No. A163767

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT,
DIVISION FOUR

AMY'S KITCHEN, INC.,
Plaintiff and Appellant,

v.

FIREMAN'S FUND INSURANCE COMPANY,
Defendant and Appellee.

On Appeal from the Superior Court for
Sonoma County
Hon. Jennifer V. Dollard
Case No. SCV-268104

APPLICATION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF APPELLANT AMY'S KITCHEN, INC.

Rani Gupta (#296346)
rgupta@cov.com
COVINGTON & BURLING LLP
3000 El Camino Real, 10th Fl.
Palo Alto, CA 94305
Telephone: (650) 632-4700
Facsimile: (650) 632-4800

David B. Goodwin (#104469)
dgoodwin@cov.com
Sabrina T. McGraw (#334120)
smcgraw@cov.com
COVINGTON & BURLING LLP
415 Mission Street, Suite 5400
San Francisco, CA 94105
Telephone: (415) 591-6000
Facsimile: (415) 591-6091

Attorneys for Amicus Curiae
United Policyholders

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 Amy's Kitchen, Inc.

INTEREST OF UNITED POLICYHOLDERS

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

UP assists insurance consumers when seeking to purchase a policy or pursuing a claim. UP is routinely called upon to help 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 assisted business owners around the country whose operations have been affected by COVID-19 and COVID-19-related public safety orders. UP conducts educational workshops for businesses and trade associations and maintains an online library at uphelp.org/COVID. In addition, UP engages on an ongoing basis with insurance regulators through the National Association of Insurance Commissioners, where UP has served as a consumer representative since 2009.

Since 1991, UP has filed *amicus* briefs in federal and state appellate courts across the country. The United States Supreme

Court, the California Supreme Court, and other state supreme courts have cited UP's amicus briefs in their opinions. *E.g.*, *Humana Inc. v. Forsyth* (1999) 525 U.S. 299, 314 (favorably citing UP's amicus brief); *Pitzer College v. Indian Harbor Ins. Co.* (2019) 8 Cal.5th 93 (favorably citing UP's amicus brief); *Assoc. of Cal. Ins. Cos. v. Jones* (2017) 2 Cal.5th 376 (favorably citing UP studies).[1]

UP continues its mission of supporting policyholders through its *amicus* efforts here in support of Amy's Kitchen.

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

Policyholders across the country—like the appellant in this matter, Amy's Kitchen—buy insurance for protection against unexpected disasters. Confidence that insurance will pay claims spurs economic growth and encourages people and businesses to take risks and pursue innovation. Thus, insurance is a crucial engine of the economy and 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 crucial that insurance fulfill its dominant purpose "to indemnify the insured in case of loss." *Ins.*

---

[1] A list of amicus curiae briefs filed by UP can be found at https://www.uphelp.org/resources/amicus-briefs.

Co. of N. Am. v. Elec. Purification Co. (1967) 67 Cal.2d 679, 689; *see also* American Law Institute (2019) Restatement of Liability Ins. § 2, cmt. c (insurance policy interpretation helps "give effect to the … dominant purpose of indemnity"). Profit and loss considerations should not dominate the claim determination process, nor should courts consider insurance company finances in analyzing coverage issues, as the California Supreme Court held in *Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, 75.

Judicial oversight is essential to maintaining the purpose and value of insurance in this complex system. Courts require insurance policies—which are classic adhesion contracts—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.

Amicus 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 provide guidance to federal courts as they attempt to predict how the California Supreme Court will rule on California law.

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. No

other person or entity made a monetary contribution to fund the preparation or submission of the brief other than the *amicus curiae* and its counsel.

CONCLUSION

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

DATE: June 1, 2022

Respectfully submitted,

COVINGTON & BURLING LLP

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

Counsel for Amicus Curiae United Policyholders

No. A163767

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT,
DIVISION FOUR

AMY'S KITCHEN, INC.,
Plaintiff and Appellant,

v.

FIREMAN'S FUND INSURANCE COMPANY,
Defendant and Appellee.

On Appeal from the Superior Court for
Sonoma County
Hon. Jennifer V. Dollard
Case No. SCV-268104

[PROPOSED] *AMICUS CURIAE* BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF APPELLANT AMY'S KITCHEN, INC.

Rani Gupta (#296346)
rgupta@cov.com
COVINGTON & BURLING LLP
3000 El Camino Real, 10th Fl.
Palo Alto, CA 94305
Telephone: (650) 632-4700
Facsimile: (650) 632-4800

David B. Goodwin (#104469)
dgoodwin@cov.com
Sabrina T. McGraw (#334120)
smcgraw@cov.com
COVINGTON & BURLING LLP
415 Mission Street, Suite 5400
San Francisco, CA 94105
Telephone: (415) 591-6000
Facsimile: (415) 591-6091

Attorneys for Amicus Curiae
United Policyholders

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

INTRODUCTION

Appellant Amy's Kitchen alleges in its complaint that the COVID-19 virus caused physical loss or damage to its properties and that this physical loss and damage triggers the extensions of coverage in the Fireman's Fund policy for Communicable Disease and Loss Avoidance or Mitigation. In its responsive brief, Fireman's Fund insists that this Court should disregard the allegations in the complaint and instead should adopt *sua sponte* fact findings from other cases about what the COVID-19 virus does and does not do. Fireman's Fund cites extensively to those fact findings even though they are not pleaded in the complaint in the present case. Nor are they properly the subject of judicial notice: those purported facts are disputed (and thus cannot satisfy the requirements of Evidence Code section 452) and often are contrary to authoritative scientific studies. The fact findings that Fireman's Fund's urges the Court to adopt thus are irrelevant to this appeal, which arises from an order sustaining a demurrer where the Court must accept as true the allegations in the complaint.

Fireman's Fund also cites to cases construing different insurance policy language and argues for a definition of "physical loss or damage" that the seminal California Court of Appeal decision on property insurance described as contrary to what "common sense requires ...."[2] Fireman's Fund never discusses that seminal decision, even though a recent appellate ruling

---

[2] *Hughes v. Potomac Ins. Co.* (1962) 199 Cal.App.2d 239, 248.

described it as the "central relevant California opinion" on the issue,[3] nor does Fireman's Fund mention the five other published pre-COVID-19 California appellate opinions that adopt interpretations of "physical loss or damage" that are contrary to the position that Fireman's Fund advocates here. And even if the cases that Fireman's Fund's relies upon were correctly decided—and they were not—its cases are inapposite. Insurance policies must be read and interpreted as a whole, and the Fireman's Fund policy at issue here is quite different from the insurance policies in nearly all of Fireman's Fund's cases.

Finally, three COVID-19-related California appellate decisions have been issued as of the date of this *amicus* brief submission: *United Talent Agency v. Vigilant Insurance Co.* (2022) 77 Cal.App.5th 821 ("*UTA*"); *Musso & Frank Grill Co. v. Mitsui Sumitomo Insurance USA Inc.* (2022) 77 Cal.App.5th 753 ("*Musso*"); and *Inns-by-the-Sea v. California Mutual Insurance Co.* (2021) 71 Cal.App.5th 688 ("*Inns*"). But none of those cases governs this appeal, as they all address materially different insuring agreements. Moreover, *UTA*'s reasoning is seriously flawed and has no application to the pertinent language of Amy's Kitchen's policy and complaint. *Musso* involves a complaint that never alleges physical loss or damage to its properties. The third appellate decision, *Inns*, supports coverage here because it concludes that the COVID-19 virus *can* cause insured physical loss or damage.

---

[3] *Inns-by-the-Sea v. Cal. Mut. Ins. Co.* (2021) 71 Cal.App.5th 688, 701.

This Court should reverse the judgment below and remand the case for further proceedings.

