No. B313609

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

SADDLE RANCH SUNSET, LLC, ET AL.,

Plaintiffs and Appellants,

v.

FIREMAN'S FUND INSURANCE COMPANY, ET AL.,

Defendants and Respondents.

On Appeal from the Superior Court for
the County of Los Angeles
Hon. Steven Kleifield
Case No. 20STCV36531

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 Saddle Ranch Sunset, LLC, Saddle Ranch Orange, LLC, Saddle Ranch Valencia, LLC, and Saddle Ranch Glendale, LLC in their appeal of an adverse judgment in their insurance coverage lawsuit against Respondents Fireman's Fund Insurance Company, Allianz Global Corporate & Security, and Allianz Global Risks US 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 & 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]

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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 Saddle Ranch.

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

Policyholders across the country such as Saddle Ranch 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 (internal quotation marks and 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 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. Some California state courts, in turn, have been relying on these incorrect federal decisions. In particular, some California courts and nearly all 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: October 10, 2022 Respectfully submitted,

COVINGTON & BURLING LLP

By: */s/ Rani Gupta*
Rani Gupta

Attorney for Amicus Curiae United Policyholders

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

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INTRODUCTION AND SUMMARY OF ARGUMENT

Two recent published California appellate decisions have reversed superior court decisions that sustained demurrers filed by the Respondent insurer in this case, Fireman's Fund Insurance Company, in COVID-19 insurance coverage cases. Both appellate decisions construed insurance policies that are essentially the same as the one at issue in this appeal. Both held that the superior courts had misapplied California pleading and insurance law. The logical consequence of both decisions is that the court below in the present case erred when it sustained the demurrer to Saddle Ranch's complaint without leave to amend.[2]

The first such case is *Marina Pacific Hotel & Suites, LLC v. Fireman's Fund Insurance Co.* (2022) 81 Cal.App.5th 96, which held that it was "error at this nascent phase of the case" (the demurrer stage) for the superior court to rule that "the COVID-19 virus cannot cause direct physical loss or damage to property for purposes of insurance coverage." *Id.* at 99, 112. *Marina Pacific* held instead that the plaintiffs had "unquestionably pleaded direct physical loss or damage to covered property" consistent with pre-pandemic California law. *Id.* at 109. As noted in another recent appellate decision, *Inns by the Sea v. California Mutual Insurance Co.* (2021) 71 Cal.App.5th 688, the COVID-19 virus is analogous to physical perils such as wildfire smoke,

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[2] "Saddle Ranch" refers collectively to Appellants Saddle Ranch Sunset, LLC, Saddle Ranch Orange, LLC, Saddle Ranch Valencia, LLC, and Saddle Ranch Glendale, LLC and "Fireman's Fund" refers collectively to the insurance company Respondents.

ammonia, odor, and asbestos, which have been found to trigger insurance coverage under a property policy. *Id.* at 703.

Marina Pacific also drew support from the Fireman's Fund insurance policy language, which the Court held "undermined" Fireman's Fund's argument that the COVID-19 virus cannot cause "direct physical loss or damage" to property within the meaning of that policy. 81 Cal.App.5th at 112. The Fireman's Fund policy provides coverage for "direct physical loss or damage" to insured property caused by "a covered communicable disease event," and therefore "contemplates that a communicable disease, such as a virus" can cause "direct physical loss or damage as defined in the policy." *Id.* That language—also contained in Saddle Ranch's policy—similarly undermines Fireman Fund's identical argument here that "direct physical loss or damage" is limited to "broken chairs, dented walls, or smashed restaurant equipment that had to be repaired, rebuilt, or replaced." Resp't Br. at 22.

Marina Pacific thus correctly held that the insured stated a claim under the general business income coverage of its policy, which provides coverage for lost earnings resulting from "direct physical loss or damage" to property at the insureds' business property. Saddle Ranch alleges the same, and therefore the judgment entered after the superior court sustained Fireman's Fund's demurrer should be reversed.

But this case is even more straightforward because Saddle Ranch *also* alleged a claim under the specific "communicable disease" coverage of its policy. That issue was addressed in the

second published appellate decision adverse to Fireman's Fund. That case, *Amy's Kitchen, Inc. v. Fireman's Fund Ins. Co.* (Cal.App. 1st Dist. Oct. 4, 2022) 2022 WL 4875656, reversed a judgment entered after the trial court had sustained a demurrer without leave to amend. The Court of Appeal held that the plaintiff should have been permitted to amend its complaint to allege facts satisfying this specific "communicable disease" insuring agreement. Construing the same insuring agreement found in the Saddle Ranch policy, *Amy's Kitchen* rejected Fireman's Fund's cramped interpretation of this coverage. It held that Fireman's Fund effectively proposed to read the "communicable disease" insuring agreement out of the policy, which would render portions of the policy "illusory," contrary to long-settled California insurance law. *Id.* at *5. The Court of Appeal held instead that the plaintiff had alleged direct physical loss or damage (as those words are used in the context of the Fireman's Fund policy) and that the policyholder should have been permitted to amend its complaint to allege facts stating a claim for another requirement under this coverage. *Id.* at *8.

Marina Pacific and *Amy's Kitchen* apply directly here, confirming that Saddle Ranch alleged a claim for coverage under its policy or, at minimum, should have been allowed to amend its complaint. This Court should reverse the decision below.

ARGUMENT

I. Saddle Ranch Stated A Claim For "Communicable Disease" Coverage Under *Amy's Kitchen*

The first, and perhaps simplest, reason for reversal of the judgment below is found in *Amy's Kitchen*, which confirms that

Saddle Ranch has alleged, or can allege, a claim for insurance coverage under the "communicable disease" provision of the Fireman's Fund insurance policy.

Fireman's Fund's "communicable disease" provision insures against "direct physical loss or damage" to property caused by a "communicable disease event." AA109–110. It expressly includes necessary costs to "[r]epair or rebuild [insured property] which has been damaged or destroyed by the communicable disease" in subsection (b), as well as costs to "[m]itigate, contain, remediate, treat, clean, detoxify, disinfect, neutralize, cleanup, remove, dispose of, test for, monitor, and assess the effects the communicable disease" in subsection (c). AA110. The provision is triggered by a "communicable disease event," which is defined as "an event in which a public health authority has ordered that a location be evacuated, decontaminated, or disinfected due to the outbreak of a communicable disease at such location." AA140.

Fireman's Fund argues that Saddle Ranch has not alleged a claim under the "communicable disease" provision because Saddle Ranch supposedly did not allege a "physical alteration" of property (Fireman's Fund's proposed interpretation of the phrase "direct physical loss or damage") nor a "communicable disease event." Resp't Br. at 34–37. Both of these arguments fail.

