No. 21-55123

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SELANE PRODUCTS, INC.,
Plaintiff-Appellant,

v.

CONTINENTAL CASUALTY COMPANY,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
NO. 2:20-CV-07834-MSC-AFM
HON. MARK C. SCARSI

BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF APPELLANT'S MOTION FOR PANEL REHEARING AND REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

United Policyholders ("UP") is a nonprofit, 501(c)(3) corporation and has no public ownership.

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STATEMENT ON THE AUTHORSHIP OF THIS BRIEF

UP confirms that: (1) no party's counsel authored any part of this brief; (2) no party or party's counsel contributed any money to fund preparation of submission of this brief; and (3) no person, other than UP and UP's counsel, contributed any money to prepare or submit this brief.

CONSENT TO FILE PURSUANT TO FED. R. APP. PROC. 29(a)(2)

All parties have consented to UP filing this amicus curiae brief. Fed. R. App. Proc. 29(a)(2).

SOURCE OF AUTHORITY TO FILE PURSUANT TO FED. R. APP. PROC. 29(a)(4)(D)

UP's executive management has authority to authorize filing this amicus curiae brief, and has done so. Fed. R. App. Proc. 29(a)(4)(D).

STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

UP is a non-profit organization whose mission is to serve as an effective voice and a source of information and guidance for insurance consumers around the country. UP is funded by donations and grants. It does not sell insurance or accept money from insurance companies.

During the COVID-19 pandemic, UP's commitment to advocating for policyholders' rights to coverage for their devastating losses is more vital than ever. Here, UP seeks to assist the Court on an issue of immense public importance – coverage for losses caused by SARS-CoV-2 and COVID-19 – by identifying arguments and authority that has escaped the Courts' attention to date.

STATEMENT OF THE CASE

A rehearing or a rehearing *en banc* is necessary for several reasons.

First, by ignoring Selane's allegations that SARS-CoV-2 was present on property other than its own, the Panel erred regarding a central feature of Selane's Civil Authority endorsement – that it *does not* require a showing of physical loss of or damage to Selane's covered property. The Panel's erroneous ruling will have a broad and devastating impact on property insurance policies throughout the country as the ruling essentially rewrites all Civil Authority coverage to require loss or damage to the *insured's* property, regardless of the policy's actual language. Such a ruling negates the essential purpose of Civil Authority coverage – providing

coverage in those times where property other than the insured property suffers loss or damage and civil authorities prohibit the policyholder from accessing the insured property.

Second, whether SARS-CoV-2 causes direct physical loss of or damage to property is a question of exceptional importance that should be reserved for a ruling on a fully developed record, not at the pleading stage. Where the question has been addressed, courts have either found that the actual presence of SARS-CoV-2 *can* result in physical loss of or damage to property or the decisions have rested upon distinguishable authority and/or facts. In no event should the Panel adopt a ruling that decides this fact-specific issue against coverage at the pleading stage.

Third, although the answer to the above question rests upon substantive California law, the California Supreme Court has not weighed in. Many California state courts, however, are permitting cases to proceed beyond the pleading stage to allow the parties to develop the evidentiary record and, if necessary, appeal to California's highest state court. Given that this issue is of such grave import for California policyholders, this Court should grant a rehearing so that it can give deference to those cases that are currently proceeding in California courts.

In its Memorandum, the Panel cited the correct requirements for the Civil Authority endorsement,[1] but ignored Selane's well-pled allegations and instead erroneously required Selane to allege direct physical loss of or damage to its *own* property to trigger the Civil Authority endorsement.[2] By requiring loss or damage to the insured's own property, the Panel ignored the plain language and purpose of Civil Authority coverage.

In the future, insurance companies will point to this ruling as barring all Civil Authority coverage if the policyholder does not allege that its *own* property suffered loss or damage. Such a result would vitiate vast amounts of Civil Authority coverage that policyholders reasonably expect to have. In addition, and paradoxically, insurance companies themselves will be negatively impacted if this ruling is left to stand. They will no longer be able to effectively market and sell Civil Authority endorsements because, as noted, the entire point of the coverage is to apply in situations in which there is no direct loss of or damage to the insured's own property.

