No. 21-15585

IN THE

United States Court of Appeals for the Ninth Circuit

OUT WEST RESTAURANT GROUP, INC.; CERCA TROVA RESTAURANT GROUP, INC.; CERCA TROVA STEAKHOUSE, L.P.; AND CERCA TROVA SOUTHWEST RESTAURANT GROUP, LLC,

Plaintiffs-Appellants,

v.

AFFILIATED FM INSURANCE COMPANY,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California,
No. 3:20-CV-06786-TSH [Hixson, M.J.]

APPLICATION OF UNITED POLICYHOLDERS TO SUBMIT *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANTS

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

United Policyholders ("UP") moves the Court for an order permitting it to file the attached *amicus curiae* brief in support of the Appellants. The brief brings to the Court's attention longstanding California precedents and maxims of insurance law that bear directly on the issue of whether coronavirus-related losses are insurable under the language of the Affiliated FM Insurance Company "all risks" property insurance policy that is the subject of this appeal but which the district court did not consider and which, in large part, Appellants' opening brief does not address. *Amicus* support is especially vital here because the issues implicated by this case are far-reaching and of critical importance, and are likely to affect insurance recoveries for medium-sized businesses throughout California.

I. INTEREST OF *AMICUS CURIAE*

UP is a respected national non-profit section 501(c)(3) organization and policyholder advocate. Founded in 1991, for nearly three decades UP has operated as a dedicated information resource and voice for individual and commercial insurance consumers throughout the entire United States, and has helped secure important trial and appellate victories for insurance policyholders. During this

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), UP affirms that no counsel for a party authored this brief in whole or in part and that no person other than its counsel made any monetary contributions intended to fund the preparation or submission of this brief.

historic pandemic, UP's commitment to defending and arguing for policyholders' rights to insurance coverage for losses associated with COVID-19 is critically important.

UP assists purchasers of insurance when seeking a policy or pursuing a claim for loss. UP is routinely called upon to help individual policyholders in the wake of large-scale natural disasters such as floods, wildfires, hurricanes, and, now, a pandemic that has caused substantial economic losses to businesses across the nation. Since March 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 COVID-19-related public safety orders. UP is conducting educational workshops for businesses and trade associations and it maintains an online help library at uphelp.org/COVID.

In addition, UP engages on an ongoing basis with insurance regulators through the proceedings of the National Association of Insurance Commissioners, where UP has served as a consumer representative since 2009. UP gave three NAIC presentations in 2020 concerning coverage for business interruption losses related to COVID-19 and public safety orders.

Since 1991, UP has filed *amicus* briefs in federal and state appellate courts across 42 states and in more than 500 cases, including more than 40 appellate decisions applying California law and at least ten cases before this Court. 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.*, 35 Cal. 4th 747, 760 (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).[2]

II. UP FULFILLS THE CLASSIC ROLE OF AMICUS CURIAE

By submitting a brief in this matter, UP seeks to assist the Court on an important issue to many of the policyholders that UP advocates for—namely, the insurability of coronavirus-related losses—by drawing the Court's attention to controlling law that has escaped the attention of the lower courts. This is a quintessential role for *amicus curiae*. *See Funbus Sys., Inc. v. CPUC*, 801 F.2d 1120, 1125 (9th Cir. 1986) (describing "the classic role of amicus curiae [as] assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that might otherwise escape consideration").

It bears adding that, while insurers are "repeat players" in coverage

[2] A complete listing of all cases in which UP has appeared as *amicus curiae* can be found in UP's online Amicus Project library at https://www.uphelp.org./resources/amicus-briefs.

litigation, most policyholders are not. *Coleman v. Gulf Ins. Group*, 41 Cal. 3d 782, 806 n.9 (1986) (Bird, C.J., dissenting); *see also Travelers Ins. Co. v. Budget Rent-A-Car Sys., Inc.*, 901 F.2d 765, 771 (9th Cir. 1990) (describing insurance companies as "institutional litigants"). Thus, if UP were denied the opportunity to present its arguments, from the perspective of a policyholder advocate steeped in insurance law, while the appellee insurance company retained its position as the only institutional litigant in this case, the Court would then be deprived of a symmetry of advocacy necessary for the fair and even-handed development of the law.

For the foregoing reasons, UP respectfully requests leave to file the attached *amicus curiae* brief.[3]

Dated: July 19, 2021

Respectfully submitted,

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

[3] The undersigned is representing UP in this matter on a *pro bono* basis.

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[PROPOSED] *AMICUS CURIAE* BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *Amicus Curiae* United Policyholders discloses that it is a non-profit section 501(c)(3) organization, it has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The insurance policy in this appeal, issued by Appellee Affiliated FM Insurance Company, provides coverage for "ALL RISKS OF PHYSICAL LOSS OR DAMAGE," unless excluded.[1] The magistrate judge concluded that this insuring agreement requires "a physical change in the condition or a permanent dispossession of the property" to trigger coverage,[2] relying on *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.,* 487 F. Supp. 3d 384, 839-40 (N.D. Cal. 2020), which in turn relied on *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779-80 (2010), and *Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, 2018 WL 3829767, at *3-4 (C.D. Cal. July 11, 2018). He also cited to district court opinions that cited to each other and to *MRI Healthcare*. The magistrate judge's analysis was, in his defense, identical to that of almost all of the other California federal district court decisions addressing claims for insurance coverage for COVID-19-related business losses, *i.e.,* citing to each other and to *MRI Healthcare* as if every insurance policy were identical and *MRI Healthcare* had addressed "all risks" coverage, neither of which is the case. This was error.

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1 2-ER-113.

2 1-ER-008.

