agric. Ins. Co.*, 973 N.W.2d 507 (Iowa 2022); *Verveine Corp. v. Strathmore Ins. Co.*, 184 N.E.3d 1266 (Mass. 2022); *Consol. Rest. Operations, Inc. v. Westport Ins. Corp.*, 205 A.D.3d 76 (N.Y. App. Div. 2022); *Sweet Berry Café, Inc. v. Soc'y Ins., Inc.*, -- N.E.3d --, 2022 WL 780847 (Ill. App. Ct. 2022); *Gavrilides Mgmt. Co., LLC v. Mich. Ins. Co*., -- N.W.2d--, 2022 WL 301555 (Mich. Ct. App. 2022); *Ind. Repertory Theatre v. Cincinnati Cas. Co.*, 180 N.E.3d 403 (Ind. Ct. App. 2022); *Sanzo Enters. LLC v. Erie Ins. Exch.*, 182 N.E.3d 393 (Ohio Ct. App. 2021); *Nail Nook, Inc. v. Hiscox Ins. Co.*, 182 N.E.3d 356 (Ohio Ct. App. 2021); *see also* Univ.

B. The Presence Of Virus Particles *On* Property Does Not Constitute A Distinct, Demonstrable Physical Alteration *To* Property

Seeking to evade the controlling force of *Mudpie*, AP alternatively contends that it has sufficiently alleged "direct physical loss or damage" by pleading that "SARS-CoV-2 was present on [insured] properties" and that "SARS-CoV-2 physically alters and damages surfaces by attaching to them and turning them into fomites." OB35. That argument, too, is foreclosed by California precedent establishing that the mere temporary presence of an easily-removable virus on property does not constitute "direct physical loss or damage" to the property.

1. *The Mere Presence Of A Virus On Property Does Not Establish Physical Loss Or Damage To Property*

The overwhelming consensus of courts nationwide is that the mere presence of COVID-19 on property does not trigger coverage because the relevant language "requires 'direct physical loss or damage *to* property,' not merely a physical substance *on* property." *Circle Block Partners, LLC v. Fireman's Fund Ins. Co.*, 2021 WL 3187521, at *7 (S.D. Ind. 2021). Businesses have always suffered economic losses during cold and flu season when cold and flu viruses alight on their premises and make employees and customers ill, but nobody has ever claimed property damage coverage for such losses. The SARS-CoV-2 virus has a more

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of Pa. Carey Law School COVID Coverage Litigation Tracker, https://cclt.law.upenn.edu/judicial-rulings/.

severe effect on *people* than these common viruses, but no different effect on *property*.

a. The California Court of Appeal's decision in *UTA* is dispositive on this point. In that case, as here, the insured set forth "extensive allegations about how the virus spreads from one person to another, including in '[a]erosolized droplets exhaled' by an infected person traveling through the air, and 'fomite transmission' from touching surfaces contaminated with the virus." 77 Cal. App. 5th at 834; *compare, e.g.*, 3-ER-397-401. Those allegations were insufficient for coverage, the court held, because it "agree[d] with the majority of the cases finding that the presence or potential presence of the virus does not constitute direct physical damage or loss." *Id.* at 838; *see id.* at 835-36 & n.10 (collecting cases). The court emphasized that "[m]any courts have rejected the theory that the presence of the virus constitutes physical loss or damage to property," recognizing instead that "[w]hile the impact of the virus on the world ... can hardly be overstated, its impact on physical property is inconsequential: deadly or not, it may be wiped off surfaces using ordinary cleaning materials, and it disintegrates on its own in a matter of days." *Id.* at 835 (quoting *Sandy Point*, 20 F.4th at 335). As the court observed: "If, for example, 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." *Id.* (quoting

Unmasked Mgmt., Inc. v. Century-Nat'l Ins. Co., 514 F. Supp. 3d 1217, 1226 (S.D. Cal. 2021)). At bottom, *UTA* holds that the presence of the virus does not qualify as "direct physical loss or damage" because it "can be cleaned from surfaces through general disinfection measures, and transmission may be reduced or rendered less harmful through practices unrelated to the property, such as social distancing, vaccination, and the use of masks," such that "the presence of the virus does not render a property useless or uninhabitable." *Id.* at 838. That holding comports with the California Court of Appeal's holding in *Musso & Frank* that "[u]nder California law, a business interruption policy that covers physical loss and damages does not provide coverage for losses incurred by reason of the COVID-19 pandemic." 77 Cal. App. 5th at 760. These cases undermine AP's argument (OB33-35) that its allegations of the virus's possible presence on covered property satisfy the California Court of Appeal's requirement, set forth in *MRI Healthcare*, of a "distinct, demonstrable alteration to property" in order to demonstrate "direct physical loss to property." 187 Cal. App. 4th at 779.

b. *UTA* is consistent with the overwhelming majority of decisions from California and elsewhere holding that an alleged presence of the SARS-CoV-2 virus does not establish "direct physical loss or damage" because, in essence, "the virus harms human beings, not property." *Wellness Eatery La Jolla LLC v. Hanover Ins. Grp.*, 517 F. Supp. 3d 1096, 1106 (S.D. Cal. 2021); *see Inns by the*

Sea, 71 Cal. App. at 703 n.17 (collecting cases); *see also*, *e.g.*, *Kim-Chee LLC v. Phila. Indem. Ins. Co.*, 2022 WL 258569, at *2 (2d Cir. 2022) (cited approvingly by *UTA,* 77 Cal. App. 5th at 836); *Gilreath*, 2021 WL 3870697, at *2; *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, 491 F. Supp. 3d 738, 740 (S.D. Cal. 2020); *O'Brien Sales & Mktg., Inc. v. Transp. Ins. Co.*, 512 F. Supp. 3d 1019, 1023-24 (N.D. Cal. 2021); *Kevin Barry Fine Art Assocs. v. Sentinel Ins. Co.*, 513 F. Supp. 3d 1163, 1171 (N.D. Cal. 2021); *Out W. Rest. Grp. Inc. v. Affiliated FM Ins. Co.*, 527 F. Supp. 3d 1142, 1149 (N.D. Cal. 2021); *Mortar & Pestle Corp. v. Atain Specialty Ins. Co.*, 508 F. Supp. 3d 575, 580-81 (N.D. Cal. 2020).

c. The recent *Marina Pacific* decision breaks from that consensus and holds that, under California's liberal pleading standards, detailed allegations of the presence of the SARS-CoV-2 virus on property suffice to claim "direct physical loss or damage" to property. 2022 WL 2711886, at *11. The panel acknowledged, however, that its conclusion was "at odds with almost all" COVID-19 coverage decisions. *Id.* at *8. Moreover, the court emphasized that it would not follow *federal* decisions, in particular, because "pleading rules in federal court are significantly different from those [California courts] apply when evaluating a trial court order sustaining a demurrer." *Id.* In *Marina Pacific*'s view, California courts are prohibited from applying the "context-specific" analysis mandated by *Iqbal* and other precedents, which allow a court "to draw on its judicial experience

and common sense." *Id.* (quoting *Iqbal*, 556 U.S. at 678). While "it might be more efficient if [California] trial courts" could likewise "dismiss lawsuits at the pleading stage based on the judges' common sense and understanding of common experience," as their federal counterparts are empowered to do, the panel reasoned that this was "not how the civil justice system works" in California. *Id.* at *11. Given *Marina Pacific*'s express acknowledgment that an alleged presence of COVID-19 would not suffice to establish direct physical damage under federal pleading standards, the decision does not support reversal of the district court in this federal case.