For all of these reasons, UP respectfully submits this *Amicus Curiae* brief in support of Selane's Petition for Panel Rehearing and Rehearing *En Banc*.

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[1] *Selane Prods., Inc. v. Cont'l Cas. Co.*, No. 21-55213, at 3, ¶ 3 (9th Cir. Oct. 1, 2021) ("*Selane* Memorandum").

[2] *Id.*, 3, ¶¶ 2-3.

I. INTRODUCTION

Amicus Curiae UP files this brief to give this Court further context in relation to three issues: (1) the legal requirements of Selane's Civil Authority endorsement and whether its Civil Authority claim was plausibly pled; (2) whether SARS-CoV-2 causes "direct physical loss of or damage" to property is a factual inquiry precluding resolution at the pleading stage; and (3) the importance of deferring to California's lower courts that are currently handling these very issues.

First, the Civil Authority endorsement does not require that Selane allege loss or damage to its own property. Moreover, the factual issues surrounding the circumstances and effects of the government orders warrant discovery to develop a record on these novel issues.[3]

Second, allegations of SARS-CoV-2 on property are sufficient to plead direct physical loss or damage. Moreover, the Court relied on two court opinions which do not apply to Selane's arguments and do not warrant dismissal of its First Amended Complaint.

Third, under well-established *Erie* principles, this Court should grant a rehearing so that it can consider and give deference to several lower court decisions

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[3] Many civil authorities considered the presence of SARS-CoV-2 as a cause of property loss or damage and issued orders in response. *See e.g.,* City of Los Angeles, Safer at Home Order (Rev. Apr. 1, 2020); *see also Selane Prods., Inc. v. Cont'l Ca. Co.*, No. 2:20-cv-07834-MCS-AFM (C.D. Cal.), First Amended Complaint (ECF No. 36), ¶ 44.

in California courts that have held allegations of loss or damage caused by the presence of SARS-CoV-2 were sufficient to proceed to discovery.

II. ARGUMENT

A. The Panel Erroneously Disregarded Selane's Plausible Claims under The Civil Authority Endorsement.

In its decision to affirm the dismissal of Selane's claim under the Civil Authority endorsement, the Panel ignored Selane's well-pled allegations that brought it within coverage. The Panel's erroneous ruling will have sweeping negative ramifications for policyholders and insurance companies across the country.

As the Panel correctly noted, to trigger coverage under the Civil Authority endorsement, one must allege "'direct physical loss of or damage to' ***property at locations, other than the insured premises***" (emphasis added).[4] But the Panel held that "Selane failed to plausibly allege coverage under the Civil Authority endorsement . . . [because] [a]s noted above, Selane has not alleged any direct physical loss of or damage to property."[5] When the Panel stated "[a]s noted above," it was ostensibly referring to its prior paragraph that stated "Selane did not allege that SARS-CoV-2 was present on its property to cause damage [and] . . . it did not plausibly allege that the stay-at-home orders caused its property to sustain any

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4 *Selane* Memorandum, at *3, ¶ 3.

5 *Id*.

physical alterations."[6] But whether Selane has plausibly alleged loss of or damage to its *own* property has no bearing on its Civil Authority claim. And the Panel ignored Selane's well-pled allegations that fall within the Civil Authority coverage.

The Panel based its decision on the mistaken premise that Selane needed to allege that its ***own*** property suffered loss or damage to plausibly allege it was entitled to coverage under the Civil Authority endorsement. Such an error will surely be a boon for insurance companies' claims handling (though not underwriting or sales) departments, who will point to this ruling to argue that all civil authority coverages require loss or damage to insured property, regardless of the actual language of the policy. In a time where many policyholders are on the brink of collapse, a new, unbargained-for prerequisite to coverage will have ruinous consequences. For this reason alone, this Court should grant the petition for rehearing so that Selane's allegations can be considered under the appropriate legal standard.

Without a rehearing, this Court will never be able to correct its creation of a new prerequisite to civil authority coverage not found in the policy language at all, which will damage untold numbers of policyholders who would otherwise be entitled to coverage if property other than their own suffered loss or damage. A rehearing will give the Court the chance to properly assess whether Selane, unlike the policyholders in *Mudpie*, plausibly alleged a claim for coverage under the Civil

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[6] *Id.*, at p. *2, ¶ 1.