First, issues of insurance coverage turn on the language that the insurer used in the insurance policy, and not on general rules or on cases construing differently worded policies. That is a black letter rule of California insurance law.[3] But the magistrate judge failed to recognize that the Affiliated FM "all risks" insurance policy was materially different from the policy in *Mudpie*; and both the magistrate judge and the district judge in *Mudpie* apparently failed to notice that *MRI Healthcare* wasn't addressing an "all risks" policy at all—that case concerned an "open cover" policy that did not cover "all risks," required the loss to be "direct" and "accidental," and did not insure against "loss or damage." The magistrate judge was mistaken in assuming that *MRI Healthcare* governs the differently worded insurance policy here, and he did not consider the published California appellate decisions that do govern the state law questions that this case presents.

Second, the magistrate judge erred further in relying on district court opinions addressing different insurance policies. Those cases construed property

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[3] *See, e.g., Ameron Int'l; Corp. v. Ins. Co. of the State of Pa.*, 50 Cal. 4th 1370, 1378 (2010) ("'The…interpretation of a contract must give effect to the 'mutual intention' of the parties…[, which] is to be inferred, if possible, solely from the written provisions of the contract.'") (citations omitted); *In re KF Dairies, Inc.*, 224 F.3d 922, 927 (9th Cir. 2000) ("'In questions of insurance coverage the court's initial focus must be upon the language of the policy itself, not upon 'general' rules of coverage that are not necessarily responsive to the policy language.'"), quoting *American Cyanamid Co. v. American Home Assur. Co.*, 30 Cal. App. 4th 969, 978 (1994) .

policies issued on Insurance Services Office forms, or variations on those forms, with policy language designed to cover small businesses. In contrast, Affiliated FM, which caters to mid-market companies,[4] provides quite different coverage, as detailed below. Because California law requires a court to construe the policy language in the context of the entire contract of insurance (*see Powerine Oil Co. v. Superior Court*, 37 Cal. 4th 377, 390-91 (2005)), a case interpreting an ISO form is not necessarily applicable to the differently worded Affiliated FM form.

Third, Appellants pleaded facts that are more than adequate to support an insurance claim for physical loss or damage as those terms are used in the Affiliated FM Policy. The magistrate judge instead granted judgment on the pleadings based on two fundamentally incorrect assumptions: first, that no coverage is available for physical loss if it can be repaired quickly—an assumption contrary to the plain policy language and common sense; and, second, that no coverage is available for physical loss unless the insured is permanently deprived of the property, relying for the latter holding on the district court opinion in *Total Intermodal*. But *Total Intermodal* addressed a cargo policy, not an "all risks" policy. And it did not hold, even under the terms of the cargo policy, that

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4 *See* https://www.affiliatedfm.com/about/why-afm ("AFM specializes in commercial property insurance for the middle market. It's what we do."). Affiliated FM's sister insurer, FM, markets to very large businesses and likewise provides different coverage from both the ISO forms and the Affiliated FM form.

"physical loss" is limited to permanent deprivation. Nor could such a holding apply to the Affiliated FM Policy, which provides express business interruption coverage for property that can be repaired and, hence, not permanently lost.

Finally, although the magistrate judge did not address the "contamination" exclusion in the Affiliated FM Policy, this brief explains why that exclusion does not provide an independent ground for affirming the ruling below.

ARGUMENT

I. California Law Broadly Defines "Physical Loss" and "Damage"

The Affiliated FM policy covers "ALL RISKS OF PHYSICAL LOSS OR DAMAGE" to covered property "except as hereinafter excluded." 2-ER-113. "All risks" coverage is the broadest form of property policy as it covers all perils unless expressly excluded. *See Garvey v. State Farm Fire & Cas. Co.*, 48 Cal. 3d 395, 406 (1989); *Fire Ins. Exch. v. Superior Ct.*, 116 Cal. App. 4th 446, 465 n. 13 (2004) ("'An 'all-risk' policy is one that covers all perils generally and without enumeration except those specifically excepted, as opposed to the typical policy which specifies both included and excluded perils.'") (citation omitted).[5]

[5] It also is different from and broader than the more common forms of property insurance: "named perils" and "open cover" policies. *See* J. Walter Croskey, et al., *California Practice Guide: Insurance Litigation* ¶¶ 6:250 et seq. (Rutter Group rev. ed. 2021).

California law does not limit "all risks" coverage to instances in which there was "a physical change in the condition or a permanent dispossession of the property," as the magistrate judge assumed, and instead provides that real or personal property may be physically lost or damaged when an external peril undermines the property's safe use and function.

To plead insured physical loss, a plaintiff therefore need only allege "an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event,…*causing it to become unsatisfactory for future use* or requiring that repairs be made to make it so." *MRI Healthcare*, 187 Cal. App. 4th at 779 (citation omitted and emphasis added).[6] In keeping with this standard, courts applying California law have found physical loss and/or damage in a wide range of circumstances involving perils that deprive property of its use, often by rendering it unsafe, without also altering the property's physical structure, such as:

- changing soil conditions that render homes unsafe by placing them at imminent risk of collapse, even though the building structures were not physically altered, *see Hughes v. Potomac Ins. Co. of D.C.*, 199 Cal. App. 2d 239, 248-49 (1962); *Strickland v. Fed. Ins. Co.*, 200 Cal. App. 3d 792, 799-801 (1988);

[6] The quotation omits the "direct" requirement in the *MRI Healthcare* "open cover" insuring agreement, but not in the Affiliated FM insuring agreement.

