No. H048443

In the Court of Appeal of the State of California
Sixth Appellate District

The Inns By The Sea,
Appellant,

vs.

California Mutual Insurance Co.,
Appellee.

APPLICATION FOR LEAVE TO FILE AN AMICUS BRIEF AND BRIEF AMICI CURIAE OF UNITED POLICYHOLDERS IN SUPPORT OF APPELLANT THE INNS BY THE SEA

On Appeal from the Superior Court for Monterey County,
Case No. 20CV001274,
Judge Lydia M. Villareal

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

United Policyholders ("UP") applies for permission to file the attached amicus curiae brief in support of Appellant The Inns by the Sea ("Inns").

INTEREST OF UNITED POLICYHOLDERS

Founded in 1991, United Policyholders has served as a respected voice for the interests of consumers and policyholders across the country for nearly 30 years. Individual policyholders routinely call upon UP for help in the wake of large-scale national disasters such as hurricanes in the Gulf and across the Eastern Seaboard; floods and windstorms in the Midwest; wildfires in the West; and most recently, in the wake of the COVID-19 pandemic.

Indeed, since the pandemic began in 2020, UP has assisted business owners whose operations have been impacted by COVID-19 and resulting public safety orders. UP has educated policyholders on COVID-19 insurance issues and maintains a library of resources at uphelp.org/COVID. UP also routinely engages in nationwide policy work to assist and to educate the public, governmental agencies, legislators, and the courts on policyholders' insurance rights. Grants, donations, and volunteers support UP's work in three program areas: Roadmap to Recovery, Roadmap to Preparedness, and Advocacy and Action.

Public officials, regulators, legislatures, academics, and journalists routinely seek UP's input on insurance and related legal matters. UP serves on the Federal Advisory Committee on Insurance, which briefs the Federal Insurance Office and U.S. Treasury Department. UP has been an official consumer representative to the National Association of Insurance Commissioners since 2009, monitoring policy language and claim practices and developing model laws and regulations.

UP has advocated for the rights of policyholders and consumers across the country throughout the pandemic, addressing coverage related to COVID-19 and public safety orders. UP has filed amicus briefs in both federal and state appellate courts in more than 450 cases across 42 states. In fact, the U.S. Supreme Court and California Supreme Court have cited UP amicus briefs. *See, e.g., Humana Inc. v. Forsyth* (1999) 525 U.S. 299, 314; *Julian v. Hartford Underwriters Ins. Co*. (2005) 35 Cal.4th 747, 759-60.

UP continues its mission of supporting policyholders through its amicus efforts here in support of Appellant Inns.

THE AMICUS CURIAE BRIEF WILL ASSIST THIS COURT IN DECIDING THIS MATTER

Policyholders across the country – like Inns – buy insurance for protection against unexpected disasters. Confidence that insurance will pay claims spurs growth of our economy and encourages people and businesses to take risks and pursue

innovation. Insurance therefore is a crucial engine of the economy and, given its protective purpose, is imbued with a public purpose.

At the same time, insurance is woven into the fabric of the U.S. economy through mandatory purchase requirements, personal and business risk management, and pricing of goods and services. Each state regulates insurance contracts and transactions separately; yet most insurers operate across state lines. Although insurance companies are in business to make a profit for their shareholders, it is most crucial that insurance fulfil its dominant purpose "to indemnify the insured in case of loss." *Ins. Co. of N. Am. v. Elec. Purification Co.* (1967) 67 Cal.2d 679, 689; *see also American Law Institute, Restatement of the Law, Liability Insurance* § 2, cmt. c (2019) (insurance-policy interpretation helps "effect[] the dominant protective purpose of insurance"). Profit and loss considerations should be considered in the claim determination process, nor should courts consider insurance company finances in analyzing coverage issues.

Judicial oversight is essential to maintain the purpose and value of insurance in this complex system. Courts require insurance, the classic adhesion contract, to pay pursuant to the plain meaning of the policy language and put the burden on insurers, as the drafters of the boilerplate language, to show that theirs is the only reasonable interpretation of the contract terms.