ARGUMENT

I. Amy's Kitchen Has Alleged Physical Loss or Damage Under Its Policy

Insurance coverage depends "upon the language of the policy itself, not upon 'general' rules of coverage that are not necessarily responsive to the policy language." *Am. Cyanamid Co. v. Am. Home Assur. Co.* (1994) 30 Cal.App.4th 969, 978. The analysis therefore must start, as California law requires, with the language of the Fireman's Fund insurance policy (*AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 822)—language that, as Amy's Kitchen points out, is quite different from that in other property insurance forms. The Fireman's Fund insurance policy language must be given its "ordinary and popular sense," (*id.*), and "read as a whole, without giving a distorting emphasis to isolated words or phrases." *Tana v. Pros. Prototype I Ins. Co.* (1996) 47 Cal.App.4th 1612, 1618. Further, that insuring agreement language must be interpreted broadly, to "afford the insured the greatest possible protection." *Energy Ins. Mut. Ltd. v. Ace Am. Ins. Co.* (2017) 14 Cal.App.5th 281, 291; *see also AIU*, 51 Cal.3d at 822-823 (ambiguities in the insurance policy language must be "resolv[ed] … in favor of coverage").

Because context matters, words used in one insurance policy can have a different meaning when used in a different insurance policy. *See Minkler v. Safeco Ins. Co. of Am.* (2010) 49 Cal.4th 315, 319, 330-333. That is the case here.

A. Amy's Kitchen's Policy Confirms The COVID-19 Virus is Capable of Physical Loss or Damage

When the words "physical loss or damage" in the Fireman's Fund policy are read in the context of the entire insurance policy, including the Communicable Disease Coverage provision, those words must be construed to encompass harm caused by communicable diseases like COVID-19. Otherwise, the express coverage for communicable disease in the insurance policy would be rendered a nullity—a result that California law does not permit. *See* Civ. Code § 1641.

That is, Fireman's Fund promises to cover "direct physical loss or damage" from a communicable disease event (Aplt. App. Vol. I. at 104), "including" costs incurred to "[r]epair or rebuild" what "has been damaged or destroyed by the communicable disease" as well as to "[m]itigate, contain, remediate, treat, clean, detoxify, disinfect, neutralize, cleanup, remove, dispose of, test for, monitor, and assess the effects the [sic] communicable disease." *Id.* (emphasis omitted). By using the term "including," the policy incorporates these costs into the meaning of "direct physical loss or damage."[4]

If communicable diseases were not capable of causing physical loss or damage as those words are used in the Fireman's Fund form, then there would be no coverage provided by this communicable disease provision, a construction that California law does not permit. *See AIU*, 51 Cal.3d at 827-828. And if there

---

[4] *See* Aplt. Opening Br. 18. "Include" means "to take in or comprise as a part of a whole or group." *Include*, Merriam-Webster, https://www.merriam-webster.com/dictionary/include.

were doubt as to the matter: "[w]here an agreement is capable of being interpreted in two ways, we should construe it in order to make the agreement lawful, operative, definite, reasonable and capable of being carried into effect and avoid an interpretation which will make the instrument extraordinary, harsh, unjust, inequitable or which would result in absurdity." *Jones v. Jacobson* (2011) 195 Cal.App.4th 1, 18 (quotations and citation omitted).

Thus, as a communicable disease, COVID-19 is necessarily capable of causing physical loss or damage as those terms are used in the Fireman's Fund policy. That also means that coverage is extended to include the "potential" loss or damage from the COVID-19 virus that is "actually and imminently threatening" under the Loss Avoidance or Mitigation Coverage. Aplt. App. Vol. I. at 96.

Fireman's Fund fundamentally misreads its own policy in attempting to reinterpret "physical loss or damage." In trying to show why this coverage is not illusory, Fireman's Fund contends that the communicable disease extension provides coverage *only* for harm caused as a result of complying with a public health authority, such as damage caused by the insured to food manufacturing equipment that occurs as a result of an ordered decontamination process. Aplee. Br. at 28. Fireman's Fund's reading of its coverage provision is so exceedingly narrow that one wonders how this hypothetical is meant to demonstrate the provision is not illusory.

Fireman's Fund argues in support of its coverage-minimizing interpretation that a "communicable disease event" refers *only* to a public health order. *Id.* As such, it contends coverage is triggered only when physical loss or damage is "caused by or result[s] from" a public health order. *Id.* But the policy does not define "communicable disease event" to refer only a public health order; rather, it is "*an event* in which a **public health authority** has ordered that a location be evacuated, decontaminated, or disinfected due to the outbreak of a **communicable disease** at such location." Aplt. App. Vol. I. at 138 (italics added, bolding of defined terms in original). Thus, "communicable disease event" includes the entire "event": the public health order, the evacuation, decontamination, and disinfection processes, and the outbreak from the communicable disease. In contrast, Fireman's Fund would render "event" a nullity; if the insuring agreement were meant only to refer to the public health order, the definition would have omitted the word "event" and defined the term simply as "a public health authority order that orders a location to be evacuated, decontaminated, or disinfected due to the outbreak of a communicable disease."

Fireman Fund's construction of the communicable disease extension also ignores that the coverage is for orders that require evacuation. Under Fireman's Fund's narrow construction of "physical loss or damage," what kind of physical loss or damage could result from an order merely requiring evacuation from a communicable disease?

Thus, communicable disease can cause physical loss or damage under the Fireman's Fund form. At the very least, the policy is ambiguous, and the trial court erred in holding that the policy, broadly construed, provided no coverage for the losses alleged in Amy's Kitchen's complaint.

B. *Inns* Confirms Amy's Kitchen's Allegations Sufficiently Allege Physical Loss or Damage

Even outside the context of a policy with Communicable Disease Coverage, the COVID-19 virus can cause physical loss or damage to property.

Inns confirmed that physical loss or damage can be caused by the presence of the COVID-19 virus. Surveying cases regarding whether physical effects invisible to the naked eye qualify as physical damage, *Inns* endorsed a pre-pandemic line of cases holding that physical perils such as wildfire smoke, foul odors, ammonia fumes, gasoline vapor, and asbestos cause insured "direct physical loss of or damage" to property. *Inns*, 71 Cal.App.5th at 699-701 (citing cases). Analogizing to those cases, *Inns* held that "the COVID-19 virus—like smoke, ammonia, odor, or asbestos—is a physical force" that is capable of impairing the safe use of property. *Id.* at 703. *Inns* explained "if a business—which could have otherwise been operating—had to shut down because of the presence of the virus within the facility," the business could "successfully allege that the virus created physical loss or damage." *Id.* at 704-705 (quotations and citations omitted). *Inns* repeatedly confirmed that the COVID-19 virus can cause insured physical loss and damage:

- "[I]t could be possible ... that an invisible airborne agent would cause a policyholder to suspend operations because of direct physical damage to property." *Id.* at 704.
- "[A] virus could cause a suspension of operations through direct physical loss of or damage to property." *Id.* at 710.
- "[C]ase law supports the view that … an invisible substance or biological agent might give rise to coverage because it causes a policyholder to suspend operations due to direct physical loss of or damage to property." *Id.* at 711, fn. 21.

Consistent with *Inns*, Amy's Kitchen alleges that: "[t]he persistent presence of this deadly, airborne live coronavirus and disease on surfaces and in the air renders buildings and properties damages, unsafe, unfit, and uninhabitable for occupancy or use without additional measures and protections." Aplt. App. Vol. I. at 13 (Compl. ¶ 27). "The coronavirus and COVID-19 were present on and around Amy's properties. People with confirmed cases of COVID-19 were on Amy's premises and properties, causing Amy's to incur significant sums to mitigate, contain, clean, disinfect, monitor, and test for the communicable disease. In addition to breathing the coronavirus and COVID-19 into the air, these individuals touched surfaces in Amy's insured premises." *Id.* (Compl. ¶ 29). And: "COVID-19 caused direct physical loss or damage to properties throughout the country, including Amy's offices and facilities in Petaluma, California;

Santa Rosa, California; Medford, Oregon and Pocatello, Idaho and surrounding properties, by altering the physical conditions of properties such that properties were no longer safe or fit for occupancy or use without additional measure and protections." *Id*. at 12 (Compl. ¶ 24). Under the terms of its policy and *Inns*, this is sufficient to establish physical loss or damage.