- the intermingling of unwanted substances with otherwise undamaged goods, rendering the goods unfit for use, even though the goods themselves were not physically altered, *see Shade Foods*, *Inc. v. Innovative Prods. Sales & Mktg., Inc.*, 78 Cal. App. 4th 847, 865 (2000);

- the dispossession of property through theft or conversion (without an alteration to the composition of the property), *see EOTT Energy Corp. v. Storebrand Int'l Ins. Co.*, 45 Cal. App. 4th 565, 569 (1996);

- the dispossession of property through government seizure (with no physical change to the property), *see American Alt. Ins. Corp. v. Superior Court*, 135 Cal. App. 4th 1239, 1246-47 (2006); and

- the loss of property due to mistaken shipment (again, with no alteration of property composition), *see Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, 2018 WL 3829767, at *3-4 (C.D. Cal. July 11, 2018).

Notably, in nearly all of the foregoing cases, the insurance policies, like the Affiliated FM form, were "all risks" policies that covered both physical "loss" and, separately, "damage," *i.e.*, a full range of physical injuries. Their holdings are consistent with the requisite "ordinary and popular sense" of the terms "physical loss" and "damage"—a sense that California courts typically ascertain by consulting a dictionary and reading the policy language in the context of the entire contract.[7] *See* Merriam-Webster.com (https://www.merriam-

[7] *Ameron*, 50 Cal. 4th at 1378-79; *Scott v. Continental Ins. Co.*, 44 Cal. App. 4th 24, 29 (1996).

webster.com/dictionary (last visited July 15, 2021)) ("**loss**" is "destruction," "ruin," "the act of losing possession," and "a person or thing or an amount that is loss"); ("**damage**" is "loss or harm resulting from injury to person, property, or reputation").

Hughes provides an especially vivid illustration of how property rendered unusable and unsafe (but not structurally altered) suffers "physical loss of and damage" within the plain meaning of the phrase in an "all risks" policy. The policyholders awoke one morning to discover that the land next to their home had washed away, leaving their otherwise physically intact home on the edge of a newly created 30-foot cliff. 199 Cal. App. 2d at 242-43. They sought coverage for the cost of stabilizing their home under an "all risks" policy. *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 California Court of Appeal rejected this narrow interpretation, explaining that "[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 799-801 (a "significant risk" that

property will "collapse[] or become uninhabitable" in the future is "the type of risk" a property insurer is "paid to assume").

In approving coverage for the cost of stabilizing a home when it was physically unsafe for use, but had not yet collapsed, *Hughes* "encourage[d]" what the California Supreme Court subsequently described as "a most salutary course of conduct, that is, the taking of measures to mitigate or prevent damage." *State v. Allstate Ins. Co.* 45 Cal. 4th 1008, 1026 (2009) (internal quotation marks omitted).

Shade Foods likewise found the existence of physical loss and damage where the utility of the property was materially harmed by an external peril, even though the property itself remained structurally unaltered. There, a manufacturer had purchased 80,000 pounds of almonds from a supplier, which were tainted by a quarter pound of wood splinters. *Shade Foods*, 78 Cal. App. 4th at 862. Although the almonds themselves were unaltered, the manufacturer was unable "to remove the injurious splinters" and thus could not "restor[e] it to use." *Id.* at 866-67. The Court found it "obvious that the contamination of the almonds with wood splinters, requiring their destruction, constituted physical loss of the [supplier's] stock" for purposes of commercial property coverage. *Id.* at 874; *see also id.* (referring to the coverage awarded as "coverage for physical damage").

These precedents align with authority in the liability insurance context holding that property is physically harmed when noxious substances, even in small

or merely threatened quantities, physically disturb the safe use of property. *See Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 91 (1996) (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" in the air, the "injury to the buildings is a physical one") (emphasis in original). These California decisions find support in (and are often cited by) persuasive authorities in other jurisdictions that find insured physical loss and/or damage to property based on losses of use flowing from the fortuitous presence of gases, smoke, odors, and other noxious substances in and around the air and surfaces of the subject property that do not alter the structure of that property.[8]

II. Out West Has Alleged (and Can Further Allege) Facts Showing That Viral Outbreaks Caused Direct "Physical Loss" *or* "Damage"

The coronavirus is a dangerous and unexpected physical peril. Outbreaks of the coronavirus have physically damaged business premises by altering the surfaces of and the air inside property so that formerly safe property is rendered dangerous. These are concrete and substantial physical changes that fit precisely

[8] *E.g., W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55–56 (Colo. 1968) (gasoline fumes) (citing *Hughes*); *Matzner v. Seaco Ins. Co.*, 1998 WL 566658, at *3–4 (Mass. Super. Aug. 12, 1998) (carbon monoxide) (citing *Hughes*); *TRAVCO Ins. Co. v. Ward*, 715 F. Supp. 2d 699 (E.D. Va. 2010) (drywall gases) (citing *Hughes*); *Or. Shakespeare Ass'n v. Great Am. Ins. Co.*, 2016 WL 3267247, at *5-9 (D. Or. June 7, 2016) (smoke), *vac'd by stipulation*; *Mellin v. N. Sec. Ins. Co.*, 115 A.3d 799, 804-05 (N.H. 2015) (urine odor); *Farmers Ins. Co. of Or. v. Trutanich*, 858 P.2d 1332, 1335-36 (Or. App. 1993) (meth odor).

within the policy language. Actual or imminent viral infiltration has caused a physical loss of business premises by rendering those premises and their physical spaces unsafe (and, during the pendency of lockdown orders, unlawful) for their intended use, at least absent restorative or mitigation measures. These consequences arise from an external, fortuitous pandemic that is acting upon real and personal (*i.e.*, tangible) property of the type insured against by "all risks" policies.

Out West's complaint alleges the foregoing with respect to its restaurant properties, or can be further amended to do so.