Amici Curiae UP respectfully seeks to assist this Court in rendering a decision here that likely will be influential around the country on COVID-19 insurance specifically and policy

interpretation generally, and certainly will help to define the law in California and will provide guidance to federal courts as they attempt to determine how these important issues should be decided under state law. As discussed below, and has often been true in past disputes, the federal courts are not properly interpreting California law as it pertains to losses arising from COVID-19. The same is also true for the court below, which apparently relied on improperly decided federal trial court decisions.

RULE 8.200(C)(3) DISCLOSURE

Consistent with California Rule of Court 8.200(c)(3), UP states that no party or any counsel for any party authored this amicus brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of this brief.

CONCLUSION

UP respectfully asks this Court to grant this application and file the accompanying amicus curiae brief.

DATED: April 20, 2021

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BRIEF OF AMICUS CURIAE UNITED POLICYHOLDERS

I. INTRODUCTION

The Court's charge on this appeal is straightforward: it must determine whether The Inns by the Sea's ("Inns") Complaint "states facts sufficient to constitute a cause of action" or "whether there is a reasonable possibility that [any] defect [in the Complaint] can be cured by amendment." *Moreno v. Sanchez* (2003) 106 Cal.App.4th 1415, 1423.

In the court below, the Superior Court found that Inns' Complaint, which seeks insurance coverage for losses arising from the COVID-19 pandemic, did not adequately plead a claim for relief and was incapable of amendment. To achieve this result, the Superior Court purportedly adopted California Mutual Insurance Co.'s ("California Mutual") arguments that the policy's grant of coverage for "direct physical loss of or damage to Covered Property" applies only when an insured's property suffers some "physical alteration." (1 AA 74 § A, 252-258). But the Superior Court and California Mutual are incorrect.

For decades, courts across the nation, including in California, have refused to add into the policy a "physical alteration" requirement when interpreting the words "direct physical loss of or damage to" property. Instead, California courts find "direct physical loss of or damage to" real property occurs when a property becomes unsafe for its intended use. Here, Inns

has pled, among other things, that its property became unsafe for its intended use due to the physical presence of COVID-19. Such allegations are sufficient to withstand California Mutual's demurrer.

Accordingly, Amicus Curiae United Policyholders ("UP") writes in support of Inns' appeal to provide further context to this Court regarding: (1) why the insurance term "direct physical loss of or damage to" property does not require a showing of "physical alteration" to real property; (2) how the insurance industry, including California Mutual, has continued to use the phrase "direct physical loss of or damage to" property despite ample admonitions from courts that the term is at least ambiguous; (3) why California Mutual's bundle of favored authorities, including failed attempts by federal district courts to apply California law in this area, are inapposite; and (4) how the evolving science regarding COVID-19 compels that these coverage questions be decided on a full record, not just on the pleadings.

II. ARGUMENT

A. California Law Does Not Require A Showing of "Physical Alteration" Before Finding "Physical Loss Of Or Damage" To Property.

California Mutual's interpretation of the policy—that "physical loss of or damage" to real property[1] unambiguously

[1] This phrasing is used in Inns' policy. (1 AA 74 § A.) (The policy covers "direct physical loss of or damage to Covered Property at

requires a showing of "physical alteration"—is inconsistent with California law. In California, and in other states across the country, when *real property* becomes unsafe or dangerous for its intended use, it suffers physical loss or damage, irrespective of any physical alteration. California Mutual ignores this basic proposition. Instead, as discussed below, California Mutual relies on unfitting cases involving personal or intangible property, such as contractual rights relating to fast-food restaurant game pieces, MRI equipment that will not turn on after being turned off, and missing computer data. California Mutual also focuses on federal district court decisions that rely on these same inapposite decisions to wrongly conclude there is no coverage for COVID-19 losses.