Inns ruled for the insurer only because the plaintiff there did not and could not meet the specific *causation* requirement of its policy. *Inns*, 71 Cal.App.5th at 703-704. Specifically, the plaintiff did not allege that it shut its doors because of physical loss or damage to its own property, and it could not allege a claim under the insurance policies "civil authority" coverage because that coverage was triggered by physical loss or damage and the two specific "civil authority" orders in that case were not issued because of physical loss or damage. *Id*.

In contrast, Amy's Kitchen repeatedly alleges causation consistent with *Inns* and its policy. Amy's Kitchen alleges that the COVID-19 virus was present at its properties, rendered its property unsafe and unusable, and caused Amy's Kitchen to incur "significant sums" to address its effects, including mitigating, containing, cleaning, disinfecting, monitoring, and testing for COVID-19. Aplt. App. Vol. I. at 13 (Compl. ¶¶ 27-30). Amy's Kitchen also alleges it had to conduct "additional cleaning and sanitization to respond to the governmental orders relating to the coronavirus and COVID-19." *Id.* (Compl. ¶ 31). Under the Communicable Disease Coverage provision, that is all that is required to trigger coverage.

Finally, the *Inns* holding on causation cannot apply to the Loss Avoidance or Mitigation Coverage. That is because Amy's Kitchen paid for coverage for "necessary expense" incurred to "protect, avoid, or significantly mitigate *potential* covered loss or damage that is actually and imminently threatening **Insured Property**." Aplt. App. Vol. I. at 96 (italics added, bolded defined term in original). Thus, for the purposes of this provision, Amy's Kitchen need not allege that the physical loss or damage caused by the COVID-19 virus actually caused its losses. It purchased coverage for its expenses in protecting, avoiding, or mitigating the "potential" for the COVID-19 virus to cause such physical loss or damage.

C. *UTA* and *Musso* Do Not Apply to The Language of The Fireman's Fund Policy

Unlike *Inns*, *UTA* and *Musso* did not affirm that the COVID-19 virus is capable of causing physical loss or damage. *UTA*, 77 Cal.App.5th at 840; *Musso*, 77 Cal.App.5th at 760. Even if this Court were to approve of the reasoning of those decisions and their deviation from both *Inns* and pre-existing California law—a position the Court should not take for the reasons explained in Section II, *infra*—*UTA* and *Musso* construed different insurance policy language and differently worded complaints from Amy's Kitchen's.

First, *UTA* and *Musso* were decided in the context of property insurance policies that do not contain a Communicable Disease extension of coverage. Thus, when those courts analyzed their plaintiffs' respective policies, their analysis focused on the undefined phrase "direct physical loss or damage" and how the

"period of restoration" provision might inform the phrase's meaning. *UTA*, 77 Cal.App.5th at 833-834; *Musso*, 77 Cal.App.5th at 759. Applying that narrow analysis to Amy's Kitchen's policy would not be reading it "as a whole," but rather would be improperly "giving a distorting emphasis to isolated words or phrases." *Tana*, 47 Cal.App.4th at 1618. As explained in Section I.A., the different language in the insurance policy that Fireman's Fund sold to Amy's Kitchen can only be understood to mean that communicable diseases like COVID-19 are capable of causing physical loss or damage.

Indeed, if the reasoning of *UTA* were to apply to this case, the Amy's Kitchen policy would be twisted into knots. In coming to its conclusion that the COVID-19 virus is not capable of causing physical loss or damage, *UTA* announced that the virus is "inconsequential" because, it found, the virus can be "wiped off surfaces using ordinary cleaning materials" and "can be addressed by simple cleaning." *UTA*, 77 Cal.App.5th at 835 (quotations and citations omitted).[5] *UTA* distinguished the

---

[5] Section III, *infra* addresses the validity of *UTA*'s factual findings, which are highly questionable as they are contrary to the findings in CDC and other studies. Also, as discussed there, the facts that *UTA* recited were neither pleaded in the *UTA* complaint nor were the subject of a request for judicial notice. Instead, *UTA* took them from federal court opinions that provided no authority for the facts they recited. Moreover, if someone in *UTA* had made a request for judicial notice of the facts in the federal court opinions, the request could not be granted: the federal court facts are not just controverted, they are almost certainly wrong, and thus could not satisfy California law, as set forth in Evidence Code section 452.

COVID-19 virus from other kinds of contaminants by assuming that the effects of the virus do not extend "to the point of repair, replacement or total loss ...." *Id.* at 836 (quotations and citation omitted).[6]

But even if *UTA*'s reasoning had merit (it does not, *see* Sections II and III, *infra*), it does not apply to an insurance policy like Fireman's Fund's, which itself contemplates cleaning to remedy the physical loss or damage from a communicable disease. That is, the Communicable Disease Coverage provision is not limited to "repair, replacement, or total loss." Instead, it affirmatively includes coverage for, among other things, the costs to "clean, detoxify, disinfect, neutralize, [and] cleanup" communicable diseases. Aplt. App. Vol. I. at 104. If *UTA*'s reasoning were applied to Amy's Kitchen's policy, something expressly covered (cleaning) would not only be excluded but would serve as the basis for eliminating coverage altogether. This cannot be the case given the express Communicable Disease insuring agreement. Instead, the Court should construe the text of the policy in front of it rather than follow *UTA*'s flawed analysis of the different insurance policy form in that case.

Musso is likewise inapplicable. In that case, the plaintiff's policy not only lacked Communicable Disease coverage, it also contained an Insurance Services Office Exclusion for Loss Due to Virus or Bacteria. *Musso*, 77 Cal.App.5th at 756 ("Under the

---

[6] This is another highly questionable fact finding, again neither pleaded in the complaint nor the subject of a request for judicial notice.

heading 'Exclusion of Loss Due to Virus or Bacteria,' the policy included two relevant exclusions, one for losses arising from governmental action, the other for losses sustained by reason of a virus or bacteria."); *id.* at 761 ("The virus exclusion expressly bars coverage for all loss or damage caused by or resulting from 'any virus, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease.").[7] To avoid that exclusion, the *Musso* plaintiff alleged that the COVID-19 virus was *not* on its premises. *Musso* Complaint ¶ 57.[8] Thus, when *Musso* stated that "losses incurred by reason of the COVID-19 pandemic" are not covered, 77 Cal.App.5th at 760, it referred to a scenario in which an insured alleges that an order alone—and not the virus—causes loss or damage.

Fireman's Fund also relies upon similar cases contending that an order—rather than the virus—caused "physical loss or damage" insured under policies that do not contain communicable disease coverage. *See, e.g., Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.* (9th Cir. 2021) 15 F.4th 885, 893 (plaintiff alleges that the order is the covered peril rather than the virus); *Oral Surgeons, P.C. v. Cincinnati Ins. Co.* (8th Cir. 2021) 2 F.4th 1141, 1144 (same).

In contrast, Amy's Kitchen pleads physical loss or damage that the COVID-19 virus caused to its own property, not pure loss

---

[7] UP takes no position on the scope of that exclusion.

[8] *See* Complaint, *Musso & Frank Grill Co. v. Mitsui Sumitomo Ins. USA Inc.* (L.A. Cnty. Super. Ct. May 1, 2020) 2020 WL 2096329.

of use arising from government orders. Aplt. App. Vol. I. at 13 (Compl. ¶¶ 27-30). Thus, *UTA*, *Musso*, and the other cases on which Fireman's Fund relies have no application to Amy's Kitchen.