A. The Coronavirus Physically Alters the Conditions and Safe Use of Property

The physical consequences of the coronavirus are manifold. *First*, as Out West alleges in its operative complaint, the coronavirus alters the physical surfaces of property. *See* 2-ER-202-03 ¶¶ 70-79 ("COVID-19 also can spread through surface- or object-to-person transmission after an infected person has touched a surface....Thus, the presence of COVID-19 causes physical alteration of the property."). These allegations must be accepted as true at the pleading stage, *see Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009), and they would be borne out in discovery and in expert testimony.

For example, the World Health Organization and researchers funded by the National Institutes of Health have advised that people can become infected with

the coronavirus by touching virus-laden objects and surfaces, and then touching their eyes, nose, or mouth.[9] This mode of transmission—indirect transmission via objects and surfaces—is known as "fomite transmission." A study of a COVID-19 outbreak 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 China.[10] Additional research has shown 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.[11] Further, cleaning of surfaces normally does not fully remove the virus, and thus, even after cleaning, some physical residue of the virus, and some alteration of the surface caused by the

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[9] 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; Alicia N.M. Kraay et al., *Risk for Fomite-Mediated Transmission of SARS-CoV-2 in Child Daycares, Schools, Nursing Homes, and Offices*, 27(4) Emerging Infectious Diseases 1229 (Apr. 2021), https://wwwnc.cdc.gov/eid/article/27/4/20-3631_article.

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

[11] Shane Riddell et al., *The effect of temperature on persistence of SARS-CoV-2 on common surfaces*, 17 Virology J. 145 (Oct. 7, 2020), https://virologyj.biomedcentral.com/articles/10.1186/s12985-020-01418-7.

virus, remains.[12] A recent study by the largest hospital network in New York State found that even after trained hospital personnel had used disinfection procedures in COVID-19 patient treatment areas and antechambers, much of the virus survived, indicating that even intense, non-routine cleaning cannot remove the virus from surfaces.[13] These studies are fundamentally inconsistent with the magistrate judge's assumptions in the dismissal order, assumptions made without any support in the record.

Second, as the Centers for Disease Control has recognized, an infected person can generate virus-laden aerosols that linger in the air well after the person leaves the area.[14] Moreover, the virus 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, exhaust filters,

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[12] Nicolas Castaño et al., *Fomite transmission and disinfection strategies for SARS-CoV-2 and related viruses*, arXiv:2005.11443 (May 23, 2020), https://arxiv.org/ftp/arxiv/papers/2005/2005.11443.pdf.

[13] Zarina Brune et al., *Effectiveness of SARS-CoV-2 Decontamination and Containment in a COVID-19 ICU*, 18 Int'l J. Env't Rsch. & Pub. Health 5, 2479 (Mar. 2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7967612/.

[14] CDC, *Scientific Brief: SARS-CoV-2 Transmission* (last updated May 7, 2021), https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/sars-cov-2-transmission.html.

and central ducts that were located more than 50 meters from the patients' rooms.[15] Another study concluded that the spread of the coronavirus "was prompted by air-conditioned ventilation," with persons who sat downstream of the HVAC system's air flow becoming infected.[16] Further, based on "epidemiological evidence suggestive of [coronavirus] transmission through aerosol,"[17] federal agencies have recommended that facilities improve their ventilation and HVAC systems by, for example, increasing ventilation with outdoor air and air filtration.[18]

Although Out West's complaint only briefly referenced early research addressing coronavirus's impact on the air, *see* 2-ER-203 ¶¶ 71-73 (citing a July 2020 CDC study and the impact of air-conditioned ventilation on droplet

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[15] Karolina Nissen et al., *Long-distance airborne dispersal of SARS-CoV-2 in Covid-19 wards*, 10 Sci. Rep. 19589 (Nov. 11, 2020), https://www.nature.com/articles/s41598-020-76442-2.

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

[17] 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 visited May 15, 2021).

[18] EPA, *Indoor Air and Coronavirus* (COVID-19), https://www.epa.gov/coronavirus/indoor-air-and-coronavirus-covid-19 (last visited May 15, 2021); CDC, *COVID-19 Employer Information for Office Buildings* (last updated Apr. 7, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/office-buildings.html; OSHA, *Guidance on Preparing Workplaces for COVID-19* (2020), https://www.osha.gov/Publications/OSHA3990.pdf.

transmission), Out West could readily amend its complaint to add the growing scientific evidence, some of which is described above, highlighting the coronavirus's capacity to dangerously transform property.

Third, Out West pleaded that the actual or imminent threat of viral intrusion onto the surfaces and air of its business properties has materially impaired the safe use and function of those properties. *See, e.g.,* 2-ER-203, 205 ¶¶ 70, 75, 79, 89-90.

Fourth, government officials have issued orders that materially prohibited access to Out West's restaurants and properties precisely because physical viral outbreaks rendered those properties commercially unsafe to use. For example, as alleged in the complaint, Solano County (California) Order of Health Officer No. 2020-04, issued on March 30, 2020, limited restaurants, including Out West's, to delivery and take-out, stating "this Order is given because of the propensity of the virus to spread person to person and also because the virus physically is causing property loss or damage due to its proclivity to attach to surfaces." *See, e.g.,* 2-ER-211 ¶ 119.

Finally, the physical impact of the coronavirus on business premises is further confirmed by the many physical remedial and mitigation measures that businesses have undertaken to make their unsafe premises safe and fit for some operations. They include (a) spatial reconfigurations of premises to avoid crowding and promote outdoor use, (b) repairs or modifications of heating and air

conditioning systems to improve ventilation, (c) installation of physical barriers to limit viral spread, (d) intensive cleaning and disinfecting, (e) the modification of physical behaviors by requiring social distancing, and various other steps set forth in government guidance.[19] Although Out West's complaint was filed at a comparatively early stage in the pandemic when these response measures were still in their nascent stages, Out West could allege detailed facts about these measures if given leave to amend on remand.