Rather than grappling with the relevant authorities, California Mutual simply ignores them. For example, in *Hughes*, a case not mentioned by California Mutual, the insurance company issued a policy insuring a home against "all risks of physical loss of and damage to their dwelling." *Hughes v. Potomac Ins. Co. of Dist. of Columbia* (1962) 199 Cal.App.2d 239, 242 (1962) abrogated on other grounds by *La Bato v. State Farm Fire & Cas. Co.* (1989) 215 Cal.App.3d 336. The earth beneath the home gave way leaving the home standing on the edge of and partially overhanging a newly-formed cliff. *Id.* at 243. The house itself, however, did not suffer any physical alteration. *Id.* at 248. The insurance company

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the premises described in the Declarations caused by or resulting from any covered cause of loss.")

argued there was no coverage because its policy insured only the building structure, and the building structure was not harmed. *Id.* 248-49. The Court of Appeal rejected this argument and found the policyholder suffered a "physical loss" because the home could not be used for its intended purpose. *Id.* The court ruled that no "rational persons" would be "content" to reside in the house after the landslide. *Id*. at 249. In rejecting the insurer's arguments that "physical loss" to real property required tangible damage or alteration, the court noted that such arguments defied "common sense." *Id.* The court made clear that where a structure is rendered unsafe or "useless" it may suffer "damage," even if the structure was not physically altered:

> To accept [the insurer's] interpretation of its policy would be to conclude that a building which has been overturned or which has been placed in such a position as to overhang a steep cliff has not been "damaged" so long as its paint remains intact and its walls still adhere to one another. Despite the fact that a "dwelling building" might be rendered completely useless to its owners, appellant would deny that any loss or damage had occurred unless some tangible injury to the physical structure itself could be detected. Common sense requires that a policy should not be so interpreted in the absence of a provision specifically limiting coverage in this manner.

Id. at 248-49.

There are no California appellate courts, or at least none cited by California Mutual, that have held differently in the context of insurance for real property losses. Further, many other

courts throughout the country for decades have similarly held that "physical loss of or damage to" real property may occur absent physical alteration. These courts hold, consistent with *Hughes*, that so long as the real property is rendered unsafe due to a harmful condition, "physical loss" may be found absent any physical injury or alteration. *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.* (D. Or. June 7, 2016, No. 15-cv-01932) 2016 WL 3267247, at *7-8 (a theater suffered physical loss due to wildfire smoke that rendered the theater unusable for its intended purpose) (vacated due to settlement); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.* (D.N.J. Nov. 25, 2014, No. 12-cv-04418) 2014 WL 6675934, at *6 (business interruption caused by discharge of ammonia was caused by "direct physical loss of or damage to" the facility, as it rendered facility unusable for a period of time); *Matzner v. Seaco Ins. Co.* (Mass. Super. Aug. 12, 1998, No. Civ.A. 96-0498) 1998 WL 566658, at *3-4 (citing *Hughes* and holding that loss of use of apartment due to carbon monoxide in building was covered finding the phrase "direct physical loss or damage" to be ambiguous as it can include more than tangible damage to a structure); *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.* (3d Cir. 2002) 311 F.3d 226, 236 ("physical loss or damage" occurs where release of asbestos "nearly eliminated or destroyed" the property's function, rendering the structure "useless or uninhabitable," or "if there exists an imminent threat of the release of a quantity of asbestos fibers that would cause such loss of utility").

Likewise, the Colorado Supreme Court determined that an accumulation of gas beneath a church constituted a "physical loss" because it rendered the property unsafe to be occupied, despite the church not having suffered any damage to its physical structure. *W. Fire Ins. Co. v. First Presbyterian Church* (Colo. 1968) 437 P.2d 52, 55 (en banc). Further, in *Essex Insurance Co. v. Bloom South Flooring Corp*. (1st Cir. 2009) 562 F.3d 399, the court determined that the presence of an odor can amount to physical injury to property where the unwanted odor resulted in a loss of use of the building. *Id*. at 406. Even the loss of use of a condominium due to odor from cat urine from a neighboring property was held to be covered because "physical loss may include not only tangible changes to the insured property, but also changes that are perceived by the sense of smell and that exist in the absence of structural damage." *Mellin v. N. Sec. Ins. Co.* (N.H. 2015) 115 A.3d 799, 805.

Similarly, in *Farmers Insurance Co. v. Trutanich* (Or. Ct. App. 1993) 858 P.2d 1332, the insurer argued that losses from odors that entered the insured's home from a neighboring methamphetamine lab were not covered because an odor was not "direct physical loss to the premises." The court rejected this argument holding that the presence of the odor constituted physical damage to property. *Id*. at 1335.

