David B. Goodwin (Cal. Bar No. 104469)
Sylvia Huang (Cal. Bar No. 313358)
COVINGTON & BURLING LLP
415 Mission Street, Suite 5400
San Francisco, California 94105-2533
Telephone: + 1 (415) 591-6000
Facsimile: + 1 (415) 591-6091
Email: dgoodwin@cov.com; syhuang@cov.com

Attorneys for UNITED POLICYHOLDERS

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

STEVEN BAKER AND MELANIA KANG D/B/A CHLOE'S CAFE,

Plaintiff,

v.

OREGON MUTUAL INSURANCE COMPANY,

Defendant.

CASE NO: 3:20-cv-05467-LB

MOTION OF *AMICUS CURIAE* UNITED POLICYHOLDERS TO SUBMIT MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND, IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT; [PROPOSED] *AMICUS CURIAE* MEMORANDUM

Date: December 17, 2020
Time: 9:30 a.m.
Location: Magistrate Judge
Laurel Beeler, Via Webinar

United Policyholders ("UP") moves the Court for an order permitting it to file the attached *amicus curiae* memorandum of points and authorities in support of Plaintiffs. The memorandum, a copy of which is attached, analyzes and brings to the Court's attention longstanding California precedents and principles of California insurance law that bear directly on the coverage claims of COVID-19-affected policyholders but that have for far too long during this pandemic been overlooked. The issues implicated by this case and examined in this proposed amicus are far-reaching and of critical importance, as they may affect the fate of insurance coverage for businesses throughout California.

INTEREST OF PROPOSED *AMICUS CURIAE*

UP is a highly respected national non-profit 501(c)(3) organization and policyholder advocate. Founded in 1991, for nearly three decades UP has operated as a dedicated information resource for individual and commercial insurance consumers throughout the entire United States, and has helped secure important trial and appellate victories for policyholders who have been forced to litigate their rights in court. During this historic pandemic, UP's commitment to defending and arguing for policyholders' rights to coverage for their wide-scale losses is more critical than ever.

UP assists purchasers of insurance when seeking a policy or pursuing a claim for loss. For example, UP is routinely called upon to help individual policyholders in the wake of large-scale national disasters such as floods and windstorms in the Midwest, wildfires in Arizona, California, Colorado, New Mexico, Oregon and Washington, and hurricanes in the Gulf States and across the Eastern Seaboard. In 2020, UP has been engaged in the critical effort to assist business owners around the country whose operations have been affected by COVID-19 and public safety orders. UP is conducting educational workshops for businesses and trade associations and maintaining an online help library at uphelp.org/COVID.

In addition to hosting disaster-relief workshops and clinics around the country and helping individual policyholders resolve coverage questions and claim disputes, UP routinely engages in nation-wide policy work to assist and educate the public, governmental agencies, and the courts on policyholders' insurance rights. Grants, donations, and volunteers support UP's work, which is divided into three program areas: Roadmap to Recovery™ (disaster recovery and claim help), Roadmap to

Preparedness (insurance and financial literacy and disaster preparedness), and Advocacy and Action (advancing pro-consumer laws and public policy). Public officials, state insurance regulators, academics, and journalists throughout the U.S. routinely seek UP's input on insurance and legal matters. UP serves on the Federal Advisory Committee on Insurance, which briefs the Federal Insurance Office and in turn, the U.S. Treasury Department. UP's Executive Director has been an official consumer representative to the National Association of Insurance Commissioners since 2009. In that role, UP assists regulators in monitoring policy language and claim practices through presentations and collaboration and the development of model laws and regulations.

Since 1991, UP has filed amicus briefs in federal and state appellate courts across 42 states and in more than 450 cases, including more than 40 published appellate decisions applying California law. UP's amicus briefs have been cited in the opinions of many state supreme courts, including the Supreme Court of California, as well as the U.S. Supreme Court. *See, e.g., Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999); *Pitzer Coll. v. Indian Harbor Ins. Co.,* 8 Cal. 5th 93, 104 (2019); *Julian v. Hartford Underwriters Ins. Co.*, 110 P.3d 903, 911 (Cal. 2005); *Cont'l Ins. Co. v. Honeywell Int'l, Inc.*, 188 A.3d 297, 322 (N.J. 2018); *Allstate Prop. & Cas. Ins. Co. v. Wolfe*, 105 A.3d 1181, 1185-86 (Pa. 2014).[1]

By submitting a brief in this matter, UP seeks to fulfill the classic role of *amicus curiae* in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration. This is an appropriate role for *amicus curiae*. As commentators have often stressed, an amicus is often in a superior position to "focus the court's attention on the broad implications of various possible rulings." R. Stern, E. Greggman & S. Shapiro, *Supreme Court Practice* 570-71 (1986) (quoting Ennis, *Effective Amicus Briefs*, 33 Cath. U. L. Rev. 603, 608 (1984)).

UP therefore respectfully requests leave to file the attached *amicus curiae* brief presenting additional authorities and discussion in support of the arguments of Plaintiffs, Steven Baker and Melania Kang d/b/a Chloe's Cafe ("Chloe's Café") in their case for coverage against Defendant Oregon Mutual Insurance Company ("Oregon Mutual").

---

[1] A complete listing of all cases in which UP has appeared as *amicus curiae* can be found in our online Amicus Project library at www.uphelp.org.