A. Saddle Ranch Alleged "Direct Physical Loss or Damage"

In analyzing the same "communicable disease" coverage provision, *Amy's Kitchen* held that the presence of the COVID-19 virus on insured property was sufficient to establish "direct physical loss or damage." *Amy's Kitchen*, 2022 WL 4875656, at

*5–6. In so holding, the Court of Appeal rejected the argument that Fireman's Fund made both in *Amy's Kitchen* and in this case, namely, that even under the "communicable disease" coverage, a plaintiff cannot establish "physical loss or damage" unless there is a "physical alteration" to the property. *Id.* at *4; *see, e.g.*, Resp't Br. at 17, 28, fn. 5.[3] *Amy's Kitchen* applied long-standing California principles of insurance interpretation to explain why such an argument is flawed.

First, *Amy's Kitchen* determined that a "reasonable layperson" would understand the "communicable disease" provision to include costs to "[m]itigate, contain, remediate, treat, clean, detoxify, disinfect, neutralize, cleanup, remove, dispose of, test for, monitor, and assess the effects [of] the communicable disease," given that the policy expressly calls out those costs. *Amy's Kitchen*, 2022 WL 4875656, at *5 (citing *E.M.M.I., Inc. v. Zurich Am. Ins. Co.* (2004) 32 Cal.4th 465, 471). *Amy's Kitchen* rejected Fireman's Fund's argument that something that could be cleaned or disinfected could not amount to a "physical alteration" and, hence, according to Fireman's Fund, could not constitute "direct physical loss or damage." *See id.* at *4; *cf.* Resp't Br. at 29. *Amy's Kitchen* explained that a "reasonable layperson" interpreting the undefined phrase "direct physical loss or damage" would not think to "look outside the extension to learn

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[3] As explained in Section II.B, even if "physical alteration" is a requirement, Saddle Ranch has alleged it pursuant to *Marina Pacific*.

the meaning of that phrase," particularly where other boldface terms appear around it. *Amy's Kitchen*, 2022 WL 4875656, at *5.

Second, *Amy's Kitchen* determined that Fireman's Fund's interpretation of "direct physical loss or damage" would "render subparagraph (c) illusory." *Id.* It reasoned that subparagraph (c)'s coverage for costs from actions like disinfecting and cleaning would be "meaningless" if it required "physical alteration" because subparagraphs (a) and (b) already address situations "where property must be torn out, repaired, or replaced." *Id.*

Both of these reasons confirm *Amy's Kitchen*'s holding that "the only plausible interpretation of subparagraph (c) of the communicable disease extension in this policy is that the need to clean or disinfect infected or potentially infected covered property constitutes 'direct physical loss or damage' of that property within the meaning of the policy." *Id.* at *6. Under this approach, Saddle Ranch has stated a claim for its "communicable disease" coverage. It pleaded "direct physical loss or damage" by alleging that "[e]ach of the Saddle Ranch restaurants" incurred costs to "'[m]itigate, contain, remediate, treat, clean, detoxify, disinfect, neutralize, cleanup, remove, dispose of, test for, monitor, and assess the effects' of the SARS-CoV-2 virus...." AA006. At a minimum, as in *Amy's Kitchen*, Saddle Ranch should be granted leave to amend to so allege.

B. Saddle Ranch Alleged A "Communicable Disease Event"

As to Fireman's Fund's second argument against "communicable disease" coverage, Saddle Ranch has alleged, or could amend its complaint to allege, a "communicable disease

event." Saddle Ranch pleaded "an event in which a public health authority has ordered that a location be evacuated, decontaminated, or disinfected due to the outbreak of a communicable disease at such location." AA140. Saddle Ranch alleged that public health authorities ordered closures to their restaurants and bar operations. AA006. These include orders from Arizona and California issuing specific directives to limiting restaurant service and closing bars. AA023. It also alleged that "California and Arizona state and local officials and health departments have issued several further orders and directives" that "mandate" restaurants, like the insured properties, to "mitigate, contain, remediate, treat, clean, detoxify, disinfect, neutralize, and cleanup their premises, remove and dispose-of property that has been contaminated with COVID-19...." AA024. Saddle Ranch pleaded that these orders were issued "as a result of the global outbreak of COVID-19," and included physical loss or damage caused by the COVID-19 virus on properties, which "including the insured properties." AA023–024.

Fireman's Fund argues that Saddle Ranch has not alleged that a particular order was issued to its specific premises as a result of an outbreak at its properties. Resp't Br. at 35. But an order need not be issued to a specific location with a communicable disease outbreak and only to that specific location where the outbreak exists everywhere. *See* Reply Br. at 27–28. Saddle Ranch has alleged that the COVID-19 virus was on its properties, that the COVID-19 virus was part of a "global outbreak," and that the orders were issued because of such

outbreaks, like the ones at Saddle Ranch's specific properties. That alone should be enough pursuant to the plain text of the coverage provision. But even if the Court decides that the order must go to a particular property, the Court should still give Saddle Ranch leave to amend to clarify the nature of the orders it alleges caused its premises to be "evacuated, decontaminated, or disinfected," as *Amy's Kitchen* did for its plaintiff. 2022 WL 4875656, at *6.[4]

Because Saddle Ranch has pleaded a valid claim for "communicable disease" coverage and Fireman's Fund has not provided such coverage, Saddle Ranch has stated a claim for breach of contract and bad faith. On this basis alone, the Court should reverse the order sustaining the demurrer without leave to amend.[5]

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[4] *Amy's Kitchen* did not address whether the "event" *must* involve an order specifically directed to the insured's property or whether a more general order would suffice so long as there is an "outbreak" at the location and the orders direct it (among other locations) to evacuate, decontaminate, or disinfect that location. *See* 2022 WL 4875656, at *6. The latter makes more sense. For example, assume that the health authorities suspect that someone with Ebola entered a store on Wilshire Boulevard near Vermont. Why would a store have coverage if a health inspector phones each business in the vicinity but not if the health inspector issues an order instructing every store on that block to close? In any event, *Amy's Kitchen* noted that the insured had made an offer of proof that it had received direct communications from government agencies. *Id.*

[5] Saddle Ranch's claims under the "communicable disease" coverage are not standalone causes of action. AA009–018. Instead, they are incorporated into Saddle Ranch's breach of contract and bad faith claims. AA026–028. Thus, allegations

II. The Superior Court Erred In Holding That The COVID-19 Virus Cannot Cause "Physical Loss Or Damage" to Property

The superior court also erred in holding that Saddle Ranch could not allege "direct physical loss or damage" to property as to any of its coverages and that there were no grounds for amendment—as is confirmed by the case law that has developed since that decision. Opening Br. at 24–25 (citing RT 9, 11). As explained further below, of the five California appellate courts to consider whether an insurance policyholder states a claim for coverage based on allegations that the COVID-19 virus causes physical loss or damage, four have concluded that the virus *could* cause physical loss or damage or that amendment to state such a claim would not be futile.[6] Only the poorly reasoned outlier, *United Talent Agency v. Vigilant Insurance Co.* (2022) 77 Cal.App.5th 821, has held otherwise—basing its holding not on the pleadings in the case before it but on facts recited in other judicial opinions that were contrary to the plaintiff's allegations, and insurance policy requirements that are contrary to longstanding California law.

