No. A163136

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

PEANUT WAGON, INC., *ET AL.*,
Plaintiffs and Appellants,

v.

ALLIANZ GLOBAL CORPORATE & SPECIALTY, *ET AL.*,
Defendants and Respondents.

On Appeal from the Superior Court for
San Francisco County
Hon. Ethan P. Schulman
Case No. CGC-20-585661

APPLICATION OF UNITED POLICYHOLDERS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANTS

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to California Rule of Court 8.200(c), United Policyholders ("UP") respectfully applies for this Court's permission to file the accompanying *amicus curiae* brief in support of Appellants Peanut Wagon, Inc., Demosthenis Hountalas, and Mary G. Hountalas (collectively, "Cliff House") in their appeal of an adverse judgment in their insurance coverage lawsuit against Respondents Allianz Global Risks U.S. Insurance Company and Associated Indemnity Corporation (collectively, "Allianz").

STATEMENT OF INTEREST OF *AMICUS CURIAE*

UP is a highly respected national non-profit section 501(c)(3) organization. Founded in 1991, UP has served as a respected voice for the interests of consumers and policyholders across the country for nearly 30 years. Individual policyholders routinely call upon UP for help in the wake of large-scale national disasters such as hurricanes in the Gulf and across the Eastern Seaboard; floods and windstorms in the Midwest; wildfires in the West; and most recently, the COVID-19 pandemic.

Indeed, since the pandemic began in 2020, UP has assisted business owners whose operations have been interrupted by SARS-CoV-2, COVID-19, and resulting civil authority orders. UP has educated policyholders on COVID-19 insurance issues and maintains a library of resources at uphelp.org/COVID. UP also routinely engages in nationwide

efforts to educate the public, governmental agencies, legislators, and the courts on policyholders' insurance rights. Grants, donations, and volunteers support UP's work in three program areas: Roadmap to Recovery, Roadmap to Preparedness, and Advocacy and Action.

Public officials, state insurance regulators, academics, and journalists throughout the U.S. routinely seek UP's input on insurance and legal matters. UP serves on the Federal Advisory Committee on Insurance, which briefs the Federal Insurance Office and in turn, the U.S. Treasury Department. UP's Executive Director has been an official consumer representative to the National Association of Insurance Commissioners since 2009. In these roles, UP assists regulators in monitoring policy language and claim practices through presentations and collaboration and the development of model laws and regulations.

Since 1991, UP has filed numerous *amicus curiae* 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, 104-105 (favorably citing UP's amicus brief); *Assoc. of Cal. Ins. Cos. v. Jones* (2017) 2 Cal.5th 376 (favorably citing UP studies).[1]

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

UP continues its mission of supporting policyholders through its *amicus* efforts here in support of Cliff House.

UP'S *AMICUS CURIAE* BRIEF WILL ASSIST THIS COURT IN DECIDING THIS MATTER

Policyholders across the country such as Cliff House buy insurance for protection against unexpected disasters. Confidence that insurance will pay claims spurs growth in our economy and encourages people and businesses to take risks and pursue innovation. Insurance is therefore a crucial engine of the economy and, given its protective purpose, is imbued with a public purpose.

At the same time, insurance is woven into the fabric of the U.S. economy through mandatory purchase requirements, personal and business risk management, and pricing of goods and services. Each state regulates insurance contracts and transactions separately, yet most insurers operate across state lines. Although insurance companies are in business to make a profit for their shareholders, it is crucial that insurance fulfill its dominant purpose "to indemnify the insured in case of loss." *Ins. Co. of N. Am. v. Elec. Purification Co.* (1967) 67 Cal.2d 679, 689; see also American Law Institute (2019) *Rstmt. of the L., Liab. Ins.* § 2, cmt. c (insurance-policy interpretation helps "effect[] the dominant protective purpose of insurance"). Profit and loss considerations should not be considered in the claim determination process, nor should courts consider insurance company finances in analyzing coverage issues.

Judicial oversight is essential to maintain the purpose

and value of insurance in this complex system. Courts require insurance 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 boilerplate language, to show that theirs is the only reasonable interpretation of the contract terms.

Amicus Curiae UP respectfully seeks to assist this Court in rendering a decision here that likely will be influential around the country concerning 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 these state-law issues. As discussed below—and has often been true in past disputes—the federal courts are not properly interpreting California law as it pertains to losses arising from COVID-19. California state courts, in turn, are relying on these incorrect federal decisions. In particular, both California courts and federal courts applying California law have given only token consideration to California's statutory rules of interpretation, opting instead for a heavy reliance on what can only be described as federal common law of COVID-19 insurance coverage. This is improper and has been detrimental to California policyholders.

RULE 8.200(C)(3) DISCLOSURE

Consistent with California Rule of Court 8.200(c)(3), UP states that no party or counsel for any party authored this

amicus curiae brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of this brief.

CONCLUSION

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

DATE: June 2, 2022

Respectfully submitted,

COVINGTON & BURLING LLP

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

Attorneys for Amicus Curiae United Policyholders

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

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Respondents in this appeal, Allianz Global Risks U.S. Insurance Company and Associated Indemnity Corporation (collectively, "Allianz"), insist that this Court find that the COVID-19 virus cannot cause "direct physical loss or damage" to property, and thus cannot trigger the Allianz policy's "Civil Authority" insuring agreement, which is the focus of this *amicus* brief. As the basis for its arguments, Allianz recites facts about the motivations of the local health authorities as well as the characteristics of the COVID-19 virus and its effects on property. *See* Answering Br. 13, 34-39, 43-44. But the Appellants, Peanut Wagon, Inc., Demosthenis Hountalas, and Mary G. Hountalas (collectively, "Cliff House"), did not plead any of those claimed facts in their complaint; instead, Cliff House affirmatively pleaded that the COVID-19 virus caused physical loss or damage to its property and to third party property, such that the Civil Authority insuring agreement should respond.

Disregarding the allegations in the complaint, Allianz instead cites to federal courts that engaged in *sua sponte* fact-finding on motions to dismiss. *Id.* 34-39. But facts recited in court opinions are not subject to judicial notice for their truth, and they therefore can play no role in this appeal. This Court should not repeat those courts' errors by venturing outside of the facts that can be considered in reviewing a judgment entered after a demurrer is sustained.

As to the legal standard that Allianz advocates to plead physical loss or damage—a requirement of structural alteration of property—it has no support in the text of its insurance policy and is contrary to pre-pandemic California law where case after case found coverage, without requiring structural alteration of property, under policies that insure against physical loss or damage. Consistent with those decisions, *Inns by the Sea v. California Mutual Insurance Co.* (2021) 71 Cal.App.5th 688 ("*Inns*") concluded that the COVID-19 virus is a "physical force" that can impair the safe use of property and can therefore trigger coverage under a property and business income policy. *Id.* at 703. *Inns* analogized the COVID-19 virus to perils such as carbon monoxide, foul odors, asbestos, and wildfire smoke, which courts have held cause physical loss of or damage to property under similar insurance policies by contaminating the property's air, surfaces, or other components.

As the relevant civil authority orders reflect, government health officials recognized that when people infected with COVID-19 enter a building, they breathe viral aerosols into the air and expel viral droplets onto surfaces, rendering those once-safe parts of the property dangerous. An uninfected person who enters that property can contract COVID-19 by breathing the air inside and touching the surfaces of the property. The COVID-19 virus therefore harms people by physically affecting the air and surfaces of property. *See* 1 AA0012, 22-23, 31-32 ¶¶ 3, 39-42, 67-72. San

Francisco officials recognized as much, declaring that the introduction of the COVID-19 virus into the city created "[c]onditions of extreme peril to the safety of persons *and property*."[2] Thus, Allianz's arguments about physical loss or damage and the Civil Authority insuring agreement cannot be squared with the allegations in the complaint, and it is the complaint, not Allianz's arguments, that must be accepted as true.