DATED: December 7, 2020

Respectfully submitted,

COVINGTON & BURLING LLP

By: */s/* David B. Goodwin

David B. Goodwin

Attorney for Amicus Curiae
UNITED POLICYHOLDERS

David B. Goodwin (Cal. Bar No. 104469)
Sylvia Huang (Cal. Bar No. 313358)
COVINGTON & BURLING LLP
415 Mission Street, Suite 5400
San Francisco, California 94105-2533
Telephone: + 1 (415) 591-6000
Facsimile: + 1 (415) 591-6091
Email: dgoodwin@cov.com; syhuang@cov.com

Attorneys for UNITED POLICYHOLDERS

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

STEVEN BAKER AND MELANIA KANG D/B/A CHLOE'S CAFE, Plaintiff, v. OREGON MUTUAL INSURANCE COMPANY, Defendant.	CASE NO: 3:20-cv-05467-LB **[PROPOSED] *AMICUS CURIAE* MEMORANDUM** Date: December 17, 2020 Time: 9:30 a.m. Location: Magistrate Judge Laurel Beeler, Via Webinar

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Because some federal courts in diversity cases governed by California law have failed to locate and correctly apply California authority on certain key issues that arise in connection with claims under "all risks" insurance policies for business income losses arising from COVID-19, UP writes to bring the Court's attention to California authority bearing on an important threshold issue: whether, under California law, real or personal property sustains "direct physical loss or damage" when the proliferation of a deadly virus and ensuing government closure orders deprive that property of its intended use.

As detailed below, California courts have long adhered to the commonsense position that property is physically lost or damaged when its use or function is materially impaired by a fortuitous peril, even if the property's basic structure remains intact. Further, settled California law confirms that noxious substances that compromise the safety of property give rise to physical injury for purposes of insurance coverage. Under this established authority, a business suffers direct physical loss or damage when—as Chloe's Cafe has alleged—it is deprived of substantial use of its premises due to a viral pandemic and related government restrictions.

To be sure, the requirement of "physical" loss or damage plays an important role in filtering out insurance claims involving intangible or incorporeal losses, so as to keep the property damage portion of "all risks" insurance policies tethered to actual harm to real or personal property. Accordingly, California courts have rejected coverage for cases involving damage to *intangible* property, such as lost electronic data or defective legal title, or cases involving *internal* "vice" (to use the insurance industry term), such as hidden building code violations or design defects. But—as some recent federal district court decisions that have misapplied California precedents have failed to appreciate—such cases are conceptual worlds apart from the instant facts: real, *physical* property that has been rendered unusable (or less usable) by the *external* physical peril of the deadly coronavirus.

Of course, if a property insurer wishes to exclude such perils from the scope of coverage, it has a ready means of doing so—namely, an express exclusion for losses caused by viruses. Indeed, recent data shows that the vast majority of insurance policies covering lost business income contain such exclusions. But Chloe's Cafe's policy, which covers "all risks" of direct physical loss or damage unless

expressly excluded, *contains no virus exclusion*. And when a policyholder like Chloe's Cafe purchases an "all risks" policy that does not carve out the risk of virus-related losses, it has a reasonable expectation of insurance coverage for such losses if and when they materialize.

LEGAL STANDARD

"In questions of insurance coverage the court's initial focus must be upon the language of the policy itself." *Am. Cyanamid Co. v. Am. Home Assur. Co.,* 30 Cal. App. 4th 969, 978 (1994). In interpreting insurance policy language, the Court attempts to determine the mutual understanding of the parties at the time of contracting. *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 821–22 (1990); Cal. Civ. Code § 1636. That means, in the first instance, that courts must give insurance policy provisions their ordinary and popular meaning, read in the context of the entire insurance policy. *Garamendi v. Mission Ins. Co.*, 131 Cal. App. 4th 30, 41-42 (2005).

Insuring agreements—such as the "physical loss or damage" clause—must be read broadly, and exclusions from coverage read narrowly, so as to protect the policyholder's expectations. *MacKinnon v. Truck Ins. Exch*., 31 Cal. 4th 635, 648 (2003). Where insurance policy provisions have more than one reasonable meaning, they are ambiguous and must be construed in favor of the policyholder and against the insurer that drafted the contract. *Powerine Oil Co. v. Superior Court*, 37 Cal. 4th 377, 390-91 (2005). Ultimately, to "prevail, [the insurer] . . . would have to establish that its interpretation [of the insurance policy] is the *only* reasonable one." *MacKinnon*, 31 Cal. 4th at 655 (emphasis in original). "Even if the insurer's interpretation is reasonable, the court must interpret the policy in the insured's favor if any other reasonable interpretation would permit coverage for the claim." *Palp, Inc. v. Williamsburg Nat'l Ins. Co.*, 200 Cal. App. 4th 282, 290 (2011); *accord Global Modular, Inc. v. Kadena Pac., Inc.*, 15 Cal. App. 5th 127, 136 (2017).

ARGUMENT

I. Physical Property Suffers "Direct Physical Loss or Damage" When a Fortuitous Peril Compromises the Property's Use or Function

Chloe's Café's "all risks" policy covers its real and personal property. Under California law, such real or personal property may be physically lost or damaged when an external peril frustrates the property's intended use.

Specifically, "direct physical loss," or damage, "contemplates an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property *causing it to become unsatisfactory for future use* or requiring that repairs be made to make it so." *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779 (2010) (citation omitted and emphasis added); *id.* at 780 ("For there to be a 'loss' within the meaning of the policy . . . , [property] must have been 'damaged' within the common understanding of that term.").