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that Saddle Ranch is entitled to "communicable disease" coverage alone are sufficient to warrant reversal of the demurrer since a demurrer cannot be directed to a portion of a cause of action. *E.g., Fremont Indem. Co. v. Fremont Gen. Corp.* (2007) 148 Cal.App.4th 97, 119 ("A demurrer must dispose of an entire cause of action to be sustained.").

[6] Two other cases considered only a claim that the government *orders* themselves—untethered to physical loss or damage caused by the COVID-19 *virus*—caused loss of use. *See infra* Section IV.

This Court should follow the pre-pandemic cases, as well as *Inns by the Sea*, *Amy's Kitchen*, *Tarrar*, and *Marina Pacific* rather than the incorrectly decided *United Talent*.

A. *Inns by the Sea* Endorsed Pre-Pandemic Cases Holding That A Broad Range Of Invisible Substances Can Cause "Direct Physical Loss Or Damage"

The first California appellate case to conclude that the COVID-19 virus could cause physical loss or damage under a property and business income policy was *Inns by the Sea*.

That decision surveyed—and endorsed—a long line of pre-pandemic cases holding that physical perils such as wildfire smoke, odors, ammonia fumes, gasoline vapor, and asbestos can cause insured "direct physical loss of or damage" to property, even though those perils do not structurally damage property and are often invisible to the naked eye.[7]

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[7] *Inns by the Sea*, 71 Cal.App.5th at 701–702, *citing*, *e.g.*, *Or. Shakespeare Festival Ass'n v. Great Am. Ins. Co.* (D. Or. June 7, 2016) 2016 WL 3267247, at *5, *9 (wildfire smoke caused insured physical loss or damage to air at insured property because "while air may often be invisible to the naked eye, surely the fact that air has physical properties cannot reasonably be disputed") (vacated by stipulation); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.* (D.N.J. Nov. 25, 2014) 2014 WL 6675934, at *6–7 (ammonia in the air caused physical loss or damage because it "physically transformed the air" inside the insured property and thus rendered the property unsafe for use until the ammonia dissipated); *Mellin v. N. Sec. Ins. Co., Inc.* (N.H. 2015) 115 A.3d 799, 805 (finding coverage for urine odor, holding that physical loss includes "changes that are perceived by the sense of smell and that exist in the absence of structural damage"); *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.

Inns by the Sea also called out as the "central relevant California opinion" *Hughes v. Potomac Ins. Co.* (1962) 199 Cal.App.2d 239 (abrogated on other grounds). *Hughes* found that a building—overhanging a newly formed cliff after land behind it had eroded—had "'suffered real and severe damage'" that triggered coverage for physical loss or damage "even though the structure of the house was undamaged.'" *Inns by the Sea*, 71 Cal.App.5th at 701 (quoting *Hughes*, 199 Cal.App.2d at 249). When the insurer argued that no "loss or damage [could] occur[] unless some tangible injury to the physical structure itself could be detected," *Hughes* rejected the argument, describing it as contrary to "[c]ommon sense." 199 Cal.App.2d at 248–249. This case confirms that California law adopts the common sense notion that a structural change to property is not necessary to establish physical loss or damage so long as there is an external force that renders property unsafe for its normal use.

Nor was *Hughes* alone. 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

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1993) 858 P.2d 1332, 1338 (methamphetamine odor); *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.* (3rd 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).

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.

Analogizing to pre-pandemic cases finding coverage for perils that impaired the safe use of property without causing structural damage, *Inns by the Sea* held "the COVID-19 virus—like smoke, ammonia, odor, or asbestos—is a physical force" that can impair the normal use of property and trigger coverage. 71 Cal.App.5th at 703. *Inns by the Sea* explained "if a business—which could have otherwise been operating—had to shut down because of the presence of the virus within the facility," it could "successfully allege that the virus created physical loss or damage." *Id.* at 704–705 (internal quotation marks and citations omitted). *Inns by the Sea* confirmed throughout its opinion that the COVID-19 virus can cause insured physical loss and damage.[8] *Inns by the Sea* ruled for the insurer only because the

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[8] *See* 71 Cal.App.5th at 710 ("a virus could cause a suspension of operations through direct physical loss of or damage to property"); *id.* at 710, fn. 21 ("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 709–710 ("our analysis does not depend on an across-the-board rule that a virus can never give rise to a 'direct physical loss or damage to property'").

Because *Inns by the Sea* analyzed this issue, its holding that the COVID-19 virus can cause insured "direct physical loss

plaintiff there did not allege that its losses were caused by the virus on site, *i.e.,* that the connection between the peril and the physical loss or damage alleged was not "direct." *Id.* at 703–704.[9]

B. *Marina Pacific* Confirms The Presence of COVID-19 Can Cause Physical Loss Or Damage

Consistent with *Inns by the Sea*, *Marina Pacific* held that the COVID-19 virus could cause "direct physical loss or damage" to property.

Marina Pacific, 81 Cal.App.5th at 109, found it unnecessary to resolve the precise legal test for determining "direct physical loss or damage" because it held that the plaintiffs "unquestionably" met the standard most favorable to the insurer—that "direct physical loss or damage" under the

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or damage" is not *dictum*. *See, e.g.*, *United Steelworkers of Am. v. Bd. of Educ.* (1984) 162 Cal.App.3d 823, 834–835.

[9] That holding is inapplicable to the present appeal because Saddle Ranch alleged causation, pleading that its properties "were forced to close" because the COVID-19 virus was at "each of the Saddle Ranch restaurants." AA006. This is in contrast to the *Inns by the Sea* plaintiff, which alleged it closed through "a three-step chain of causation, beginning with the COVID-19 virus, in which 'the continued and increasing presence of the coronavirus on [Inns'] property and/or around its premises' led to the Orders, which in turn led to Inns' suspension of operations." 71 Cal.App.5th at 698.

Saddle Ranch's claim, therefore, does not require this Court to address whether the "causation" ruling in *Inns by the Sea* was correct, though UP notes that it is hard to reconcile that ruling with other California authority permitting a plaintiff to plead alternative causes of an insured loss. *See, e.g.*, *Third Eye Blind, Inc. v. Near N. Ent. Ins. Servs., LLC* (2005) 127 Cal.App.4th 1311, 1323.

insurance policy in *Marina Pacific* requires a "distinct, demonstrable, physical alteration of the property" pursuant to *MRI Healthcare Center of Glendale, Inc. v. State Farm Gen. Ins. Co.* (2010) 187 Cal.App.4th 766.[10]

Marina Pacific held that the insured adequately alleged "physical alteration" by pleading that the COVID-19 virus alters the surfaces of property by changing those surfaces from safe to unsafe, preventing the insureds from using their property as a result. *Id.* at 108–109; *see also Inns by the Sea*, 71 Cal.App.5th at 706 ("distinct, demonstrable, physical alteration' ... could include damage that is not structural, but instead is caused by a noxious substance or an odor"). Thus, the *Marina Pacific* plaintiffs "unquestionably" pleaded direct physical loss or damage under the *MRI Healthcare* standard. 81 Cal.App.5th at 109.[11]

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[10] *MRI Healthcare* construed a much narrower insuring agreement than the one at issue in the present appeal, covering only "accidental direct physical loss." 187 Cal.App.4th at 771. The insured in that case had turned off a defective MRI machine, knowing the machine might not restart. *Id.* at 770. Because the "failure of the MRI machine to satisfactorily 'ramp up' emanated from the inherent nature of the machine itself," *MRI Healthcare* concluded that there was no accidental direct physical loss because no "external force" had "acted upon the insured property to cause a physical change in the condition of the property." *Id.* at 780–781. *Marina Pacific* correctly distinguished that case because the *Marina Pacific* plaintiffs had alleged that an external force (the COVID-19 virus) was acting upon the insured property, causing a physical change in the condition of the air and surfaces of property.