Authority endorsement and prevent widespread harm to policyholders throughout the country.[7] A rehearing will also give the Court the opportunity to review decisions in California and other states where courts found that the insureds had plausibly alleged direct physical loss or damage to third-party property caused by SARS-CoV-2 under similar civil authority provisions.[8] It will give the Court the

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[7] Selane's allegations plausibly allege a claim for Civil Authority coverage and warrant discovery so that a future decision can be made based on a more developed factual record. *See Blue Springs Dental Care v. Owners Ins. Co.*, 488 F. Supp. 3d 867, 878-79 (W.D. Mo. 2020) (denying motion to dismiss because insureds plausibly alleged that SARS-CoV-2 causes physical loss or damage to property, civil authorities issued orders because of the physical loss or damage caused by SARS-CoV-2 to property other than the insured's, and the orders prohibited access to the insured's property); *see also Studio 417 v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 803 (W.D. Mo. 2020) (same).

[8] *See P.F. Chang's China Bistro, Inc. v. Certain Underwriters At Lloyd's of London*, Case No. 20STCV17169 (Cal. Super. Ct. Feb. 4, 2021) (finding that the alleged of presence of virus at insured property, and in vicinity of insured property, causing government orders and requiring mitigation efforts satisfied the requirement of physical loss or damage to property under California law); *Ross Stores, Inc. v. Zurich Am. Ins. Co.*, Case No. RG20-084158 (Cal. Super. Ct. Jun. 13, 2021) (overruling demurrer because possibility that coronavirus or stay at home orders caused direct physical loss to the insured); *Kingray Inc. v. Farmers Grp. Inc.*, 2021 U.S. Dist. Lexis 41300, at *19-21 (C.D. Cal. Mar. 4, 2021) ("[I]t is plausible that 'direct physical loss of' property includes physical dispossession because of dangerous conditions (a virus in the air) or a civil authority order requiring [the insured premises] to close."); *Pez Seafood DTLA, LLC v. Travelers Indem. Co.*, 514 F. Supp. 3d 1197, at *14 (C.D. Cal. 2021) (finding policyholder would have alleged coverage under the civil authority provision if policy did not contain virus exclusion). *See also Hair Perfect Int'l, Inc. v. Sentinel Ins. Co.*, 2021 U.S. Dist. LEXIS 102637 (C.D. Cal. May 20, 2021) (finding allegations of coronavirus at nearby properties sufficiently alleged civil authority coverage and presented factual questions); *Risinger Holdings v. Sentinel Ins. Co.*, 2021 U.S. Dist. LEXIS 192474, at *11 (E.D. Tex. 2021) (denying motion to dismiss because Civil Authority provision could be read to say insurer would pay if access to insured premises was

opportunity to distinguish *MRI*,[9] upon which the *Mudpie* decision rests because, as discussed below, *MRI* concerns loss or damage to *personal* property, examined different policy language, and does not relate in any way to civil authority coverage.

In addition to misapprehending Selane's legal arguments and well-pled facts, the district court and Panel deprived Selane of the opportunity to conduct discovery on the critical factual issues pertinent to coverage, namely whether civil authorities issued orders that prohibited access to Selane's property in response to the physical loss or damage SARS-CoV-2 caused to other properties. In fact, other courts have denied insurer motions to dismiss for this very purpose.[10]

In *Treo Salon*, for example, a district court denied a motion to dismiss despite the insured not alleging the presence of the virus at its insured property.[11] There, communicable disease coverage was triggered if (1) the insured's business was shut

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prohibited due to Covid-19 being located on property in the immediate area); *McKinley Dev. Leasing Co. v. Westfield Ins. Co.*, No. 2020 CV 00815, 2021 Ohio Misc. Lexis, at *12-13 (Ohio Com. Pl. 2021) (denying motion to dismiss because presence of coronavirus damages property and the insured "plausibly allege[d] that access was prohibited to such a degree as to trigger the Civil Authority coverage").

[9] *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766 (2010).