In addition, an intermediate appellate decision is not controlling on this Court if there is "convincing evidence" that the California Supreme Court would not follow it, *Ryman v. Sears, Roebuck & Co.*, 505 F.3d 993, 994 (9th Cir. 2007), and that standard is satisfied here for multiple reasons. First, the sheer weight of contrary authority alone is a strong indication that the California Supreme Court will reject the outlier *Marina Pacific* decision. *See In re Rivera*, 2014 WL 6675693, at *8 (B.A.P. 9th Cir. 2014) (following majority rule where court had "no convincing reason to doubt that the California Supreme Court will follow the weight of authority among California's intermediate appellate courts"). Indeed, since *Marina Pacific* was issued, the California Supreme Court has already declined to depublish *UTA* or to grant review of the case on its own motion. *See*

supra at 20.

Second, the *Marina Pacific* court misconstrued the California standards for sustaining a demurrer. While the court correctly observed that it was obligated to accept as true the insured's *factual* allegations about COVID-19's presence on surfaces and its scientific attributes, it failed to recognize that it was not bound to accept the insured's *legal conclusions* about the effect of those facts—namely, whether presence alone qualifies as "direct physical loss or damage" within the meaning of the policy. *See Moore v. Regents of Univ. of Cal.*, 51 Cal. 3d 120, 125 (1990).

Third, the *Marina Pacific* court gave short shrift to the power of California courts to "take judicial notice of facts that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute," *Daar v. Yellow Cab Co*., 67 Cal. 2d 695, 716 (1967) (quotation omitted), and the well-settled rule that a "complaint should be read as containing the judicially noticeable facts, even when the pleading contains an express allegation to the contrary," *Cantu v. Resol. Tr. Corp*., 4 Cal. App. 4th 857, 877 (1992) (quotation omitted). Those principles empower California courts to consider common-sense realities at the demurrer stage—including the common-sense reality that a virus can be removed from a surface with the swipe of a cloth.

Finally, the *Marina Pacific* court misread language in the particular insuring

agreement in that case—language absent from the Policy here—that provided coverage for losses attributable to direct physical loss or damage "resulting from a covered communicable disease event," including a virus. 2022 WL 2711886, at *10. According to *Marina Pacific*, because that language "explicitly contemplates that a communicable disease, such as a virus" can cause direct physical loss or damage, it necessarily indicates that business interruption losses stemming from the COVID-19 pandemic must be covered. *Id.* Not so. Viruses may cause direct physical loss or damage in circumstances distinct from those here. One court, for example, held that where the insured property was livestock, a virus that caused illness and death to the animals constituted direct physical damage to or loss of the property. *See Curtis O. Griess & Sons, Inc. v. Farm Bureau Ins. Co. of Neb.*, 528 N.W.2d 329, 331 (Neb. 1995). The existence of communicable disease coverage provisions thus does not mean that *all* virus-related losses stem from direct physical loss or damage to property.

For these reasons, *Marina Pacific* provides no sound basis for reversing the district court decision here.

d. Leaving *Marina Pacific* aside, AP also relies on a hypothetical scenario that *Inns by the Seas* mentioned in passing. OB37-38, 40. Though it held that the insured's allegations of mere physical presence did not "identif[y] any direct physical damage to property that caused it to suspend its operations," 71 Cal. App.

5th at 705, the opinion went on to muse that “it could be possible” that some “invisible airborne agent” might constitute direct physical damage, and that it “perhaps” might “be a different story” if such an agent forced a restaurant to shut down and engage in extensive remediation due to its presence at that particular property, *id.* at 704-05 (quotation omitted).

While *Inns by the Sea* left open the question whether such allegations could trigger coverage, *UTA* definitively answered it, squarely rejecting the insured’s reliance on the “hypothetical scenario mentioned in *Inns-by-the-Sea*.” 77 Cal. App. 5th at 838. Explaining that “a discussion of a hypothetical scenario is not a statement of California law” and that “other courts have rejected similar claims,” *UTA* held that “such a scenario” fails to “demonstrate[] ‘direct physical loss or damage.’” *Id.* at 839 (collecting cases). The Court then adopted the view, embraced by numerous courts, that “cleaning or employing minor remediation or preventive measures to help limit the spread of the virus does not constitute direct property damage or loss.” *Id.* (adopting the reasoning of the Sixth Circuit’s decision in *Brown Jug, Inc. v. Cincinnati Insurance Co.*, 27 F.4th 398 (6th Cir. 2022), and citing additional cases).

e. Contrary to AP’s assertions (OB38-39), there is no “split in California authority” as to the applicability of the *UTA* rule to this case. As explained above, *Marina Pacific* comports with *UTA* under the federal pleading standards applicable

here. *UTA* likewise does not conflict with *Inns by the Sea*, but rather simply answered the question left open by that case. *See Boardwalk Ventures CA, LLC v. Century-Nat'l Ins. Co*., 2022 WL 2037844, at *3 (Cal. Super. Ct. 2022) (rejecting insured's contention that "there is a conflict" between *Inns by the Sea* on the one hand and *UTA* and *Musso & Frank* on the other); *MSD Capital, L.P. v. Ace Am. Ins. Co*., 2022 WL 1467601, at *2-3 (Cal. Super. Ct. 2022) (recognizing that *UTA* provided "further guidance" on a point left open by *Inns by the Sea*); *Crown Intermediate Holdco Inc. v. Allianz Glob. Risks US Ins. Co*., 2022 WL 2301880, at *4 (C.D. Cal. 2022) (recognizing consistency between *UTA* and *Inns by the Sea*). Accordingly, viewing the precedents of the California Court of Appeal together and applying federal pleading standards, the *UTA* rule is controlling here and definitively forecloses AP's theory of coverage based on the alleged presence of the virus on its property. *See Baker*, 2022 WL 807592, at *1; *Rialto*, 2022 WL 1172134, at *1.[7]