In keeping with this expansive standard, California courts have found physical loss or damage in a wide range of circumstances involving perils that rob real or personal property of its use without also altering the property's structural makeup. Such scenarios include changing soil conditions that render homes uninhabitable by placing them at risk of collapse, *see Hughes v. Potomac Ins. Co. of D.C.*, 199 Cal. App. 2d 239, 248–49 (1962), *abrogated on other grounds*, *La Bota v. State Farm Fire & Cas. Co.*, 215 Cal. App. 3d 336 (1989); *Strickland v. Fed. Ins. Co.*, 200 Cal. App. 3d 792, 799-801 (1988); the dispossession of property through theft or conversion, *see EOTT Energy Corp. v. Storebrand Int'l Ins. Co.*, 45 Cal. App. 4th 565, 569 (1996); *Pac. Marine Cntr., Inc. v. Phil. Indem. Ins. Co.*, 248 F. Supp. 3d 984, 993 (E.D. Cal. 2017); and the loss of property due to mistaken shipment, *see Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, 2018 WL 3829767, at *3–4 (C.D. Cal. July 11, 2018).

The California Court of Appeal's decision in *Hughes* provides an especially powerful illustration of how property rendered unusable but otherwise intact is still "damaged" within the commonsense meaning of the term. In that case, the policyholders awoke one morning to discover that the land next to their home had washed away into a creek, leaving their home on the edge of newly created 30-foot cliff but otherwise unaltered. 199 Cal. App. 2d at 242-43. The policyholders sought coverage for the cost of stabilizing their home under a property insurance policy that (much like Chloe's Cafe's policy) insured them against "all risks of physical loss of and damage to" their dwelling. *Id.* at 242. The insurer denied coverage, essentially arguing that the home could "not be[] 'damaged' so long as its paint remains intact and its walls adhere to one another." *Id.* at 248. The Court of Appeal rejected this cramped construction. The Court held that, absent a specific limiting provision, "[c]ommon sense requires that a policy should not be [] interpreted" in such a way that an insured home "might be rendered completely useless to its

owners, [yet] [the insurer] would deny that any loss or damage had occurred unless some tangible injury to the physical structure itself could be detected." *Id.* at 248-49; *accord Strickland*, 200 Cal. App. 3d at 801 (rejecting the notion that an "insured [must] absorb the dangers inherent in living atop a land mass which is close to the point of failure" and holding that such dangers are "the type of risk [a property insurer is] paid to assume").

The foregoing precedents in first-party cases align with settled California authority in the liability insurance context holding that property is physically harmed and that property damage therefore has occurred when noxious substances, even in very small or threatened quantities, disturb the safe use of the property. *See Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 91 (1995) (when a policyholder is deemed liable for "the release of asbestos fibers, whatever the level of contamination," or for the "health hazard [] of the potential for *future* releases," the "injury to the buildings is a physical one") (emphasis in original). Likewise, these California first-party decisions find support in persuasive out-of-state authorities that find physical loss or damage based on fortuitous loss of use or function, irrespective of structural damage.[2]

II. The "Physical" Injury Requirement Only Guards Against Intangible or Non-fortuitous Losses, Not Unexpected Loss of Use of Real or Personal Property

To the extent that California courts have placed limits on the breadth of the standard for "physical" loss or damage, those limits have been relatively modest. To date, California appellate courts have declined to find insurable physical injury only when (a) the property in question is itself not physical, or (b) the property is physical but has not been altered by an external peril.

---

[2] *See, e.g., Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, at *6 (D.N.J. Nov. 25, 2014) ("[C]ourts considering non-structural property damage claims have found that buildings rendered uninhabitable by dangerous gases or bacteria suffered direct physical loss or damage."); *Manpower Inc. v. Ins. Co. of the State of Pa.*, 2009 WL 3738099, at *6 (E.D. Wis. Nov. 3, 2009) (finding that inability to access insured personal property was a direct physical loss where "a physical event—the [building] collapse—[had] created a physical barrier between the insured and its property"); *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 5, 17 (W.V. 1998) (holding that "[d]irect physical loss [] may exist in the absence of structural damage to the insured property," and holding that insured homes "suffered real damage when it became clear that rocks and boulders could come crashing down at any time," such that homes "became unsafe for habitation" due to said threat).

In the first line of cases, the property was intangible and so was not susceptible to physical loss or damage. This includes, for example, lost electronic computer data, *Ward Gen. Ins. Servs., Inc. v. Emps. Fire Ins. Co.*, 114 Cal. App. 4th 548, 555-56 (2003)[3]; cancelled business contracts, *Simon Marketing, Inc. v. Gulf Ins. Co.*, 149 Cal. App. 4th 616, 623 (2007); or a defective title to property, *Com. Union Ins. Co. v. Sponholz*, 866 F.2d 1162, 1163 (9th Cir. 1989) (California law). None of these decisions concerns physical property that could be physically harmed.

The second line of cases, on which district courts have relied heavily in early decisions rejecting coverage for COVID-19 losses, involves tangible property that was neither lost nor damaged; rather, the property suffered from internal vice. This includes an MRI machine that could not turn on because of a defect "inherent" in "the machine itself," *MRI Healthcare*, 187 Cal. App. 4th at 780; wine that was discovered to be counterfeit and thus of lesser value, *Doyle v. Fireman's Fund Ins. Co.*, 21 Cal. App. 5th 33, 38–40 (2018); and a condominium tainted by "latent defects, faulty workmanship and construction code violations," *State Farm Fire & Cas. Co. v. Super. Ct.*, 215 Cal. App. 3d 1436, 1439, 1442 (1989). In none of those cases was the subject loss external and accidental, *i.e.*, fortuitous, and so those courts concluded that the property insurance policies at issue did not respond.