B. The Coronavirus Causes Both Physical "Loss" and "Damage" as Those Terms Are Used in Out West's "All Risks" Policy

The above-described physical alteration caused by the coronavirus to the surfaces, air, and usability of property, and by related response measures, readily satisfies the any requirement Out West may have to plead "physical loss or damage."

Just as the home in *Hughes* was held to be physically lost and damaged when the imminent risk of collapse rendered it "useless" but otherwise "intact," 199 Cal. App. 2d at 248-49, and the almonds in *Shade Foods* were held to have suffered physical loss and property damage when they were mixed with a small quantity of "injurious" wood chips and were no longer safe to use, 78 Cal. App. 4th at 866, 874, so too does a building experience physical loss and damage when

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19 *See* note 18, *supra*.

it is rendered unusable or less usable due to the presence of a deadly virus in and around it. And, much like the findings of coverage for the costs of stabilizing the at-risk home in *Hughes* and the losses related to destroying the unsafe almond stock in *Shade Foods*, the physical response measures necessary to contain and limit viral spread fall squarely within the broad coverage of Out West's "all risks" policy.

Further, just as *Armstrong* reasoned that a building sustains "physical injury" when its components are such that "common daily activities may cause asbestos fibers to be released," 45 Cal. App. 4th at 91, a business likewise suffers physical injury when its common daily function of hosting employees and patrons at its physical premises suddenly becomes a health hazard due to the risk of intrusion of a deadly disease that physically transforms safe surfaces into dangerous, virus-carrying fomites. And, like the asbestos in *Armstrong*, and the gasoline fumes, drywall gases, and carbon monoxide releases at issue in *Hughes*'s multi-state progeny (*see supra*, n.8), coronavirus particles physically and powerfully corrupt the breathable air in buildings.[20] Indeed, the relevant government orders closing physical operations at Out West's premises further confirm that viral outbreaks

[20] In contrast to many property policies, the Affiliated FM form does not exclude air inside buildings.

rendered those premises physically unsafe for normal use, *i.e.*, physically lost and damaged.

That Out West's restaurant properties might one day be repaired and restored to full pre-pandemic use does not destroy coverage because nothing in the plain language of the policy requires a *permanent* loss or dispossession of property for Out West to receive coverage.[21] In fact, the express language of the Business Interruption coverage in the Affiliated FM form contemplates that the damage would *not* be permanent.[22]

Moreover, imposing an atextual "permanent deprivation" requirement on insureds would conflict with *Hughes*, which found as a matter of "common sense" that a building was physically harmed after a landslide rendered it unsafe to occupy—even though the building had been "completely stabiliz[ed]" by the time

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[21] Nor did *Total Intermodal*, on which the magistrate judge relied, purport to impose a "permanent loss" requirement. *See Total Intermodal*, 2018 WL 3829767, *4 n.4 (using "the word 'includes' [in addressing loss of property] to make clear that its construction is non-limiting'").

[22] It covers "Business Interruption loss…[d]uring the Period of Liability," which is defined as the time needed to repair damage and restore property to pre-loss conditions (2-ER-146-150), thereby including within coverage temporary (i.e., repairable) loss or damage. Likewise, the civil authority coverage in the Affiliated FM form is triggered "if an order of civil or military authority prohibits access" to an insured location, limiting that coverage to a specified time period, 2-ER-151, which necessarily assumes that the action of civil authority would effect a non-permanent prohibition of access.

the insurance claim reached the Court of Appeal. 199 Cal. App. 2d at 248-249. Similarly, a "complete" deprivation condition would ignore the California Court of Appeal's recent holding that when a policy 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) (liability insurance) (emphasis in original).[23] Furthermore, California's statutory rule that "[a]n insurer is liable" where "a loss is caused by efforts to rescue the thing insured from a peril insured against," *see* Cal. Ins. Code § 531(b), would be a dead letter if a policyholder could not obtain coverage for efforts to temporarily and/or partially close down its premises in order to avoid a larger loss. *Allstate*, 45 Cal.4th at 1026.

III. Cases Concerning Intangible Property or Inherently Defective Property Are Inapposite

To the extent that, as the court below suggested, *see* 1-ER-8, California appellate decisions have placed limits on coverage for "physical" loss or damage, those limits have been modest. To date, California appellate courts have declined to find insured physical loss or damage only when (a) the alleged property in question is itself not physical under the terms of the policy, or (b) the property is

[23] Of course, few if any claims for truly fleeting or insignificant losses of use are likely to make their way to an insurance company's door, given that policy deductibles, transaction costs, and the risk of premium increases will almost always render such claims worthless or economically ill-advised.

physical but has not been altered by an external peril. Neither characteristic applies here. Critically, moreover, the insurance policy language in those cases often differs markedly from the language in the Affiliated FM Policy.

In the first line of cases, the property was *intangible* and so was not susceptible to physical loss or damage. These include (i) lost electronic computer data, *Ward Gen. Ins. Servs., Inc. v. Employers Fire Ins. Co.*, 114 Cal. App. 4th 548, 555-56 (2003); (ii) cancelled business contracts, *Simon Mktg., Inc. v. Gulf Ins. Co.*, 149 Cal. App. 4th 616, 623 (2007); and (iii) leaked trade secrets, *id.* at 623-24 (*dicta*). None of these decisions concerns physical property that could be physically lost or damaged.