[11] *Marina Pacific* is consistent with recent appellate decisions from other states. *See Huntington Ingalls Indus., Inc. v. Ace Am. Ins. Co.* (Vt., Sept. 23, 2022) 2022 WL 4396475, at *13 (citing

While *Marina Pacific* and *Inns by the Sea* hold that an insured can state a claim for coverage under a standard property insurance policy, *Marina Pacific* further reasoned that Fireman's Fund's position that the COVID-19 virus cannot cause "direct physical loss or damage" to property was "undermined" by the policy's express "communicable disease" coverage. *Id.* at 112. The court explained that the provision "explicitly contemplates that a communicable disease, such as a virus, can cause damage or destruction to property and that such damage constitutes direct physical loss or damage as defined in the policy." *Id.*

The Saddle Ranch policy contains the same express coverage for "direct physical loss or damage" to property caused by a "communicable disease event" found in the Fireman's Fund policy at issue in *Marina Pacific*. AA109–110. The "same word used in an instrument is generally given the same meaning unless the policy indicates otherwise." *E.M.M.I. Inc.*, 32 Cal. 4th at 475. Thus, as *Marina Pacific* held, the Saddle Ranch policy confirms that a "communicable disease" can cause "direct physical loss or damage" under the *entire* policy, not just the "communicable disease" coverage. *See* 81 Cal.App.5th at 109, 112 (holding business income coverage was triggered).

Marina Pacific approvingly and holding that "the complaint plausibly alleges 'direct physical damage'" where the insured alleged that the virus was present through infected individuals and physically altered property); *Cajun Conti LLC v. Certain Underwriters at Lloyd's, London* (La.Ct.App. June 15, 2022) 2022 WL 2154863, at *8 ("coverage exists for loss or damage caused by 'direct physical loss of or damage to' the appellants' insured premises as a result of contamination by COVID-19").

C. *Amy's Kitchen* and *Tarrar* Further Confirm That COVID-19 Can Cause "Direct Physical Loss or Damage"

Section I above addressed *Amy's Kitchen*, which held that the Fireman's Fund property policy form does not require the plaintiff to plead "physical alteration" to allege a claim for "direct physical loss or damage" to property. 2022 WL 4875656, at *5–6.

Amy's Kitchen closely followed another appellate decision, *Tarrar Enterprises, Inc. v. Associated Indemnity Co.* (Cal.App. 1st Dist. Sept. 22, 2022) 2022 WL 4377163 which, in a brief published opinion, held that the trial court had erred in declining to grant the policyholder leave to amend to plead that the COVID-19 virus had caused "direct physical loss or damage," thereby necessarily concluding that the virus *could* cause such loss or damage. *Id.* at *2 (leave should be given unless the complaint is "incapable of amendment").

D. Saddle Ranch Alleged "Direct Physical Loss Or Damage," Triggering the Fireman's Fund Policy's Business Income Coverage

As discussed above, Saddle Ranch pleaded a claim for "direct physical loss or damage" under the interpretation of those words mandated by the presence of "communicable disease" coverage in the Fireman's Fund policy. But even if the policy required a showing of "physical alteration" to trigger other insuring agreements referencing "direct physical loss or damage," Saddle Ranch has, like the *Marina Pacific* plaintiffs, alleged facts that, if proven at trial, would establish that the COVID-19 virus causes a "physical alteration" when present on property. Saddle Ranch thus has stated a claim under its general business income

coverage, which pays for income lost and expenses incurred due to "direct physical loss or damage to property" at Saddle Ranch's insured locations.

Saddle Ranch alleged that its property and premises have been "contaminated with COVID-19." AA023–024. It alleged that the Centers for Disease Control and Prevention issued guidance indicating that the COVID-19 virus can remain "viable for hours to days on surfaces made from a variety of materials." AA024. It further alleged that cleaning, disinfecting, and closing off areas are important to preventing the COVID-19 virus from spreading and infecting humans who interact with those contaminated surfaces. *Id.*

Saddle Ranch also alleged that "each of the Saddle Ranch restaurants were [*sic*] forced to close as a result of physical losses or damage" from the "SARS-CoV-2 virus," which required it to incur costs to "[m]itigate, contain, remediate, treat, clean, detoxify, disinfect, neutralize, cleanup, remove, dispose of, test for, monitor, and assess the effects" of the virus. AA006; *see also* AA005 (alleging that the "global outbreak" of COVID-19 was "both at the insured restaurant locations and nearby"). As discussed further below, Saddle Ranch sought leave to amend and could amend to allege further facts establishing coverage. *See infra* Section VI.

Together, these allegations plead that the COVID-19 virus is a physical force that renders property unusable for its intended purpose, thus stating a claim for coverage.

III. *United Talent* Misapplied California Pleading and Insurance Law

Although the overwhelming majority of published California appellate decisions hold that the COVID-19 virus *can* cause "direct physical loss or damage," there is one outlier decision, *United Talent*, which Fireman's Fund urges this Court to follow. That case held that it does not matter what the policyholder pleads in the complaint, the COVID-19 virus is incapable, as a matter of law, of causing direct physical loss or damage. The Court should decline to follow *United Talent*.

United Talent reached its incorrect conclusion by, first, failing to accept the allegations in the plaintiff's complaint as true and, second, by failing to limit its review to the record on appeal, *i.e.,* the allegations in the complaint and facts that were properly the subject of judicial notice. *United Talent* instead improperly relied on facts that other courts had recited about the COVID-19 virus, typically without citation to any authority other than another opinion—and, according to the California Medical Association, facts that are "refuted by science."[12] In addition, *United Talent* devised new requirements for "physical loss or damage" that do not accord with insurance law. The Court should not repeat *United Talent*'s errors by following it and the

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[12] *See* California Medical Association Amicus Brief at 17 (filed Oct. 7. 2022). As the California Medical Association explains, COVID-19 cannot be cleaned or disinfected through routine cleaning. *Id.* at 9–10. The CMA characterizes Fireman's Fund's position in the present appeal as "contrary to science." *Id.*

similar erroneously decided federal court opinions on which Fireman's Fund relies.

