No. B313907

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SEVEN

SHUSHA, INC. DBA LA CAVA,

Plaintiff and Appellant,

v.

CENTURY-NATIONAL INSURANCE COMPANY,

Defendant and Respondent.

On Appeal from the Superior Court for
the County of Los Angeles
Hon. Daniel J. Buckley
Case No. 20STCV25769

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

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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 Appellant Shusha, Inc. d/b/a La Cava ("La Cava") in their appeal of an adverse judgment in their insurance coverage lawsuit against Respondent Century-National Insurance Company.

STATEMENT OF INTEREST OF *AMICUS CURIAE* UNITED POLICYHOLDERS

UP is a highly respected national non-profit section 501(c)(3) organization. Founded in 1991, UP has served as a voice for the interests of insurance consumers across the country for more than 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 the COVID-19 virus, exposure concerns, 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* briefs in federal and state appellate courts across the country that seek to uphold the indemnity function of insurance. The United States Supreme Court, the California Supreme Court, and other state supreme courts have cited UP's amicus briefs in their opinions. *See, e.g.*, *Humana Inc. v. Forsyth* (1999) 525 U.S. 299, 314 (favorably citing UP's amicus brief); *Pitzer Coll. v. Indian Harbor Ins. Co.* (2019) 8 Cal.5th 93, 104-105 (favorably citing UP's amicus brief); *Ass'n of Cal. Ins. Cos. v. Jones* (2017) 2 Cal.5th 376, 382-383 (favorably citing UP studies).[1]

UP continues its mission of supporting policyholders through its *amicus* efforts here in support of La Cava.

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

Policyholders across the country such as La Cava buy insurance for protection against unexpected disasters. Confidence that insurance will pay claims spurs economic growth and encourages individuals 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, as our Supreme Court has noted, 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 (citation omitted); *see also* American Law Institute (2019) Restatement of the Law of Liability Ins. § 2, Reporters' Note c ("insurance policies are read to effect the policy's 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, 75-76.

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 concerning COVID-19 insurance specifically and insurance 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, have been 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 contract 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 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 the Court to grant this application and permit UP to file the accompanying *amicus curiae* brief.

DATE: July 5, 2022

Respectfully submitted,

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David B. Goodwin

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INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent Century-National Insurance Company insists that this Court hold that the COVID-19 virus cannot cause "direct physical loss or damage" to property—regardless of what the plaintiff's complaint may plead or could plead about the physical effects of the virus. This Court should reject Century-National's invitation to ignore the allegations of the instant amended complaint, the language of the insurance policy at issue, and pre-pandemic insurance law to create a COVID-19 carve-out from the rules that otherwise apply to the interpretation of insurance policies in California.

In its amended complaint, Appellant Shusha Inc. d/b/a La Cava seeks insurance coverage for the business income that La Cava lost, and the additional expenses it incurred, after it shut down its restaurant operations in March 2020 because of the physical loss or damage that the COVID-19 virus caused to its premises, and because government orders prohibited public access to its premises due to the damage caused by the COVID-19 virus at other properties in the Los Angeles area. Under longstanding California Supreme Court authority, the trial court was required to accept as true La Cava's allegations about the effects of the COVID-19 virus on its property. But it did not.

Century-National attempts to justify the trial court's failure to follow California law by arguing that the COVID-19 virus cannot cause physical loss or damage. That cannot be a question of law since the effects of the COVID-19 virus on surfaces and the air at the insured's property are factual issues, which ultimately will depend on the finder of fact's conclusions

after hearing expert testimony and the results of peer-reviewed studies. Instead, acknowledging that La Cava's pleadings present complex factual issues, Century-National relies on facts recited in decisions of federal courts that engaged in *sua sponte* fact-finding on motions to dismiss, even though such facts were not pleaded in La Cava's complaint and are not properly the subject of judicial notice, which means they are not part of the record on this appeal. Moreover, Century-National advocates a legal interpretation of "physical loss or damage" that has no support in the text of its insurance policy, is contrary to pre-pandemic California law finding coverage without structural alteration of property, and also is inconsistent with the ruling in a recent California appellate decision.