The above lines of precedents are wholly inapposite in a case involving both *physical* property, such as Chloe's Cafe's restaurant, and a *fortuitous* peril, such as a once-in-a-lifetime pandemic involving changes to property (discussed next) and forcing the total or substantial shutdown of businesses.

III. Damage to the Usability of Property Due to a Viral Pandemic and Related Government Orders Constitutes Direct Physical Loss and Damage

The coronavirus is a uniquely dangerous health and safety risk. The virus is potentially deadly, easily yet silently spread, and as such is one of the rare public health threats that have triggered government closure orders. Consequently, the unexpected coronavirus pandemic has caused commercial policyholders to lose, in whole or in substantial part, safe use of their tangible property for

[3] In deeming electronic computer information "intangible," 114 Cal. App. 4th at 556, the *Ward* court apparently was unaware of Albert Einstein's theory articulated in 1906, which was subsequently confirmed, that electricity has mass and, hence, is tangible.

business purposes—which, under the above-described *Hughes* and *Armstrong* lines of precedents, constitutes "direct physical loss or damage" under California law.

A. The Coronavirus Pandemic is Physically Dangerous

The coronavirus is, of course, a serious physical peril. It has given rise to an infectious disease that has plagued more than 67 million people worldwide and has taken the lives of more than 1.5 million victims.[4] And because the virus has proven so hard to contain, it has led to a proliferation of governmental closure restrictions that have rendered broad swaths of properties unfit for their full and intended use.

The coronavirus alters the physical conditions of property. The World Health Organization ("WHO") has advised that people can become infected with the coronavirus by touching virus-laden objects and surfaces, then touching their eyes, nose, or mouth. This mode of transmission—indirect transmission via objects and surfaces—is known as "fomite transmission."[5] To take one example, a study of a COVID-19 outbreak published in the *Emerging Infectious Diseases* journal identified indirect transmission via objects such as elevator buttons and restroom taps as an important possible cause of a "rapid spread" of the coronavirus in a shopping mall in Wenzhou, China.[6] And, unfortunately, the coronavirus has a proclivity to "stick." One recent study found that the coronavirus remained viable for up to 28 days on a range of common surfaces—such as glass, stainless steel, and money—left at room temperature.[7] It is undoubtedly for this reason that when people return home from a trip to the

---

[4] Johns Hopkins University & Medicine, COVID-19 Dashboard by the Center for Systems Science and Engineering, https://coronavirus.jhu.edu/map.html (last viewed on Dec. 7, 2020).

[5] WHO, *Transmission of Sars-CoV-2: Implications for Infection Prevention Precautions* (July 9, 2020), https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions (last viewed on Dec. 5, 2020).

[6] Jing Cai et al., *Indirect Virus Transmission in Cluster of COVID-19 Cases, Wenzhou, China, 2020*, 26 Emerging Infectious Diseases 1343 (2020), https://wwwnc.cdc.gov/eid/article/26/6/20-0412_article (last viewed Dec. on 5, 2020).

[7] Shane Riddell et al., *The Effect of Temperature on Persistence of SARS-CoV-2 on Common Surfaces*, 17 Virology J. 145 (2020), https://virologyj.biomedcentral.com/articles/10.1186/s12985-020-01418-7 (last viewed on Dec. 5, 2020).

supermarket, for example, almost everyone will wash their hands thoroughly immediately after entering the door: they may have touched a surface on which the virus was present and they do not want to risk spreading the disease to themselves or their families.

Also of note, infected persons can generate virus-laden aerosols that linger in the air even after the infected person has left the vicinity and can migrate substantial distances through a building's ventilation systems. One study found the presence of the coronavirus within the HVAC system servicing hospital ward rooms of COVID-19 patients. This study detected SARS-CoV-2 RNA in ceiling vent openings, vent exhaust filters, and central ducts that were located more than 50 meters from the patients' rooms.[8] Another study of an outbreak at a restaurant in China concluded that the spread of the coronavirus "was prompted by air-conditioned ventilation," with persons who sat at tables downstream of the HVAC system's air flow becoming infected.[9] Based on "epidemiological evidence suggestive of [coronavirus] transmission through aerosol,"[10] the Environmental Protection Agency ("EPA"), the Occupational Safety and Health Administration ("OSHA"), and the Centers for Disease Control and Prevention ("CDC") have recommended that facilities improve their ventilation and HVAC systems by, for example, increasing ventilation with outdoor air and air filtration.[11]

---

[8] Karolina Nissen et al., *Long-Distance Airborne Dispersal of SARS-CoV-2 in Covid-19 Wards*, 10 Sci. Rep. 19589 (2020), https://www.nature.com/articles/s41598-020-76442-2 (last viewed on Dec. 7, 2020).

[9] Jianyun Lu et al., *COVID-19 Outbreak Associated with Air Conditioning in Restaurant, Guangzhou, China*, 26 Emerging Infectious Diseases 1628, 1629 (2020), https://wwwnc.cdc.gov/eid/article/26/7/20-0764_article (last viewed on Dec. 7, 2020).

[10] EPA, *Indoor Air and COVID-19 Key References and Publications*, https://www.epa.gov/coronavirus/indoor-air-and-covid-19-key-references-and-publications (last viewed on Dec. 5, 2020) (capitalization omitted).

[11] EPA, *Indoor Air and Coronavirus* (COVID-19), https://www.epa.gov/coronavirus/indoor-air-and-coronavirus-covid-19 (last viewed on Dec. 5, 2020); CDC, *COVID-19 Employer Information for Office Buildings* (Oct. 29, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/office-buildings.html (last viewed on Dec. 5, 2020); OSHA, *Guidance on Preparing Workplaces for COVID-19* 12 (2020), https://www.osha.gov/Publications/OSHA3990.pdf (last viewed on Dec. 5, 2020).