[10] *See e.g., Treo Salon, Inc. v. W. Bend Mut. Ins. Co.*, 2021 U.S. Dist. LEXIS 8857 (S.D. Ill. May 10, 2021); *see also Baldwin Acad., Inc. v. Markel Ins. Co.*, 2020 WL 7488945, at pp. *3-4 (S.D. Cal. Dec. 21, 2020) (plaintiff's plausibly alleged that government orders shut down their property; motivations and effects of government orders are more properly the subject of a motion for summary judgment with a developed record).

[11] *Treo Salon*, *supra*, 2021 U.S. Dist. LEXIS 8857.

down by a government authority order; (2) the shutdown was due to an outbreak of a communicable disease; and (3) the order(s) shut down the insured's business.[12] The court found that the insured plausibly alleged facts sufficient to trigger coverage under those three prongs.[13] Importantly, the court rejected the insurer's argument that the government did not specifically shut down the insured's business because, since the government did not create any mechanism for the insured to prove that it was virus free, the insurer could not demonstrate that the virus was not at its premises.[14] Similarly, other courts have also recognized that civil authority coverage depends on (1) damage to properties near or adjacent to the insured's property, (2) orders issued in response to that damage, and (3) that the orders prohibit access to the insured premises.[15]

The *Treo Salon* court added that any disputed issues relating to coverage were "better suited for disposition on a motion for summary judgment, after the case has

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12 *Id*. at *10.

13 *Id*. at *11-14.

14 *Id*. at *15-16.

15 *See e.g., Allen Park Theatre Co. v. Michigan Millers Mut. Ins. Co.,* 210 N.W.2d 402, 402–03, 404 (Mich. Ct. App. 1973) (rejecting putative requirement of physical damage to the policyholder's premises for policyholder to make civil authority claim for closure of theatres in wake of rioting after murder of Martin Luther King, Jr); *U.S. Airways, Inc. v. Commonwealth Ins. Co.*, 2004 WL 1094684, at *4-5 (Va. Cir. Ct. May 14, 2004) (finding "[d]amage to the physical property of [the policyholder] is not a condition precedent to recovery"); *Bros., Inc. v. Liberty Mut. Fire Ins. Co.*, 268 A.2d 611, 613-14 (D.C. 1970) (civil authority coverage does not cover damage to insured premises, its covers losses caused by orders issued in response to damage to adjacent property).

been more fully developed."[16] Likewise, here, Selane has plausibly alleged coverage but has been erroneously denied a chance to develop the factual record.[17]

B. SARS-CoV-2 & COVID-19 Cause Direct Physical Loss of or Damage to Property.

Many California courts have determined that SARS-CoV-2 can plausibly cause direct physical loss to property, even when evaluating claims under the *MRI* standard (discussed below).[18] Like those cases that have proceeded past the pleading

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[16] *Treo Salon*, *supra*, 2021 U.S. Dist. LEXIS 8857, at *14.

[17] Even *MRI*, which this Court relied on in holding that "accidental direct physical loss of or damage to" must require some sort of alteration, was decided on a fully developed factual record at the summary judgment stage. *MRI Healthcare*, *supra*, 187 Cal. App. 4th 766; *see also Ross Stores, supra*, Case No. RG20-084158, at *6 (criticizing citation to *MRI* on demurrer because it was decided on summary judgment).

[18] *See e.g.*, *Ross Stores*, *supra*, Case No. RG20-084158; *Boardwalk Ventures CA, LLC v. Century-National Ins. Co.*, Case No. 20STCV27359m (Cal. Super. Ct. Mar. 18, 2021); *P.F. Chang's China Bistro*, *supra*, Case No. 20STCV17169; *Goodwill Indus. of Orange Cnty., Cal. v. Philadelphia Indem. Ins. Co.*, No. 30-2020-01169032-CU-IC-CXC, slip op. (Cal. Super. Ct. Jan. 28, 2021); *Baldwin Acad.*, *supra*, Case No. 3:20-cv-02004-H-AGS, 2020 WL 7488945, at *3-4; *Best Rest Motel, Inc. v. Sequoia Ins. Co.*, Case No. 2:20-cv-02113-KSM (Cal. Super. Ct. Sept. 30, 2020); *Kingray Inc.*, *supra*, 2021 U.S. Dist. Lexis 41300, at *19-21 ("it is plausible that 'direct physical loss of' property includes physical dispossession because of dangerous conditions (a virus in the air) or a civil authority order requiring [the insured premises] to close"); *Pez Seafood DTLA*, *supra*, 514 F. Supp. 3d 1197, at *14 (plaintiff would have plausibly alleged coverage under the civil authority provision if policy did not contain virus exclusion). *See also Hair Perfect*, *supra*, 2021 U.S. Dist. LEXIS 102637 (allegations of dangerous conditions at nearby properties sufficiently alleges civil authority coverage and presents factual questions that cannot be resolved on a motion to dismiss but policy's virus exclusion fatal to claim).