The second line of cases involves claims premised on *internal* defects, as opposed to property that was lost or damaged by an *external* peril. They include (i) 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; (ii) an "internal defect in a building, such as bad title or bad paint," *id.* (citing *Pirie v. Fed. Ins. Co.*, 696 N.E.2d 553, 555 (Mass. App. Ct. 1998)) (*dicta*); (iii) wine that was discovered to be counterfeit and thus of lesser value than expected, *Doyle v. Fireman's Fund Ins. Co.*, 21 Cal. App. 5th 33, 38-40 (2018); and (iv) a condominium that contained "latent defects, faulty workmanship and construction code violations"—all perils that the policy excluded, *State Farm Fire & Cas. Co. v. Superior Court*, 215 Cal.

App. 3d 1435, 1439, 1442-43 (1989). In none of those cases was the subject loss caused by an external and accidental (*i.e.*, fortuitous) peril and so those courts concluded that the property insurance policies at issue did not respond.

The above lines of cases are readily distinguishable from a matter involving both *physical* property, such as Out West's restaurants, and *external* and fortuitous perils, such as unprecedented viral outbreaks spurring changes to property and forcing the substantial shutdown of businesses.

Moreover, those cases almost always involve policy language materially narrower than that in the Affiliated FM "all risks" form. For instance, *Simon Marketing* featured a "specified perils" (i.e., "named perils") policy that only insured a limited set of enumerated risks (as opposed to all risks unless expressly excluded, as in the Affiliated FM form). 149 Cal. App. 4th at 622.

MRI Healthcare construed an "open peril" policy that covered "accidental direct physical loss," 187 Cal. App. 4th at 771, but did not (as the Affiliated FM form does) promise to cover (i) "**all risks**" in connection with (ii) "physical loss ***or*** damage" (and required that the physical loss be "direct" and accidental," neither of which is in the Affiliated FM insuring agreement). As for (i), under an "all risks" property policy, "all risks"—that is, all perils—"except those specifically excepted" are covered. *Fire Ins. Exch.*, 116 Cal. App. 4th at 633 n.13. Regarding (ii), because "loss" and "damage" in the Affiliated FM form is stated in the

disjunctive, those two terms cannot mean the same thing, and so their scope cannot be limited to the meaning that *MRI Healthcare* assigned to just one of those terms.

Thus, the heavy reliance of Affiliated FM and the magistrate judge on *MRI Healthcare* and related cases was entirely misplaced—as was reliance on district court cases that likewise relied on such inapposite authority,[24] as none of them recognized that those cases were addressing materially different insurance policy language and factual circumstances.

IV. The Federal District Court Cases Cited by the Court Below and Relied Upon by Affiliated FM are Inapposite and Unpersuasive

Affiliated FM's argument, and the decision of the court below, heavily rely upon other district court rulings, all of which are inapposite.

As a preliminary matter, many of the district court rulings that the magistrate judge cited interpret the law of a different state,[25] and the California district court

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[24] *See, e.g., BA LAX, LLC v. Hartford Fire Ins. Co.*, 2021 WL 144248, *3 (C.D. Cal. Jan. 12, 2021); *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 487 F. Supp. 3d at 839-40; *Protégé Rest. Partners LLC v. Sentinel Ins. Co.*, 2021 WL 428653, *4-5 (N.D. Cal. Feb. 8, 2021).

[25] *Diesel Barbershop, LLC v. State Farm Lloyds*, 479 F. Supp. 3d 353, 358 (W.D. Tex. 2020); *Mama Jo's, Inc.*, 2018 WL 3412974, *8 (S.D. Fla. 2018), *aff'd*, 823 F. App'x 686 (11th Cir. 2020); *Promotional Headwear Int'l v. Cincinnati Ins. Co.*, 504 F. Supp. 3d 1191, 1196 (D. Kan. 2020); *Rococo Steak, LLC v. Aspen Specialty Ins. Co.*, 2021 WL 268478 *3 (M.D. Fla. Jan. 27, 2021); *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, 488 F. Supp. 3d 690, 693 (N.D. Ill. 2020), *recon. Denied*, 2021 WL 83758 (N.D. Ill. 2021); *Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co.*, 2021 WL 972878, *4 (W.D. Tex. Jan. 21, 2021); *Turek*

cases rely primarily on other district court rulings, rather than on published California appellate authority.[26]

Moreover, all of the district court decisions that the magistrate judge and Affiliated FM cited are factually and legally inapposite because, *inter alia*, they: (1) construe insurance policies containing the standard-form Insurance Services Office's "Loss Due to Virus or Bacteria" exclusion, or a similar exclusion, which Affiliated FM chose not to include in its "all risks" form[27]; (2) ignore apposite published California appellate authority, discussed above, and, if they cite California authority, focus on inapposite cases such as *MRI Healthcare* and *Ward*

Enters., Inc. v. State Farm Mut. Auto. Ins. Co., 484 F. Supp. 3d 492, 498 (E.D. Mich. 2020).

[26] *See Selane Prods., Inc. v. Cont'l Cas. Co.*, 2021 WL 609257, *3-4 (N.D. Cal. Nov. 24, 2020) (relying heavily on "voluminous authority from California [federal] district courts" and leaving largely unaddressed policyholder's "'controlling' California law"); *accord Geragos & Geragos Engine Co. No. 28, LLC v. Hartford Fire Ins. Co.*, 2020 WL 7350413, *3 (C.D. Cal. Dec. 3, 2020); *Kevin Barry Fine Art Assocs. v. Sentinel Ins. Co.*, 2021 WL 141180 *3 (N.D. Cal. Jan. 13, 2021); *Palmdale Estates, Inc. v. Blackboard Ins. Co.*, 2021 WL 25048, *2-3 (N.D. Cal. Jan. 4, 2021).