For the reasons discussed here and in detail in Amy's Kitchen's briefs, Amy's Kitchen has alleged all of the requirements necessary to trigger coverage under its Communicable Disease Coverage and Loss Avoidance or Mitigation Coverage provisions. *See* Aplt. App. Opening Br. at 13-17, 27-34; Aplt. App. Reply Br. at 2-8, 14-18. It therefore was error for the trial court to sustain Fireman's Fund's demurrer to Amy's Kitchen's complaint.

II. *Inns, UTA,* and *Musso* Have Confused Previously Settled California Law on The Meaning of "Physical Loss or Damage"

As discussed above, the COVID-19 coverage cases decided in favor of insurers, like *UTA* and *Musso*, do not apply to Amy's Kitchen's policy because its Communicable Disease Coverage requires a construction of the words "physical loss or damage" that includes harm caused by communicable diseases like COVID-19. On this basis alone, this Court can and should reverse the lower court's ruling. However, to the extent the Court views Amy's Kitchen's policy as similar to those cases—and it is not—this Court should still not follow *UTA*, *Musso*, or the cases that Fireman's Fund cites.

The COVID-19-related decisions in favor of insurers have largely been results-oriented, rather than driven by an application of pre-pandemic case law to the allegations in the

complaints. As such, these cases have disregarded existing California law on "physical loss or damage." In particular, courts have (1) introduced a physical alteration requirement, (2) imposed additional criteria for COVID-19 claims not present in other kinds of physical loss or damage cases, and (3) determined that harm to people and harm to property are irreconcilable. This Court should not follow that path.

A. California Law Has Traditionally Not Required Physical Alteration of Property to Trigger Coverage

Property insurance coverage for risks of physical loss or damage dates back more than 60 years. Richard P. Lewis, et al. (2021) *Couch's "Physical Alteration" Fallacy: Its Origins and Consequences*, 56 Tort, Trial & Ins. Prac. L.J. 621, 624. In the earliest California decision on the issue, the insurance industry raised the same argument that Fireman's Fund advocates in this appeal, that coverage must be limited to instances in which "tangible injury to the physical structure itself could be detected." *Hughes v. Potomac Ins. Co.* (1962) 199 Cal.App.2d 239, 249. The Court of Appeal rejected that argument, stating that the insurer's proposed reading of "physical loss or damage" is contrary to what "[c]ommon sense requires …." *Id.* at 248.

Inns characterized *Hughes* as the "central relevant California opinion …." *Inns*, 71 Cal.App.5th at 701. In the decades since *Hughes*, until the pandemic, the other California cases that addressed the "physical loss or damage" issue held that demonstrable physical alteration of the structure of the insured property is *not* a requirement for coverage, finding

instead that coverage is triggered when external forces render property "uninhabitable or unsuitable for its intended use." *Id.* at 703.

For example, *American Alternative Insurance Corp. v. Superior Court* (2006) 135 Cal.App.4th 1239, 1246-1247, found coverage for the seizure of an otherwise undamaged aircraft. *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 865, found physical loss or damage when the insured property—80,000 pounds of almonds—was intermingled with a tiny quantity of wood chips, rendering the otherwise undamaged almonds unsafe to market. *EOTT Energy Corp. v. Storebrand International Insurance Co.* (1996) 45 Cal.App.4th 565, 569-570, found coverage for theft of property without structural change. And *Strickland v. Federal Insurance Co.* (1988) 200 Cal.App.3d 792, 799-801, held that physical loss or damage had occurred to an unsafe but structurally undamaged house.[9] For reasons that are hard to explain, *UTA* cited to *Hughes* and *Strickland* but not to the portion of *Hughes* that rejected the *UTA* holding as contrary to common sense. *Musso* did not cite to any of these cases.

Inns noted that *Hughes* was not alone. Many out-of-state cases were to the same effect, including *Western Fire Insurance Co. v. First Presbyterian Church* (1968) 165 Colo. 34, 39-40

---

[9] *American Alternative* and *EOTT* were both written by the late Justice H. Walter Croskey, who was considered the leading authority on insurance coverage issues in California during his time on the bench. Justice Croskey was also the co-author of a frequently cited treatise on California insurance law.

(discussing *Hughes*) (gasoline vapors from a nearby property that saturate insured building such that it becomes inhabitable); *Gregory Packaging Inc. v. Travelers Property Casualty Co. of America* (D.N.J. Nov. 25, 2014) 2014 WL 6675934 (release of ammonia that burns employees and requires remediation to make the building safe for employees again); and *Oregon Shakespeare Festival Assn. v. Great American Insurance Co.* (D.Or., June 7, 2016) 2016 WL 3267247 (smoke rendered outdoor theater unsafe for performances).

The California cases that rejected coverage under policies that insured against direct physical loss or damage did so because the insured sought coverage for purely intangible losses such as (i) lost electronic computer data, *Ward General Insurance Services, Inc. v. Employers Fire Insurance Co.* (2003) 114 Cal.App.4th 548, 555-556; (ii) cancelled business contracts, *Simon Marketing, Inc. v. Gulf Insurance Co.* (2007) 149 Cal.App.4th 616, 623; (iii) leaked trade secrets, *id*. at 623-624 (*dictum*); or (iv) mislabeled wine, *Doyle v. Fireman's Fund Insurance Co.* (2018) 21 Cal.App.5th 33, 38-40.

The court below, Fireman's Fund, its California federal court cases, *UTA*, and *Musso* all rely in large part on a case that did not construe "physical loss or damage"—*MRI Healthcare Center of Glendale, Inc. v. State Farm General Insurance Co.* (2010) 187 Cal.App.4th 766—in support of their argument that structural alteration of property is required to trigger coverage. Fireman's Fund and its cases fail to understand that *MRI*

Healthcare applied different (and narrower) insurance policy language to distinguishable facts.

The insurance policy in *MRI Healthcare* was more limited in scope than Amy's Kitchen's, covering only "accidental direct physical loss [of] business personal property." *Id.* at 771. *MRI Healthcare* did not address an insurance policy that insures against "physical loss *or* damage to" property, let alone one with express "Communicable Disease" coverage. Because "loss" and "damage" in the Fireman's Fund policy are stated in the disjunctive, those two terms cannot mean the same thing. *See E.M.M.I. Inc. v. Zurich Am. Ins. Co.* (2004) 32 Cal.4th 465, 473. Thus, their scope cannot be limited to the meaning that *MRI Healthcare* gave to a variant of just one of those terms.

As to the facts, *MRI Healthcare* involved a defective MRI machine whose owner turned off the machine, knowing that it might not restart. 187 Cal.App.4th at 770. *MRI Healthcare* held that the narrower insuring agreement for "direct physical loss" "contemplates an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property *causing it to become unsatisfactory for future use* or requiring that repairs be made to make it so." *Id.* at 779 (italics added). The court concluded that because the "failure of the MRI machine to satisfactorily 'ramp up' emanated from the inherent nature of the machine itself," there was no "*external force*" that "acted upon the insured property to cause a *physical change* in the condition of the property." *Id.* at 780-781 (emphasis in original).

MRI Healthcare also cited uncritically to a treatise indicating that physical alteration of property is a requirement for coverage. *Id.* But none of the pandemic decisions citing to *MRI Healthcare* or to the treatise acknowledged that the treatise's author subsequently disclaimed the notion that physical alteration is a requirement for coverage.[10] And even if there were a physical alteration requirement under some property insurance forms, the COVID-19 virus satisfies any such requirement under those forms because it physically alters the air and surfaces of property. *See Inns*, 71 Cal.App.5th at 706 ("it is possible that in the context of real property, the 'distinct,

---

[10] The treatise, Steven Plitt et al., 10A *Couch on Insurance* 3d, § 148:46, has been cited by California appellate courts for the unobjectionable proposition that "physical loss or damage" to property does not encompass intangible or purely economic loss. *See Inns*, 71 Cal.App.5th at 706 (citing cases).