For all of these reasons, the Court should reverse the judgment below.

ARGUMENT

I. Cliff House Alleged Facts Establishing Coverage Under The Civil Authority Provision

Insurers added Civil Authority coverage to "all risks" policies decades ago to "extend ... business interruption coverages to include situations where the insured's own property has not itself been damaged," but government officials decide to prohibit access to the insured property because of "damage to nearby property."[3] For example,

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[2] San Francisco Office of the Mayor, Proclamation By the Mayor Declaring the Existence of a Local Emergency (Feb. 25, 2020), https://tinyurl.com/ytpn494e (last viewed June 1, 2022) (italics added). The civil authority orders issued by the San Francisco Department of Public Health on which Cliff House's claims rely incorporated that Proclamation by reference. *See* 1 AA0023-27 ¶¶ 43-55; *see also* 1 AA0061 ¶ 8; 1 AA104 ¶ 10; 1 AA0127 ¶ 13; 1 AA0160 ¶ 13; 1 AA0198 ¶ 13; 1 AA0263 ¶ 9.a.

[3] Paula B. Tarr, *Where Have All the Customers Gone? Business Interruption Coverage for Off-Premises Events*, 30

during the recent Caldor Fire, local agencies issued orders requiring businesses in the Lake Tahoe area to close because it was not safe to stay open with the air quality index as high as 596. The businesses' Civil Authority insuring agreements would cover profits lost as a result of the agency closure orders. Similarly, at the outset of the COVID-19 pandemic, many government entities issued orders requiring businesses to close because of the physical harm that the COVID-19 virus causes to property and, through those effects, to people. In ordering businesses such as Cliff House to close, San Francisco officials recognized that the COVID-19 virus causes "extreme peril to the safety of persons *and property*." *See* note 2 *supra* (italics added).

The Civil Authority insuring agreement in the Allianz policy provides coverage for: [1] "the actual loss of Business Income you sustain and necessary Extra Expense" [2] "caused by action of civil authority that prohibits access to the described premises" [3] "due to direct physical loss of or damage to property, other than at the described premises," [4] "caused by or resulting from any Covered Cause of Loss." 3 AA0501 (bracketed numbers added). Unlike Civil Authority insuring agreements in other insurance policies, Allianz's policy does not require the "physical loss of or damage to property" in subsection [3] to occur within a limited radius (typically, one mile) of the insured property.

Brief (American Bar Association) 20, 21 (2001) (quoting *FC&S Bulletins*, Business Interruption Ca-1 (1987)).

In its complaint, Cliff House alleged facts that satisfy all four requirements:

[1] Cliff House lost business income and incurred extra expense. 1 AA0027-30 ¶¶ 55-64.

[2] Those losses were caused by civil authority orders issued by San Francisco City and County and the State of California that prohibited access to Cliff House's insured properties (*i.e.*, the "described premises"). 1 AA0023-27 ¶¶ 43-54, 70-73.

[3] Those orders were issued due to direct physical loss of or damage to property other than Cliff House's caused by or resulting from the COVID-19 virus. 1 AA0014, 16, 22-23, 31-33 ¶¶ 11, 17, 39-42, 67-73.

[4] The virus is a Covered Cause of Loss, defined in the policy as "Risks of Direct Physical Loss," unless the loss is specifically "excluded or limited." 3 AA0494.[4] The COVID-19 virus is both a peril and a physical condition presenting the

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[4] California cases have defined "risks of direct physical loss" as follows: "Risk" refers to "the chance of injury, damage or loss." *Doheny W. Homeowners' Ass'n v. Am. Guar. & Liab. Ins. Co.* (1997) 60 Cal.App.4th 400, 405, fn. 4. "'Physical' is defined as having material existence: perceptible especially through the senses and subject to the laws of nature." *Inns*, 71 Cal.App.5th at 700. "'Direct' is defined as … characterized by close logical, causal, or consequential relationship." *Id.* And "loss" can include "'destruction' and 'ruin' [as well as] … the partial or complete deterioration or absence of a physical capability or function, an instance of losing someone or something, and the harm or privation resulting from losing or being separated from someone or something." *Id.* at 705, fn. 18.

direct risk of injury, damage or loss; it is not specifically excluded. *See* Opening Br. 14, 22, 50.

Allianz does not dispute requirement [1], that Cliff House alleged that it lost business income. Instead, Allianz focuses on requirements [2], [3], and [4], arguing that: [2] Cliff House did not plead that the relevant orders that prevented customers and employees from entering Cliff House's property "prohibited" access; [3] no "specific causal nexus" exists between the loss or damage caused by the COVID-19 virus and the orders; and [4] the COVID-19 virus does not cause physical loss or damage to property. *See* Answering Br. 34-39, 43-44.

The discussion below addresses those three requirements in turn and shows that Allianz misreads the complaint and the policy. Because Cliff House has alleged facts establishing Civil Authority coverage, the complaint states a "Civil Authority" claim.

A. Cliff House Alleged That Government Orders Prohibited Access To Insured Property

Cliff House has more than sufficiently alleged that its lost business income was "caused by action of civil authority that prohibits access to the described premises." *See* Opening Br. 24. Specifically, Cliff House alleged that on March 6, 2020, "the San Francisco Department of Public Health … issued a Declaration of Local Health Emergency Regarding" COVID-19. 1 AA0023 ¶ 44. It further alleged that on March 13, 2020, the health department "issued Order of the Health

Officer No. C19-05b," which "prohibit[ed] all indoor public and private gatherings and outdoor gatherings within an enclosed space that has a maximum occupant load of 100 people or more anywhere in San Francisco"; and that the order "expressly applie[d] to on-premises dining at restaurants." 1 AA0024 ¶ 48. The health department's March 13 order also incorporated by reference the February 25, 2020, Proclamation, 1 AA0050 ¶ 10, which explicitly stated that the COVID-19 pandemic had created "[c]onditions of extreme peril to the safety of persons *and property*" throughout San Francisco. *See* note 2 *supra* (italics added).

The numerous orders subsequently issued by the health department between March 16 and May 17, 2020, then prohibited all "public and private gatherings of any number of people occurring outside a single household," and specifically mandated the closure of restaurants and cafes "except solely for takeout and delivery service." 1 AA0024-26 ¶¶ 48, 50-52. All of these orders—violations of which were "punishable by fine, imprisonment, or both," *id.*—also incorporated the February 25 Proclamation. *See* note 2 *supra*.

Allianz asserts that none of the March 16 through May 17 orders "prohibited" access to Cliff House's property. Answering Br. 44. Not so. As detailed above, Cliff House alleged that the orders required "dine-in restaurants and other non-essential businesses to close, due to ... the widespread physical presence of the coronavirus" in the region. 1 AA0013 ¶ 5; *see also* 1 AA0014, 27, 30, 32, ¶¶ 11,

55-56, 63-64, 70. An ordinary person would understand that an order instructing Cliff House to close its business to the public is an order prohibiting the public from accessing Cliff House's premises. *See* Reply Br. 20-21.[5] That understanding is consistent with the plain meaning of *prohibit*: "to prevent from doing something" or "to forbid by authority."[6] And, if any doubt were to exist, the Court must construe all uncertainties in Cliff House's favor. *E.g., Minkler v. Safeco Ins. Co. of Am.* (2010) 49 Cal.4th 315, 319.