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[7] AP suggests in a footnote that certification of the questions in this case to the California Supreme Court "may be appropriate." OB40 n.5. But California law authorizes certification only in the absence of "controlling precedent," Cal. R. Ct. 8.548(a), and as discussed, multiple decisions of the California Court of Appeal directly address the questions presented here. *See Mudpie*, 15 F.4th at 890 n.3; *Circus Circus LV, LP v. AIG Specialty Ins. Co*., 2022 WL 1125663, at *2 (9th Cir. 2022). Further, if the California Supreme Court believes the issue is worthy of review, it will have many opportunities for such review in one of the cases arising in the California courts in the ordinary course. *Cf. Anderson v. Deutsche Bank Nat'l Tr. Co. Ams*., 649 F. App'x 550, 552 n.1 (9th Cir. 2016) ("We decline to certify this question to the Supreme Court of California … as it seems clear that the

2. *Even Under The* Inns by the Sea *Hypothetical, AP's Claim Nevertheless Fails*

Even if the hypothetical discussed in *Inns by the Sea* accurately stated California law—contra *UTA*—AP's claims still would fail. That much is clear from *Inns by the Sea* itself: in articulating the hypothetical, the court there cited *this case* as an example of facts that do *not* establish physical damage, contrasting such facts with the hypothetical scenario that "could be a different story." 71 Cal. App. 5th at 704-05 (quoting *Another Planet Ent., LLC v. Vigilant Ins. Co.*, 2021 WL 774141, at *2 (N.D. Cal. 2021) (4-ER-786)). That hypothetical assumed that, unlike here, the insured adequately alleged both (1) the actual presence of SARS-CoV-2 on its insured property *and* (2) that presence was the direct cause of the business shutdown. AP plausibly alleges neither.

a. As an initial matter, AP fails to even adequately allege that SARS-CoV-2 was actually present on insured or dependent business premises. Instead, it equivocally asserts that "SARS-CoV-2 has been present at and in its properties, *or would have been present* but for its efforts to reduce, prevent, or otherwise mitigate its presence on its properties," 3-ER-405 ¶76 (emphasis added), and that "SARS-CoV-2 particles attached to and damaged, *or but for the Closure Orders would have* attached to and damaged, Another Planet's insured premises, as well as the

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California Supreme Court is aware of the emergence of this issue, but has not indicated a readiness to address it.").

surrounding vicinity, 3-ER-408 ¶87 (emphasis added); *see also, e.g.*, 3-ER-380-81 ¶5 ("Another Planet is informed and believes, and on that basis alleges, that SARS-CoV-2 was present at various times on and in its insured properties, *or would have been present* had it not been for the closures of its properties directed to curb the spread of SARS-CoV-2." (emphasis added); 3-ER-406 ¶78 (setting forth threadbare allegation that "SARS-CoV-2 has been present at numerous dependent business premises"). Instead of alleging concrete facts establishing the virus's actual presence, AP's FAC sets forth a theory of coverage based on the *potential* presence of the virus, and merely speculates that the virus may have been present in light of its ubiquitous nature. *See, e.g.*, 3-ER-399 ¶54.

Courts applying federal pleading standards have repeatedly held that allegations based on this conjectural ubiquity-based theory of presence do not suffice to state a plausible claim of direct physical damage. *See*, *e.g.*, *Kim-Chee LLC*, 2022 WL 258569, at *2 (rejecting as insufficient "generic allegations" that virus is "ubiquitous, such that it exists everywhere" and that it was accordingly "present at, in, throughout, and on" insured property); *Dakota Girls, LLC v. Phila. Indem. Ins. Co*., 17 F.4th 645, 649 n.1 (6th Cir. 2021) (noting "the contradiction in [the insured's] complaint—that it could not confirm that anyone with COVID was ever on the covered premises, yet that COVID was also somehow 'damaging surfaces' within"); *Promotional Headwear Int'l v. Cincinnati Ins. Co.*, 504 F.

Supp. 3d 1191, 1203 (D. Kan. 2020) (rejecting "speculative" and "conclusory assertion" that "the virus likely contaminated its property"). The same logic applies here.

b. The FAC is likewise deficient because, even accepting that the FAC adequately alleges the physical presence of the virus, AP cannot plausibly allege that the *presence of the virus* is what *caused* its business interruption losses, especially given AP's own allegation that *governmental orders* caused its losses by limiting use of its property.

In *Inns by the Sea*, the California Court of Appeal assumed that the complaint sufficiently alleged the presence of the virus on insured premises, 71 Cal. App. 5th at 699, but held that such allegations were insufficient because the insured could not "reasonably allege that the presence of the COVID-19 virus on its premises is what *caused* the premises to be uninhabitable or unsuitable for their intended purpose." *Id.* at 703. Rather, "all that [was] required for [the insured] to return to full working order [was] for the government orders and restrictions to be lifted." *Id.* at 704 (quoting *First & Stewart Hotel Owner, LLC v. Fireman's Fund Ins. Co.*, 2021 WL 3109724, at *4 (W.D. Wash. 2021)). Even if the insured had "thoroughly sterilized its premises to remove any trace of the virus," the court observed, it "would still have continued to incur a suspension of operations because the Orders would still have been in effect and the normal functioning of

society still would have been curtailed," illustrating the disconnect between the insured's losses and the actual presence of the virus. *Id* (emphasis omitted).

This Court applied that reasoning in *Rialto Pockets*, holding that an insured's claim of coverage failed under *Inns by the Sea* in light of its inability to adequately plead a causal connection between direct physical loss or damage and the economic losses it incurred. 2022 WL 1172134, at *2.

The same is true here. The only losses the FAC articulates with any specificity are those sustained because of government orders issued to stop the spread of COVID-19 in the community as a whole—losses it would have incurred regardless whether the virus was actually present on its premises. *See* 3-ER-401-05; *see also* OB11 (conceding that AP "was forced to suspend its operations, close [its] concert venues, and cancel performance … *well into 2021*," even though the virus continues to circulate throughout the world in 2022 (emphasis added)). AP's failure to "make the proximate cause allegation based on the particular presence of the virus on its premises," *Inns by the Sea*, 71 Cal. App. 5th at 703, precludes AP from establishing an "actual or potential impairment of operations" that is "caused by or result[s] from direct physical loss or damage … to property," as required by the Policy, 3-ER-485.

C. AP's Counterarguments Lack Merit

AP raises essentially four arguments in an attempt to evade the California

case law set forth above. None has merit.