However, the cases that Fireman's Fund relies upon cite to another passage in that section of the treatise, stating that the "distinct, demonstrable, physical alteration of property" standard was a "widely held rule" on the meaning of "physical loss or damage." In fact, at the time this section was first published, only one case had so held: a federal district court opinion purporting to apply Oregon law, and that court's reading of the policy language had been rejected by the Oregon Court of Appeals. Numerous other cases had rejected the contention that "physical alteration" is necessary. *See* Lewis, 56 Tort, Trial & Ins. Prac. L.J. at 624-29.

The treatise's author, Mr. Plitt, conceded more recently that the treatise's statement was wrong, stating "courts are not looking for physical alteration but for loss of use." *See, e.g.*, Steven Plitt, *Direct Physical Loss in All-Risk Policies: The Modern Trend Does Not Require Specific Physical Damage, Alteration*, Claims J. (Apr. 15, 2013), https://amp.claimsjournal.com/magazines/ idea-exchange/2013/04/15/226666.htm.

demonstrable, physical alteration' referenced in the Couch treatise (10A Couch [on Insurance], § 148:46, p. 148-98) could include damage that is not structural, but instead is caused by a noxious substance or an odor").

B. This Court Should Not Impose Additional Requirements for COVID-19 Claims

UTA and many of Fireman's Fund's cases seek to place restrictions on coverage that courts did not impose before the pandemic. For instance, *UTA* suggests that the COVID-19 virus does not cause physical damage because it "can be cleaned from surfaces through general disinfection measures." 77 Cal.App.5th at 838. But this is not consistent with pre-pandemic law holding that perils that can be repaired through cleaning can cause insured "physical loss or damage." *See, e.g.*, *Farmers Ins. Co. of Oregon v. Trutanich* (1993) 123 Or.App. 6, 11-12 (odor requiring insured to "clean the house"); *Graff v. Allstate Ins. Co.* (2002) 113 Wash.App. 799, 801 (costs to "clean up" methamphetamine residue); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. CML Metals Corp.* (D.Utah Aug. 11, 2015) 2015 WL 4755207, at *4 (oil spray "caused physical damage to the building roof (necessitating cleaning)"). Moreover, as discussed above, the Amy's Kitchen policy expressly covers the costs to "clean, detoxify, disinfect, neutralize, [and] cleanup" communicable diseases. Aplt. App. Vol. I. at 104. Therefore, *UTA*'s suggestion that perils that can be addressed through cleaning cannot cause physical loss or damage can have no application to the present case since it conflicts with the express language of the Fireman's Fund policy.

UTA also suggests that the COVID-19 virus differs from insured perils such as asbestos or environmental contamination because it is not "tied to a location." 77 Cal.App.5th at 838. *UTA*'s suggestion is untethered to the actual facts: to take just two examples, asbestos was dispersed widely over southern Manhattan following the destruction of the World Trade Center, and environmental releases can spread over hundreds of miles.[11] *UTA* also forgets some of the other common perils that property insurance policies routinely cover can damage vast areas at once, such as wildfire smoke, hurricanes, and storms. If insurance policies only covered damage cabined to specific properties, as *UTA* suggests, it would lead to the absurd result that a fire that burned one building would trigger coverage while a fire that burned thousands would not.

UTA further suggests that the COVID-19 virus cannot cause physical damage because "transmission may be reduced or rendered less harmful" through "social distancing, vaccination, and the use of masks." 77 Cal.App.5th at 838. This conflicts with *Inns* and the pre-pandemic line of cases that recognized wildfire

---

[11] *See, e.g.,* Office of Inspector General, *EPA's Response to the World Trade Center Collapse*, at 2 (Aug. 21, 2003), https://www.epa.gov/sites/default/files/2015-12/documents/wtc_report_20030821.pdf (EPA report on dispersal of dust containing asbestos and other substances that "blanketed Lower Manhattan"); EPA, *Anaconda Co. Smelter Superfund Site*, https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.cleanup&id=0800403#bkground (EPA report on 300 square mile area polluted from releases from a single smelter) (last visited May 28, 2022).

smoke, toxic gas, asbestos, and mold all cause insured physical damage, even though people can wear masks or don protective equipment to protect themselves from those perils. *Inns* correctly held that neither insurance policies nor the case law distinguish between a physical risk introduced into the property through people (such as the COVID-19 virus) or some other way, so long as that risk physically affects the property. *Inns*, 71 Cal.App.5th at 701-703.[12]

Most fundamentally, none of the requirements that *UTA* or Fireman's Fund's cases purport to impose are actually found in

---

[12] Based on this incorrect reasoning, *UTA* then concludes that "the presence of the virus does not render a property useless or uninhabitable…." *UTA*, 77 Cal.App.5th at 838. But an insured does not need to show that a peril renders a property completely useless to obtain business interruption coverage. Under California law, "it is well settled that the purpose and nature of 'business interruption' or 'use and occupancy' insurance is 'to indemnify the insured against losses arising from his inability to continue the normal operation and functions of his business, industry, or other commercial establishment." *Pac. Coast Eng'g Co. v. St. Paul Fire & Marine Ins. Co.* (Ct. App. 1970) 9 Cal. App. 3d 270, 275 (emphasis added).

In any event, *UTA*'s suggestion does not apply to Amy's Kitchen's because the coverages for Communicable Disease and Loss Avoidance or Mitigation in the Fireman's Fund policy do not restrict recovery to instances in which property is rendered completely useless. *See* Aplt. App. Vol. I. at 96, 104, 138. For example, a public health authority order requiring the disinfection of property will trigger the Communicable Disease Coverage, and that insuring agreement has no requirement that the building be rendered unusable. Aplt. App. Vol. I. at 104, 138. Similarly, Loss Avoidance or Mitigation Coverage includes coverage for expenses incurred from perils that just threaten the property. Aplt. App. Vol I. at 96.

the insurance policies themselves. Instead, *Inns* identified the required elements: (1) a physical force (2) that renders property uninhabitable or unsuitable for intended use. *Id.* at 700. Policyholders like Amy's Kitchen have more than met those two requirements in alleging that COVID-19 was physically present at its properties and rendered them unsafe. Aplt. App. Vol. I. at 13 (Compl. ¶ 27).

The decision on the part of *UTA* and *Musso* to treat COVID-19 claims differently from other claims is apparently motived by a misguided desire to protect the insurance industry. *Musso* admitted as much, stating that "[t]o suddenly add non-physical losses caused by a pandemic would give policyholders more than they bargained for and dramatically affect the insurers' financial obligations .... Nationwide losses from COVID-19 have been estimated at between $255 billion and $431 billion *per month*." *Musso*, 77 Cal.App.5th at 761, fn. 2 (italics in original) (referencing numbers provided by the National Association of Insurance Commissioners).

In fact, to the knowledge of UP, no insurance company has entered insolvency due to the pandemic.[13] Instead, insurers have earned record amounts. For example, Allianz SE, the parent

---

[13] *See generally* Erik S. Knutsen & Jeffrey W. Stempel, *Infected Judgment: Problematic Rush to Conventional Wisdom & Insurance Coverage Denial in a Pandemic* (2021) 27 Ct. Ins. L. J. 185, 201-228, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3830136 (discussing the insurers' "public relations blitz" with regard to COVID-19 business interruption coverage, including the alleged massive expense to the insurance industry).

company of wholly owned subsidiary Fireman's Fund, boasted in its 2020 Annual Report that its net income increased and that it closed out 2020—a year that was catastrophic for most businesses—by booking over 4.6 billion euros in income, after taxes and expenses.[14] Allianz is not in danger of insolvency, in any sense of the word, if the Court enforces the promises that it made to Amy's Kitchen.