A crucial factor that has facilitated the rapid proliferation of COVID-19 outbreaks is that infected persons can spread the virus *even while they do not exhibit any symptoms of COVID-19*. Research published through the National Academy of Sciences has found that most COVID-19 transmission is attributable to "silent transmission" by people who are not even showing symptoms.[12] According to the WHO, the incubation period for COVID-19—*i.e.*, the time between exposure to the coronavirus and symptom onset—can be up to 14 days,[13] while other sources recognize the potential for longer "pre-symptomatic" periods. In addition, the CDC estimates that 40% of infected individuals may never show symptoms (referred to as "asymptomatic" carriers),[14] while other studies suggest even higher rates.

Due to the physical ramifications of the coronavirus, government officials have responded with a slew of restrictions that, among other things, seeks to preserve property from viral contamination that could exacerbate this pandemic's human tragedy. As Chloe's Cafe has alleged, its property was subject to multiple orders that prohibited access to the property. *See* ECF No. 1, ¶¶ 37–43. In Executive Order N-33-20, Governor Newsom ordered all California residents to (with limited exceptions) stay home at their place of residence—which in effect barred residents from leaving their homes to patronize Chloe's Cafe. *See* ECF No. 11-2. Likewise, patrons were prohibited from accessing Chloe's Cafe under orders issued by the San Francisco Department of Health which required individuals to remain at home and explicitly directed restaurants to close, except to provide takeout and delivery service. *See, e.g.,* ECF No. 11-3, 11-4.

Other California authorities have responded similarly. Earlier this year, Los Angeles Mayor Eric Garcetti ordered that operations cease at businesses requiring in-person worker attendance, based on the

---

[12] Syed M. Moghadas et al., *The Implications of Silent Transmission for the Control of COVID-19 Outbreaks*, 117 PNAS 30 (2020), https://www.pnas.org/content/117/30/17513 (last viewed on Dec. 5, 2020).

[13] WHO, *Coronavirus disease 2019 (COVID-19) Situation Reports - 73*, https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200402-sitrep-73-covid-19.pdf (last viewed on Dec. 7, 2020).

[14] CDC, *Pandemic Planning Scenarios* (Sept. 10, 2020), https://www.cdc.gov/coronavirus/2019-ncov/hcp/planning-scenarios.html (last viewed on Dec. 5, 2020).

pervasive "COVID-19 virus [that] can spread easily from person to person and [that] is physically causing property loss or damage due to its tendency to attach to surfaces for prolonged periods of time."[15] More recently, all of the Bay Area counties have entered orders closing many businesses, including cafes and restaurants.[16]

B. The Coronavirus Pandemic Has Caused Direct Physical Loss and Damage

The viral pandemic and attendant government restrictions have made it unsafe and, in many cases, unlawful for businesses to use property for its full intended function. Property undermined in this manner has, under California law and basic principles of insurance interpretation, been physically lost and damaged.

Just as the home in *Hughes* was held to be physically harmed when the imminent risk of collapse rendered it "useless" but otherwise "intact," so too is the substantial risk of actual or imminent viral contamination and ensuing loss of use an apt example of physical loss and damage. 199 Cal. App. 2d at 248-49.; *accord Strickland*, 200 Cal. App. 3d at 801.[17] Further, just as the *Armstrong* Court reasoned that a building sustains "physical injury" when its components are such that "common daily activities may cause asbestos fibers to be released," likewise a business also intuitively suffers physical injury where its common function of hosting employees, staff, and patrons at its physical premises suddenly becomes a health hazard. 45 Cal. App. 4th at 91.

Moreover, whether the coronavirus is conclusively shown to be on-premises and corrupting property thereon is in no way dispositive. Nothing in the text of the insuring agreement covering "direct

---

[15] Mayor Eric Garcetti, *Public Order Under City of Los Angeles Emergency Authority* (issued March 19, 2020 and revised April 10, 2020), https://www.lamayor.org/sites/g/files/wph446/f/page/file/SaferAtHomeAPR10.pdf (last viewed on Dec. 5, 2020).

[16] *See* Aidin Vaziri, *Bay Area Drive-ins, Museums, Theaters and More to Close Again Under New Stay-At-Home Order*, SF Chronicle (Dec. 4, 2020), https://datebook.sfchronicle.com/entertainment/bay-area-drive-ins-museums-theaters-and-more-to-close-again-under-new-stay-at-home-order (last viewed on Dec. 5, 2020).

[17] *See also* 10A Couch on Ins. § 148:46 (citing cases "allowing coverage based on physical damage despite the lack of physical alteration of the property," where "threatened physical damage" rendered premises "uninhabitab[le]" and "trigger[ed] the insured's obligation to mitigate the impending loss").

physical loss or damage" conditions insurance coverage on adverse impacts to the structural makeup of property. Indeed, *Hughes* long ago rejected the narrow view of coverage that "would deny that any loss or damage occurred unless some tangible injury to the physical structure itself could be detected." 199 Cal. App. 2d at 248. Further, it is settled law in California that "[d]irect physical loss under an all-risk policy generally may include losses due to either theft or conversion"—*i.e.*, perils defined not by structural alterations but by their capacity to destroy the use and enjoyment of property. *Pac. Marine*, 248 F. Supp. 3d at 993 (citing *EOTT Energy*, 45 Cal. App. 4th at 569). Injury owing to loss of use of property due to a pervasive physical virus and related government restrictions is no less "physical" than injury based on mere property theft.