stage, Selane has plausibly alleged that SARS-CoV-2 has caused physical alterations to other properties, triggering orders prohibiting access to its property.

Physical alteration is not synonymous with direct physical loss or damage. For one, if the insurance industry sought to require a "distinct, demonstrable, physical alteration of the property" as a condition precedent, they should have made that requirement explicit. Many insurers and courts – including this Panel in *Mudpie*, which it relied upon in *Selane* – have relied on a problematic section of *Couch on Insurance* to add a requirement of "distinct, demonstrable, physical alteration" to show physical loss or damage. 10A COUCH ON INS. 3D §148:46; Richard P. Lewis et al., *Couch's "Physical Alteration" Fallacy: Its Origins and Consequences*, Tort, Trial & Ins. Prac. L.J. ___ (forthcoming 2021).

The requirement of "physical alteration" was a minority rule that was included in the 1998 update to *Couch*. Lewis at 15, 19. Other well-respected insurance treatises eschew that standard and recognize a more liberal one. *See e.g.,* Windt, *Insurance Claims & Disputes*; Appleman, *Ins. Law & Practice*, *Policyholder's Guide to the Law of Ins. Coverage*. Significantly, even the principal author of the "physical alteration" requirement, Steven Plitt, does not agree with his own (faulty) test any longer, and courts should be wary about continuing to rely upon the treatise, as it is not a neutral nor dispassionate distillation of insurance law. *See* Steven Plitt, *Direct Physical Loss in All-Risk Policies: The Modern Trend Does Not Require*

Specific Physical Damage, Alteration, CLAIMS J. (Apr. 15, 2013) (admitting that the modern trend focuses on "loss of use as opposed to direct physical loss involving physical alteration."). This concession appears nowhere in the updates to *Couch*.

Due to the absence of any clear precedent from the California Supreme Court, this Court followed the faulty standard articulated above, which appears to rely solely on the California Court of Appeal's decision in *MRI Healthcare Center of Glendale, Inc. v. State Farm General Insurance Co.* 187 Cal. App. 4th 766 (2010) to hold that "direct physical loss of or damage to property" always requires structural alteration.[19] But the policy language and loss in *MRI* are distinguishable from the losses at issue here. To begin, *MRI* involved narrower coverage language in an open cover policy that did not apply to *all risks*, required the loss to be "direct" and "accidental," and did not include a disjunctive two-part trigger for coverage against loss ***or*** damage.[20] Moreover, the loss in *MRI* involved *personal property* – an MRI machine that was already known to be defective – that was turned off and would not turn back on.[21] The court construed the policy language to require that a fortuitous, unintended event directly cause the damage, i.e., "some *external force* must have acted upon the insured property to cause a *physical change* in the condition of the

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19 *See Mudpie v. Travelers Cas. Ins. Co.*, No. 20-16858, at 10 (9th Cir. Oct. 1, 2021).

20 *MRI Healthcare Ctr., supra*, 187 Cal. App. 4th at 771.

21 *Id.* at 770.

property."[22] The MRI machine's failure to ramp up was caused by a defect that manifested after it was ramped down, an intentional choice foreclosing any possibility of "accidental direct physical loss" within the meaning of the policy.[23] Although the *MRI* court found there was no "direct physical loss under the policy," there is no discussion as to how the court's analysis would differ if the policy at issue was an all risk policy or if the property were *real* property, which experiences "physical loss" if it becomes unsafe or unusable for its intended use.[24] As noted above, even when evaluating claims under the *MRI* standard, California courts have determined that SARS-CoV-2 can cause direct physical loss to property.[25]

Selane's losses are factually distinct in that they do not arise out of an inherent defect in *personal* property. Rather, the external force of COVID-19 physically changed the insured's and other properties by turning the once-safe surfaces and air into deadly agents of transmission of a dangerous virus and disease. Even under *MRI*, Selane's allegations are sufficient to plausibly allege covered physical loss or damage – or at minimum confirm that Continental has not negated that construction of the insurance policy beyond reasonable controversy.[26] And nothing in the *MRI*

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22 *Id.* at 779-781 (emphasis in original).