Critically, the California Supreme Court rejected the reasoning that *Musso* expressed in a case that *Musso* did not consider. In *Aerojet-General Corporation v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, the Supreme Court considered an argument by the insurance industry that a finding in favor of coverage for environmental remediation proceedings would put them out of business. The Supreme Court rejected that argument as contrary to California law, stating: "the pertinent policies provide what they provide. [The policyholder] and the insurers were generally free to contract as they pleased. They evidently did so. They thereby established what was 'fair' and 'just' inter se. We may not rewrite what they themselves wrote. We must certainly resist the temptation to do so here simply in order to adjust for chance—for the benefits it has bestowed on one party without merit and for the burdens it has laid on others without desert." *Id.* at 75.

---

[14] Allianz SE, *2020 Annual Report*, at 13 (Mar. 4, 2021), https://www.allianz.com/content/dam/onemarketing/azcom/Allianz_com/investorrelations/en/results-reports/annual-report/ar-2020/en-Allianz-SE-Annual-Report-2020.pdf.

Aerojet, of course is binding here, not the ill-considered footnote in *Musso*. That is particularly the case because Fireman's Fund not only eschewed the industry-standard Insurance Services Office Exclusion for Loss Due to Virus or Bacteria but it specifically wrote into its policies coverage for physical loss or damage caused by Communicable Disease. Holding Fireman's Fund to its promise of providing that coverage would not bankrupt Fireman's Fund or the insurance industry.

C. COVID-19 Harms People *and* Property

Part of this erosion of physical loss or damage law also comes from courts repeating some form of an expression invented by insurer counsel that COVID-19 harms people, not property. *UTA* references cases that rely on it repeatedly. *UTA*, 77 Cal.App.5th at 833, 835 & fn. 10. Fireman's Fund leans on it as well. Aplee. Br. at 24-25. But harm to people and property are not mutually exclusive. Tangible property that is unsafe for people to use is tangible property that is physically lost or damaged. *See e.g.*, *Shade Foods*, 78 Cal.App.4th at 865 (undamaged almonds unsafe to consumers and, hence, physically lost or damaged, because of the presence of a small quantity of wood chips); *Hughes*, 199 Cal.App.2d at 249 (discussing safety risk to owners if they lived in the undamaged dwelling that had shifted to hang off a cliff due to soil erosion); *Strickland*, 200 Cal.App.3d at 803 (describing plaintiffs' residence as "far below accepted standards of safety"); *see also Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.* (1996) 45 Cal.App.4th 1, 87 (finding "property damage" under liability policies because asbestos was a "health hazard").

Non-California cases are in accord. For example, in one Oregon district court case, the court found coverage when "smoke from nearby wildfires caused health concerns about poor air quality inside the theater" despite no "permanent or structural damage" to the property. *Inns*, 71 Cal.App.5th at 702 (describing *Or. Shakespeare Festival Assn.*, 2016 WL 3267247). Likewise, in a Third Circuit case, the court concluded that "'[w]hen the presence of large quantities of asbestos in the air of a building is such as to make the structure *uninhabitable and unusable*, then there has been a distinct loss to its owner' within the meaning of a first party property insurance policy." *Id.* (quoting *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.* (3d Cir. 2002) 311 F.3d 226, 236) (emphasis added). In these cases, discussed in *Inns*, physical loss or damage is rooted in people's ability to safely interact with property, even when the property itself maintains its structural integrity. *Inns*, 71 Cal.App.5th at 702.

The "people versus property" argument also must be read in the context of policyholder allegations that the COVID-19 virus harms both. As Amy's Kitchen alleges: "[t]he coronavirus or COVID-19 attaches itself to surfaces and properties and causes a physical change in the condition of the surfaces and properties—from safe and touchable to unsafe and deadly." Aplt. App. Vol. I. at 12 (Compl. ¶ 24). The complaint continues: "[t]he persistent presence of this deadly, airborne live coronavirus and disease on surfaces and in the air renders buildings and properties damaged, unsafe, unfit, and uninhabitable for occupancy or use with additional measures and protections." *Id.*

at 13 (Compl. ¶ 27). Together, these allegations reflect that the COVID-19 virus physically changes the property and that change threatens the safety of people. But when courts take "people not property" literally, they effectively reject the allegations of policyholders that the COVID-19 virus harms property. As a result, those courts are not accepting the truth of the allegations in the complaints, which they are required to do on a demurrer. *Fremont Indem. Co. v. Fremont Gen. Corp.* (2007) 148 Cal.App.4th 97, 111. As discussed in more detail below, this is not the only place that courts ruling for insurers have disregarded the standards that govern a demurrer (or, in federal court, a motion to dismiss).

III. The Courts Ruling For Insurers Flout Established Authority By Finding Facts Outside of The Complaint at The Pleading Stage

It is black-letter law that the factual record for a demurrer is limited to material facts properly pleaded in the complaint and facts that are the subject of judicial notice. *Evans v. Berkeley* (2006) 38 Cal.4th 1, 6; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318; Code Civ. Proc. § 430.30. It is also black-letter law that a court ruling on a demurrer (and an appellate court reviewing a judgment entered after a demurrer is sustained) must accept the factual allegations in the complaint as true. *Evans*, 38 Cal.4th at 6. It is irrelevant that a court may not agree with the allegations in the complaint, thinks that the plaintiff will not be able to prove its case, or believes there are facts outside of the complaint not subject to judicial notice that would preclude a recovery. *See, e.g., Committee on Children's Television, Inc. v. Gen. Foods Corp.*

(1983) 35 Cal.3d 197, 213-214 (superseded by statute on other grounds); *Align Tech., Inc. v. Tran* (2009) 179 Cal.App.4th 949, 958.

No California statute nor any California Supreme Court decision has created an exception to the black-letter rules summarized above. Yet the court below effectively concluded—as have virtually all of the cases on which Fireman's Fund relies—that there must be an unwritten exception to the rules governing demurrers (or, in federal courts, motions to dismiss[15]) when it comes to COVID-19 insurance coverage.

For example, central to many policyholder complaints, including Amy's Kitchen's, is the allegation that the COVID-19 virus physically alters air and surfaces, rendering them unsafe and deadly. *See e.g.*, Aplt. App. Vol. I. at 12-13 (Compl. ¶¶ 26-29); *UTA*, 2022 WL 1198011 at *8. Under California law, these allegations should have been accepted as true at the demurrer stage. *Fremont*, 148 Cal.App.4th at 114-115 ("'A demurrer is simply not the appropriate procedure for determining the truth of disputed facts.'"). Instead, the court below—like the courts in many of the cases on which Fireman's Fund relies (as well as *UTA*)—disregarded the allegations in the complaint about the

---

15 Federal motion to dismiss standards are similar to California demurrer standards, except that federal courts apply a plausibility standard that provides those judges "more latitude to dismiss claims at the pleading stage … than California trial judges have under our traditional notice pleading standards." *Morris v. JPMorgan Chase Bank, N.A.* (2022) 78 Cal.App.5th 279, 304, fn. 14. This is another reason that California courts err when they rely on federal rulings involving motions to dismiss.

science of COVID-19 and opted to make its own factual findings or to adopt unsupported motion-to-dismiss fact findings from other courts. The court below did so even though the facts it purported to find were neither pleaded in the Amy's Kitchen complaint nor were facts that "are of such common knowledge ... that they cannot reasonably be the subject of dispute" and are therefore subject to judicial notice. Evid. Code § 452(g). The court below, like the courts cited in Fireman's Fund's brief (and like *UTA*), apparently believed, contrary to established California law, that a fact must be deemed true—and thus can override an allegation of material fact in a complaint—if the fact appears in a judicial opinion. This was error. *See Fremont*, 148 Cal.App.4th at 113. Nor does repetition of the same fact in multiple opinions cure the error; repetition of a fact subject to dispute does not turn that fact into one that is properly the subject of judicial notice.[16]

UP respectfully requests this Court to adhere to California law and decline to follow the practice of engaging in unilateral judicial fact finding merely because the policyholder in this case seeks insurance coverage for losses related to the pandemic.