Century-National further contends that, regardless of the complaint's allegations, La Cava closed its restaurant because of the government closure orders and not the physical loss or damage to its premises from the virus. Century-National also argues there can be no coverage for La Cava's losses due to the government closure orders, because, it contends, the orders prohibited La Cava's operations rather than access to its premises and because the orders were not issued because of physical loss or damage. But these arguments ignore La Cava's allegations and instead rely on yet more non-pleaded and non-judicially noticeable "facts" about the characteristics of the COVID-19 virus, its effects on property, and the motivations of the local health authorities.

Century-National disregards La Cava's affirmative pleading that its business income losses were caused *both* by the suspension of its operations necessitated by the damage caused by the presence of COVID-19 virus on its premises, *and* by the government orders restricting public access to its premises due to the damage caused by the presence of the COVID-19 virus at other properties. La Cava has sufficiently alleged facts that state a claim for coverage, and this Court accordingly should reverse the judgment below and remand for further proceedings.

ARGUMENT

I. La Cava Alleged That The COVID-19 Virus Causes "Physical Loss Of Or Damage To Property" To Establish Business Income Coverage.

The package insurance policy that Century-National sold to La Cava provides commercial property and liability coverage for its restaurant operations, including coverage for the loss of business income sustained due to physical loss of or damage to its property or a civil authority action prohibiting access to its premises. Under California law, "it is well settled that the purpose and nature of 'business interruption' … 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.* (1970) 9 Cal.App.3d 270, 275 (citations omitted).

The Century-National Business Income insuring agreement provides coverage for "the actual loss of Business Income you sustain due to the necessary 'suspension' of your

'operations' during the 'period of restoration,'" provided the "suspension" was "caused by direct physical loss of or damage to" La Cava's insured property and the "loss or damage" was "caused by or result[ed] from a Covered Cause of Loss." 1 AA 120 (Business Income Form, § A.1).

In its amended complaint, La Cava alleged that its losses sustained from the full and partial suspensions of its operations beginning in March 2020 were caused by direct physical loss or damage that the COVID-19 virus caused to its insured premises. *See, e.g.*, 1 AA 17-19 ¶¶ 38-43, 45 (physical damage caused by COVID-19 virus); 1 AA 22, 27-29, ¶¶ 55, 74, 76, 87 (presence of virus on La Cava's premises); 1 AA 27-29, ¶¶ 81, 87 (suspension of operations caused by damage caused by virus).

Relying on federal district court cases addressing coverage for COVID-19-related claims—with different factual allegations and different policy provisions—and interpreting "physical damage" to require "physical alteration" of property, the trial court held that La Cava's allegations of property damage were "insufficient as a matter of law to establish the presence of the coronavirus caused direct physical loss [of or] damage to Plaintiff's property within the meaning of the insurance provisions." 2 AA 318. In sustaining Century-National's demurrer, the court erred in holding that the COVID-19 virus cannot cause physical loss or damage and in failing to follow existing California law on "physical loss or damage" by (1) disregarding La Cava's factual allegations and analogous pre-pandemic cases; (2) finding that the COVID-19 virus could not

satisfy a physical alteration requirement that it added to the policy; and (3) imposing additional pleading requirements for COVID-19 claims not required by the insurance policy. This Court should not follow that erroneous path.