Additionally, in *TRAVCO Insurance Co. v. Ward* (E.D. Va. 2010) 715 F.Supp.2d 699, aff'd, (4th Cir. 2013) 504 F.App'x 251,

the policyholder sought coverage under a homeowner's policy for losses from the presence of defective drywall. *Id.* at 703. The policy insured against "risk of direct physical loss to property …." *Id.* at 702. The insurance company argued that there was no coverage for removing the drywall because it had not sustained any "direct physical loss." *Id.* at 704. The insurance company further claimed that the drywall was "physically intact, functional and has no visible damage." *Id.* at 708. The court rejected this argument and relying on *Hughes*, *Trutanich*, and many other cases cited above, ruled: "The majority of cases appear to support [the policyholder's] position that physical damage to the property is not necessary, at least where the building in question has been rendered unusable by physical forces." *Id.* at 708-709. The court found that the cases cited by the insurance company were "readily distinguishable" because "they do not involve situations in which the property in question was rendered unusable." *Id.* at 709.

Accordingly, the Superior Court erred dismissing Inns' case because it is immaterial whether Inns' property was "physically altered" due to the presence of COVID-19. Physical alteration is not a necessary element of coverage under the policy to show "physical loss of or damage to" property. To hold otherwise nullifies any coverage for "physical loss," which must be distinct from "physical damage." *See Palmer v. Truck Ins. Exch.* (1999) 21 Cal.4th 1109, 1115 (courts "must give effect 'to every part' of the policy with 'each clause helping to interpret the other.'")

The California Supreme Court has held that the object and purpose of insurance is "to indemnify the insured in case of loss, and ordinarily such indemnity should be effectuated rather than defeated." *Ins. Co. of N. Am. v. Elec. Purification Co.* (1967) 67 Cal.2d 679, 689. When interpreting "all-risk" insurance policies like the one at issue, courts should start from a "presumption of coverage." *Travelers Cas. & Sur. Co. v. Superior Ct.* (1998) 63 Cal.App.4th 1440, 1454-55. And when faced with "troubl[e]" or "difficulty" in ascertaining the meaning of certain phrasing, the Supreme Court has "warned against interpreting [insurance policies] to deny the basic insurance contemplated by the insured." *Elec. Purification Co. supra*, 67 Cal.2d at 689.

Here, Inns' "all-risk" policy protects itself and its business from: *all risks* that were not explicitly excluded. Even if this Court may find some "difficulty" in construing the term "physical loss of or damage to" property, it should be mindful not to deny Inns the protections it bargained for when it purchased its policy. *Id.*

Inns alleges it suffered covered direct physical loss or damage because its venue was rendered unsafe and unusable due to the actual presence of COVID-19 at its property. (1 AA 21 ¶ 21.) Just like the real property in *Hughes*, *Trutanich*, *TRAVCO*, and the other cases cited above, a hotel is a property that must be fit for occupancy, a safe place for individuals to gather without an unnecessary risk of becoming seriously ill. When a venue, such as Inns, becomes dangerous and unsafe for use due to the presence of

a virus or deadly disease on its premises, it suffers direct physical loss.

B. Insurance Companies, Like California Mutual, Have Known For Decades That "Physical Loss" To Real Property Does Not Necessarily Require "Physical Alteration."

As early as the 1960s, courts warned insurance companies that the term "physical loss" covers loss-of-use claims. *See Hughes*, *supra*, 199 Cal.App.2d at 242. In case after case, appellate courts—including those in California—rejected a supposed "physical alteration" or "tangible damage" requirement to "physical loss," holding instead that "physical loss" affords coverage where property becomes too dangerous for its intended use. *See* Section II.A *infra*. These holdings confirm that the term "physical loss or damage" is at least ambiguous because it has "more than one reasonable meaning." [2] *Safeco Ins. Co. of Am. v. Robert S.*, (2001) 26 Cal.4th 758, 777.