In that regard, several persuasive pandemic precedents in other states have, at least at the pleadings stage, acknowledged the possibility that "physical damage occurs where a policyholder loses functionality of their property [] by operation of civil authority," *Optical Services, USA v. Franklin Mut. Ins. Co.*, BER-L-3681-20, Tr. at 29 (N.J. Super. Ct. Aug. 30, 2020), and/or through "the presence of COVID-19 at *or near*" premises, *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.*, A-20-816628-B, at *3-4 (Nev. Dis. Ct. Nov. 30, 2020) (emphasis added). *See also, e.g., Hill & Stout PLLC v. Mut. of Enumclaw Ins. Co.*, 2020 WL 6784271, at *2 (Wash. Super. Ct. Nov. 13, 2020) (holding that dental practice sufficiently pled "physical loss" where it was allegedly "unable to see patients and practice dentistry" due to "the wide spread of COVID-19 and the Governors' Orders").

Accordingly, Chloe's Cafe's injury—the forced closure of its dining room due to a fast-spreading virus and related governmental limitations—fits squarely within the grant of coverage against "direct physical loss or damage." At minimum, Oregon Mutual has failed to carry its burden of establishing that its contrary interpretation of the policy is "the *only* reasonable one," and it is therefore not entitled to a hasty dismissal of its policyholder's coverage claim. *MacKinnon*, 31 Cal. 4th at 655.

IV. The Federal Precedents Oregon Mutual Invokes are Inapposite and Unpersuasive

To date, no California appellate decision has addressed COVID-19 insurance coverage issues. With no controlling California authority on point, Oregon Mutual resorts to citing federal district court cases that, purporting to apply California law, dismissed coverage claims by pandemic-affected

businesses.[18] Yet for several reasons, those federal decisions are factually inapposite and at odds with California law. None of those cases justifies the dismissal of Chloe's Cafe's well-pleaded complaint—which alleges physical harm due to fortuitous pandemic perils insured under an "all risks" policy.

First, in all the federal cases Oregon Mutual cites, the subject policies specifically exclude viral risks from the insuring agreement.[19] In contrast, Chloe's Cafe's policy contains no such exclusion. *See Dino Palmieri Salons, Inc. v. State Auto. Mut. Ins. Co.*, No. 20-cv-932117, at *11 (Ohio Ct. Cmn. Pleas Nov. 17, 2020) (denying insurer's motion to dismiss pandemic coverage claim, and distinguishing contrary authorities that "involved policies with a specific virus exclusion").

Also of note, in many of the cited cases, the policyholders sought to plead around virus exclusions by disclaiming reliance on the physical perils posed by widespread coronavirus.[20] In other

---

[18] *See* ECF No. 10 at 20-24 (citing *10E, LLC v. Travelers Indem. Co. of Conn.*, 2020 WL 5359653 (C.D. Cal. Sept. 2, 2020); *Mark's Engine Co. No. 28 Rest., LLC v. The Travelers Indem. Co. of Conn.*, 2020 WL 5938689 (C.D. Cal. Oct. 2, 2020), *appeal filed*, No. 20-56031 (9th Cir. Oct. 6, 2020); *Pappy's Barber Shops, Inc. et al. v. Farmers Group, Inc.*, 2020 WL 5500221 (S.D. Cal. Sept. 11, 2020); *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 2020 WL 5525171 (N.D. Cal. Sept. 14, 2020); *Franklin EWC, Inc. v. Hartford Fin. Servs. Group, Inc.*, 2020 WL 5642483 (N.D. Cal. Sept. 22, 2020), *appeal filed*, No. 20-16858 (9th Cir. Sept. 24, 2020)). Oregon Mutual also cites to a California trial court order sustaining a demurrer to a pandemic-related complaint, but that order provides no written opinion and therefore provides no real guidance. *Id.* at 24 n.8 (citing *The Inns By the Sea v. Cal. Mut. Ins. Co.*, No. 20-cv-001274 (Cal. Super. Ct. Aug. 6, 2020)).

[19] *See, e.g., 10E*, 2020 WL 5359653, at *1 ("We will not pay for loss or damage caused by or resulting from any virus . . . ."); *Mark's Engine*, 2020 WL 5938689, at *2 (same); *Mudpie*, 2020 WL 5525171, at *1 (same); *Pappy's Barber Shops*, 2020 WL 5500221, at *2 (exclusions for "virus or bacteria"); *Franklin EWC*, 2020 WL 5642483, at *2 ("We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss: (1) Presence, growth, proliferation, spread or any activity of . . . bacteria or virus.").

[20] *See, e.g., Pappy's Barber Shops*, 2020 WL 5500221, at *4 n.2 ("Plaintiffs expressly allege that COVID-19 did not cause physical loss of or damage to their properties, alleging and arguing only that that the government orders themselves constitute direct physical loss of or damage to the properties"); *10E*, 2020 WL 5359653, at *6 ("Plaintiff asserts that it is 'is not attempting to recover any losses from COVID-19 or its proliferation.'"); *Mudpie*, 2020 WL 5525171, at *5 ("Rather than alleging that COVID-19 or any other physical impetus caused the loss of functionality of its storefront, Mudpie alleges that its 'loss is caused by government closure orders . . . .'").

words, those policyholders disqualified themselves from coverage by explicitly steering clear of perils that, but for a virus exclusion, could constitute "direct physical loss or damage." No similar disqualifying allegation is present in Chloe's Cafe's complaint.