A. *United Talent* Disregarded The Complaint's Allegations And Instead Based Its Rulings On Its "General Belief" And On Judicial Fact-Findings Outside Of The Record

Saddle Ranch alleges that the COVID-19 virus caused "direct physical loss or damage" to its property. AA006. Fireman's Fund asks this Court to disregard that allegation, and any further allegations that Saddle Ranch could add if given leave to amend. Fireman's Fund wants this Court instead to hold as a matter of law that "the presence of COVID-19 virus particles on property does not alter the physical nature of property" regardless of what a plaintiff alleges or could allege in an amended complaint. Resp't Br. at 27. As support for that argument, Fireman's Fund asks this Court to follow *United Talent* and the federal cases on which it relied. But *United Talent* reached its conclusion by engaging in improper judicial fact-finding rather than by assuming the truth of the allegations in the plaintiff's complaint, as the Supreme Court requires.

This Court should decline to follow *United Talent*. As this Court is well aware, long-established California Supreme Court precedent requires that courts "deem as true" the allegations of a complaint. *Marina Pacific*, 81 Cal.App.5th at 106, 110 (citing, *e.g.*, *Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 20)). "Unlike in federal court, the plausibility of the insureds' allegations has no role in deciding a demurrer under governing state law standards." *Id.* at 109–110 (citing cases); *see also Friends of Glendora v. City of Glendora* (2010) 182 Cal.App.4th 573, 576.

Further, the Supreme Court has repeatedly held that the record on a demurrer is limited to the complaint and facts that are properly the subject of judicial notice. *E.g., Evans*, 38 Cal.4th at 6.

As *Marina Pacific* pointed out, *United Talent* defied this precedent when it "found—without evidence—the COVID-19 virus does not damage property" based on the court's "general belief" about what is needed to restore property damaged by the virus to "its original, safe-for-use condition." 81 Cal.App.5th at 111. *United Talent*'s improper judicial fact-finding provided the basis for most of its rulings.

First, *United Talent* ignored its plaintiff's own allegations. For example, the court suggested that the virus does not cause physical damage because it "can be cleaned from surfaces through general disinfection measures," 77 Cal.App.5th at 838, even though the plaintiff, United Talent Agency, had alleged that "[e]ven frequent cleanings cannot be assured to eliminate SARS-CoV-2 from a premises, given its ability to spread easily and quickly as long as people are entering the premises during an outbreak at or near the premises," First Am. Compl. ¶ 47, *United Talent Agency LLC v. Vigilant Ins. Co.* (L.A.Super.Ct. Apr. 7, 2021) No. 20STCV43745. *See also id.* ¶ 45 (alleging COVID-19 requires "extensive cleaning and disinfecting"); *United Talent*, 77 Cal.App.5th at 835 (describing plaintiff's allegations that "remedial measures" were needed "to reduce or eliminate the presence of SARS-CoV-2, including extensive cleaning and disinfecting; installing, modifying, or replacing air filtration

systems; remodeling and reconfiguring physical spaces; and other measures").

Second, *United Talent* relied on facts recited in opinions issued by *other* courts that also had disregarded the allegations made by the plaintiffs in those cases. For instance, *United Talent* based its understanding of how viruses are cleaned from statements in a federal case applying Illinois law, *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.* (7th Cir. 2021) 20 F.4th 327, 335 (case cited by Resp't Br. at 27). But the plaintiffs in *Sandy Point* did not allege that the virus is easy to clean or goes away on its own in short periods of time. In fact, *Sandy Point* cited nothing to support its statement and rejected the plaintiff's request for leave to amend to allege facts about how the COVID-19 virus physically attaches to properties through droplets, aerosols, and fomites. *Id.*

United Talent quoted another federal case, *Unmasked Management, Inc. v. Century-National Insurance Co.* (S.D.Cal. 2021) 514 F.Supp.3d 1217, for the factual proposition that it would "strain credulity to say that" countertops with the COVID-19 virus on them could be "damaged or physically altered as a result." *Id.* (quoting *Unmasked*, 514 F.Supp.3d at 1226) (case cited by Resp't Br. at 22). One of *Unmasked*'s two sources for this statement is another federal case, *O'Brien Sales & Marketing, Inc. v. Transportation Insurance Co.* (N.D.Cal. 2021) 512 F.Supp.3d 1019, that in turn relied upon a University of Arizona newsletter published two weeks into the pandemic. *Id.* at 1024 (case cited by Resp't Br. at 27). And the newsletter said no such

thing, instead cautioning readers not to touch surfaces and to wash their hands frequently to avoid contracting the virus.[13] *Unmasked*'s other source was the federal case *Uncork & Create LLC v. Cincinnati Insurance Co.* (S.D.W.Va. 2020) 498 F.Supp.3d 878, which cited no support at all for its assertions about cleaning the COVID-19 virus. *Id.* at 883 (case cited by Resp't Br. at 30).

California does not recognize a loophole for the demurrer standard for facts recited in federal court opinions. Nor can judicial notice provide a substitute: Judicial notice does not extend to the truth of "facts" recited in judicial opinions in other cases. *See, e.g.*, *O'Neill v. Novartis Consumer Health, Inc.* (2007) 147 Cal.App.4th 1388, 1405 (court may not use judicial notice to "prove the truth of the facts found and recited" in other rulings); *Lockley v. Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 885 (judicial notice of court actions extends only to the "existence of the [court's] act, not that what is asserted in the act is true").

In short, *United Talent* strayed far outside of the permissible record in adopting federal court statements about COVID-19. And those statements, that is, whether the COVID-19 virus can satisfy the standard for "direct physical loss or

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[13] The newsletter also said that it was too early to draw conclusions concerning COVID-19 but studies of *other* viruses had revealed that they persist for up to nine days on surfaces but can be cleaned using certain chemical combinations. *See* Dawn H. Gouge et al., *People United Against the Threat of COVID-19*, Univ. of Ariz. Agric., Life & Veterinary Sci. & Cooperative Extension (Mar. 30, 2020), https://bit.ly/3ytOaoK (last visited Oct. 10, 2022).

damage" articulated in *United Talent* as a factual matter, are neither part of the record in the present appeal nor the types of facts that can properly be the subject of judicial notice.

Third, *United Talent*'s improper reliance on federal judges' self-help fact findings on motions to dismiss was particularly problematic because almost all of those federal cases did not involve allegations that the COVID-19 virus physically altered property. For example, the plaintiffs in *Barbizon School of San Francisco v. Sentinel Insurance Co.* (N.D.Cal. 2021) 530 F.Supp.3d 879—whose policy contained a broad exclusion for "loss or damage" caused by a "virus"—"concede[d] there has been no physical damage to or alteration of their property." *Id.* at 889 (cited by *United Talent*, 77 Cal.App.5th at 835, fn. 10). Thus, instead of limiting the record to the allegations of the complaint before it, *United Talent* relied on unsubstantiated second-hand fact findings in different cases involving far more narrowly pleaded complaints.

Fourth, many of the federal court decisions that provided the basis for *United Talent's* factual recitations are "readily distinguishable" because the courts applied the federal court "plausibility" standard on a motion to dismiss, which is "significantly different" from the demurrer standard that the California state courts apply. *Marina Pacific*, 81 Cal.App.5th at 105, 109–110 (citing *Friends of Glendora*, 182 Cal.App.4th at 576).