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[5] Other cases before the pandemic found a "prohibition" giving rise to Civil Authority coverage if an order instructed the insured to close its doors and cease doing business. *See, e.g.*, *Sloan v. Phx. of Hartford Ins. Co.* (Mich.Ct.App. 1973) 207 N.W.2d 434, 435-437 (government curfew order qualifies as an order prohibiting access); *Assurance Co. of Am. v. BBB Serv. Co.* (Ga.Ct.App. 2002) 576 S.E.2d 38, 40 ("no dispute" that evacuation order in advance of a hurricane prohibited access to restaurants); *Bamundo, Zwal & Schermerhorn, LLP v. Sentinel Ins. Co.* (S.D.N.Y. Mar. 26, 2015) 2015 WL 1408873, at *1, *4 (same); *Altru Health Sys. v. Am. Prot. Ins. Co.* (8th Cir. 2002) 238 F.3d 961, 962-963 (no dispute that when local authorities ordered a hospital to close following a flood, the authorities prohibited access to the hospital). The Supreme Court of the United Kingdom addressed the issue in connection with the pandemic and concluded that a closure order prohibits access. *See Financial Conduct Auth. v. Arch Ins. (UK) Ltd.* [2021] UKSC 1, 152, https://www.supremecourt.uk/cases/docs/uksc-2020-0177-judgment.pdf.

[6] *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/prohibit (last viewed June 1, 2022); *see also* Answering Br. 44 (citing dictionary definition).

B. Cliff House Alleged That The Relevant Orders Were Issued "Due To" Physical Loss Or Damage Caused By The Coronavirus

Allianz also argues that Cliff House has not identified a "specific causal nexus" between direct physical loss of or damage to other property and the prohibition of access in the orders. Answering Br. 43-44. But the Civil Authority coverage in the Allianz policy requires only that the government action prohibit access "*due to* direct physical loss of or damage to property, other than at the [insured] premises." 3 AA0501 (italics added). The ordinary meaning of "due to" is "a causal relationship" or "because of." *See U.S. Postal Serv. v. Postal Reg. Comm'n* (D.C. Cir. 2011) 640 F.3d 1263, 1267. In the context of this insuring agreement, "due to" cannot impose the much broader limitation on coverage that Allianz proposes—to restrict coverage to those situations in which a close and immediate causal relationship exists—because Allianz used broader language to that effect elsewhere in the same insuring agreement. *See Palmer v. Truck Ins. Exch.* (1999) 21 Cal.4th 1109, 1115-1116 (words in insurance policies must be given meaning by the context in which they are used).[7]

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[7] For example, the very next line of the insuring agreement uses the phrase "caused by or resulting from." *See* 3 AA0501.

1. The Complaint Pleads That The Orders Were Issued Due To Physical Loss And Damage That Occurred Prior To The Orders' Issuance

Cliff House alleged in detail that the relevant government orders were issued due to (or because of) the physical loss or damage caused by the COVID-19 virus. In particular, Cliff House asserted that, starting in March 2020, San Francisco and other Bay Area county governments "ordered dine-in restaurants and other non-essential businesses to close, due to ... the widespread physical presence of the COVID-19 virus in the San Francisco Bay Area." 1 AA0013 ¶ 5; *see also, e.g.*, 1 AA0014 ¶ 11 ("The Closure Orders **prohibited** on-premises dining at The Cliff House due to the physical presence of the coronavirus in the community"). Moreover, the San Francisco orders discussed above were allegedly "issued due to droplets containing the coronavirus being on surfaces and objects in, on, around, and in the immediate area of The Cliff House." 1 AA0032 ¶ 70.

Allianz tries to avoid these allegations by suggesting that the relevant government orders must also identify specific property that suffered physical loss or damage from the COVID-19 virus. *See* Answering Br. 13, 20. But no such requirement appears in the Allianz policy. And before the pandemic, courts held that the requirement that the government order or other action be issued due to direct physical loss of or damage to property can be satisfied through the general purpose of the order without reference to individual property. *See Assurance Co. of Am. v. BBB Serv.*

Co. (Ga.Ct.App. 2003) 593 S.E.2d 7, 8-9 (order requiring evacuation because of hurricane approaching Florida was issued because of property damage that the hurricane caused throughout the Bahamas).

2. The Government Orders' Possible Other Bases Do Not Limit Coverage

Allianz also tries to re-characterize the relevant orders as "social distancing" orders. Answering Br. 13, 43. But Cliff House does not plead that the orders were social distancing orders, so that is not a fact in the record. And even if the text of the orders had so stated, a court cannot take judicial notice of the truth of facts set forth in a government order. *See, e.g.*, *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063 (judicial notice is limited to the existence of a government report, not the truth of its contents); *Herrera v. Deutsche Bank Nat'l Trust Co.* (2011) 196 Cal.App.4th 1366, 1375 ("While courts take judicial notice of public records, they do not take notice of the truth of matters stated therein"). Thus, Allianz effectively asks this Court to make factual determinations in Allianz's favor about the basis for the issuance of the orders, and to do so without any support in the record. But California law does not permit the Court to draw inferences against the plaintiff/appellant in an appeal of a judgment following an order sustaining a demurrer.[8]

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[8] *See, e.g., Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967; *Hacker v. Homeward Residential, Inc.* (2018) 26 Cal.App.5th 270, 280; *Perez v. Golden Empire Transit Dist* (2012) 209 Cal.App.4th 1228, 1238.

The trial court suggested that a purpose of the orders is to protect people by "prevent[ing] the spread of COVID-19." *See* 4 AA1187. But that is immaterial for Civil Authority coverage. While the triggering order must be issued due to physical loss or damage to property other than insured property (which Cliff House alleged), the Civil Authority coverage does not require a particular motivation for the prohibition of access to insured property. Allianz cannot ask the Court to rewrite the policy language now that a claim has arisen. *See Supervalu, Inc. v. Wexford Underwriting Managers, Inc.* (2009) 175 Cal.App.4th 64, 76.[9]

Allianz also errs in suggesting that coverage depends on what the order recites. As noted, a court cannot take judicial notice of the truth of the facts recited in a government order. *See* cases cited in Section I.B.2 *supra*.

Moreover, and critically, for purposes of determining whether a government order triggers insurance coverage, the California Supreme Court held that an order's basis is determined by looking not at the "dominant motive" of the government agencies issuing the order, but at the "event precipitating their legal action." *AIU Ins. Co. v. Superior Ct.* (1990) 51 Cal.3d 807, 843. In that case, the precipitating event was "contamination of property," so the ensuing order was issued "because of ... property damage" even though "motivations other than protection of property—for example,

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[9] *See also* Section I.C.2 *infra* (addressing Allianz's "people not property" argument).

protection of the health of persons living near hazardous waste sites—also contribute[d] to the agencies' pursuit of statutory relief." *Id.* at 842-843.