A. La Cava Alleged Physical Loss or Damage.

La Cava alleges it lost business income due to the suspension of its restaurant operations as a result of physical damage that the COVID-19 virus caused to its premises. *See, e.g.*, 1 AA 27-28, ¶ 81 ("The presence of droplets containing coronavirus at La Cava led to its closure....Once the La Cava management was made aware by the Orders of the clear and present danger of the virus and its existence everywhere in LA County, including on the surfaces and in the air in and around La Cava's premises, it promptly shut down operations."). Century-National does not dispute that La Cava alleged a loss of business income due to the suspension of its operations; its argument against business income coverage primarily is that the COVID-19 virus cannot cause physical loss or damage no matter what is alleged. Respondent's Br. 27-44.[2]

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[2] Century-National also argues that La Cava's suspension of its restaurant operations was caused by the government shutdown orders rather than by the presence of the COVID-19 virus on its premises, citing La Cava's allegations regarding its claim for Civil Authority coverage. Respondent's Br. 22-26. Century-National ignores that La Cava *also* alleges that the danger created by the presence of the COVID-19 virus on its premises caused its suspension of operations. *See* 1 AA 27-28, ¶ 81; Reply Br. 16-19. At the demurrer stage, the complaint's allegations must be taken as true. *See Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6.

Three California appellate decisions have addressed COVID-19-related insurance claims as of the date of this brief. Century-National's argument conflicts with the first decision, *Inns by the Sea v. California Mutual Insurance Co.* (2021) 71 Cal.App.5th 688 ("*Inns*"), which 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.

In holding that the COVID-19 virus can cause physical loss or damage to property, *Inns* analogized the 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 by contaminating the property's air, surfaces, or other components. *Inns* also surveyed 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 wildfire smoke, foul odors, ammonia, gasoline vapor, and carbon monoxide. 71 Cal.App.5th at 699-702 (citing cases).[3] *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

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[3] *See, e.g., W. Fire Ins. Co. v. First Presbyterian Church* (Colo. 1968) 437 P.2d 52, 55 (gasoline fumes); *Farmers Ins. Co. of Or. v. Trutanich* (Or.Ct.App. 1993) 858 P.2d 1332, 1338 (methamphetamine odor); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.* (D.N.J. Nov. 25, 2014) 2014 WL 6675934, at *6 (ammonia discharge); *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.* (3d Cir. 2002) 311 F.3d 226, 236 (asbestos); *Mellin v. N. Sec. Ins. Co., Inc.* (N.H. 2015) 115 A.3d 799, 805 (urine odor); *Matzner v. Seaco Ins. Co.* (Mass. Super. Ct. Aug. 12, 1998) 1998 WL 566658, at *4 (carbon monoxide).

odor," *id.* at 706, fn. 19, or by an "invisible substance or biological agent," *id.* at 710, fn. 21.

Inns concluded that "the COVID-19 virus—like smoke, ammonia, odor, or asbestos—is a physical force" capable of impairing the safe use of property. *Id.* at 703. *Inns* explained that "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 (citations omitted). *Inns* repeatedly confirmed that the COVID-19 virus can cause insured physical loss and damage, stating that "a virus could cause a suspension of operations through direct physical loss of or damage to property," *id.* at 710, and that "case 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 710, fn. 21.

The second decision, *Musso & Frank Grill Co. v. Mitsui Sumitomo Insurance USA Inc.* (2022) 77 Cal.App.5th 753, rejected coverage on the ground that the insured did not plead physical loss or damage to any property because the insured alleged only that an order—rather than the virus—caused insured "physical loss or damage." *Id.* at 759. The insured's policy contained the industry-standard "Exclusion of Loss Due to Virus or Bacteria," *id.* at 756, an exclusion that is not at issue here. The insured neither alleged that the virus was present at its property nor pursued a claim based on its civil authority

coverage on appeal. *Id*. at 755; *Musso* Appellant's Opening Br., 2021 WL 4169380, at *16. Thus, in stating that "a business interruption policy that covers physical loss and damages [*sic*] does not provide coverage for losses incurred *by reason of the COVID-19 pandemic*," 77 Cal.App.5th at 760 (italics added), *Musso* held only that an order (or the pandemic at large) is not insured "physical loss or damage." *Id*. at 759-761. That narrow ruling does not address La Cava's complaint, which seeks coverage based on physical loss and damage caused by the COVID-19 virus. As to the legal standard, the *Musso* court never articulated its position on what is necessary to constitute "direct physical loss or damage."