In contrast to *United Talent*, *Marina Pacific* properly accepted its plaintiff's allegations as true and did not consider

facts outside of the record. 81 Cal.App.5th at 109. This ruling not only complied with California's pleading rules, it also accords with decades of case law in which determinations about whether a noxious substance caused insured physical loss or damage were made only with evidence, at summary judgment or trial.[14] It is only in COVID-19 insurance coverage cases that courts such as *United Talent* (and the federal cases that Fireman's Fund cites) decided to make its own outside-of-the-record factual determinations at the pleadings stage.

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[14] *See, e.g.*, *Gregory Packaging*, 2014 WL 6675934, at *3, *8 (granting the policyholder's partial motion for summary judgment on the issue of "physical loss of or damage to" property based on "substantial evidence that the ammonia discharge physically incapacitated its facility"); *Sentinel Mgmt. Co. v. N.H. Ins. Co.* (Minn.Ct.App. 1997) 563 N.W.2d 296, 300 (affirming denial of insurer's summary judgment because the policyholder "presented evidence showing that released asbestos fibers have contaminated the buildings, creating a hazard to human health" constituting "direct, physical loss"); *Mellin*, 115 A.3d at 803–805 (overruling grant of summary judgment and remanding for additional fact-finding on whether an odor caused structural alteration).

Even pre-pandemic courts that ultimately ruled in favor of insurers did so only after discovery. *See, e.g., Mama Jo's Inc. v. Sparta Ins. Co.* (11th Cir. 2020) 823 F. App'x 868, 879 (considering expert testimony in considering whether dust caused "direct physical loss" on appeal from summary judgment); *Mastellone v. Lightning Rod Mut. Ins. Co.* (Ohio Ct.App. 2008) 884 N.E.2d 1130, 1143–1145 (assessing whether mold caused "physical injury" after considering expert testimony on appeal of denial of motion notwithstanding the verdict).

B. *United Talent* Improperly Invented New Requirements for COVID-19 Claims

In addition to disregarding longstanding pleading standards, *United Talent* invented new requirements for "direct physical loss or damage" in an attempt to preclude COVID-19 coverage claims. These new requirements have no basis in insurance law decided prior to the pandemic nor in the language of the insurance policy that *United Talent* interpreted.

1. *United Talent* Is Wrong About Cleaning

United Talent first suggested 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. Even if that was true—and, as discussed above, it is contrary to the plaintiff's allegations in that case and, according to the California Medical Association's amicus brief in this matter, contrary to science—the ability to restore a property to safe condition through cleaning would not foreclose coverage. Rather, as *Marina Pacific* recognized, this would only affect the measure of damages, *i.e.,* the amount of the covered loss, not whether there was coverage in the first place. This is because the insured would be entitled to business income coverage for income lost during the time that the property was "damaged in the interim" by the virus, as well as for the costs of cleaning. *Id.* at 112.

Marina Pacific did not need to address a further flaw in the *United Talent* reasoning, the court's suggestion that an insurance policy would not cover a peril that can be remediated through cleaning, because such a suggestion is contrary to common sense.

Property policies cover fires as a matter of law, Ins. Code, § 2700, and an insured can clean up at least some fire damage. It also is contrary to pre-pandemic law holding that cleaning can establish insured "physical loss or damage." *See, e.g., Trutanich*, 858 P.2d 1332, 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)"). Accordingly, *Inns by the Sea* recognized that coverage could be triggered if the presence of COVID-19 required an insured property "to be thoroughly sanitized and remain empty for a period." 71 Cal.App.5th at 704–705.

Finally, even if the reasoning in *United Talent* had merit, it cannot apply in the context of an insurance policy that contains "communicable disease" coverage that expressly insures the costs to "clean" and "disinfect" the effects of a "communicable disease." AA010 ("Mitigate, contain, remediate, treat, clean, detoxify, disinfect, neutralize, cleanup, remove, dispose of, test for, monitor, and assess the effects the [sic] communicable disease."). If *United Talent*'s reasoning were applied to Saddle Ranch's policy, something expressly covered (cleaning) would not only be excluded but would serve as the basis for eliminating coverage altogether. This cannot be the case. A court cannot construe an insurance policy in a way that renders portions of the policy a nullity. *Filtzer v. Ernst* (2022) 79 Cal.App.5th 579, 584.

This Court should construe the text of Saddle Ranch's policy rather than follow *United Talent*'s flawed analysis of a different insurance policy form.

2. The COVID-19 Virus Harms People *And* Property

United Talent also stated—without citation to the allegations in the complaint, facts that were properly the subject of judicial notice, peer reviewed studies of the COVID-19 virus by virologists or epidemiologists, or, indeed, any source at all—that the COVID-19 virus "can carry great risk to people but no risk at all to a physical structure." 77 Cal.App.5th at 833.

Even setting aside the perils of basing a legal ruling on extra-record *ipse dixit*, the premise for *United Talent's* statement is faulty: harm to people and property are not mutually exclusive. *Inns by the Sea* recognized that the virus was akin to substances such as wildfire smoke and asbestos that can trigger coverage under a property insurance policy—not because they endanger a physical structure, but because they prevent people from using the property as it was intended to be used. *See* 71 Cal.App.5th at 701–702; *see also Huntington*, 2022 VT 45, ¶ 29 (property policies can pay when insured "property is unusable due to a health hazard"). Such holdings are consistent with the purpose of business income (or interruption) coverage to protect "the insured against losses arising from his inability to continue the normal operation and functions of his business" due to a physical peril. *Pac. Coast Eng'g Co. v. St. Paul Fire & Marine Ins. Co.* (1970) 9 Cal.App.3d 270, 275.

3. Saddle Ranch's Policy Insures Perils Affecting A Large Area

United Talent also based its statement that the COVID-19 virus could not cause direct physical loss or damage on the ground that, unlike perils like asbestos or environmental contamination, the COVID-19 virus is not "tied to a location." 77 Cal.App.5th at 838. But the insurance policy does not tie covered insured *perils* to perils at "a location"; the policy only requires direct physical loss or damage to occur at an insured location. In fact, countless perils can cause physical loss or damage to a location without being tied to the location. Environmental releases can spread over hundreds of miles[15] and insured perils such as forest fires, hurricanes, tornadoes, deep frosts, and earthquakes can damage vast areas. If insurance only covered damage cabined to specific properties, it would lead to the absurd result that a fire that starts in and burns one building would trigger coverage while a fire that burns thousands would not.

4. *United Talent* Relied On Measures Unavailable During The Relevant Time Period

United Talent asserted that the COVID-19 virus transmission could be reduced with "social distancing, vaccination, and the use of masks," suggesting that those mitigation measures somehow mean that the property was not rendered unfit for use. 77 Cal.App.5th at 838; *see also id.* at 839. But vaccination and widespread masking were not available at

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[15] *See, e.g.*, *Anaconda Co. Smelter Superfund Site*, EPA, https://tinyurl.com/4f7zb2vd (last visited Oct. 10, 2022).

the outset of the pandemic. In fact, from February through July 2020, the CDC advised *against* wearing a mask.[16] Moreover, the Fireman's Fund policy does not distinguish between an insured physical peril that is introduced into property through people or some other way. *See, e.g., Trutanich*, 858 P.2d 1332, 1335 (physical loss or damage covered methamphetamine odor introduced through people).