Second, the federal cases cited by Oregon Mutual are especially unpersuasive given that, in those cases, neither the insurer nor the policyholder brought the most relevant California authority to the court's attention. In particular, those decisions do not cite the *Hughes* and *Armstrong* lines of precedents discussed above, which are the most authoritative precedents in a case, like this one, where an imminent risk of property damage substantially alters and undermines the usability of physical property.[21]

Critically, moreover, the California precedents on which those district courts did rely do not address the issues presented in this case. Rather, they are decisions in which the harm was only to what the court considered intangible property, such as electric data, *Ward Gen. Ins. Servs*, 114 Cal. App. 4th at 555-56, or where the cause of loss was an internal vice, such as a machine defect, *MRI Healthcare*, 187 Cal. App. 4th at 780, or newly-discovered counterfeit status, *Doyle*, 21 Cal. App. 5th at 38–40. *See generally 10E*, 2020 WL 5359653, at *4-5. None of these rulings speaks to a case of fortuitous viral harm to real, tangible commercial property.

Third, while a number of Oregon Mutual's cited cases allow for the possibility that fortuitous loss of usability of physical property can constitute physical harm, they then erroneously demand that

---

[21] In a recent order granting demurrer as to a pandemic coverage complaint, a California trial court finally acknowledged *Hughes* but attempted to recast it as a traditional physical damage case—opining that *Hughes* "involved physical damage to the property adjacent to the home in a manner that physically damaged the home itself by taking away its lateral support." *Musso & Frank Grill Co., Inc. v. Mitsui Sumitomo Ins. USA Inc.*, No. 20STCV16681, at *5 (Cal. Super. Ct. Nov. 9, 2020). But, if the property in *Hughes* can be considered "physically damaged" because a peril external to the property (shifting land) rendered the property itself (a house) unusable for lack of lateral support, then it follows that Chloe's Café's property should likewise be considered "physically damaged" because coronavirus in the vicinity of its property rendered it unusable for lack of health safety. In any event, the trial court's discussion of *Hughes* is *dictum*, because the court held that the policyholder had "failed to allege facts suggesting its claim would not fall within the Virus Exclusion" contained in its policy. *Id.* at *4.

any such loss be total and permanent.[22] This additional coverage hurdle, however, runs contrary to text, purpose, and precedent. Nothing in the policy's "direct physical loss or damage" insuring agreement requires "complete" or "permanent" physical deprivation in order to trigger coverage, let alone imposes that requirement by the requisite clear and unambiguous language. *See Adv. Cable Co., LLC v. Cincinnati Ins. Co.*, 2014 WL 975580, at *11 (W.D. Wisc. Mar. 12, 2014) ("The Policy does not state that damage must reach some level of severity to trigger the coverage threshold."), *aff'd*, 788 F.3d 743 (7th Cir. 2015); *see generally MacKinnon*, 31 Cal. 4th at 648. Moreover, such an atextual requirement would conflict with the "purpose and nature of 'business interruption' insurance," which is to "indemnify the insured against losses arising from his inability to continue the *normal* operation and functions of his business." *Northrop Grumman Corp. v. Factory Mut. Ins. Co.*, 2013 WL 3946103, at *12 (C.D. Cal. July 31, 2013) (quoting *Pac. Coast Eng'g Co. v. St. Paul Fire & Marine Ins. Co.*, 9 Cal. App. 3d 270, 275 (1970)) (emphasis added and ellipses omitted). Further, imposing such a requirement on property insureds would be inconsistent with the California Court of Appeal's recent holding, in the liability insurance context, that when an insurance contract covers "loss of use," "the reasonable expectations of the insured would be that 'loss of use' means the loss of *any* significant use of the premises, not the total loss of all uses." *Thee Sombrero, Inc. v. Scottsdale Ins. Co.*, 28 Cal. App. 5th 729, 737 (2018) (emphasis in original).

In short, despite what some lower courts have suggested, a business may justifiably expect that if it purchases "all risks" insurance on a property designed to serve customers, it would be eligible for coverage if a non-excluded risk deprived the business of its ability to use the property to offer its full range of services for any meaningful period of time.

Fourth, Oregon Mutual's cases too often make the mistake of equating all losses of use of property with pure economic losses that do not qualify as physical injury. *See, e.g., 10E*, 2020 WL

---

[22] *See, e.g.*, *10E*, 2020 WL 5359653, at *5 (finding no physical loss where a restaurant could not host diners but "remained in possession of its dining room"); *Mudpie*, 2020 WL 5525171, at *4 (finding no physical loss where dispossession of storefront due to the pandemic was not a "permanent dispossession").

5359653, at *4-5 (equating "impairment to economically valuable use of property" with "[d]etrimental economic impact" that falls short of "physical loss or damage"). Those cases ignore the California Court of Appeal's admonition that the "correct principle [] is *not* that economic losses, by definition, do not constitute property damage," because it is "difficult to conceive of loss-of-use damages as anything other than economic losses." *Thee Sombrero,* 28 Cal. App. 5th at 739 (emphasis in original and citation omitted). "Rather," as the Court explained, "the correct principle is that losses that are *exclusively economic*, without any accompanying physical damage or loss of use of tangible property, do not constitute property damage." *Id.* (emphasis added).

Here, Chloe's Cafe has alleged property damage, *i.e.*, loss of use of tangible property (its restaurant) due to an external physical force (the viral pandemic and attendant restrictions). Further, Chloe's Cafe seeks to recover lost business income not because of an exclusively economic event (such as a loss in market popularity of its restaurant), but because it purchased business income coverage specifically designed to insure against business losses in the event of unexpected physical injury like that which it has alleged. Chloe's Cafe's losses, which are both physical *and* economic, are covered.