23 *Id*. at 781.

24 *See Hughes v. Potomac Ins. Co.*, 199 Cal. App. 2d 239, 242 (1962).

25 *See, supra,* footnote 8.

26 *See Ross Stores, Inc.*, *supra*, Case No. RG20-084158 (rejecting application of *MRI* on demurrer, finding that *MRI* did not foreclose coverage for physical loss to property caused by coronavirus and government orders); *Boardwalk Ventures,*

decision indicates how the California Supreme Court would resolve the coverage issues arising out of Selane's losses. In no event should the Panel issue a broad ruling that SARS-CoV-2 or COVID-19 can never cause physical loss of or damage to property, particularly at the pleading stage and before the California Supreme Court or any California appellate court has had the opportunity to address the issue.

C. Under Well-Established *Erie* Principles, a Rehearing Should Be Granted To Consider California Decisions That Have Permitted an Insured's Claims To Proceed Beyond the Pleadings.

The federal court's task in this diversity case is "to approximate state law as closely as possible in order to make sure that the vindication of the state right is without discrimination because of the federal forum." *Murray v. BEJ Minerals, LLC*, 924 F.3d 1070, 1071 (9th Cir. 2019) (certifying question) (cleaned up). As this Court is aware, the California Supreme Court has not had the opportunity to decide how it would interpret this policy language.[27] Nor has any other state or federal appellate court applying California law. But it is an axiomatic principle of California

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supra, Case No. 20STCV27359 (rejecting application of *MRI* on demurrer because allegations regarding coronavirus were sufficient to satisfy applicable standard); *Goodwill Indus., supra,* Case No. 30-2020-01169032-CU-IC-CXC (discussing *MRI* and stating that no California state cases have resolved the question of whether coronavirus constitutes an external force that causes a change in the condition of the property, i.e., damaging the property).

[27] The *Selane* Memorandum cites to its decision in *Mudpie* that "California courts *would* construe 'direct physical loss of or damage to'" and holding that, because Selane had not alleged physical alterations to its own property, there is no coverage. (*See Selane* Memorandum, pp. 2-3, ¶ 1; emphasis added).

insurance law that coverage clauses are interpreted broadly so as to protect "the objectively reasonable expectations of the insured." *AIU Ins. Co. v. Superior Court*, 799 P.2d 1253, 1264 (Cal. 1990). In fact, as the California Supreme Court has stated in response to a certified question from this Court, any ambiguity in an insurance policy "must be construed in favor of coverage that a lay policyholder would reasonably expect." *Minkler v. Safeco Ins. Co. of Am.*, 49 Cal. 4th 315, 319 (2010).

Selane's expectations of coverage for the losses it suffered due to the COVID-19 pandemic and the government shut-down orders were reasonable. Both federal and state courts around the country, including in California, have arrived at that same conclusion.[28] This Court, too, should grant Selane's motion for rehearing so that it can adequately consider those decisions in connection with Selane's allegations.

CONCLUSION

The Court should grant the motion for rehearing and rehearing *en banc*.

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Dated October 25, 2021

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UNITED POLICYHOLDERS

[28] *See e.g., Ross Stores*, *supra,* Case No. RG20-084158; *Boardwalk Ventures*, *supra,* Case No. 20STCV27359m; *P.F. Chang's China Bistro*, *supra,* Case No. 20STCV17169; *Goodwill Indus.*, *supra,* Case No. 30-2020-01169032-CU-IC-CXC; *Baldwin Acad.*, *supra,* Case No. 3:20-cv-02004-H-AGS, 2020 WL 7488945; *Best Rest*, *supra,* Case No. 2:20-cv-02113-KSM.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CERTIFICATE OF SERVICE

On October 25, 2021, a copy of the foregoing brief was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Court's appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

/s/ Amber S. Finch
Amber S. Finch