None of *United Talent*'s invented "requirements" are based in the language of the policy it construed, much less Saddle Ranch's materially different policy. *United Talent* erred in adopting these novel standards solely for COVID-19 property insurance cases.

C. The "Period Of Restoration" Definition Does Not Bar Coverage for Saddle Ranch

United Talent and Fireman's Fund also rely on the "period of restoration" definition to divine a meaning for "direct physical loss or damage" that is narrower than its text suggests. *United Talent*, 77 Cal.App.5th at 833–834; Resp't Br. at 22. But the period of restoration in the separate business income section does not narrow the main insuring agreement in the property damage section. Rather, it sets the end date of coverage for "when such property at the location should be repaired, rebuilt, or replaced with reasonable speed and like kind and quality." AA146. *See Ungarean, DMD v. CNA & Valley Forge Ins. Co.* (Pa.Com.Pl.

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[16] *See* Deborah Netburn, *A Timeline of the CDC's Advice on Face Masks*, Los Angeles Times (July 27, 2021), https://www.latimes.com/science/story/2021-07-27/timeline-cdc-mask-guidance-during-covid-19-pandemic.

Mar. 25, 2021) 2021 WL 1164836, at *8 (period of restoration "merely imposes a time limit on available coverage, which ends whenever such measures, if undertaken, would have been completed with reasonable speed and similar quality"); *see also K.C. Hopps, Ltd. v. Cincinnati Ins. Co., Inc.* (W.D.Mo. 2021) 561 F.Supp.3d 827, 838 (period of restoration "is not a definition of coverage, but instead describes a time period during which loss of business income may be recovered").

No reasonable insured would expect to find a significant limitation on the broad coverage provided by the policy's property damage insuring agreements buried in the description of the period during which the separate business income coverage might be measured. *See Haynes v. Farmers Ins. Exch.* (2004) 32 Cal.4th 1198, 1206 (limitations on coverage must be "conspicuous, plain and clear" to be enforced). This is particularly true where such period of restoration language does not even apply to some of the coverages that require physical loss or damage, such as the civil authority coverage. AA106.

Perhaps most important, Fireman's Fund's interpretation of the period of restoration language cannot be harmonized with the express "communicable disease" coverage, the unambiguous meaning of "direct physical loss or damage" in that coverage grant—a meaning contrary to the one that Fireman's Fund advocates now—and the rule that the same words should be given the same meaning through the insurance policy. *See* Section I.A & II.C, *supra*. Fireman's Fund cannot avoid that

reading by pointing to a definition of a different term in a different section of the policy.

This interpretation is consistent with court decisions finding coverage for noxious substances such as wildfire smoke that often resolve or dissipate without specific remediation. *See Or. Shakespeare Festival*, 2016 WL 3267247, at *6 (insurance provided coverage for lost income during the days it took for wildfire smoke to "dissipate before business could be resumed"); *Gregory Packaging*, 2014 WL 6675934, at *3 (policy covered closure until ammonia "dissipated"); *see also Inns by the Sea*, 71 Cal.App.5th at 702 (citing cases).

Finally, even assuming that repair or remediation was necessary under the policy, Saddle Ranch has alleged such repairs by alleging it needed to "'[m]itigate, contain, remediate, treat, clean, detoxify, disinfect, neutralize, cleanup, remove, dispose of, test for, monitor, and assess the effects' of the SARS-CoV-2 virus" at "[e]ach of the Saddle Ranch restaurants." AA006. Aside from parroting snippets from recent federal or out-of-state COVID-19 cases, Fireman's Fund provide no reasoning for why such cleaning should not constitute "repairs." As explained above, pre-pandemic cases and Saddle Ranch's own policy are consistent with Saddle Ranch's reading, that the policy covers perils (including diseases) that can be remediated through cleaning. *See supra* Section I.A & III.B.1. This is also consistent with the plain meaning of repair: "to restore to a sound or healthy state." *Repair*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/repair; *see also*

Stamm Theatres v. Hartford Cas. Ins. Co. (2001) 93 Cal.App.4th 531, 543 (dictionary definitions relevant to the determining "ordinary and popular sense" of a word).

IV. Cases Concerning Pure "Loss Of Use" From Government Orders Are Inapposite

Hoping to pull this case into an entirely different line of precedent, Fireman's Fund argues that Saddle Ranch has not alleged "direct physical loss or damage" as to any of its coverage grants because it merely alleged economic harm from government orders. That is not the case. Saddle Ranch alleges that the COVID-19 virus was on site and caused direct physical loss or damage *to its property*. *See, e.g.*, AA023–024; Reply Br. at 34, fn. 5 ("To be clear, this is not a case where Appellants contend that mere 'loss of use' suffices to establish direct physical loss or damage.").[17] Saddle Ranch also sought leave to amend to make additional allegations to that effect. Opening Br. at 54; Reply Br. at 25, fn. 2; *see also* Opening Br. at 32. Saddle Ranch does *not* allege that the government orders alone caused its harm, untethered to physical loss or damage from the COVID-19 virus.

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[17] The Respondents portray Saddle Ranch's claim as one for "pure economic loss" by pointing to Saddle Ranch's allegations regarding lost income and the orders. Resp't Br. at 11. But this characterization confuses the issues. Economic loss, on its own, does not amount to "physical loss or damage." But once there is "direct physical loss or damage"—such as the kind caused by the physical force, COVID-19 virus—Saddle Ranch is entitled to income losses, expenses, and costs under various business income coverage provisions. AA009–018. Several of these coverages provide income loss caused by closures due to government orders. AA010, AA012–018 (communicable disease coverage, civil authority coverage, ordinance or law coverage).

The cases that Fireman's Fund cites in support of this argument are thus entirely inapposite because they all concern a legal theory that is not at issue in this case: that a government *order*, on its own, has caused loss—specifically, loss of use—of an insured's business property.