Here, too, Cliff House alleged that the event precipitating the issuance of the relevant orders was the physical loss and damage caused by the COVID-19 virus throughout the Bay Area. *See, e.g.*, 1 AA0013, 14, 16 ¶¶ 5, 11, 17. Even if a motive of issuing the orders was to protect people—so they would not come into contact with air and surfaces that could kill them—the orders were issued "due to" physical damage. That interpretation also accords with the reason that businesses purchase Civil Authority coverage: When damage to nearby property causes government officials to restrict access to a business's property, the business may nevertheless recover lost profits and the extra expenses required to reopen. *See* note 3 *supra*. The government's purpose in prohibiting access to an insured's property in that situation is to protect public health or safety rather than to protect the property.[10] Therefore, even if this Court could

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[10] *See also Assurance Co. of Am.*, 593 S.E.2d at 7-9 (county hurricane evacuation order issued due to "actual damage to property," even though the text of the order stated that it was also issued "because of the serious threat to the lives … of residents"); *Narricot Indus., Inc. v. Fireman's Fund Ins. Co.* (E.D.Pa. Sept. 30, 2002) 2002 WL 31247972, at *5 (city orders "*resulted* from hurricane and flood," triggering civil authority coverage, "[r]egardless of whether" city also issued order "to prevent hurricane and flood damage or alleviate the perils caused by hurricane and flood damage").

ignore Cliff House's allegations about the basis of the orders, which it cannot, doing so would not help Allianz.[11]

C. Cliff House Alleged That The Coronavirus Causes "Physical Loss Of Or Damage To Property"

Allianz's principal argument against Civil Authority coverage is that the COVID-19 virus does not cause physical loss or damage. Answering Br. 34-39. Though Allianz relies upon *Inns* for that proposition, *Inns* held no such thing: Instead, it found that the COVID-19 virus is a "physical force" that can impair the safe use of property and thereby trigger coverage, but ultimately held that the insured in that case had not alleged a covered claim for different reasons specific to that insured's own circumstances.

As *Inns* reflects, the COVID-19 virus harms people through its effects on property—specifically, by physically altering the air and surfaces within property. In that way, *Inns* noted, the virus is similar to perils such as carbon monoxide, noxious odors, and ammonia fumes that courts have found cause physical loss or damage under a property and business income policy. 71 Cal.App.5th at 703.

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[11] The cases that Allianz relies on do not address the San Francisco orders and include broad virus exclusions not contained in Cliff House's policy. *See, e.g.*, *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.* (N.D.Cal. 2020) 487 F.Supp.3d 834, 844 (plaintiff did not allege damage to property and disavowed civil authority coverage), *aff'd* (9th Cir. 2021) 15 F.4th 885, 893.

California law thus supports the conclusion that the COVID-19 virus can cause covered physical loss or damage.

In addition, as Cliff House points out in its Opening Brief, Allianz decided to take the unusual step of omitting the broadly worded, industry-standard virus exclusion from its policy. Opening Br. 14, 22, 49-50.[12] Yet Allianz relies heavily upon cases interpreting insurance policies *with* that exclusion (or the equivalent), in which the plaintiffs tried to plead around the exclusion by alleging that the *government orders themselves* caused physical loss to property rather than the COVID-19 virus. In contrast, as is discussed below, Cliff House alleged that the COVID-19 virus caused physical loss or damage (and that the orders prohibited access "due to" physical loss or damage to property), thereby satisfying the final elements of Civil Authority coverage.

1. *Inns* Held That The COVID-19 Virus Can Cause Physical Loss Or Damage

As alleged in the complaint, the COVID-19 virus causes physical loss of or damage to property by altering the air and surfaces within a property, transforming the air and surfaces into potentially deadly vectors of disease transmission. While

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[12] The vast majority of property insurance policies in effect at the outset of the pandemic were subject to that or an equivalent exclusion. *See* National Association of Insurance Commissioners, *COVID-19 Property & Casualty Insurance Business Interruption Data Call – Part 1: Premiums and Policy Information* (2020), https://tinyurl.com/2w2jynnj (last viewed June 1, 2022). UP takes no position as to the effects of that exclusion on coverage.

Allianz argues that *Inns* held that "COVID-19 does not cause direct physical loss or damage as a matter of law," Answering Br. 34, *Inns* says no such thing.

Inns pointed to a long line of pre-pandemic cases holding that "physical loss" or "damage" insured under a property policy can be caused by material perils such as gasoline fumes, ammonia, wildfire smoke, carbon monoxide, and foul odors that do not cause *structural* loss or damage but make property unsafe or unfit for its normal purposes.[13] *Inns* then concluded that "the COVID-19 virus—like smoke, ammonia, odor, or asbestos—is a physical force" capable of impairing the safe use of property. 71 Cal.App.5th at 702-703. *Inns* observed that "physical loss or damage" may be shown by alleging "damage that is not structural, but instead is caused by a noxious substance or an odor," *id*. at 706, fn.

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[13] *See Inns*, 71 Cal.App.5th at 701-702 (citing *W. Fire Ins. Co. v. First Presbyterian Church* (Colo. 1968) 437 P.2d 52, 55 (gasoline fumes); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.* (D.N.J. Nov. 25, 2014) 2014 WL 6675934, at *6 (ammonia); *Or. Shakespeare Festival Ass'n v. Great Am. Ins. Co.* (D. Or. June 7, 2016) 2016 WL 3267247, at *5 (wildfire smoke) (vacated by stipulation); *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.* (3d Cir. 2002) 311 F.3d 226, 236 (asbestos); *Matzner v. Seaco Ins. Co.* (Mass.Super.Ct. Aug. 12, 1998) 1998 WL 566658, at *4 (carbon monoxide); *Farmers Ins. Co. of Or. v. Trutanich* (Or.Ct.App. 1993) 858 P.2d 1332, 1338 (methamphetamine odor); *Mellin v. N. Sec. Ins. Co., Inc.* (N.H. 2015) 115 A.3d 799, 805 (urine odor); *Widder v. La. Citizens Prop. Ins. Corp.* (La.Ct.App. 2011) 82 So.3d 294, 296 (inorganic lead contamination); *TRAVCO Ins. Co. v. Ward* (E.D.Va. 2010) 715 F.Supp.2d 699, 707-708 (sulfuric gas)).

19, or by an "invisible substance or biological agent," *id.* at 710, fn. 21.

Inns held that the insured did not plead a claim for civil authority coverage based on the different allegations and civil orders at issue in that case. *See id.* at 710-712. And *Inns* ultimately went on to find no coverage under the general business income insuring agreement in the insurance policy in that case, which was triggered by physical loss or damage at the insured's premises, based on the insured's failure to plead "causation"—*not* based on an inability to show physical loss of or damage to covered property. *See id.* at 698.

As to the general business income loss caused by physical loss or damage to insured premises, the insured had pleaded that it closed its hotels not because of on-site COVID-19 but solely because of shelter-in-place orders issued by San Mateo and Monterey Counties. As a result, the *Inns* court concluded that the insured could not show that it had suspended operations due to physical loss or damage to its insured properties caused by the virus. *Id.* at 703. Moreover, based on the language of the insurance policy in that case, the Court considered and rejected the plaintiff's alternative argument that the mere "loss of use" of its property constituted "physical loss" "regardless of the physical presence of the COVID-19 virus." *Id.* at 705 & fn.18.[14]

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[14] Similarly, the Iowa Supreme Court recently held that the loss of use of property due to a government order "does not meet the requirement for a direct physical loss of

The *Inns* causation holding does not apply to Cliff House's "Civil Authority" insuring agreement, which, as explained above, has different and less stringent causation requirements, which Cliff House met. *See* Section I.B *supra*. Cliff House pleaded that the relevant orders were issued due to the physical loss or damage that the COVID-19 virus caused to air, surfaces, and other property within San Francisco County and to physical damage to other property, consistent with the language in the Civil Authority insuring agreement. *See* 1 AA0013, 14, 16, 32 ¶¶ 5, 11, 17, 70. For purposes of this appeal, those pleadings must be accepted as true. *See* cases cited in note 8 *supra*.