---

[16] *JDS Constr. Grp., LLC et al. v. Cont'l Cas. Co.* (Oct. 25, 2021) No. 20-CH-05678, at 4 ("Judges are not sheep, and I do not decide a case by counting noses. Further, the 'herd' can be wrong.") (accessible at https://www.claimsjournal.com/app/uploads/2021/10/JDS.opinion.pdf).

A. Fireman's Fund's Cases and *UTA* Erred in Failing To Accept The Plaintiff's Allegations About COVID-19 As True

In sustaining the demurrer to Amy's Kitchen's complaint, the court below primarily relied on a federal trial court case *Unmasked Management, Inc. v. Century-National Insurance Co.* (S.D.Cal. 2021) 514 F.Supp.3d 1217. Aplt. App. Vol. 3 at 620. But Amy's Kitchen did not plead any of the facts that the court below cited from *Unmasked*, and *Unmasked* itself disregarded the rule that on a "motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus* (2007) 551 U.S. 89, 93-94. The *Unmasked* court instead decided that it was "not persuaded" by the plaintiffs' allegation that COVID-19 particles cause structural alteration:

> And, as [the plaintiffs] explain, this physically altered their property because "COVID-19 particles, though unseen, ***structurally alter their environment*** in a manner that causes loss and damage by rendering affected premises dangerous to human health." ... Even assuming, *arguendo*, that these allegations demonstrate the presence of COVID-19 in Plaintiffs' businesses, the Court is not persuaded that such allegations demonstrate a physical alteration to Plaintiffs' Property.

Aplt. App. Vol. 3 at 620-621 (quoting *Unmasked*, 514 F.Supp.3d at 1225) (emphasis added). The *Unmasked* court substituted for those allegations various fact findings in two other federal district court cases that had decided that the COVID-19 virus is incapable of causing physical loss or damage to property anywhere. *Unmasked*, 514 F.Supp.3d at 1225 (citing *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.* (S.D.Cal. 2020) 491

F.Supp.3d 738, 740; *O'Brien Sales & Mktg., Inc. v. Transp. Ins. Co.* (N.D.Cal. 2021) 512 F.Supp.3d 1019, 1024).

The trial court's use of facts from *Unmasked* rather than the facts pleaded in the complaint is particularly problematic because Amy's Kitchen's complaint includes detailed scientific allegations on how COVID-19 causes physical alteration of property—allegations not made in the *Unmasked* complaint. *Compare* Aplt. App. Vol. I. at 12-13 (detailed scientific allegations on how COVID-19 physical alters air and surfaces and renders them unsafe), *with Unmasked* Complaint ¶ 20 (making little to no affirmative allegations on how COVID-19 interacts with property).[17] In fact, Amy's Kitchen's complaint alleges: "COVID-19 caused direct physical loss or damage to properties ... by altering the physical conditions of properties such that properties were no longer safe or fit for occupancy or use without additional measures and protection. The coronavirus or COVID-19 attaches itself to surfaces and properties and causes a physical change in the condition of the surfaces and properties—from safe and touchable to unsafe and deadly." Aplt. App. Vol. I. at 12 (Compl. ¶ 24). Amy's Kitchen further alleges that the virus was present on its properties. *Id*. at 12 (Compl. ¶ 24); *id.* 13 (Compl. ¶¶ 29-31). In light of those allegations, the only conclusion one can reach is that the trial court in this case sustained a demurrer without leave to amend in reliance on second-hand fact findings

---

17 *See* First Amended Class Action Complaint, *Unmasked Mgmt., Inc. v. Century-Nat'l Ins. Co.* (S.D.Cal. Nov. 9, 2020) 2020 WL 9425075.

in different cases involving far more narrowly pleaded complaints and narrower insurance policies instead of limiting the record on the demurrer to the factual allegations of the complaint in front of it.[18]

Fireman's Fund's attempts to cure the trial court's errors by citing to other cases. But they are equally problematic. For example, Fireman's Fund relies on *Barbizon School of San Francisco v. Sentinel Insurance Co.* (N.D.Cal. 2021) 530 F.Supp.3d 879, even though the plaintiffs in that case "concede[d] there has been no physical damage to or alteration of their property." *Id*. at 889. As noted, Amy's Kitchen made no such concession.

Other cases cited by Fireman's Fund simply reject the plaintiffs' factual allegations. For example, *Gilreath Family & Cosmetic Dentistry, Inc. v. Cincinnati Insurance Co.* declared: "we do not see how the presence of those particles would cause physical damage or loss to the property." (11th Cir. Aug. 31, 2021) 2021 WL 3870697, at *2. Yet, the plaintiff's complaint had alleged the COVID-19 virus' "contamination" of property with respiratory droplets and fomites in the context of its dentistry practice. *Gilreath* Complaint ¶¶ 32-33, 53-55, 58-60.[19] Even

---

[18] *UTA* made this same egregious error: it adopted factual conclusions from *Unmasked* as well as from other cases with similarly limited complaints instead of confining the record to the *UTA* plaintiff's allegations. *See, e.g.*, *UTA*, 77 Cal.App.5th at 835 ("Many courts have rejected the theory that the presence of the virus constitutes physical loss or damage to property.").

[19] *See* First Amended Complaint Class Action, *Gilreath Family & Cosmetic Dentistry, Inc. v. Cincinnati Ins. Co.* (N.D.Ga.

assuming that the federal appellate court was entitled to disregard the United States Supreme Court's ruling that all of the factual allegations in a complaint must be accepted as true, this Court has no such discretion. *See Evans*, 38 Cal.4th at 6.

Unfortunately, *UTA* followed the federal court practice of disregarding the plaintiffs' allegations and substituting its own facts even though they were neither in the record nor the proper subject of judicial notice. To take just a few of many examples of *UTA*'s failure to adhere to California procedure in reviewing a judgment entered after a demurrer is sustained:

(1) *UTA* found that COVID-19 cannot cause physical loss or damage as a factual matter not by citing to an allegation in the complaint but by quoting a Seventh Circuit case that said that COVID-19 is "inconsequential" because "it may be wiped off surfaces using ordinary cleaning materials, and it disintegrates on its own in a matter of days." *UTA*, 77 Cal.App.5th at 835 (quoting *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.* (7th Cir. 2021) 20 F.4th 327, 335).

(2) The plaintiffs in *Sandy Point* did not allege that the virus is easy to clean or goes away on its own in short periods of time.[20] In fact, *Sandy Point* cited nothing to support its fact finding and rejected the plaintiff's request for leave to amend to allege facts about how COVID-19 physically attaches to

---

July 20, 2020) 2020 WL 9256735.

[20] *See* Amended Complaint, *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.* (N.D.Ill. July 17, 2020) No. 1:20-cv-02160; First Amended Complaint, *United Talent Agency, LLC v. Vigilant Ins. Co.* (L.A. Cnty. Super. Ct. Apr. 7, 2021) No. 20STCV43745.

properties through droplets, aerosols, and fomites. *Sandy Point*, 20 F.4th at 335.

(3) In relying on the unsupported fact finding in *Sandy Point*, *UTA* disregarded the contrary allegations in the plaintiff's complaint: "Even frequent cleanings cannot be assured to eliminate SARS-CoV-2 from a premises, given its ability to spread easily and quickly as long as people are entering the premises during an outbreak at or near the premises." *UTA* Compl. ¶ 47; *see also id.* ¶ 45 (alleging COVID-19 requires "extensive cleaning and disinfecting").