1. *AP Misrepresents The Policy Language*

AP repeatedly asserts that the language of the Policy is different from that considered by other courts. According to AP, "this Policy only requires 'direct loss or damage to property,'" whereas "many other cases … turned on different policy language—namely, 'direct *physical* loss of or damage to property.'" OB32; *see* OB11 (asserting that Vigilant agreed to insure AP "when there was, to quote the policy, 'direct loss or damage to property'"); OB33 (other courts' "concerns" about virus's negligible physical effect on property "do not arise under this policy"). The asserted distinction is a complete fabrication. In fact, the Policy contains the same standard language requiring "direct physical loss or damage" that has been analyzed by countless courts in rejecting COVID-19 coverage claims. *See supra* at 4-7; 3-ER-380 ¶3. Indeed, it is the *same Vigilant policy form* analyzed in *UTA*, 77 Cal. App. 5th at 824-25.

2. *AP Relies On Inapposite Cases That Have Been Explicitly Rejected In This Context By This Court And The California Court of Appeal*

Seeking to escape the well-established requirement of a direct, demonstrable alteration to property, AP cites inapposite California case law that has been repeatedly distinguished by courts in the COVID-19 coverage context.

a. To start, AP repeatedly cites *AIU Insurance Co. v. Superior Court*, 51 Cal. 3d 807 (1990)—a case involving commercial general liability ("CGL")

coverage for damage caused by environmental contaminants, *id.* at 813-14—and *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co*., 45 Cal. App. 4th 1 (1996)—a case involving CGL coverage for asbestos damage, *id.* at 37. AP relies on these decisions for the proposition that "microscopic substances that do not cause visible alterations to property may still cause direct loss or damage." OB30. But courts addressing COVID-19 coverage arguments have repeatedly held that *Armstrong* and *AIU* have no relevance to the COVID-19 commercial property coverage context.

The *UTA* decision again leads the way. According to *UTA*, "cases involving CGL coverage are of limited benefit in determining the scope of property insurance coverage" because the "cause of loss in the context of property insurance is wholly different from that in a liability policy, and a liability insurer agrees to cover the insured for a broader spectrum of risks than in property insurance." 77 Cal. App. 5th at 837 (quotation omitted).[8] Further, *UTA* explains, "[w]hile the infiltration of asbestos as in *Armstrong* or environmental contaminants as in *AIU* constituted property damage in that they rendered a property unfit for a certain use

[8] Indeed, AP concedes that the policy in *Armstrong* defined property damage to include "loss of use" (OB32)—a distinction that makes that case inapposite. *See Selane Prods., Inc. v. Cont'l Cas. Co.*, 2021 WL 609257, at *4 (C.D. Cal. 2021) (distinguishing "the commercial general liability policies in *AIU* and *Armstrong*" because they "expressly included the 'loss of use' of tangible property"), *aff'd*, 2021 WL 4496471 (9th Cir. 2021).

or required specialized remediation, the comparison to a ubiquitous virus transmissible among people and untethered to any property is not apt." 77 Cal. App. 5th at 838. Asbestos contained within "installed building materials" and environmental contaminants at an affected site are both "necessarily tied to a location, and require specific remediation or containment to render them harmless," in contrast to the general, non-property related measures necessary to reduce the risk from COVID-19. *Id.* *Inns by the Sea* agrees: "*Armstrong* is not a persuasive precedent" because "it dealt with insurance coverage under a third party commercial general liability (CGL) policy with different policy language and posing distinct coverage issues." 71 Cal. App. 5th at 701 n.16. Controlling California precedent thus forecloses AP's reliance on *AIU* and *Armstrong*.

b. AP also relies (OB35-36) on *Hughes v. Potomac Insurance Co. of D.C.*, 199 Cal. App. 2d 239, 249 (1962), and *Strickland v. Federal Insurance Co.*, 200 Cal. App. 3d 792, 799-801 (1988), both of which involved the interpretation of homeowner's insurance policies in the context of landslides that physically imperiled insured homes without causing the homes themselves to collapse. According to AP, those cases establish that the requirement of "direct physical loss or damage" can be satisfied simply "if property is not usable for its intended purpose" without an accompanying tangible physical impact to the property. OB35. AP is incorrect. As the California Court of Appeal explained in *Ward*

General Insurance Services, Inc. v. Employers Fire Insurance Co., 114 Cal. App. 4th 548 (Cal. Ct. App. 2003), the actual "loss of the backyard" in *Hughes* was "[q]uite clearly" a "physical loss of tangible property," leaving only the further question of "whether the insured 'dwelling' included the ground under the building," *id.* at 558. That question was easily answered: "It goes without question that [insured's] 'dwelling building' suffered real and severe damage when the soil beneath it slid away and left it overhanging a 30-foot cliff." *Hughes*, 199 Cal. App. 2d at 249. In other words, by physically altering the foundation underlying the insured structure, the landslide transformed it from a stable and safe dwelling into an unstable and unsafe structure—not a "dwelling" at all, that is. The virus worked no such physical transformation here.

For these reasons, this Court and multiple California Court of Appeal decisions have squarely rejected insureds' attempts to apply *Hughes* and *Strickland* to the COVID-19 coverage context. As *UTA* explained, these cases did not involve the "loss of use of otherwise undamaged property." 77 Cal. App. 5th at 833. "To the contrary, the undermined ground beneath both houses placed the structures at serious risk. Moreover, the risk was inextricably linked to the insured property." *Id.* The insured's COVID-19 related business-interruption losses, by contrast, "arose from closures intended to limit the spread of a virus that can carry great risk to people but no risk at all to a physical structure." *Id.*; *see Inns by the Sea*, 71 Cal.

App. 5th at 701-02 (concluding that *Hughes* does not support insured's argument). This Court in *Mudpie* agreed: *Hughes* "did not purport to interpret a 'direct physical loss' provision similar to the one at issue here" and "did not imply that an insured need not show any physical change to the insured property to prove 'direct physical loss.'" 15 F.4th at 891.

c. Finally, AP cites (OB36) the decision in *Total Intermodal Services Inc. v. Travelers Property Casualty Co. of America*, 2018 WL 3829767 (C.D. Cal. 2018), which holds that that the "permanent dispossession" of property—for example, from theft, conversion, or misplacement—constitutes "direct physical loss of" property, *id.* at *4; *see supra* note 3. This case obviously does not apply here: AP does not allege that it was permanently dispossessed of any property. *See Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Conn.*, 492 F. Supp. 3d 1051, 1056 (C.D. Cal. 2020) (insured could not recover for COVID-19 business interruption losses because, "[e]ven if the Policy covers 'permanent dispossession' in addition to physical alteration" under *Total Intermodal* rule, complaint "does not allege that it was permanently dispossessed of any insured property"); *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 487 F. Supp. 3d 834, 839 (N.D. Cal. 2020) (same), *aff'd*, 15 F.4th 885.