The third decision, *United Talent Agency v. Vigilant Insurance Co.* (2022) 77 Cal.App.5th 821 ("*UTA*"), 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. In *dictum*, *UTA* stated that "the presence or potential presence of the virus does not constitute direct physical damage or loss" to insured property. 77 Cal.App.5th at 838; *see Wilson v. Blue Cross of S. Cal.* (1990) 222 Cal.App.3d 660, 667 ("broadly stated language … unnecessary to the decision" is *dictum* if applied to different alleged facts). But 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. 77 Cal.App.5th at 838 & fn. 12. In contrast, La Cava made such allegations. *See, e.g.*, 1 AA 27-28, ¶ 81 ("The presence of droplets containing coronavirus at La Cava led to its closure....Once the La Cava management was made aware by the Orders of the clear and present danger of the virus and its existence everywhere in LA County, including on the surfaces and in the air in and around La Cava's premises, it promptly shut down operations."); 1 AA 37, ¶ 124 ("Plaintiff has incurred…direct physical loss or damage to its covered properties as a result of the physical presence of coronavirus, COVID-19, and the Orders," resulting in "substantial loss of business income, lost revenue from having to suspend or limit its operations, and extra expenses incurred to mitigate the suspension of its operations").[4]

UTA suggests that its *dictum* is consistent with *Inns* but that is incorrect. *Inns* found no coverage under the business income insuring agreement in that case only because the plaintiff there failed to plead "causation," as it did not allege it suspended its operations because of physical loss or damage to its own property, 71 Cal.App.5th at 698 & fn. 11, 703; *Inns* did not reject coverage because of an inability to show physical loss of or damage to covered property. *Id*. at 698.

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[4] This Court of course is not bound by *UTA* and *Musso*. *See, e.g.*, *Tourgeman v. Nelson & Kennard* (2014) 222 Cal.App.4th 1447, 1456, fn. 7 ("A Court of Appeal panel is free to disagree with a decision by another panel, division, or district, and may even reconsider its own prior decisions.") (citation omitted).

In contrast, La Cava alleges causation consistent with the required elements: (1) a physical force (2) that renders property uninhabitable or unsuitable for intended use. *Id.* at 700. For example, La Cava alleges that the "this deadly, airborne live coronavirus on surfaces and in the air renders buildings and properties damaged, lost, unsafe, unfit, and uninhabitable for occupancy or use." 1 AA 19, ¶ 45. It alleges its premises were physically damaged by "virus matter present on walls, floors, tables, chairs, silverware, dishes, and other surfaces," 1 AA 27, ¶ 74, and that "droplets containing SARS-CoV-2 have been physically present at the La Cava restaurant premises insured by the Policy at all relevant times," 1 AA 27, ¶ 76; *accord* 1 AA 22, ¶ 55. La Cava further alleges certain of its employees tested positive for COVID-19, 1 AA 24, ¶ 58; 1 AA 27, ¶ 78, and "that it entertained customers since March 2020 who subsequently tested positive for COVID-19 and who had the ability to use the restroom facilities during the time they were outside dining," 1 AA 24, ¶ 59. These allegations, which must be accepted as true at the demurrer stage, are sufficient to establish physical loss or damage under the terms of the policy and the standard set forth in *Inns*.

Furthermore, while not addressed in *Inns* because the parties did not brief causation before the Court of Appeal, California law permits plaintiffs to plead multiple bases of recovery. *See Adams v. Paul* (1995) 11 Cal.4th 583, 593 ("party may plead in the alternative"); *Third Eye Blind, Inc. v. Near N. Ent. Ins. Servs., LLC* (2005) 127 Cal.App.4th 1311, 1323 ("the

complaint properly alleges multiple causes of appellants' losses"). The Century-National policy does not restrict La Cava's recovery to just one of the policy's multiple coverages, particularly at the pleading stage. Therefore, La Cava could permissibly plead that it suspended operations because of the physical loss and damage caused by the virus on site and because of the orders.