[27] *10E, LLC v. Travelers Indem. Co. of Conn.*, 483 F. Supp. 3d 828, 832 (C.D. Cal. 2020); *BA LAX,* 2021 WL 144248, *2; *Colgan v. Sentinel Ins. Co. Ltd.*, 2021 WL 472964, *2 (N.D. Cal. Jan. 26, 2021); *Diesel Barbershop, LLC v. State Farm Lloyds*, 479 F. Supp. 3d 353, 356-57 (W.D. Tex. 2020); *Karen Trinh, DDS, Inc. v. State Farm Gen. Ins. Co.*, 2020 WL 7696080, *3 (N.D. Cal. Dec. 28, 2020); *Kevin Barry*, 2021 WL 141180 *2; *Palmdale Estates,* 2021 WL 25048, *2; *Pappy's Barber Shops, Inc. v. Farmers Group, Inc.*, 487 F. Supp. 3d 937, 941 (S.D. Cal. 2020); *Protégé Rest. Partners*, 2021 WL 428653, *7.

General without acknowledging that those cases were construing different insurance policy language in inapposite factual scenarios[28]; and/or (3) consider factual allegations vastly different than those alleged in Out West's complaint, including complaints that expressly disavowed reliance on viral spread as a basis for coverage or that did not allege that the coronavirus was on the insured premises.[29]

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[28] *10E,* 483 F. Supp. 3d at 835-36; *BA LAX,* 2021 WL 144248, *3; *Colgan v. Sentinel Ins. Co. Ltd.*, 2021 WL 472964, *3 (N.D. Cal. Jan. 26, 2021); *Karen Trinh,* 2020 WL 7696080, *4; *Mudpie,* 487 F. Supp. 3d at 839-40; *O'Brien Sales & Mktg., Inc. v. Transp. Ins. Co.*, 2021 WL 105772, *3-4 (N.D. Cal. Jan. 12, 2021); *Pappy's Barber*, 487 F. Supp. 3d at 943-44; *Protégé Rest.*, 2021 WL 428653, *4-5.

[29] *10E,* 483 F. Supp. 3d at 837 ("Plaintiff asserts that it...'is not attempting to recover any losses from COVID-19 or its proliferation.'"); *10E,* 500 F. Supp. 3d at 1072 ("Plaintiff...does not point to any allegations of direct physical loss of or damage to property at its own premises."); *BA LAX,* 2021 WL 144248, *2 ("Plaintiffs have not even attempted to provide evidence demonstrating loss or damage...."); *Colgan*, 2021 WL 472964, *2 ("Plaintiff...stat[es]...that there was no evidence the virus 'even threatened his property."); *Diesel Barbershop,* 479 F. Supp. 3d at 358 ("Plaintiffs...argue that it is not COVID-19 within Plaintiffs' Properties that caused the loss directly...."); *Kevin Barry*, 2021 WL 141180 *5 ("KBFA ...has not alleged that COVID-19 has actually damaged its property."); *Mama Jo's,* 2018 WL 3412974, *8 (addressing a claim for losses due to the "migration of dust and construction debris" rather than physical loss or damage caused by a deadly virus); *Mudpie,* 487 F. Supp. 3d at 841 ("Mudpie does not allege that 'Covid-19 entered the [property] through any employee or customer."); *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, 488 F. Supp. 3d 690, 693 (N.D. Ill. 2020), *recon. denied*, 2021 WL 83758 (N.D. Ill. 2021) (plaintiff "fails to allege" the "presence of the virus on ...physical surfaces"); *Turek Enters., Inc. v. State Farm Mut. Auto. Ins. Co.*, 484 F. Supp. 3d 492, 499 (E.D. Mich. 2020) ("Plaintiff is adamant that COVID-19 never entered its premises.").

V. The Contamination Exclusion Does Not Bar Coverage for Out West's Business Interruption Losses

To the extent that Affiliated FM argues on appeal that its "contamination exclusion" supplies an independent ground for affirmance, the Court should reject that argument. The exclusion bars coverage for:

> Contamination, and any cost due to contamination including the inability to use or occupy property and any cost of making property safe or suitable for use or occupancy. If contamination due only to the actual not suspected presence of contaminant(s) directly results from other physical damage not excluded by this Policy, then only physical damage caused by such contamination may be insured….
>
> Contamination means any condition of property due to the actual or suspected presence of any foreign substance, impurity, pollutant, hazardous material, poison, toxin, pathogen or pathogenic organism, bacteria, virus, disease causing or illness causing agent, fungus, mold or mildew.

2-ER-132, 169. Seizing on the words "virus, disease causing or illness causing agent," Affiliated FM argued below for an expansive reading of the exclusion. But California law requires that exclusions be construed narrowly. *MacKinnon*, 31 Cal. 4th at 648. So read, the exclusion cannot extend to (i) the lost earnings that are the subject of Out West's insurance claim (referred to in the Policy as "Business Interruption loss," 2-ER-146); (ii) claims relating to *communicable* diseases such as COVID-19; and (iii) claims that are not "conventional environmental pollution."

First, the plain language of the exclusion does not encompass lost earnings. That is because the exclusion only applies to (a) "contamination," which the

Affiliated FM Policy defines as a "condition of property," and (b) "costs," *i.e.*, out-of-pocket expenses (such as clean-up costs) due to that condition. The exclusion does not say anything about eliminating the coverage for "loss," let alone "Business Interruption loss." Nor can the exclusion be rewritten to encompass such loss now that a claim has arisen. *See Safeco Ins. Co. of Am. v. Robert S.*, 26 Cal. 4th 758, 763 (2002).