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property." *Wakonda Club v. Selective Ins. Co. of Am.* (Iowa Apr. 22, 2022) 2022 WL 1194012, at *5. The court also noted, though, that insureds in other COVID-19 cases have stated claims by alleging that the coronavirus was present on their insured properties and caused physical loss or damage. *Id.* at *6. And the court specifically highlighted other cases in which courts have held that insured physical loss or damage resulted from perils that are "physical in nature" but do not cause any structural changes to property. *Id.* at *5 (citing *Sentinel Mgmt. Co. v. N.H. Ins. Co.* (Minn.Ct.App. 1997) 563 N.W.2d 296, 298-300 (release of asbestos fibers); *Gen. Mills, Inc. v. Gold Medal Ins. Co.* (Minn.Ct.App. 2001) 622 N.W.2d 147, 152 (non-harmful pesticides used in oats); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Terra Indus., Inc.* (8th Cir. 2003) 346 F.3d 1160, 1162-63, 1165 (benzene-contaminated carbon dioxide)).

2. As *Inns* Reflects, The COVID-19 Virus Causes Loss Or Damage To Air And Surfaces Of Property

In concluding that the COVID-19 virus is a physical force that can cause physical loss of or damage to property, *Inns* relied upon allegations similar to those in Cliff House's complaint, which pleaded that the COVID-19 virus has a physical impact on property. 1 AA0012-13, 14, 16, 27, 31-32 ¶¶ 3, 11, 17, 57, 67-72; *see also* 1 AA0022 ¶ 40 ("Because the coronavirus that causes COVID-19 is contained in and transmitted by droplets that land indiscriminately on the surfaces of property with potentially fatal consequences, it unquestionably causes physical damage and loss."). As Cliff House asserts, "the coronavirus spreads via droplets ... through contact with surfaces and objects" and it "can remain infectious on a variety of surfaces and objects from a few hours to several days." 1 AA0031 ¶¶ 67-68. Moreover, the virus "can also travel and remain infectious while suspended in the air," with droplets from a sneeze capable of traveling "as far as 26 feet." *Id.* ¶ 69. These allegations must be accepted as true at the demurrer stage. *See Evans v. Berkeley* (2006) 38 Cal.4th 1, 6.

If granted leave to amend, Cliff House could plead additional facts, including the existence and conclusions of authoritative studies on the issue.[15] Cliff House could further

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[15] *See, e.g.*, WHO, *Transmission of Sars-CoV-2: Implications for Infection Prevention Precautions* (July 9, 2020), https://www.who.int/news-

plead that, as the CDC has recognized, an infected person can generate virus-laden aerosols that linger in the air even after the person has left the area. Moreover, the virus can migrate substantial distances through a building's ventilation systems. One study, for example, detected RNA from the COVID-19 virus in ceiling vent openings, exhaust filters, and central ducts that were located more than 50 meters from the rooms of hospital patients infected with the virus.[16]

Allianz argues that—based on "[c]ommon sense" and "our shared experience during the pandemic"—the COVID-19 virus "impacts human health and human behavior, not

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room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions (last viewed June 1, 2022); Alicia Kraay et al., *Risk for Fomite-Mediated Transmission of SARS-CoV-2 in Child Daycares, Schools, Nursing Homes, and Offices*, 27 Emerging Infectious Diseases 1229 (2021), https://wwwnc.cdc.gov/eid/article/27/4/20-3631_article (last viewed June 1, 2022); Jing Cai et al., *Indirect Virus Transmission in Cluster of COVID-19 Cases, Wenzhou, China, 2020*, 26 Emerging Infectious Diseases 1343 (2020), https://wwwnc.cdc.gov/eid/article/26/6/20-0412_article (last viewed June 1, 2022) (identifying indirect transmission via objects such as elevator buttons and restroom taps as an important possible cause of a "rapid spread" of the coronavirus in a shopping mall in China); Shane Riddell et al., *The Effect of Temperature on Persistence of SARS-CoV-2 on Common Surfaces*, 17 Virology J. 145 (2020), https://virologyj.biomedcentral.com/articles/10.1186/s12985-020-01418-7 (last viewed June 1, 2022) (coronavirus remained viable on surfaces for up to 28 days).

[16] Karolina Nissen et al., *Long-Distance Airborne Dispersal of SARS-CoV-2 in Covid-19 Wards*, 10 Sci. Rep. 19589 (2020), https://www.nature.com/articles/s41598-020-76442-2 (last viewed June 1, 2022).

physical structures." Answering Br. 34. This argument, however, finds no support in the complaint. Like other physical perils that property insurance policies commonly cover, such as hurricanes, fires, and floods, the COVID-19 virus harms people *and* property alike.

More specifically, the complaint pleads that the COVID-19 virus harms people by first altering the air and surfaces of property. As alleged in the complaint, the COVID-19 virus is highly communicable from "contact with surfaces and objects." 1 AA031 ¶ 67. Cliff House also alleges (and could further allege) that the COVID-19 virus is easily transmissible by air. *Id.* ¶ 69. Therefore, when a person infected with COVID-19 is present inside covered property, that person transmits particles of the virus into air and onto surfaces, changing that property's components from safe to unsafe. In this way, the COVID-19 virus is analogous to unseen but indisputably physical perils such as carbon monoxide, wildfire smoke, radiation, or asbestos fibers, which harm people through their effect on air or other aspects of property. And when those physical effects on property make the property unsafe for use, that constitutes direct physical loss or damage to property that triggers insurance coverage. *See Inns*, 71 Cal.App.5th at 701-703.

In other words, harm to people and harm to 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, Inc. v. Innovative Prods.*

Sales & Mktg., Inc. (2000) 78 Cal.App.4th 847, 865 (undamaged almonds were physically lost or damaged because of the presence of a small quantity of wood chips, which rendered them unsafe to consumers); *Hughes v. Potomac Ins. Co.* (1962) 199 Cal.App.2d 239, 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 v. Fed. Ins. Co.* (1988) 200 Cal.App.3d 792, 803 (same); *see also Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.* (1996) 45 Cal.App.4th 1, 87 (finding that the presence of asbestos on site can constitute "property damage" under liability policies because asbestos is a "health hazard").

That Allianz does not agree with the allegations in the complaint, thinks that Cliff House will not be able to prove its case, or believes that the allegations are contrary to what Allianz thinks is "common sense" are irrelevant to this appeal, where the factual record turns on what is pleading and facts that are properly the subject of judicial notice. *See, e.g., Comm. 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.

Allianz also argues—again with no factual support in the record and before any discovery or expert testimony has taken place—that "COVID-19 is temporary and can be cleaned," and that therefore the virus cannot plausibly cause physical loss or damage. Answering Br. 38-39.

But Cliff House has not alleged that a simple cleaning can remove the COVID-19 virus.[17] And Allianz's argument is factually inaccurate because the COVID-19 virus is "much more resilient to cleaning than most respiratory viruses so tested," and experts have recommended applying "a complex disinfectant solution" to combat those viruses.[18] Accordingly, businesses have had to implement extensive cleaning and disinfectant protocols and numerous other measures to ensure the safety of their staff and patrons. Furthermore, the COVID-19 virus cannot simply be "cleaned" from the air; to the contrary, because the virus is highly transmissible by air, federal agencies have recommended that facilities improve their ventilation and HVAC systems through, for example, increased outdoor air and air filtration.[19] Therefore, the Court should reject Allianz's request to affirm based on fact-

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17 Even if cleaning *could* remove the virus, *Inns* held that closing property to "thoroughly sanitize[]" the property would establish physical loss or damage. 71 Cal.App.5th at 704-705.