B. Pre-Pandemic California Cases Did Not Require Structural Alteration of Property to Trigger Coverage.

The *Inns* "physical loss or damage" standard described above is not novel. 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, which *Inns* recognized as "[t]he central relevant California opinion" on the issue (71 Cal.App.5th at 701), the insurer raised the same argument that Century-National 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. of D.C.* (1962) 199 Cal.App.2d 239, 248. The Court of Appeal rejected that argument, concluding that the insurer's proposed reading of "physical loss or damage" is contrary to "[c]ommon sense." *Id.*

Before the COVID-19 pandemic, the California cases that addressed the "physical loss or damage" issue did not hold that demonstrable physical alteration of the structure of the insured property is a requirement for coverage. Instead, case after case

held that coverage is triggered when external forces render property "uninhabitable or unsuitable for its intended use." *Inns,* 71 Cal.App.5th 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, 862, 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.[5]

Many out-of-state cases were to the same effect, including *First Presbyterian Church*, 437 P.2d at 55-56 (discussing *Hughes*) (gasoline vapors from a nearby property that saturated insured building such that it became uninhabitable); *Gregory Packaging*, 2014 WL 6675934 at *6 (release of ammonia that burns employees and requires remediation to make the building safe for employees again); and *Oregon Shakespeare Festival Ass'n v.*

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[5] *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.

Great American Insurance Co. (D.Or. June 7, 2016) 2016 WL 3267247 at *6 (smoke rendered outdoor theater unsafe for performances) (vacated by stipulation).

C. This Court Should Not Impose New Requirements Specific To COVID-19 Claims.

The Superior Court, Century-National, and the recent *UTA* decision seek to place restrictions on insurance coverage that courts did not impose before the pandemic.[6]

First, Century-National argues—without factual support in the record and before any discovery or expert testimony has taken place—that the alleged presence of the COVID-19 virus on La Cava's premises could not cause physical damage because the virus "could be removed or eliminated through basic cleaning methods." Respondent's Br. 39. Similarly, *UTA* suggested that the COVID-19 virus does not cause physical damage because it

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[6] The novel restrictions apparently were motivated by unfounded concerns about the cost to certain insurers of honoring their contractual promises. *See Musso,* 77 Cal.App.5th at 761, fn. 2. But our Supreme Court held that such concerns are irrelevant and that the language of the contract of insurance must be honored. *Aerojet*, 17 Cal.4th at 75. In fact, no insurer has declared insolvency because of the pandemic; instead, they have enjoyed record profits. *See generally* Erik S. Knutsen & Jeffrey W. Stempel, *Infected Judgment: Problematic Rush to Conventional Wisdom & Insurance Coverage Denial in a Pandemic* (2021) 27 Conn. Ins. L. J. 185, 201-228 (discussing the insurers' "public relations blitz" with regard to COVID-19 business interruption coverage, including the alleged massive expense to the insurance industry). Accordingly, no basis exists for accepting Century-National's proposed new COVID-19-specific restrictions.

"can be cleaned from surfaces through general disinfection measures." 77 Cal.App.5th at 838. But La Cava alleged that the contamination of its premises caused by the COVID-19 virus could not be removed through basic cleaning methods. *See* Reply Br. 12-13; 1 AA 19, ¶ 45 ("Cleaning of surfaces alone is insufficient."); 1 AA 27, ¶¶ 75-76, 79 (alleging the virus was present at La Cava at all relevant times despite extensive cleaning and sanitation). Those allegations must be accepted as true.[7]

Moreover, Century-National's argument is inconsistent with pre-pandemic law holding that perils that can be repaired through cleaning *can* cause insured "physical loss or damage." *See, e.g.*, *Trutanich*, 858 P.2d at 1335-1336 (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)"). And indeed, *Inns* found that the need to "shut down"