Finally, at least one of Oregon Mutual's cases relied on the period of restoration measure—namely, the time in which injured property "should be repaired, rebuilt or replaced"—to justify its view that "inability to occupy" property during this pandemic is not a covered event because there is ostensibly nothing to "repair." *Mudpie*, 2020 WL 5525171, at *4. Not so. Loss of utility can be repaired, rebuilt, or replaced—*i.e.*, property that is unusable or non-functional can be restored to its previous functional purpose. And in most cases, unusable premises can be restored to usable business space only through physical remedial measures—such as extensive and repeated cleaning and disinfecting, reconfiguring building layouts to accommodate social distancing, and modifying air-conditioning systems to improve ventilation.[23]

---

[23] Some out-of-state courts have dismissed COVID-19 coverage claims on the ground that a viral event can supposedly be cleaned quickly. *See, e.g.*, *Uncork & Create LLC v. Cincinnati Ins. Co.*, 2020 WL 6436948, at *5 (S.D.W.V. Nov. 2, 2020). But nothing in the insurance policy eliminates coverage if the period of restoration is short (deductibles serve that function). Further, a one-time wipe-down of

V. Oregon Mutual Cannot Credibly Oppose Coverage for a Viral Pandemic Under a Policy With No Virus Exclusion.

Perhaps the most basic flaw in Oregon Mutual's argument against virus-related coverage is that Oregon Mutual promised to insure against "all risks," and could have—but did not—include in its policy an exception for virus-related risks.

"The general rule is that in an all-risk property insurance" policy, such as Chloe's Cafe's, "all risks are covered unless specifically excluded in the policy." *Davis v. Utd. Servs. Auto. Ass'n*, 223 Cal. App. 3d 1322, 1328 (1990). Oregon Mutual knew how to include a broad virus exclusion in its insurance policy: In 2006, the Insurance Services Office ("ISO") drafted an expansive virus and bacteria exclusion, which ISO has published and made available for use by insurers as a standard virus exclusion form. *See* ECF No. 1 (Complaint), ¶¶ 22-23 (alleging that Oregon Mutual used, in part, ISO policy form language but failed to use the ISO virus exclusion); *see also Boxed Foods Co., LLC v. Cal. Cap. Ins. Co.*, 2020 WL 6271021, at *6-7 nn. 7-8 (N.D. Cal. Oct. 26, 2020) (describing the "exceptionally wide net" cast by "ISO's Virus Exclusion"). And, notably, a substantial majority of insurers has adopted either the ISO virus exclusion or some other express virus exclusion: according to a June 2020 report by the National Association of Insurance Commissioners, approximately 83% of business policies contain a virus exclusion.[24] But the "all risks" policy that Oregon Mutual drafted and sold Chloe's Cafe is not one of them.

And this omission cannot be ignored. The California Supreme Court has explained that if an

---

the virus is often insufficient to restore property to its intended use—given how prevalent and easily spread the virus is and thus how imminent its return would be if normal operations resumed. Thus, such cleaning does not foreclose ongoing physical loss and damage (and business income loss) by virtue of continued impaired use. *See Pac. Coast Eng'g*, 9 Cal. App. 3d at 275 (defining the "purpose" of business interruption insurance as providing indemnity during the time when one is unable "to continue the normal operation and functions of his business"); *see also Columbiaknit, Inc. v. Aff'd FM Ins. Co.*, 1999 WL 619100, at *6 (D. Or. Aug. 4, 1999) ("[I]f an article of retail clothing has an odor strong enough that it must be washed to remove it, (and the garment therefore cannot be sold as new) it has sustained physical damage and would be covered under an 'all-risk' property insurance policy.").

[24] National Association of Insurance Commissioners, *COVID-19 Property & Casualty Insurance Business Interruption Data Call: Part 1, Premiums and Policy Information*, at 3 (June 2020), https://content.naic.org/industry_property_casualty_data_call.htm (click "COVID-19 Business Interruption Premium Nat'l Aggregates (PDF)" on the right sidebar).

insurer is aware of an exclusion that bars coverage but chooses not to use it, the insurer cannot obtain a construction of its insurance policy that imposes the language of the exclusion that it chose not to use. *See Safeco Ins. Co. of Am. v. Robert S.*, 26 Cal. 4th 758, 763-64 (2001) ("Because Safeco chose not to have a criminal act exclusion, instead opting for an illegal act exclusion, we cannot read into the policy what Safeco has omitted. To do so would violate the fundamental principle that in interpreting contracts, including insurance contracts, courts are not to insert what has been omitted.").

In short, if Oregon Mutual did not want to cover the risk of virus-induced loss of use, it needed to say so "specifically," with an available, on-point virus exclusion—not with an after-the-fact attempt to insert the missing exclusion in the policy by recasting California's longstanding definition of "direct physical loss or damage." *See Hughes*, 199 Cal. App. 2d at 248-49 (declining to hold that a property rendered "useless" but otherwise intact is not lost or damaged, and explaining that "a policy should not be so interpreted in the absence of a provision *specifically* limiting coverage in this manner") (emphasis added). California law does not permit the interpretation of the insurance policy that Oregon Mutual urges this Court to adopt. *Safeco*, 26 Cal. 4th at 763-64.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Chloe's Cafe's brief, the Court should deny Oregon Mutual's motion for dismissal or, in the alternative, summary judgment.

DATED: December 7, 2020

Respectfully submitted,

COVINGTON & BURLING LLP

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

Attorney for Amicus Curiae
UNITED POLICYHOLDERS