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

AP next seeks support from the fact that the Policy is a "package" policy

that contains both a Liability section and a Property section. OB12. That fact is meaningless: countless other COVID-19 coverage cases have likewise involved combination policies with both liability and property sections, including two cases controlling here: *Mudpie* and *UTA*. *See Mudpie*, 15 F.4th at 888; Appellant's Opening Brief, *United Talent Agency, LLC v. Vigilant Ins. Co.*, 2021 WL 5514433, at *15 (Cal. Ct. App. Oct. 29, 2021) (hereinafter "UTA Opening Brief").

AP likewise gets nowhere in citing the "Biological Agents" exclusion in the policy's Liability section, which defines Biological Agents to include viruses. According to AP, the exclusion implies "Vigilant's knowledge of the ability of a virus to cause property damage." OB17. That argument fails for at least two reasons.

First, courts have routinely recognized that it is inappropriate to "cross wires between different definition sections of the Policy" in this manner, since business income coverage and commercial general liability sections "protect entirely different interests." *Michael Cetta, Inc. v. Admiral Indem. Co.*, 506 F. Supp. 3d 168, 181 (S.D.N.Y. 2020); *see UTA*, 77 Cal. App. 5th at 837 (in CGL context, "insurer agrees to cover the insured for a broader spectrum of risks than in property insurance"); *see Mudpie*, 487 F. Supp. 3d at 843 n.8; *Garvey*, 48 Cal. 3d at 408.

The Policy here reflects those important differences. The term "property damage" in the Policy's Liability section contrasts markedly with the Property

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

Second, even if it were permissible to cross different wires from different Policy sections, the inclusion of virus in the Biological Agents exclusion does not suggest that a virus *necessarily* causes "direct physical loss or damage." In fact, courts have found that a virus *can* damage insured property, as when a virus kills or sickens insured livestock. *See Curtis O. Griess*, 528 N.W.2d at 331. In that situation, a Biological Agents exclusion would apply. But the fact that some viruses can damage living property does not establish that the *SARS-CoV-2 virus* damages inert property that it alights upon, any more than a flu virus does.

AP's reliance on the "Biological Agents" exclusion is thus doubly misplaced. Little wonder, then, that the *UTA* trial and appellate courts rejected the same argument based on the same "Biological Agents" exclusion in the same policy form. *See* UTA Opening Brief, 2021 WL 5514433, at *21-22 (emphasizing

that the liability section of the policy in that case contained an exclusion for loss caused by "Biological Agents," a term defined to include viruses); *see also United Talent Agency, LLC v. Vigilant Ins. Co.*, 2021 WL 4197670, at *12 (Cal. Super. 2021) (rejecting identical argument by insured based on "the existence of the Biological Agents exclusion in *liability* coverage"), *aff'd*, 77 Cal. App. 5th 821.

4. *The Absence Of A Virus Exclusion Is Irrelevant*

Finally, AP argues that coverage should apply because the policies do not contain a specific exclusion for virus-related losses promulgated by the Insurance Services Office ("ISO"). But under California law, extrinsic evidence "is not admissible to flatly contradict the express terms of an agreement." *Supervalu, Inc. v. Wexford Underwriting Managers, Inc.*, 175 Cal. App. 4th 64, 75 (2009) (quotation omitted). For that reason, this Court rejected a similar effort by an insured to rely on extrinsic evidence in another COVID-19 coverage case, explaining that "the evidence [the insured] proffered" was inadmissible under California law because it was "irrelevant to proving the meaning of 'physical loss of or damage to' property as used in this Policy." *Selane Prods., Inc. v. Cont'l Cas. Co.*, 2021 WL 4496471, at *1 (9th Cir. 2021); *see Gen. Reinsurance Corp. v. St. Jude Hosp.*, 107 Cal. App. 4th 1097, 1108 (2003) ("[T]he insured's expectations ... cannot be relied upon to create an ambiguity where none exists."); *Pac. Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 37

(1968) (extrinsic evidence that is not "relevant to prove a meaning to which the language of the instrument is reasonably susceptible" is inadmissible).[9]

The California Court of Appeal in *Inns by the Sea* already rejected an insured's argument for coverage based on the absence of a virus exclusion from a property damage policy. That argument, the court explained, "improperly attempts to rely on the absence of an exclusion to create an ambiguity in an otherwise unambiguous insuring clause," contravening the settled rule of California law that "coverage is defined in the first instance by the insuring clause, and when an occurrence is clearly not included within the coverage afforded by the insuring clause, it need not also be specifically excluded." 71 Cal. App. 5th at 709 (alteration and quotation omitted). As *Inns by the Sea* further explains, both cases cited by AP in support of this argument—*Fireman's Fund Insurance Cos. v. Atlantic Richfield Co.*, 94 Cal. App. 4th 842 (2001) and *Pardee Construction Co. v. Insurance Co. of the West*, 77 Cal. App. 4th 1340 (2000), *see* OB44—are "inapposite because [they do] not deal with the absence of an *exclusion* in a policy; instead, the cases discuss the significance of missing language *in the insuring*

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[9] For the same reasons, AP derives no support from allegations of vague and conclusory "evidence" bearing on Vigilant's general awareness of the possibility of pandemics and their effect on the insurance industry as a whole. OB42-43. Nor is there merit in AP's passing suggestion that it is entitled "to develop evidence regarding whether the parties understood that a virus like SARS-CoV-2 could cause 'direct physical loss or damage to property.'" OB10.

clause itself," 71 Cal. App. 5th at 709-10.

II. THE DISTRICT COURT PROPERLY DISMISSED AP'S CIVIL AUTHORITY COVERAGE CLAIM

AP fares no better under the Policy's Civil Authority provision, which by its plain terms applies only when three distinct conditions are each satisfied: there is (i) "direct physical loss or damage to property" near the insured premises, (ii) that "direct[ly]" causes a civil authority (iii) to "prohibit[]" access to the insured premises. 3-ER-487-88. AP does not and cannot allege facts establishing any of these conditions.

A. AP's Failure To Adequately Allege Direct Physical Loss Or Damage Precludes Civil Authority Coverage

"The imperative of a 'direct physical loss' or 'direct physical damage' … is the North Star of this property insurance policy from start to finish." *Santo's*, 15 F.4th at 402. Thus, as with the Business Income provisions, coverage under the Policy's Civil Authority provisions fails because AP cannot establish "direct physical loss or damage."