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[7] In contrast, the facts recited in *UTA* are irrelevant to this appeal. Although the record on a demurrer includes facts that are judicially noticed, a court cannot take judicial notice of the truth of facts recited in a judicial opinion, like the facts recited in *UTA*. *See, e.g., O'Neill v. Novartis Consumer Health, Inc.* (2007) 147 Cal.App.4th 1388, 1405; *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 885. In any event, Century-National did not seek judicial notice of such facts. For both reasons, whatever facts *UTA* and Century-National's federal court opinions may have recited about the virus are not part of the record in the present case.

a business where a person with COVID-19 was present in order to "thoroughly sanitize[]" the building and have it "remain empty" established insured physical loss or damage to property. 71 Cal.App.5th at 704-705.

Second, *UTA* 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. Not so. Perils that property insurance policies routinely cover, such as wildfire smoke, hurricanes, and storms, can damage vast areas at once. To take *UTA*'s own 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. If insurance policies only covered damage cabined to specific properties, as *UTA* suggests, that 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 Century-National 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 are resolved without specific remediation. *See Or. Shakespeare Festival Ass'n,* 2016 WL 3267247, at *6 (policy covered closure of business to permit "dissipation" of wildfire smoke).

Fourth, *UTA* 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 suggestion conflicts with *Inns* and the pre-pandemic cases that recognized wildfire 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 distinguishes 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.

Finally, *UTA* stated that "the presence of the virus does not render a property useless or uninhabitable." 77 Cal.App.5th at 838. But La Cava's policy does not restrict recovery to instances in which property is rendered *completely* useless; rather, the proper inquiry for business interruption coverages like the Century-National policy's Business Income and Civil Authority insuring agreements 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.,* 9 Cal.App.3d at 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. 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 Ins. Co. v. Super. Ct.* (1990) 51 Cal.3d 807, 822, not on invented rules finding no support in the policy language.

Fundamentally, none of the requirements that *UTA* or Century-National's cases purport to impose are actually found in the insurance policy itself. In contrast, *Inns* identified the required elements: (1) a physical force (2) that renders property uninhabitable or unsuitable for intended use. 71 Cal.App.5th at 700-701. La Cava has more than met those two requirements in alleging that COVID-19 was physically present at its premises and rendered them unsafe. *See, e.g.*, 1 AA 28-29, ¶¶ 87-89.

D. Century-National's Other Arguments Are Meritless

Century-National argues that another appellate decision, *MRI Healthcare Center of Glendale, Inc. v. State Farm General Insurance Co.* (2010) 187 Cal.App.4th 766, requires a ruling in Century National's favor. It also invokes the "period of restoration" definition in its policy. Neither argument is persuasive .

1. *MRI Healthcare* Does Not Support A Physical Alteration Requirement Under The Policy At Issue Here.

The court below and Century-National rely in large part on *MRI Healthcare* in support of their argument that physical alteration of property is required to trigger coverage. But *MRI Healthcare* did *not* construe the relevant policy language, "physical loss or damage." Instead, it applied different, and materially narrower, insurance policy language to distinguishable facts.

The insurance policy in *MRI Healthcare* covered only "accidental direct physical loss [of] business personal property." 187 Cal.App.4th at 771 (emphasis omitted). *MRI Healthcare* did not address an insurance policy that insures against "physical loss *or* damage to" property, like the Century-National policy. Because "loss" and "damage" in the Century-National 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; citations omitted). 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 this treatise acknowledge that the treatise's author subsequently disclaimed the notion that physical alteration is a requirement for coverage.[8] 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 Couch treatise (10A Couch

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[8] 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 705-706 (citing cases).

However, the cases that Century-National 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*, supra*, 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.