18 Nevio Cimolai, *Environmental and decontamination issues for human coronaviruses and their potential surrogates*, 92 J. Med. Virology 2498, 2498, 2504 (2020), https://doi.org/10.1002/jmv.26170 (last viewed June 1, 2022).

19 EPA, *Indoor Air and Coronavirus (COVID-19)*, https://www.epa.gov/coronavirus/indoor-air-and-coronavirus-covid-19 (last viewed June 1, 2022); CDC, *COVID-19 Employer Information for Office Buildings* (Apr. 7, 2021), https://www.cdc.gov/coronavirus/2019-ncov/community/office-buildings.html (last viewed June 1, 2022); OSHA, *Guidance on Preparing Workplaces for COVID-19* 12 (2020), https://www.osha.gov/Publications/OSHA3990.pdf (last viewed June 1, 2022).

finding contrary to the allegations in the complaint and not the type of indisputable fact that could properly be the subject of judicial notice.

3. The Two Post-*Inns* Appellate Decisions Are Inapposite And Unpersuasive

Two COVID-19-related insurance coverage opinions have been issued since *Inns*. The first, *Musso & Frank Grill Co. v. Mitsui Sumitomo Insurance USA Inc.* (2022) 77 Cal.App.5th 753, suggests that *Inns* held that "a policy requiring physical loss or damage does not cover losses incurred by reason of the pandemic." *Id.* at 759. That is incorrect. As explained above, *Inns* explicitly recognized that the COVID-19 virus could cause direct physical loss or damage. Moreover, the complaint in *Musso* never alleged physical loss or damage to its, or any other, property. *Musso* Compl., 2020 WL 2096329.[20] That insured affirmatively alleged that the COVID-19 virus was never at its property and did not cause its losses. *Id.* ¶ 57. Instead, the insured contended that a government order alone was a covered "physical loss" of its property. Because Cliff House makes no such argument, *Musso* is inapposite.

The second case, *United Talent Agency v. Vigilant Insurance Co.* (2022) 77 Cal.App.5th 821 ("*UTA*"), concerned talent agents who worked from home when their office closed

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

during the pandemic and lost money due to events cancelled at locations not associated with the agency. Even though the agency offered only generalized "allegations about how the virus spreads from one person to another," *UTA* also went on to state that "the presence or potential presence of the virus does not constitute direct physical damage or loss" to insured property. *Id.* at 838.

As an initial matter, this statement is *dictum*. *See Wilson v. Blue Cross of S. Cal.* (1990) 222 Cal.App.3d 660, 667 ("broadly stated language was unnecessary to the decision" and therefore *dicta* concerning different facts). And that *dictum* does not apply to the different facts alleged in the present appeal. For example, in *UTA*, the plaintiff did not allege that any insured "facilities were closed as a direct result" of the COVID-19 virus on site or that it lost earnings as a result of physical damage to *insured* business premises as opposed to unspecified third-party properties. *See* 77 Cal.App.5th at 838 & fn. 12. In contrast, Cliff House has made both allegations. *See, e.g.*, 1 AA0027 ¶ 57 ("[E]ven if the Closure Orders had not issued, The Cliff House would have had to close the restaurant and suspend its operations due to the worsening pandemic-level presence of the COVID-19 virus in, on, and around the Insured Premises"); *see also* 1 AA0016, 30, 32 ¶¶ 17, 63-64, 70, 72.

UTA also conflicts with *Inns*, which is far more persuasive. For example, *UTA*'s suggestion that the COVID-19 virus does not cause physical loss or damage directly

conflicts with the repeated statements in *Inns* that the COVID-19 virus is a "physical force" that *can* cause insured business interruption losses. *See Inns*, 71 Cal.App.5th at 699-704. And *UTA*'s efforts to distinguish the COVID-19 virus from other noxious substances that have long been found to cause physical loss and damage are unpersuasive for several reasons.

First, *UTA* characterizes *Inns* as rejecting claims based on "'short lived' contamination." *UTA*, 77 Cal.App.5th at 835-836. *Inns* held no such thing. *Inns* found that an insured could state a claim if it needed to "close for a week" due to the COVID-19 virus, citing approvingly to other cases finding coverage even when the insured was "forced to close" only for "*several days*." 71 Cal.App.5th at 702, 704-705 (italics added). Moreover, the Allianz policy has no language limiting coverage to lengthy, rather than short, interruptions. Instead, Allianz addresses the issue by imposing a (modest) deductible on claims. 3 AA0466. In any event, the length of the loss period is a factual issue that cannot be resolved on demurrer and does not affect the question of whether a peril causes physical loss or damage at all.

Second, *UTA* speculates that the COVID-19 virus differs from insured perils such as asbestos or environmental contamination because the virus is not "tied to a location." 77 Cal.App.5th at 838. *UTA*'s speculation is untethered to 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.[21] *UTA* also forgets that 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.

Third, *UTA* attempted to distinguish asbestos and environmental contamination on the basis that they require "specific remediation or containment to render them harmless." *Id.* But the Allianz policy says nothing about limiting coverage to claims involving specific remediation efforts. Instead, as *Inns* correctly held, perils such as wildfire smoke cause insured physical damage, and such physical harms often resolve without specific remediation. *See Or. Shakespeare Festival Ass'n v. Great Am. Ins. Co.* (D.Or. June 7, 2016) 2016 WL 3267247, at *6 (policy covered closure of

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[21] *See, e.g.*, Office of Inspector Gen., EPA, Report No. 2003-P-00012, *EPA's Response to the World Trade Center Collapse*, at 2 (Aug. 21, 2003), https://tinyurl.com/22nsznd6 (last viewed June 1, 2022) (EPA report on dispersal of dust containing asbestos and other substances that "blanketed Lower Manhattan"); EPA, *Anaconda Co. Smelter Superfund Site*, https://tinyurl.com/3z6vw8rz (last visited June 1, 2022) (EPA report on 300 square mile area polluted from releases from a single smelter).

business to permit "dissipation" of wildfire smoke) (vacated by stipulation).

Fourth, *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. *UTA*'s finding of facts—largely based on the improper citation to facts recited in other cases even though such facts were neither pleaded in the complaint nor subject to judicial notice[22]—contravenes extensive scientific evidence that even diligent and thorough cleaning and disinfecting cannot ensure that the virus is fully removed. *See* Part I.C.2 *supra*. In any event, *UTA* conflicts with *Inns*, which concluded that the need to sanitize property in response to the COVID-19 virus demonstrates that the virus can cause physical damage. *See* 71 Cal.App.5th at 704-705. Until cleaning or other remediation is completed, therefore, the property is damaged from the virus's physical impacts.

Inns is also consistent with pre-pandemic case law holding that perils that can be repaired through cleaning can cause insured "physical loss or damage." *See, e.g.*, *Farmers Ins. Co. of Or. v. Trutanich* (Or.Ct.App. 1993) 858 P.2d 1332, 1336 (odor requiring insured to "clean the house"); *Graff*

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[22] "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).

v. Allstate Ins. Co. (Wash.Ct.App. 2002) 54 P.3d 1266, 1267 (costs to "clean up" methamphetamine residue); *Nat'l Union Fire Ins. Co. of Pittsburgh 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)").

Fifth, *UTA* opined 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, too, conflicts with *Inns*, which recognized that wildfire smoke, toxic gas, asbestos, and mold all cause insured physical damage, even though people can wear masks or protective equipment to protect themselves from those perils. *Inns* correctly recognized 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. The Policies protect against "all risks of direct physical loss" no matter the source. *See* 3 AA0645.