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[2] Courts are not the only entities that struggle with the meaning of "physical loss of or damage to" property. There is also disagreement among *insurers* regarding the interpretation of this phrase. For example, in a recent insurer versus insurer subrogation action, Factory Mutual Insurance Company ("FM") filed a brief relying on many of the same cases UP cites here. In its brief, FM argues that "direct physical loss or damage" may occur when a property loses its intended "functionality or reliability." *See Factory Mutual Insurance Company, et al. v. Federal Insurance Company*, No. 1:17-cv-00760-GJF-LF pending in the United States District Court for the District of New Mexico.

Despite being aware of policyholders' reasonable interpretations that "physical loss" includes "loss of use" and is not necessarily limited to "tangible damage" or "physical alteration," insurers, like California Mutual, continued selling broad coverage that does not even mention "tangible damage" or "physical alteration." Courts lack power to alter California Mutual's wording, and it was error for the Superior Court to do so here. *Aerojet-Gen. Corp. v. Transp. Indem. Co.*, (1997) 17 Cal.4th 38, 75 (stating courts may not "rewrite" insurance contracts for insurance companies.) California Mutual, like all insurers, ought to be held to the words it used—not the words it now wishes it had used—and its decision not to define "physical loss or damage" despite its knowledge of the term's ambiguities is significant.[3]

Now, having failed to define direct physical loss or damage as they (and others before them) have argued it should be

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[3] In a different context, the Third Circuit chastised the insurance industry's continued use of a term that caused years of divergent judicial opinions, and on that basis, found the language ambiguous. *See New Castle County DE v. National Union Fire Ins. Co. of Pittsburgh, Pa.* (3d Cir. 2001) 243 F.3d 744, 755-56 ("A single phrase, which insurance companies have consistently refused to define, and that has generated literally hundreds of lawsuits, with widely varying results, cannot, under our application of commonsense, be termed unambiguous. As such, we hold that an 'invasion of the right of private occupancy' must be construed liberally.") Likewise, the insurance industry's continuing use of the "ensuing loss" clause has caused years of interpretive struggle. In 1988, the Fifth Circuit called this policy language "self-contradictory gibberish." *Lake Charles Harbor & Terminal Dist. v. Imperial Cas. & Indem. Co.* (5th Cir. 1988) 857 F.2d 286, 288 (finding that catastrophic damage to a machine caused by its own mechanical breakdown was covered).

interpreted, California Mutual must honor its broadly worded promise of coverage and accept Inns' reasonable interpretation that "physical loss or damage to property" is not limited to just "physical alteration." *See Robert S.*, *supra*, 26 Cal.4th at 777 ("If a provision has more than one reasonable meaning, the ambiguity is resolved in favor of coverage a lay policyholder would reasonably expect.") This Court should not be in the business of rescuing insurance companies who regret their choice to sell vaguely worded insurance policies, especially where the lack of clarity was well established in prior case law and well known to California Mutual

C. California Mutual's Authorities Are Inapposite, Unhelpful, And Should Be Given Little Weight.

California Mutual, and most other insurers litigating in California, have harped on a smattering of California cases that purport to hold that "physical loss of or damage to" property requires "physical alteration." But all of these cases involve *personal* or *intangible* property, such as computer data, or business arrangements relating to fast-food game pieces, not *real* property that is at issue here. As such, when California Mutual's favored cases are closely examined, it is clear that these cases offer nothing to this Court's analysis. Moreover, once California Mutual's district court opinions are unpacked, they reveal a flimsy tower that is ripe to fall.

For example, *MRI Healthcare Center of Glendale, Inc. v. State Farm General Insurance Co.* (2010) 187 Cal.App.4th 766 involved an MRI machine that was "ramped down" when the property owner had to repair roof damage due to a storm, but then failed to ramp back up after the repairs were completed. *Id.* at 770. In other words, the machine was turned off and then wouldn't turn back on. In determining that there had to be an alteration of property for there to be "direct physical loss or damage," the court stated that "[t]he failure of the MRI machine to satisfactorily 'ramp up' emanated from the machine itself rather than actual physical 'damage' … in effect, the machine was turned off and could not be turned on." *Id.* at 780. Thus, the court found there was no "direct physical loss under the policy." *Id.*

In *Ward General Ins. Services, Inc. v. Employers Fire Insurance Co.* (2003) 114 Cal.App.4th 548, the insurance claim involved the loss of stored computer data. *Id.* at 556-57. During an update of a database, the system crashed causing the loss of data. *Id.* at 550-51. There was no accompanying loss or destruction of any storage medium, so the court held there was no physical loss or damage. *Id.* at 556.