The Affiliated FM Policy divides its exclusions into three groups (2-ER-129-132), the first excluding "loss or damage" caused by various perils; the second excluding perils but not ensuing loss; and the third excluding physical conditions (including contamination). Unlike other exclusions in the latter group, the contamination exclusion excludes not just the physical condition ("contamination") but also "*any cost due to contamination*…." (Emphasis added.) Thus, the exclusion identifies a class of consequential harms (ensuing costs) that, in addition to contamination itself, are excluded, but omits all other ensuing harms (such as business interruption "loss") from its scope. *See White v. W. Title Ins. Co.*, 40 Cal. 3d 870, 881 n.4 (1985) (invoking *expressio unius* canon in the contract context).

All parts of the exclusion have meaning, but none excludes "loss" or "lost revenue." As to the initial part, the standalone term "contamination" excludes only claims premised on the fact that property is in a contaminated "condition," such as claims for diminished value or lower sale price of contaminated property, and not

any downstream, consequential injuries apart from "costs." As to the other part, "costs due to contamination," the policy uses "costs" throughout, consistent with its plain meaning, to refer to out-of-pocket expenses. (Elsewhere, the policy equally consistently uses "loss" when referring to business interruption coverage.)

"Contamination" cannot encompass "costs" because, if it did, that would render surplusage the express exclusion for "costs" that immediately follows. Furthermore, there is no reasonable construction of "Contamination" that excepts "costs" yet includes business interruption "loss." Instead "Contamination" must be harmonized with the rest of the policy to exclude lost value or lost sales price, both of which can—and often do—result from the condition of a property that has been contaminated. Such lost value happens without any action by the policyholder, as most properties are worth less in a contaminated state, and this lowered value would be covered *but for* the first word in the exclusion, "Contamination." Finally, the reference to "costs"—the next part of the exclusion—cannot encompass "loss" because the two terms are used in the conjunctive in other exclusions (2-ER-129) and equating the two would improperly render the conjunctive redundant. *AIU Ins. Co. v. Superior Ct.*, 51 Cal. 3d 807, 828 (1990). In short, the fairest reading of Affiliated FM's exclusion is that it excludes the most common impacts of contamination on property but not resulting lost revenue and that is enough for Out West's interpretation to prevail. *See MacKinnon v. Truck*

Ins. Exch., 31 Cal. 4th 635, 655 (2003) (to prevail, insurer must "establish that its interpretation is the *only* reasonable one") (emphasis in original).

Second, to avoid rendering redundant the "additional coverage" in the policy for "costs" and "losses" arising from Communicable Disease (defined as disease transmitted from person to person) (2-ER-134, 154, 169), the words "virus, disease causing or illness causing agent" in the exclusion cannot encompass communicable diseases like COVID-19: The "additional coverages" do not say that they apply notwithstanding the contamination exclusion, and the exclusion does not say that it is inapplicable to the "additional coverages" for Communicable Disease.

When an insurance policy has an express grant of "additional coverage" and an exclusion that, if read broadly, eliminates that express grant of "additional coverage," California law deems the exclusion ambiguous, and resolves that ambiguity in favor of preserving coverage. *See Jordan v. Allstate Ins. Co.*, 116 Cal. App. 4th 1206, 1212 (2004) (rejecting the application of an exclusion because "an ambiguity was created by conflicting policy language contained in [the] exclusion on the one hand, and a provision for 'additional coverage' on the other"). The simplest way to accomplish that here is to construe the definition of "contaminants" to extend to viruses that are not within the definition of Communicable Disease. That would give meaning to the exclusion and leave the express "additional coverages" intact. So construed, "contamination" would not

extend to COVID-19 or the coronavirus but would extend to the many viruses that do not cause "Communicable Disease."[30]

Third, under California law and also in keeping with insureds' reasonable expectations, contamination-type exclusions apply only to "classic" environmental contamination. *See MacKinnon*, 31 Cal. 4th 653-54 (liability policy); *Villa Los Alamos Homeowners Ass'n v. State Farm Gen. Ins. Co.*, 198 Cal. App. 4th 522 (2011) ("all risks" and "open peril" policies). Because naturally-occurring outbreaks of COVID-19 are far removed from the classic environmental contamination setting, no reasonable insured would expect the Affiliated FM contamination exclusion to bar coverage. *Id.*; *see also London Bridge Resort LLC v. Ill. Union Ins. Co. Inc.*, 505 F. Supp. 3d 956, 960 (D. Ariz. 2020) ("the types of incidents courts have found to be traditional environmental pollution are substantially different than a virus outbreak"); *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.,*, 2020 WL 7190023, at *3 (Nev. Dist. Ct. Nov. 30, 2020) ("[It is not] unreasonable to interpret the Pollution and Contamination Exclusion to apply only to instances of traditional environmental and industrial pollution and contamination that is not at issue here,…where JGB's losses are

[30] Examples include cholera, hantavirus, malaria, rabies, salmonella, and West Nile Disease. *See* https://acphd.org/communicable-disease.

alleged to be the result of a naturally-occurring, communicable disease…even though the Exclusion contains the word 'virus.'").

CONCLUSION

For the foregoing reasons, the Court should reverse and remand with instructions to allow the claim to proceed or, alternatively, to grant leave to amend.

Dated: July 19, 2021

Respectfully submitted,

By: /s/ David Goodwin
David B. Goodwin

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UNITED POLICYHOLDERS

CERTIFICATE OF SERVICE

I certify that counsel for the parties have been served with a true and correct copy of the foregoing via this Court's CM/EMF system to all registered users and a courtesy copy emailed to the following counsel of record on July 19, 2021.

Dated: July 19, 2021

Respectfully submitted,

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