[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"); 1 AA 17-20, ¶¶ 37-47 (the COVID-19 virus "cause[s] direct physical loss and damage to properties and buildings by altering the physical condition of air" and surfaces).[9]

2. The "Period of Restoration" Definition Does Not Limit Coverage To Physical Alteration Of Property.

Century-National also argues that the policy's "Period of Restoration" definition, which specifies *when* the insurer provides business income coverage under the main Business Income insuring agreement, limits coverage for physical loss or damage to demonstrable physical alteration of property because it defines the coverage period as generally ending when the premises should be "repaired, rebuilt or replaced." Respondent's Br. 32-35; *see* 1 AA 064. Century-National is mistaken.

First, the policy's definition of the "period of restoration" 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."

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[9] Similarly, other California appellate cases that rejected coverage under property 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.

Second, Century-National is incorrect in assuming that the language in its definition is inapplicable to the measures a business must take to respond to the physical harm that the COVID-19 virus causes to air and surfaces of property. 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. 1 AA 18-20, ¶¶ 43-47 (remediation can occur through "substantial physical alterations, system changes to facilities, and new protocols for air circulation, disinfection, and disease prevention"). 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 have it "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 Century-National. *Inns* 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 under the "direct physical loss" language. *Id.* at 707 (italics added). That part of the ruling rejected the insured's "alternative[]" contention that a government *order*—rather than the COVID-19 *virus*—caused insured "physical loss or damage."

Id. at 705 ("According to Inns, *regardless of* the physical presence of the COVID-19 virus, it has adequately pled direct physical loss by alleging 'the loss of use, function, and value of its property.'" (italics added)). In rejecting this theory, *Inns* did not disturb its earlier holding that the COVID-19 virus can cause physical loss or damage.

II. La Cava Has Sufficiently Alleged Facts Establishing Coverage Under The Civil Authority Provision.

The Century-National Business Income coverage form additionally provides Civil Authority coverage. 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."[10]

The insuring agreement provides coverage for "the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss." 1 AA 120 (Business Income Form, § A.5.a).

In its amended complaint, La Cava alleged facts satisfying each of these requirements. *See, e.g.*, 1 AA 24-26, ¶¶ 60-70

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[10] Paula B. Tarr, *Where Have All the Customers Gone? Business Interruption Coverage for Off-Premises Events*, 30 Brief (American Bar Association) 20, 21 (2001) (quoting *FC&S Bulletins*, Business Interruption Ca-1 (1987)).

(government shut down orders); 1 AA 22-23, ¶ 57 (COVID-19 damage at nearby businesses); 1 AA 28, ¶¶ 83-84 (prohibition of access and lost revenue). Century-National argues that the government orders did not "prohibit access" to La Cava's property and that La Cava failed to allege a causal connection between the alleged property loss or damage caused by the COVID-19 virus and the orders. Respondent's Br. 45-48. Century-National misreads the complaint and the policy. And La Cava has alleged facts establishing Civil Authority coverage.

A. La Cava Alleged That Government Orders Prohibited Access To Insured Property.

La Cava sufficiently alleged that its lost business income was "caused by action of civil authority that prohibits access to the described premises." La Cava alleged that on March 15, 2020, "Los Angeles Mayor Eric Garcetti issued a 'Public Order under City of Los Angeles Emergency Authority'" that prohibited restaurants "from serving food for consumption on premises," and that a subsequent order issued by the mayor "included a 'finding' that the Order 'prohibiting restaurants from serving to dine-in customers while permitting take-out,' was being given because, among other reasons, 'the COVID-19 virus can spread easily from person to person and it is physically causing property loss or damage due to its tendency to attach to surfaces for prolonged periods of time….'" 1 AA 24-25, ¶¶ 61-62 (emphasis omitted). La Cava further alleged that additional city, county, and state orders over the following weeks and months continued to prohibit access to its property for on-premises dining. 1 AA 25-26, ¶¶ 63-70.