In *Simon Marketing v. Gulf Insurance Co.* (2007) 149 Cal.App.4th 616, an insured marketing company, Simon, designed game pieces for McDonald's fast-food restaurants. *Id.* at 619. An employee of Simon orchestrated a scheme to steal winning game pieces and funnel them to certain individuals. *Id.* As a result of

this criminal conduct, McDonald's terminated its contract with Simon. *Id.* at 620. Simon sought coverage from its property insurer due to McDonald's termination of its business contract and the court found that "the termination of Simon's business because McDonald's and others cancelled their contracts with Simon is not the physical loss, or damage, to insured property." *Id.*

Notably, neither *MRI*, *Ward*, *Simon*, nor any of California Mutual's other state law cases involve any discussion of *real* property. These cases also fail to discuss how *real* property is different from *personal* property because *real* property experiences "physical loss" if it becomes unsafe or unusable for its intended use. *Hughes*, *supra*, 199 Cal.App.2d at 242. For these reasons, California Mutual's state authorities should be disregarded here. Further, when these cases are disregarded, the rest of California Mutual's argument falls away as well. This is especially so for California Mutual's reliance on federal district court decisions in California dismissing COVID-19 coverage cases based on the same improper extension of *MRI*, *Ward*, and *Simon* to cases involving real property rendered unsafe for its intended use.

Importantly, the federal cases relied on by California Mutual "do not constitute binding authority" on this Court. *Gong v. City of Rosemead* (2014) 226 Cal.App.4th 363, 375. The issues arising on this appeal concern a California plaintiff and California insurance company that will be decided under California law and decisions from "federal courts are not controlling on questions of

state law." *Whiteley v. Philip Morris Inc.* (2004) 117 Cal.App.4th 635, 690; *see also Antelope Valley Groundwater Cases* (2018) 30 Cal.App.5th 602, 626 n.19.

There is good reason to approach California Mutual's federal authorities with great skepticism. In many instances, federal courts tasked with interpreting novel state law issues have made incorrect predictions, especially in the area of insurance coverage, a uniquely state body of law. *See* John L. Watkins, *Erie Denied: How Federal Courts Decide Insurance Coverage Cases Differently and What to Do About It*, 21 CONN. INS. L.J. (2015) 455, 459-60 (describing how federal courts predict wrongly and how federal judges have admitted that federal courts predict wrongly when deciding unsettled state insurance law questions). In other instances, state supreme courts have often repudiated or overruled many of the federal courts' predictions on state law.[4] The same

[4] *In re Watts* (9th Cir. 2002) 298 F.3d 1077, 1081-83 (upon "reexamining our interpretation of [the statute] in light of [the California Court of Appeals decisions], we conclude that, if confronted with the issue, the California Supreme Court would follow the rationale of [these decisions] and not the approach that we adopted in *Jones*."); *LeFrere v. Quezada* (11th Cir. 2009) 588 F.3d 1317, 1318 ("'Because of the *Shelley* decision [by the Alabama Supreme Court], we now know that the Erie-guess we made [twelve years ago in *Lancaster v. Monroe County* (11th Cir. 1997) 116 F.3d 1419, 1431] is not an accurate statement of Alabama law. We now know that jailers are not entitled to absolute state immunity under Art. I, § 14 of the Alabama Constitution.'"); *United Servs. Life Ins. Co. v. Delaney* (5th Cir. 1964) 328 F.2d 483, 486 (Brown, J., concurring)(Judge John R. Brown observed how the state supreme courts of Texas, Alabama, and Florida have repudiated many of the Fifth Circuit's predictions: "And now that

should be true here as federal district courts are merely *guessing* as to how this Court, and other California courts, would decide how to apply "physical loss or damage to" property in cases involving COVID-19 and its effect on real property. The California Supreme Court and this Court, not California federal courts, should be the arbiters of how California insurance law develops in this important area. For this additional reason, this Court should give little weight to any of California Mutual's federal authority.