Neither the FAC nor AP's opening brief even attempts to identify a qualifying property as a basis for asserting Civil Authority coverage, apparently expecting this Court to extrapolate from its failed "ubiquity" theory of presence both (1) that some building actually exists within the required proximity, and (2) that the unknown building suffered direct physical loss or damage. But as

explained above, AP does not allege facts establishing that COVID-19 causes any tangible alteration to property amounting to “direct physical loss or damage.” And “just as the presence of the virus does not constitute physical loss or damage to insured property, it also does not constitute physical loss or damage to property ‘away from’ or within a mile of the covered property.” *UTA*, 77 Cal. App. 5th at 840. Accordingly, for the same reason coverage does not apply under the Business Income provisions, Civil Authority coverage does not apply either. *See id.*; *Selane*, 2021 WL 4496471, at *1; *Gilreath*, 2021 WL 3870697, at *2; *Sanzo*, 182 N.E.3d at 406; *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, 487 F. Supp. 3d 937, 945 (S.D. Cal. 2020).

B. The Civil Authority Orders Were Not Issued In Response to Nearby Property Damage

AP also cannot satisfy the causation element of Civil Authority coverage—it does not allege facts establishing that the relevant orders were issued as “the direct result” of prior direct physical loss or damage to a nearby property, as the Policy requires. 3-ER-488. To the contrary, AP itself alleges that the orders were issued “in order to curtail the spread of SARS-CoV-2” due to the general “prevalence of SARS-CoV-2” in the community, since “COVID-19 testing was not readily available and was imprecise”—not because of the presence of the virus at any particular location, let alone an insured or dependent business premises of AP. 3-ER-401 ¶58.

UTA and *Inns by the Sea* are again controlling here. The insured in *UTA*, like AP, relied on California Executive Order N-25-20, among others, as the basis for its claim of Civil Authority coverage. *See UTA*, 77 Cal. App. 5th at 825 n.3; 43-ER-402-03. The California Court of Appeal scrutinized the text of the orders and, based on its analysis of that text, looked beyond the complaint's conclusory allegations regarding the purpose of the government orders to conclude that "[c]losure orders across the country," including California Executive Order N-25-20, "were issued in response to the public health crisis arising from the pandemic, not as 'the direct result of' damage to property near [the insured's property]." *UTA*, 77 Cal. App. 5th at 840.[10] Because, under the Policy, "the civil authority order cannot *itself* cause the 'physical loss or damage to property,'" but rather the

[10] The court reached this conclusion notwithstanding that one of the orders cited by insured—much like one of the Nevada orders cited by AP—contained a passing reference to property damage. *See UTA*, 77 Cal. App. 5th at 840 (quoting order's statement that "the COVID-19 virus … is physically causing property loss or damage due to its tendency to attach to surfaces for prolonged periods of time"); *compare* 3-ER-403 ¶64. *UTA* thus refutes AP's contention that there is any relevance to "statements of public officials specifying that the shut-down orders were issued, in part, to prevent further property damage and loss." OB23. To the contrary, courts have made clear that preventative orders issued to avoid *future* damage fail to satisfy the requirements of Civil Authority coverage. *See*, *e.g.*, *United Air Lines, Inc. v. Ins. Co. of the State of Pa.*, 439 F.3d 128, 134-35 (2d Cir. 2006) (closure of airport after September 11 attacks was to prevent future terrorist acts and not direct result of damage to Pentagon); *Mudpie*, 487 F. Supp. 3d at 844 (no coverage because "orders were preventative"); *see also Levy Ad Grp., Inc. v. Fed. Ins. Co*., 2022 WL 816927, at *1 (9th Cir. 2022) (affirming denial of Civil Authority claims based on Nevada orders).

damage must "*preced[e] and necessitate[]* the issuance of the civil authority order," Civil Authority coverage did not apply. *Id*.

Inns by the Sea is in accord. There, too, the court analyzed the text of the relevant civil authority orders to distill their purpose, ultimately concluding that "the Orders were issued to prevent the spread of the pandemic, not because of any direct physical loss of or damage to property." 71 Cal. App. 5th at 712. The orders accordingly "did not trigger the Policy's Civil Authority coverage." *Id.*

UTA and *Inns by the Sea* are far from alone in that analysis. Many decisions "have made the same observation in concluding that government stay-at-home and closure orders resulting from the pandemic did not give rise to Civil Authority coverage." *Id*. These decisions all recognize that "the government closure orders were intended to prevent the spread of COVID-19," *Mudpie*, 487 F. Supp. 3d at 844, and "not as a result of any physical loss of or damage to property," *Mortar & Pestle*, 508 F. Supp. 3d at 582; *see 10012 Holdings*, 21 F.4th at 223; *Baker v. Or. Mut. Ins. Co.*, 2021 WL 1145882, at *5 (N.D. Cal. 2021), *aff'd*, 2022 WL 807592; *Tralom, Inc. v. Beazley USA Servs., Inc.*, 2020 WL 8620224, at *6 (C.D. Cal. 2020). As these authorities establish, Civil Authority coverage does not apply because AP does not and cannot allege facts establishing the requisite "causal link between prior damage and civil authority order." *Dickie Brennan & Co. v. Lexington Ins. Co.*, 636 F.3d 683, 686 (5th Cir. 2011).

C. The Civil Authority Orders Did Not Prohibit Access To AP's Property

AP's Civil Authority coverage claim fails for the independent reason that AP does not allege a "prohibition of access" to its premises. No order banned AP employees or anyone else from entering onto its property. AP insists otherwise (OB45-46), but its theory appears to be that the prohibition-on-access requirement can be satisfied *even when access is allowed*, merely so long as a government order restricts the *use* of property for some particular purpose. AP thus contends that Civil Authority coverage applies here because government orders effectively prohibited AP from using its property to conduct its operations in the same manner that it ordinarily would.

That theory is incorrect. By its plain terms, the Civil Authority provision is triggered only by a *prohibition* on *access* to property, not by a regulatory restriction on the permissible *use* of the property. A "prohibition" is a "law or order that forbids a certain action." Black's Law Dictionary (11th ed. 2019); *see 730 Bienville Partners, Ltd. v. Assurance Co. of Am.*, 67 F. App'x 248, 2003 WL 21145725, at *2 (5th Cir. 2003) (the "plain, ordinary, and generally prevailing meaning" of "prohibit" is "to forbid by authority or command") (emphasis omitted). And what the Civil Authority provision requires is a prohibition on "access," not "use."