Finally, *UTA* stated that "the presence of the virus does not render a property useless or uninhabitable." 77 Cal.App.5th at 838. But Cliff House's policy does not restrict recovery to when property is rendered *completely* useless; rather, the proper inquiry for business interruption-type coverages like Civil Authority or Business Income is whether the insured is able 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.* (1970) 9 Cal.App.3d 270, 275 (italics added). Therefore, the out-of-state trial court decision, *Kim-Chee LLC v. Philadelphia Indemnity Insurance Co.* (W.D.N.Y. 2021) 535 F.Supp.3d 152, on which *UTA* relied for this proposition is incorrect.[23] And even if *Kim-Chee* were consistent with *UTA*'s suggestion, our Supreme Court has held that insurance coverage turns on the insurance policy language, *AIU*, 51 Cal.3d at 822, not on invented rules finding no support in the policy language.

D. Allianz's Other Arguments Are Also Unpersuasive

1. Allianz's Inapposite Federal And Out-Of-State Cases

Allianz also relies heavily on federal and out-of-state cases, typically cases addressing whether a government closure order by itself—rather than the COVID-19 virus or some other physical force—causes physical loss of property. *See* Answering Br. 26-33. Those claims are usually brought in cases by insureds that purchased property insurance policies

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[23] Allianz also relies on other federal cases that seek to distinguish the cases approved by *Inns* on the same grounds as the *UTA* court. Answering Br. 32-33. For instance, *Sandy Point Dental, P.C. v. Cincinnati Insurance Co.* (7th Cir. 2021) 20 F.4th 327, attempts to distinguish insured perils like nuclear radiation and asbestos from the coronavirus on the basis that they physically alter concrete and other parts of the property. *Id.* at 332-334. But the reason that an insured cannot use a radioactive or asbestos-contaminated property is because it would be harm people to do so. Those perils, like the coronavirus, harm people through their effect on property.

that, unlike Cliff House's, include the industry-standard "Exclusion for Loss Due to Virus or Bacteria" or the equivalent.

As previously noted, some plaintiffs attempt to plead around the exclusion by alleging that the government *orders* (rather than the virus) caused physical loss of *insured* property so as to trigger coverage under the general business income portion of their policies. Such cases include not just *Musso*, discussed above, but also *Mudpie, Inc. v. Travelers Casualty Insurance Co. of America* (9th Cir. 2021) 15 F.4th 885, in which the insured tried to avoid the industry-standard virus exclusion by alleging that the peril that caused its loss was a government order. *Id.* at 893.[24] Though Allianz incorrectly suggests that *Mudpie* and similar cases hold that "COVID-19 does not cause direct physical loss or damage," *see* Answering Br. 23-24, the actual holding of those cases is that *government orders* by themselves do not damage property. Allianz also relies upon cases addressing whether pure loss of use constitutes physical loss or damage rather than whether the COVID-19 virus causes physical loss or damage. Answering Br. 26-33. But that is not what Cliff House

[24] The insured in *Mudpie* did not seek Civil Authority coverage, 15 F.4th at 889, fn. 2, presumably because the insured believed that the policy's standard form virus exclusion would have excluded coverage if the insured had argued that the relevant civil authority orders were issued due to a virus.

pleaded. 1 AA027 ¶ 57; *see also* Opening Br. 58-62.[25] Consequently, those cases do not provide any basis for departing from established California law on the meaning of "physical loss or damage."

2. Allianz Is Wrong In Suggesting That Physical Alteration Of Property Is Necessary To Trigger Coverage

Allianz argues further that "physical loss or damage" requires structural alteration of property. As *Inns* reflects, however, Allianz's argument is argument is contrary to well-established California law.

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[25] In fact, all of the appellate cases that Allianz cites are inapposite because (1) the plaintiffs alleged that government orders alone caused physical loss or damage, *10012 Holdings, Inc. v. Sentinel Ins. Co., Ltd.* (2d Cir. 2021) 21 F.4th 216; *Goodwill Indus. of Cent. Okla., Inc. v. Phila. Indem. Ins. Co.* (10th Cir. Dec. 21, 2021) 2021 WL 6048858; *Oral Surgeons, P.C. v. Cincinnati Ins. Co.* (8th Cir. 2021) 2 F.4th 1141; *Terry Black's Barbecue, L.L.C. v. State Auto. Mut. Ins. Co.* (5th Cir. Jan. 5, 2022) 2022 WL 43170; (2) the case was decided based on a virus exclusion not present here, *Nail Nook, Inc. v. Hiscox Ins. Co.* (Ohio Ct.App. Dec. 2, 2021) 2021 WL 5709971; (3) the court did not address civil authority coverage, *Bridal Expressions LLC v. Owners Ins. Co.* (6th Cir. Nov. 30, 2021) 2021 WL 5575753; *Ind. Repertory Theatre v. Cincinnati Cas. Co.* (Ind.Ct.App. Jan. 4, 2022) 2022 WL 30123; *Sandy Point Dental*, 20 F.4th 327; or (4) the court's decision rested on factual findings at the motion to dismiss stage, *Gilreath Family & Cosmetic Dentistry, Inc. v. Cincinnati Ins. Co.* (11th Cir. Aug. 31, 2021) 2021 WL 3870697 (unpublished), which a California court is not authorized to do.

a) Pre-Pandemic California Law Never Limited Coverage To Claims Involving Physical Alteration of Property

Inns based its discussion of physical loss or damage on *Hughes*, 199 Cal.App.2d 239, which *Inns* referred to as "the central relevant California opinion" on the "physical loss or damage" issue. 71 Cal.App.5th at 701, 704.

Hughes addressed the same argument that Allianz makes here—whether the standard form insuring agreement for risks of "physical loss of and damage" requires "tangible injury to the physical structure itself [to] be detected." 199 Cal.App.2d at 248; *see also* Answering Br. 35. Like *Inns*, *Hughes* rejected the insurer's argument, holding that "[c]ommon sense requires that a policy should not be so interpreted in the absence of a provision specifically limiting coverage in this manner." 199 Cal.App.2d at 248-249.

In the decades since *Hughes*, the other California cases that have addressed the "physical loss or damage" issue have held that demonstrable physical alteration of the structure of the insured property is not a requirement for coverage. 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*, 78 Cal.App.4th at 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*, 200 Cal.App.3d at 799-801, held that physical loss or damage had occurred to an unsafe but structurally undamaged house.[26]

Allianz disagrees with the result of those cases, suggesting that physical loss or damage must cause a material physical alteration of property that is discernable to the naked eye. *See* Answering Br. 33, fn. 7, 37. But such an interpretation would be inconsistent with the exclusions in the policy for perils that cannot be discerned by the naked eye, such as computer viruses, 3 AA0460, or nuclear radiation, 3 AA0495—exclusions that would be rendered a nullity if coverage were limited to perils that can be discerned by the naked eye. *See Shade Foods*, 78 Cal.App.4th at 868. Moreover, California courts have recognized that there is no "size cutoff" when it comes to perils that can cause property damage. *See Inns*, 71 Cal.App.4th at 710, fn. 21 ("[C]ase law supports the view that in certain circumstances an invisible substance or biological agent might give rise to coverage."); *see also AIU*, 51 Cal.3d at 842-843 (environmental contamination—which often is measured in parts per million

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[26] *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.

or even parts per billion—can cause property damage); *Armstrong*, 45 Cal.App.4th at 98 (individual asbestos fibers cause physical damage).[27]

The court below and Allianz rely in large part on *MRI Healthcare Center of Glendale, Inc. v. State Farm General Insurance Co.* (2010) 187 Cal.App.4th 766 in support of the argument that structural alteration of property is required to trigger coverage. But neither the court below nor Allianz acknowledges that *MRI Healthcare* addressed different—and materially narrower—insurance policy language and applied that different language to distinguishable facts.