(4) *Sandy Point* was not the only federal case that *UTA* cited to for facts when it disregarded allegations in the complaint before it. *See UTA*, 77 Cal.App.5th at 835, fn. 10 (citing, *e.g.*, *Pappy's Barber Shops,* 491 F.Supp.3d at 740 ("the presence of the virus itself, or of individuals infected the virus, at Plaintiffs' business premises or elsewhere do not constitute direct physical losses of or damage to property"); *Kevin Barry Fine Art Assocs. v. Sentinel Ins. Co.* (N.D. Cal. 2021) 513 F.Supp.3d 1163, 1171).

(5) In another portion of the opinion, *UTA* distinguishes environmental contaminants that are "necessarily tied to a location and require specific remediation or containment to render them harmless" with COVID-19, which it asserts "exists worldwide wherever infected people are present, [but] it can be cleaned from surfaces through general disinfection measures, and transmission may be reduced or rendered less harmful through practices unrelated to the property ...." *UTA*, 77 Cal.App.5th at 838. But, again, the *UTA* complaint alleges no such thing.

Instead, UTA alleged that the virus is tied to a location by "physically permeating" and "binding to" property and being "aerosolized." *Id.* at 834-835. It also alleged that COVID-19 requires "remedial measures to reduce or eliminate the presence of SARS-CoV-2, including extensive cleaning and disinfecting; installing, modifying, or replacing air filtration systems; remodeling and reconfiguring physical spaces; and other measures." *Id.* at 835 (quotations and citations omitted).

(6) *UTA* took matters a step further when it quoted *Unmasked* for the proposition that it would "strain credulity to say that" countertops with COVID-19 on them could be "damaged or physically altered as a result." *Id.* (quoting *Unmasked*, 514 F.Supp.3d at 1226). The plaintiff in *UTA* did not plead that fact and the appellate court did not say that it could take judicial notice of such a fact. Nor was it proper for the trial court in *Unmasked* to make such a fact finding since the *Unmasked* plaintiff's claims had included allegations that COVID-19 causes "harm to the air inside Covered Property and infestation on the surface of Covered Property ...." *Unmasked* Complaint ¶ 36.

In short, *UTA* and Fireman's Fund's other cases disregarded California's pleading rules under the apparent belief that the allegations of the plaintiffs' complaint do not matter in an insurance case arising out of the pandemic. This Court should not follow the mistaken reasoning of those cases.

B. Facts Recited in Court Documents About COVID-19 Are Not Judicially Noticeable

Fireman's Fund may argue that *UTA* and the other cases discussed in the preceding section were entitled to disregard the

plaintiffs' complaints and rely on facts recited in other cases because the facts recited in those cases are subject to judicial notice. Not so.

A fact does not become subject to judicial notice merely because it appears in a court opinion or record. "A court may take judicial notice of a court's action, but may not use it to prove the truth of the facts found and recited." *O'Neill v. Novartis Consumer Health, Inc.* (2007) 147 Cal.App.4th 1388, 1405 (refusing to take judicial notice of facts recited in federal appellate opinion); *Kilroy v. California* (2004) 119 Cal.App.4th 140, 145-148 (same; California state court ruling). As one court explained: "while an official record of an appellate opinion can be admitted to prove the truth of the facts asserted, the most it may prove is that the appellate opinion was delivered and that the court made orders, factual findings, judgments and conclusions of law .... The truth of any factual matters that might be deduced from official records is not the proper subject of judicial notice." *Lockley v. L. Off. of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 885. As these and many other cases hold, a court cannot accept facts recited in judicial opinions as true. *Id.* Nor can a court rely on non-record evidence (not properly the subject of judicial notice) that contradicts the allegations of a complaint; instead, those allegations must be assumed to be true. *Lafferty v. Wells Fargo Bank* (2013) 213 Cal.App.4th 545, 566 (citations omitted).

Further, the "facts" about COVID-19 that these courts recite are not subject to judicial notice on their own. Judicial

notice of facts can only be taken when they "cannot reasonably be the subject of dispute." Evid. Code §§ 452(g)-(h). How long the virus lasts on surfaces, how it can be cleaned, and the extent to which it causes physical injury to air and surfaces are not matters outside of dispute. Scientific sources support the allegations made by Amy's Kitchen,[21] and courts that make sweeping statements to the contrary do not point to any dispositive sources for their statements apart from noting they

---

[21] These sources include scientific articles discussing how "surface disinfection once- or twice-per-day had little impact on reducing estimated risks." CDC, *Science Brief: SARS-CoV-2 and Surface (Fomite) Transmission for Indoor Community Environments* (Apr. 5, 2021), https://www.cdc.gov/coronavirus/2019-ncov/more/science-and-research/surface-transmission.html. That is the case even in hospitals, where cleaning and disinfecting practices are conducted under the supervision of health care professionals. Zarina Brune, et al., *Effectiveness of SARS-CoV-2 Decontamination and Containment in a COVID-19 ICU*, Int. J. Env't Res. Pub. Health (Mar. 2021), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7967612/. There are also sources that confirm how the COVID-19 virus physical alters property. *See, e.g.*, 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 (describing how COVID-19 virus turns surfaces into fomites that transmit disease); CDC, *Scientific Brief: SARS-CoV-2 Transmission*, (May 7, 2021), https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/sars-cov-2-transmission.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fscience%2Fscience-briefs%2Fscientific-brief-sars-cov-2.html (The COVID-19 virus "can build-up in the air space").

appear in other court opinions. The practice of disregarding the record and relying on factual statements in court opinions is a serious legal error this Court should not condone.

CONCLUSION

After more than two years of living with COVID-19, it is understandable that some judges have developed perceptions of how the virus functions. But a court cannot disregard California's pleading rules based on a feeling of familiarity. Amy's Kitchen has alleged the science behind how the COVID-19 virus physically affects surfaces and air. Such allegations cannot be rejected out of hand on a demurrer; instead they must be tested with the benefit of a full evidentiary record.

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

DATE: June 1, 2022

Respectfully submitted,

COVINGTON & BURLING LLP

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

Counsel for Amicus Curiae
United Policyholders

CERTIFICATE OF COMPLIANCE

The foregoing Amicus Curiae Brief contains 9,589 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 2016. 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).

DATE: June 1, 2022

Respectfully submitted,

COVINGTON & BURLING LLP

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

PROOF OF SERVICE

No. A162795

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action. My business address is 1999 Avenue of the Stars, Suite 3500, Los Angeles, CA 90067. On June 1, 2022, I served the following document(s) described as:

APPLICATION FOR LEAVE TO FILE AN AMICUS BRIEF AND BRIEF AMICI CURIAE OF UNITED POLICYHOLDERS IN SUPPORT OF APPELLANT AMY'S KITCHEN, INC.

on the interested parties in this action as follows:

Andrew Bisbas
Andrew M. Reidy
Lowenstein Sandler LLP
2200 Pennsylvania Avenue NW, Suite 500E
Washington, DC 20037

John P. Phillips
DLA Piper LLP
555 Mission Street, Suite 2400
San Francisco, CA 94105

Brett Solberg
DLA Piper LLP
1000 Louisiana St., Suite 2800
Houston, TX 77002

[x] (BY TRUEFILING) By filing and serving the foregoing through Truefiling such that the document will be sent electronically to the eservice list on June 1, 2022; and

The Hon. Jennifer V. Dollard

Superior Court of California

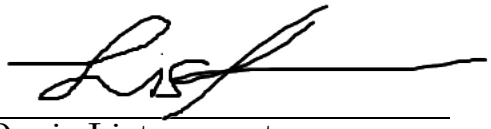
County of Sonoma

3055 Cleveland Ave.

Santa Rosa, CA 95403

[x] (BY MAIL) By causing the document to be sealed in an envelope addressed to the recipient above, with postage thereon fully prepaid, and placed in the United States mail at 1999 Avenue of the Stars, Suite 3500, Los Angeles, CA 90067.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this proof of service is executed at Los Angeles, on June 1, 2022.



Denis Listengourt