The Tenth Circuit's pre-COVID-19 decision in *Southern Hospitality, Inc. v. Zurich American Insurance Co.*, 393 F.3d 1137, 1139-41 (10th Cir. 2004), properly distinguishes between orders that prohibit access to property and orders that have only the effect of reducing the public's use of the premises. In *Southern Hospitality*, hotel owners sought to recover for economic losses they incurred when the Federal Aviation Administration temporarily closed neighboring airports following the September 11th terrorist attacks. Like here, the policy applied only when a civil authority "prohibits access" to the insured premises. *Id.* at 1138. The court declined to find coverage, explaining that the "plain and ordinary meaning of 'prohibit' is to 'formally forbid, esp. by authority' or 'prevent,'" and there was no dispute that the FAA did not forbid access to the insureds' hotels. *Id.* at 1140; *see 730 Bienville Partners*, 67 F. App'x at *2-3 (same). The same is true here: nothing in the civil authority orders cited in the FAC forbade anyone from accessing AP's property. At most, the orders restricted AP's ability to use its property to conduct its business, but as shown, Civil Authority coverage addresses prohibitions on access, not restrictions on use.

Courts have consistently recognized that essential distinction in the context of COVID-19 related government orders. *See*, *e.g.*, *Protégé Rest. Partners LLC v. Sentinel Ins. Co.*, 517 F. Supp. 3d 981, 990 (N.D. Cal. 2021) ("access was not 'prohibited' where [insured] was still able to enter the premises, even though the

order prevented customers from entering"); *Jonathan Oheb MD, Inc. v. Travelers Cas. Ins. Co. of Am.*, 2020 WL 7769880, at *4 (C.D. Cal. 2020) (no civil authority coverage for COVID-19 related losses because civil authority orders "did not prevent all access") (emphasis omitted); *Barbizon Sch. of S.F., Inc. v. Sentinel Ins. Co.*, 530 F. Supp. 3d 879, 891 (N.D. Cal. 2021) (no civil authority coverage where plaintiff was prohibited from using its property to operate its business but could still access property); *Wellness Eatery*, 517 F. Supp. 3d at 1107 (orders hindering access without completely barring access do not trigger civil authority coverage).

Failing to recognize the distinction between an order prohibiting access and an order restricting use would result in wholly untenable results. Under AP's theory, Civil Authority coverage would apply, for example, when a new law restricts alcohol sales near a school, causing an insured restaurant or liquor store to change or cease operations, even though nobody is prevented from accessing the property. Regulatory laws that restrict the use of property have never been understood as prohibitions on access triggering Civil Authority coverage.

AP's claim of Civil Authority coverage elides the distinction between a business's *operations* (which is, at best, what the civil authority orders affected) and the business's physical *premises* (which is what the Policies cover). The distinction is central to the Civil Authority provision, which "only provides coverage to the extent that access to Plaintiff's *physical premises* is prohibited, and

not if Plaintiff[]s are simply prohibited from operating their *business*." *Pappy's*, 487 F. Supp. 3d at 945 (emphases added). Because AP cannot allege that any government order prohibited access to its premises, Civil Authority coverage does not apply.

III. AP IS NOT ENTITLED TO "MITIGATION DAMAGES"

Finally, AP contends that it is entitled to recover the losses that resulted from the suspension of its business "as necessary mitigation expenses." OB47. That contention is meritless. The duty to mitigate, which is incorporated in the Policy section setting forth the "Insured's Duties in The Event of Loss or Damage," is obviously limited to mitigation of *covered losses*, and thus cannot form the basis for creating coverage where none otherwise exists. *See Grebow v. Mercury Ins. Co.*, 241 Cal. App. 4th 564, 574-75 (2015); 3-ER-559. Because, for the reasons set forth above, AP cannot plead that any of its losses resulted from "direct physical loss or damage," as required by every affirmative coverage provision on which it relies, it cannot recover its losses by recasting them as "mitigation damages." *See Caribe Rest. & Nightclub, Inc. v. Topa Ins. Co.*, 533 F. Supp. 3d 938, 942 (C.D. Cal. 2021) (given failure to plead "direct physical loss or damage," no coverage for COVID-19 claims under "provision [that] merely provides the insured's duties to mitigate losses 'in the event of loss or damage' to the property covered by another provision of the Policy"); *Water Sports Kauai,*

Inc. v. Fireman's Fund Ins. Co., 499 F. Supp. 3d 670, 676 (N.D. Cal. 2020) (similar).[11]

IV. THE DISTRICT COURT PROPERLY DISMISSED AP'S BAD FAITH AND FRAUD CLAIMS

AP mentions in passing—but fails to develop any argument with respect to—its bad faith and fraud claims, which the district court dismissed alongside its breach of contract and declaratory judgment claims. AP has not sufficiently preserved those claims. *See United States v. Kama*, 394 F.3d 1236, 1238 (9th Cir. 2005). They are meritless in any event.

A. AP Fails To State A Bad Faith Claim

To establish a claim for the tortious breach of the implied covenant of good faith and fair dealing under California law, "(1) benefits due under the policy must have been withheld; and (2) the reason for withholding benefits must have been unreasonable or without proper cause." *Love v. Fire Ins. Exch.*, 221 Cal. App. 3d 1136, 1151 (1990).

AP's claim fails at each step. First, a bad faith claim generally "cannot be maintained unless policy benefits are due under the contract." *Waller*, 11 Cal. 4th

[11] For the same reasons, AP cannot recover under the Policy's "Loss Prevention Expenses" provision, which covers solely those expenses incurred to avoid "imminent *direct physical loss or damage*." 3-ER-458 (emphasis added). AP also alleges no facts satisfying the provision's other requirements, including notifying Vigilant of "any loss prevention action" within forty-eight hours and providing advance notice of such actions "[t]o the extent possible." *Id.*

at 35; *see Brown v. Mid-Century Ins. Co.*, 215 Cal. App. 4th 841, 858 (2013) ("Because the policy did not cover the [insureds'] claims … [they] do not have a claim for breach of the implied covenant of good faith and fair dealing."); *Mudpie*, 15 F.4th at 893. Because AP does not state a claim for coverage under the Policies, no "benefits are due," conclusively foreclosing any bad-faith claim.

Second, given the vastly overwhelming case law supporting the denial of property damage coverage in this exact situation—including directly-on-point decisions from this Court and the California Court of Appeal—the denial cannot be deemed unreasonable, even if this Court were to decide that it was incorrect. It is "settled law in California"—as elsewhere—that an insurer denying coverage "due to the existence of a genuine dispute with its insured as to the existence of coverage liability … is not liable in bad faith." *Chateau Chamberay Homeowners Ass'n v. Associated Int'l Ins. Co.,* 90 Cal. App. 4th 335, 347 (2001); *see, e.g.*, *Brunswick Panini's, LLC v. Zurich Am. Ins. Co*., 520 F. Supp. 3d 965, 978 (N.D. Ohio 2021) (insurer had "reasonable justification" for denying coverage given "growing consensus of courts that have rejected COVID-19 business interruption claims" (internal quotation marks omitted)).