The insurance policy in *MRI Healthcare* covered only "accidental direct physical loss [of] business personal property." *Id.* at 771. *MRI Healthcare* did not address an insurance policy like the Allianz policy, which insures against "physical loss *or* damage to" property. Because "loss" and "damage" in the Allianz 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.

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[27] While *AIU* and *Armstrong* involved liability insurance coverage, nothing in the reasoning of either opinion indicates that a different rule would apply to "physical loss" or "physical damage" under an "all risks" policy, since liability policies typically define "property damage" as "physical injury to ... tangible property." *Armstrong*, 45 Cal.App.4th at 88.

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.

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. *See* Opening Br. 54-57; Reply Br. 12-16. 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, fn. 19 ("it is

possible that in the context of real property, the 'distinct, demonstrable, physical alteration' referenced in the [treatise] could include damage that is not structural, but instead is caused by a noxious substance or an odor").

b) The "Period of Restoration" Definition Cannot Limit Coverage To Physical Alternation Of Property

Allianz next invokes the policy's "Period of Restoration" definition, which specifies when the insurer provides business income coverage under the main Business Income insuring agreement. Allianz says that this definition limits coverage for physical loss or damage to demonstrable physical alteration of property. Otherwise, Allianz says, the definition would be redundant. Answering Br. 20-23. Allianz is mistaken.

First, the "Period of Restoration" definition does not apply at all to the Civil Authority coverage in the policy, which has its own loss period. *See* 3 AA0501. Thus, no basis exists for importing supposed restrictions in that definition into the Civil Authority insuring agreement.

Second, the "Period of Restoration" definition appears in a separate part of the policy from the main insuring agreement with the "physical loss or damage" language. *See* 3 AA0506-507. No reasonable insured would expect a significant limitation on coverage like the one that Allianz advocates to be buried in a definition of a different term in an entirely separate part of the insurance policy. *See Haynes v.*

Farmers Ins. Exch. (2004) 32 Cal.4th 1198, 1205 (policy must "alert a reader" to a significant restriction on coverage for the restriction to be enforceable); *Jauregui v. Mid-Century Ins. Co.* (1991) 1 Cal.App.4th 1544, 1549 (refusing to enforce exclusion in "conditions" section of policy).

Third, the definition merely spells out the *duration* of coverage for a business income loss. It does not purport to define any term in the *trigger* of coverage, namely, "physical loss of or damage to property."

Fourth, Allianz mistakenly assumes that the language in its definition is inapplicable to the measures a business must take to respond to the COVID-19 virus. In fact, premises that are physically lost or damaged by the COVID-19 virus can be "restored" to a safe and usable condition through physical remedial measures, including by installing new partitions or ventilation systems, reconfiguring physical space to permit social distancing, or engaging in deep cleaning and sanitizing. Indeed, *Inns* found that the need to "shut down" a business where a person with COVID-19 was present in order to "thoroughly sanitize[]" the building and "remain empty" established insured physical loss or damage to property. 71 Cal.App.5th at 704-705.

Finally, the discussion of the "Period of Restoration" in *Inns* does not help Allianz. That case did not construe the "Period of Restoration" to mean that the COVID-19 virus cannot cause physical loss or damage. Instead, *Inns* found that under the insurance policy language in that case, "mere

loss of use, without any other physical impact," does not trigger coverage. *Id.* at 707. *Inns* recognized that allegations that a "business—which could otherwise have been operating—had to shut down because of the presence of the virus within the facility" would state a claim for relief. *Id*. at 704.

3. The Policy Does Not Require "Permanent Destruction" to Property

Allianz argues for yet another limitation on coverage, suggesting that loss of use of physical property due to a physical peril must be "permanent" or tantamount to complete "dispossession" of the covered property. *See* Answering Br. 19, 25, 30. But Allianz does not cite any language in its policy that requires complete or permanent deprivation of property in order to trigger coverage, let alone language that imposes those conditions by using the requisite "clear and unmistakable language" that Allianz needed to use if it wanted to limit coverage in this way. *MacKinnon v. Truck Ins. Exch.* (2003) 31 Cal.4th 635, 648.

Nor does Allianz cite any case that imposes such a requirement. *Inns*, for example, explained that the policy contemplates that the property can be repaired and restored to use. 71 Cal.App.5th at 708. Moreover, California's statutory rule that "[a]n insurer is liable" where "a loss is caused by efforts to rescue the thing insured from a peril insured against" (Ins. Code, § 531(b)) would be a dead letter if a policyholder could not obtain coverage for efforts to

temporarily or partially close down its premises in order to stave off a larger loss.[28]

II. Cliff House Should Be Granted Leave To Amend

When a trial court sustains a demurrer without leave to amend, the appellate court "must decide whether there is a reasonable possibility the plaintiff could cure the defect with an amendment." *See Schifando v. City of L.A.* (2003) 31 Cal.4th 1074, 1081.

Allianz contends that any amendment would be futile because "COVID-19 cannot cause the required direct physical loss or damage necessary to trigger coverage." Answering Br. 44. For the reasons given above, this assertion is incorrect as a matter of law. And, as further set forth above, there are extensive facts that Cliff House could plead in an amended complaint (and develop in discovery) that could confirm its right to coverage under the Civil Authority and business income insuring agreements.[29]

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[28] For the reasons discussed above and in Cliff House's briefing, Cliff House also has alleged a claim under the Business Income insuring agreement. *See* Opening Br. 58-62; Reply Br. 16-18.

[29] Cliff House should also be granted leave to amend its complaint to allege additional facts regarding its Crisis Event coverage. The policy promises to reimburse Cliff House for lost business income "due to the necessary suspension of [its] operations … caused by or result[ing] from a covered crisis event at [the] covered premises." 3 AA0527. A "covered crisis event" expressly includes "premises contamination" from, *inter alia*, "communicable disease." 1 AA0033-34 ¶ 75; 3 AA0530. Allianz cannot dispute that COVID-19 is a

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below.

DATE: June 2, 2022

Respectfully submitted,

COVINGTON & BURLING LLP

By: */s/ David B. Goodwin*
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Attorneys for Amicus Curiae United Policyholders

"communicable disease." And Cliff House could plead facts that show "contamination" from the presence of the COVID-19 virus in, on, and around its property.

CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies, pursuant to California Rule of Court 8.204(c)(1), that the enclosed Brief *Amicus Curiae* of United Policyholders in Support of Appellants was produced using 13-point Century Schoolbook type and contains 9,911 words, including footnotes, which is less than the total number of words permitted by the Rules of Court. Counsel relies on the word count of the computer program used to prepare this brief.

DATE: June 2, 2022

Respectfully submitted,

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PROOF OF SERVICE
No. A163136

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 415 Mission Street, Suite 5400, San Francisco, California 94105. On June 2, 2022, I served the following document(s) described as:

- **APPLICATION OF UNITED POLICYHOLDERS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANTS**
- **[PROPOSED] BRIEF *AMICUS CURIAE* OF UNITED POLICYHOLDERS IN SUPPORT OF APPELLANTS**

on the interested parties in this action as follows:

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[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 2, 2022; and

The Hon. Ethan P. Schulman
Superior Court of California
County of San Francisco
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[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 San Francisco, California.

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 San Francisco, California on June 2, 2022.

s/ Jeaneth S. Decena
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