Century-National asserts that the government orders never "prohibited access" to La Cava's premises, but rather prohibited the operation of its business. Respondent's Br. 45-46. But La Cava specifically alleged that the orders caused its loss of business income "by excluding individuals from on-premises dining," causing it to close "first in full, and then to dine-in customers." 1 AA 26, ¶¶ 69, 71. An ordinary person would understand that an order instructing La Cava to close its business to the public is an order prohibiting the public from accessing its premises.[11] That understanding is consistent with the plain meaning of "prohibit": "to prevent from doing something" or "to forbid by authority."[12] And, if any doubt were

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[11] Other pre-pandemic cases found a "prohibition" triggering Civil Authority coverage if an order instructed the insured to close its doors. *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, 44 ¶ 152, https://www.supremecourt.uk/cases/docs/uksc-2020-0177-judgment.pdf.

[12] *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/prohibit (last viewed June 30, 2022).

to exist, the Court must construe all uncertainties in La Cava's favor. *E.g.*, *Minkler v. Safeco Ins. Co. of Am.* (2010) 49 Cal.4th 315, 319.

Century-National further argues that the orders did not prohibit access to La Cava because the orders permitted La Cava to provide takeout and delivery. Respondent's Br. 46. But the policy contains no requirement that "all" access to the premises be restricted to trigger coverage, and this Court cannot rewrite the policy now that a claim has arisen.

B. La Cava Alleged That The Relevant Orders Were Issued "Due To" Physical Loss Or Damage Caused By The COVID-19 Virus.

Century-National also argues that La Cava has not alleged a "causal connection" between the government orders' prohibition of access and the direct physical loss of or damage to other property. Respondent's Br. 46-48.

The Civil Authority coverage in the Century-National 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." 1 AA 121 (italics added). The ordinary meaning of "due to" is "a causal relationship" or "because of." *U.S. Postal Serv. v. Postal Reg. Comm'n* (D.C. Cir. 2011) 640 F.3d 1263, 1267.

La Cava 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. *See* Reply Br. 24-25. La Cava alleges that the initial order requiring its closure was issued because, among other reasons, "the COVID-19 virus can

spread easily from person to person and it is physically causing property loss or damage due to its tendency to attach to surfaces for prolonged periods of time...." 1 AA 25, ¶ 62 (emphasis omitted). The complaint specifically alleges that the orders were issued in response to the loss or damage already caused by COVID-19 throughout Los Angeles County and surrounding counties. *See* 1 AA 25-27, ¶¶ 62-73.

Century-National contends that the government orders lack a "causal connection" to property damage because the orders "were designed to limit the spread of the COVID-19 virus." Respondent's Br. 48. 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 (as La Cava alleged, *see* 1 AA 22-24, ¶ 57; 1 AA 24-25, ¶¶ 61-62), the Civil Authority coverage does not require a particular motivation for the prohibition of access to insured property. Century-National 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.

Moreover, for purposes of determining whether a government order triggers insurance coverage, our 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.,* 51 Cal.3d at 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, 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, La Cava 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 Los Angeles area. *See, e.g.*, 1 AA 25-27, ¶¶ 62-73. 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 result in serious injury or death—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. 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. Therefore, even if this Court could ignore La Cava's allegations about the basis of the orders, which it cannot, doing so would not help Century-National.

CONCLUSION

For the reasons discussed here and in detail in La Cava's briefs, La Cava has alleged all of the requirements necessary to trigger coverage under its Business Income Coverage provision for its business income and civil authority losses. It therefore was error for the Superior Court to sustain Century-National's

demurrer to La Cava's amended complaint and this Court should reverse the judgment below.

DATE: July 5, 2022 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The foregoing Amicus Curiae Brief contains 6013 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: July 5, 2022

Respectfully submitted,

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PROOF OF SERVICE
No. B313907

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 July 5, 2022, I served the following document(s) described as:

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

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 July 5, 2022; and

The Hon. Daniel J. Buckley
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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 July 5, 2022.

Dawn Halverson

Dawn Halverson