Still, even if this Court wishes to engage with these federal cases on the merits, such opinions do nothing to undercut Inns' arguments. This is true because as noted above the federal COVID-19 decisions cited by California Mutual mistakenly apply *Simon*, *MRI, Ward*, and other similar inapposite cases.[5] Thus, California Mutual's federal cases merely build upon the unhelpful California cases involving unusual situations relating *personal* and *intangible* property. None of these state law cases find that

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we have this remarkable facility of certification, we have not yet 'guessed right' on a single case.").

[5] *See 10E, LLC v. Travelers Indem. Co. of Connecticut*, 2020 WL 5359653, at *5 (C.D. Cal. Sept. 2, 2020) (relied upon on *MRI* and *Ward* and another case that held purchasing counterfeit wine was not a covered physical loss to rule against insurer); *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Connecticut*, 2020 WL 5938689, at *5 (C.D. Cal. Oct. 2, 2020) (relied upon *MRI* and *Ward* to rule against insurer); *Plan Check Downtown III, LLC v. AmGuard Ins.* Co., 485 F. Supp. 3d 1225, 1228 (C.D. Cal. 2020) (same); *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, 487 F. Supp. 3d 937, 941 (S.D. Cal. 2020) (relied upon *MRI*); *Robert W. Fountain, Inc. v. Citizens Ins. Co. of Am.*, 2020 WL 7247207, at *4 (N.D. Cal. Dec. 9, 2020) (same).

their holdings should carry over to a case like this involving "physical loss" to *real* property arising from a dangerous condition. That situation was already addressed in *Hughes*, and *Hughes*' holding on these issues has never been overruled.

Equally important, many of the federal COVID-19 cases cited by California Mutual were premised on a theory of recovery that is different from the theory Inns asserts. In the other COVID-19 cases, the policyholders averred that the various governmental closure orders, *by themselves*, resulted in physical loss or damage. *See e.g. Pappy's Barber Shops, Inc. v. Farmers Group, Inc.* (S.D. Cal. 2020) 487 F.Supp.3d 937, 941 (granting motion to dismiss where policyholders admitted that the cause of their losses was the civil authority orders). Here, Inns does not allege that it suffered physical loss or damage only due to the issuance of government orders or that it faces a risk of harm that has not yet materialized. Rather, Inns avers that its business location was rendered dangerous and unsafe due to the COVID-19 pandemic and the actual presence of COVID-19. (1 AA 21 ¶ 21.) These allegations are sufficient to trigger coverage for direct physical loss to real property under the policy and warrant reversal by this Court.

D. The Evolving Science Concerning COVID-19 Dictates That These Coverage Questions Be Decided On A Full Evidentiary Record Rather Than The Pleadings.

Inns initiated this lawsuit on April 20, 2020, just a few weeks after the pandemic began. Since that time, scientists and

researchers have uncovered a wealth of information about COVID-19, how it is transmitted, and how it interacts with, and possibly changes, property. Rather than deciding this case at the pleading stage, without the benefit of this evolving science, this Court should at least reverse the Superior Court and allow Inns to develop a factual record to show the full extent of physical loss or damage caused by COVID-19.

COVID-19 is highly transmissible infectious disease that is ubiquitous in the United States. Christopher Ingraham, *At the Population Level, the Coronavirus is Almost Literally Everywhere*, WASH. POST (Apr. 1, 2020). While the United States alone has suffered more than 30 million COVID-19 cases, the Centers for Disease Control and Prevention ("CDC") estimates that the actual number of people in the United States who have been infected with COVID-19 is likely ten times higher. Lena H. Sun & Joel Achenbach, *CDC Chief says Coronavirus Cases may be 10 Times Higher than Reported*, WASH. POST (June 25, 2020). Confirmed COVID-19 cases are difficult to track because as high as 40% of cases may be asymptomatic. Ellen Cranley, *40% of People Infected with COVID-19 are Asymptomatic, a New CDC Estimate Says*, BUS. INSIDER (July 12, 2020).