B. AP Fails To State A Fraud Claim

The district court correctly dismissed AP's fraud claims because the FAC falls far short of the heightened pleading requirements mandated by Federal Rule

of Civil Procedure 9(b), which requires parties to "state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b); *see Neilson v. Union Bank of Cal., NA*., 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003) ("It is well-established in the Ninth Circuit that both claims for fraud and negligent misrepresentation must meet Rule 9(b)'s particularity requirements."). "To properly plead fraud with particularity under Rule 9(b), a pleading must identify the who, what, when, where, and how of the misconduct charged, as well as what is false or misleading about the purportedly fraudulent statement, and why it is false.'" *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 964 (9th Cir. 2018) (quotation omitted). The FAC merely recites the basic elements of each claim without pleading the requisite facts with respect to the sale of the Policy to AP. The district court correctly dismissed these claims. *See Water Sports Kauai*, 499 F. Supp. 3d at 680; *Wellness Eatery*, 517 F. Supp. 3d at 1108.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Dated: August 5, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Circuit Rule 32-1(a) and Federal Rule of Appellate Procedure 32(a)(5)(A). This brief uses a proportional typeface and 14-point font, and it contains 13,245 words.

Dated: August 5, 2022 By: */s/ Jonathan D. Hacker*

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendant-Appellee Vigilant Insurance Company states that it is aware of the following related cases, which raise the same or closely related issues, currently pending before this Court:

- 10E, LLC v. Travelers Indemnity Co. of Connecticut, 20-56206
- AECOM v. Zurich American Insurance Company, 22-55092
- B & F Enterprises Northwest LLC v. AMCO Insurance Company, 21-35501
- BA LAX, LLC et al v. Hartford Fire Insurance Company et al, 21-55109
- Caballero v. Massachusetts Bay Insurance Company, 21-35510
- Cadeceus LLC v. Scottsdale Insurance Company, 21-35506
- Caribe Restaurant and Nightclub v. Topa Insurance Co, 21-55405
- Chorak v. Hartford Casualty Insurance Company, 21-35508
- Colgan v. Sentinel Insurance Company LTD, 21-15332
- Daneli Shoe Company v. Valley Forge Insurance Company, 21-55374
- Discount Electronics, Inc. et al v. Wesco Insurance Company et al, 22-55133
- Egg and I, LLC et al. v. U.S. Specialty Insurance Company et al, 21-15545
- Fink v. Hanover Insurance Group, Inc. et al, 21-15421
- First & Stewart Hotel Owner LLC v. Fireman's Fund Ins. Co., 21-35637
- Founder Institute Inc. v. Hartford Fire Insurance Company, 21-15404
- French Laundry Partners LP v. Hartford Fire Insurance Company, 21-15927
- Germack v. Dentists Insurance Company, 21-35491
- Glacial Cryotherapy LLC v. Evanston Insurance Company, 21-35505
- Green Apple Event Company Inc v Liberty Mutual Group Inc, 22-55181
- Gym Management Services Inc. v. Vantapro Specialty Ins, Co. 21-55231
- Hillbro LLC v. Oregon Mutual Insurance Co., 21-35810
- Hot Yoga Inc v. Philadelphia Indemnity Insurance Company, 21-35806
- HP Tower Investments, LLC v. Nationwide Mutual Ins. Co., 21-56240
- HT-Seattle Owner LLC v. Am. Guarantee & Liability Ins. Co., 21-35916
- In-N-Out Burgers v. Zurich American Insurance Company, 22-55266
- Islands Restaurants, LP et al v. Affiliated FM Insurance Co. et al, 21-55409
- JC SC LLC v. Travelers Indemnity Company of Connecticut, 22-55200
- Kevin Barry Fine Art Associates v. Sentinel Insurance Co., Ltd, 21-15240
- Khatchik Hairabedian v. Security National Insurance Co. et al, 22-55355
- Kuhen v. The Hartford Financial Services Group, Inc. et al, 21-56368
- La Cocina de Oaxaca LLC v. Tri-State Insurance Co. of Minn., 21-35493
- Lulus Fashion Lounge LLC v. Hartford Fire Insurance Co., 22-15675

- Madison International v. Valley Forge Insurance Company, 22-55162
- Marler v. Aspen American Insurance Company, 21-35492
- McCulloch v. Valley Forge Insurance, 21-35520
- Menominee Indian Tribe of Wisconsin v. Lexington Ins. Co., 21-16557
- MGA Entertainment, Inc. v. Affiliated FM Insurance Company, 21-55792
- Mostre Exhibits, LLC v. Sentinel Insurance Company, Limited, 22-55191
- Nari Suda LLC et al v. Oregon Mutual Insurance Company, 21-35846
- Neighborhood Grills Mgmt. LLC et al v. National Surety Corp., 21-35753
- Nguyen v. Travelers Casualty Insurance Company of America, 21-35496
- North Pacific Mgmt., Inc. et al v. Liberty Mutual Fire Ins. Co., 21-35842
- Nue LLC v. Oregon Mutual Insurance Company, 21-35813
- Out West Restaurant Group Inc. et al v. Affiliated FM Ins. Co., 21-15585
- Pacific Endodontics PS v. Ohio Casualty Insurance Company, 21-35500
- Palmdale Estates, Inc. v. Blackboard Insurance Company, 21-15258
- Palomar Health v. American Guarantee and Liability Ins. Co. et al, 21-56073
- Pez Seafood DTLA, LLC v. Travelers Indemnity Company, 21-55100
- Protege Restaurant Partners LLC v. Sentinel Insurance Company, 21-16814
- Hovagimian v. Maxum Casualty Insurance Company, 22-55358
- Ragged Point Inn, LP v. State National Insurance Company, 21-56167
- RV Agate Beach, LLC et al v. Hartford Fire Insurance Company, 21-35946
- Seven LLC v. ACE Property and Casualty Insurance Company, 21-35588
- Tao Group Holdings, LLC v. Employers Ins. Co. of Wausau, 22-15506
- Team 44 Restaurants LLC et al v. The American Insurance Co., 22-15403
- The Oregon Clinic, PC v. Fireman's Fund Insurance Company, 22-35047
- The Typewritorium Company v. The Travelers Companies, Inc., 21-16716
- TP Racing LLLP v. American Home Assurance Company, 21-16910
- Trinh v. State Farm General Insurance Company, 21-15147.
- Vita Coffee LLC v. Fireman's Fund Insurance Co., 21-35646
- Water Sports Kauai, Inc. v. Fireman's Fund Insurance Co., 21-15366
- Wellington Athletic Club v. Allied World Surplus Lines Ins. Co., 21-35884

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