While the science is ever-evolving, researchers currently understand that COVID-19 is transmitted in several ways, including via human-to-human contact, airborne particles in ambient air, and touching surfaces or objects. Jing Cai et al.,

Indirect Virus Transmission in Cluster of COVID-19 Cases, Wenzhou, China, 2020 (June 2020) 26 Emerging Infections Diseases 6. COVID-19 can also be transmitted via "fomites," which are respiratory secretions or droplets expelled by infected individuals that may survive on contaminate surfaces and objects for long periods of time. *Transmission of SARS-CoV-2: implications for infection prevention precautions*, World Health Organization (July 9, 2020).

Relevant to this appeal, the presence of COVID-19 on surfaces and objects may change such objects into a transmission vehicle for COVID-19 from one host to another. In fact, the World Health Organization's ("WHO") description of fomite transmission of COVID-19 expressly recognizes this physical alteration of property, stating that "respiratory secretions or droplets expelled by infected individuals can contaminate surfaces and objects, *creating* fomites (contaminated surfaces)." *Transmission of SARS-CoV-2: implications for infection prevention precautions*, WHO (July 9, 2020) (emphasis added).

Accordingly, the current science indicates that COVID-19 adheres to surfaces and objects, thereby harming and physically changing or altering those objects through the *creation* of fomites. These fomites may then become a part of an object's surface and exists for several days. Once these fomites are in, on, or near property, they are easily spread by the air, people and objects, from one area to another, causing additional direct physical loss of or

damage to property. Moreover, these fomites cannot always be removed or eliminated by routine cleaning as studies indicate that COVID-19 is "much more resilient to cleaning than other respiratory viruses so tested." Nevio Cimolai, *Environmental and decontamination issues for human coronaviruses and their potential surrogates* (June 12, 2020) 92 J. OF MED. VIROLOGY 11, 2498-510; *see also* Joon Young Song et al., *Viral Shedding and Environmental Cleaning in Middle East Respiratory Syndrome Coronavirus Infection* (Dec. 2015) 47 INFECTION & CHEMOTHERAPY 4, 252-5 (finding that coronaviruses have demonstrated viral RNA persistence on objects despite cleaning with 70% alcohol.)

To be clear, UP submits that "physical loss or damage to" property may occur without any physical alteration. But what these studies show is that it is too soon to determine that COVID-19 *does not* cause physical alteration, to the extent such a showing is required to unlock coverage. The science also indicates that it is improvident for courts to make findings that COVID-19 does not cause damage to property or physical alteration without the benefit of an evidentiary record. Courts that conclude that COVID-19 does not cause "physical loss or damage to property," should do so only with the support of a complete evidentiary record, rather than a judge's best guess based only upon the parties' cold pleadings.

For this additional reason, this Court should reverse the Superior Court and allow Inns to develop evidence to show the full extent of damage caused by COVID-19.

III. CONCLUSION

Amici Curiae UP respectfully requests that this Court reverse the Superior Court's judgment and remand this case for decision on the remaining issues presented by the Inns' Complaint. Alternatively, UP requests this Court remand this matter with instructions to allow Inns to amend its Complaint.

DATED: April 20, 2021

REED SMITH LLP

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WORD COUNT CERTIFICATE

The foregoing Amicus Curiae Brief contains 4,866 words (including footnotes, but excluding the Application, tables, signature block, and this certificate). In preparing this certificate, I have relied on the word count generated by Microsoft Office Word 2010. The Brief and Application also conform to the format requirements set forth in California Rule of Court 8.74 (as amended eff. Jan. 1, 2020).

Executed on April 20, 2021, at San Francisco, California.

/s/ *David E. Weiss*
David E. Weiss

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH LLP, 101 Second Street, Suite 1800, San Francisco, CA 94105-3659. On April 20, 2021, I served the following document(s) by the method indicated below:

APPLICATION FOR LEAVE TO FILE AN AMICUS BRIEF AND BRIEF AMICI CURIAE OF UNITED POLICYHOLDERS IN SUPPORT OF APPELLANT THE INNS BY THE SEA

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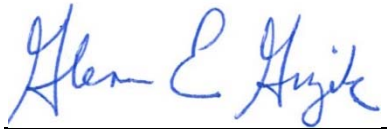
I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed on April 20, 2021 at San Francisco, California.



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