The two published California appellate decisions on the issue, *Musso* and *Apple Annie*, fall into this category of rejecting the "loss of use" theory. *See Musso & Frank Grill Co. Inc. v. Mitsui Sumitomo Ins. USA Inc.* (2022) 77 Cal.App.5th 753, 760; *Apple Annie, LLC v. Or. Mut. Ins. Co.* (2022) 82 Cal.App.5th 919, 937. Neither involve a plaintiff that alleged that the COVID-19 virus was present on its insured property (as Saddle Ranch does). Compl. ¶ 59, *Musso & Frank Grill Co. Inc. v. Mitsui Sumitomo Ins. USA Inc.* (Cal.Super.Ct. May 1, 2020) 2020 WL 2096329; *Apple Annie*, 82 Cal.App.5th at 937 (plaintiff "did not allege that the presence of the virus on the premises triggered coverage"). And neither plaintiff contended on appeal that the government agency closure order was issued because of direct physical loss or damage to property from the virus (as Saddle Ranch does). *See Musso*, 77 Cal.App.5th at 756; Opening Br. at *53, *62, *Musso*, 2020 WL 4169380; *Apple Annie*, 82 Cal.App.5th at 924, fn. 2. Several of Fireman's Fund's federal cases are similarly distinguishable.[18]

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[18] *See, e.g., Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.* (9th Cir. 2021) 15 F.4th 885, 892 (rejecting same theory alleged by policyholder whose policy contained same virus exclusion as in *Musso*); *Rialto Pockets, Inc. v. Beazley Underwriting Ltd.* (9th Cir., Apr. 20, 2022) 2022 WL 1172134, at *1(rejecting same

As *Marina Pacific* recognizes, these cases are "readily distinguishable" from cases like the present one, which alleges that the *COVID-19 virus* caused direct physical loss or damage, rather than an order untethered to loss or damage from the virus. 81 Cal.App.5th at 110, 111, fn. 13. Other courts have likewise expressly distinguished this theory that *an order* causes physical loss from the separate argument that *the virus* causes physical loss or damage.[19]

In fact, *Apple Annie* recognized that the *Marina Pacific* plaintiff had "pled the element missing" from other cases by averring that the presence of the virus on site caused insured losses. 82 Cal.App.5th at 933–934; *see also id.* at 936 (plaintiff conceded that *Marina Pacific* "does not directly implicate its theory of coverage") (brackets and internal quotations omitted). Indeed, the same panel that issued *Apple Annie* later reversed a superior court order sustaining a demurrer without leave to amend in another COVID-19 insurance coverage case, holding that the court should have allowed the plaintiff to amend its

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theory because the complaint alleges its losses were "caused by the Covid-19 Governmental Orders").

[19] *See Wakonda Club v. Selective Ins. Co. of Am.* (Iowa 2022) 973 N.W.2d 545, 553 (insured's "concession" that COVID-19 virus was never on its premises removes "any potential physical element to the loss of the use of its property, distinguishing its claim" from cases holding that insured properly alleged that COVID-19 virus caused physical loss or damage); *Hill & Stout, PLLC v. Mut. of Enumclaw Ins. Co.* (Wash. Aug. 25, 2022) 2022 WL 3651805, at *4, fn. 4 (declining to decide the issue of whether the COVID-19 virus causes physical loss or damage because plaintiff did not advance that theory).

complaint to plead the existence of direct physical loss or damage in the community and on site. *Tarrar*, 2022 WL 4377163, at *2.

Thus, the cases that Fireman's Fund relies upon are not relevant to Saddle Ranch's claim.

V. Saddle Ranch Alleged A Civil Authority Claim

Although Saddle Ranch's allegations are not based on the theory that the government orders caused "direct physical loss or damage" to property, Saddle Ranch does allege a claim for coverage under a separate insuring agreement in the Fireman's Fund policy, providing limited coverage in the event a civil authority issues an order prohibiting the public from accessing Saddle Ranch's premises. Unlike the general business income coverage, which pays for lost business income when a force or substance physically comes into contact with the insured's own business property, and as a result, the insured cannot run its business, the civil authority coverage pays for lost business income when the same type of force or substance makes contact with other property (thus causing "direct physical loss or damage") and a civil authority prohibits access to Saddle Ranch's insured property arising from that damage to other property.

In addition to its erroneous argument that the COVID-19 virus does not cause "direct physical loss or damage," Fireman's Fund makes two incorrect arguments as to why the civil authority coverage would not apply, contending that Saddle Ranch did not allege a causal connection between a "direct physical loss or damage" and the civil authority order, and also did not allege that the order caused a "prohibition" of access. Neither argument has merit.

A. The Orders Were Issued Due To Physical Loss Or Damage To Property Caused By The Virus

Saddle Ranch alleges that the California and Arizona orders were "issued as *a result of* covered causes of loss and the physical loss and damage to properties, including the insured properties ...." AA 023–024 (emphasis added). Saying nothing about that allegation, Fireman's Fund contends that Saddle Ranch failed to allege a "causal link between any direct physical loss or damage and the orders in question." Resp't Br. at 37. It quotes *United Talent* and *Inns by the Sea* for the notion that the orders were issued in response to a public health crisis from a pandemic rather than damage to property near Saddle Ranch premises. Resp't Br. at 38. This is incorrect for three reasons.

First, Fireman's Fund effectively asks this Court to make factual determinations about the basis for the orders at the pleading stage. The Court cannot do so because Saddle Ranch did not plead that the orders were issued solely as a result of a public health crisis. Nor would it help Fireman's Fund if the text of the orders stated just that because 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) (overruled on other grounds); *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.").

Second, even if Fireman's Fund could use the orders themselves to ascertain their basis, coverage does not turn solely

on what orders recite. The California Supreme Court addressed the intersection of insurance coverage and the reasons for the issuance of government orders in *AIU Insurance Co. v. Superior Court* (1990) 51 Cal.3d 807. In that case, the Supreme Court considered whether an environmental agency order had been issued "because of ... property damage," which was a requirement for coverage under the pertinent insurance policies. The Court rejected an insurer argument that government orders requiring cleanup of pollution were not issued "because of ... property damage" if "motivations other than protection of property—for example, protection of the health of persons living near hazardous waste sites—also contributed to the agencies' pursuit of statutory relief." *Id.* at 842–843. The Supreme Court held that this argument was "misplaced" because the insurance policy turned not on the "dominant motive" of the government agencies, but on the "event precipitating their legal action," which was "contamination of property." *Id.* at 843. "The costs that result from such action are therefore incurred 'because of' property damage." *Id.*[20]

Just as in *AIU*, Saddle Ranch alleged that the precipitating event for the order was to prevent people from damaging property, among other purposes. Indeed, authorities assumed that fomite transmission of COVID-19 was the primary method of transmission when the orders were issued.[21] And in assessing a

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[20] None of the parties in *Inns by the Sea* or *United Talent* raised this issue so neither court considered the argument.

[21] *See supra* footnote 13.

demurrer, any allegations in the pleadings must be "liberally construed," which includes "facts that reasonably may be inferred" from those allegations. *Ivanoff v. Bank of Am. N.A.* (2017) 9 Cal.App.5th 719, 725–726; *Evans*, 38 Cal.4th at 20); *see also* Code. Civ. Proc., § 452.

Thus, even if a motive (or the dominant motive) of issuing the orders at issue in this case was to protect people—so they would not come into contact with air and surfaces that could kill them—the orders still arose from physical loss or damage to property pursuant to *AIU* and pre-pandemic law construing civil authority provisions. *See 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"). Indeed, often the purpose of a civil authority order prohibiting access to an insured's property because of harm to *other property* is to protect the public health or safety (for instance, when access to insured property is prohibited due to a fire at another property). Additionally, discovery can reveal a basis for the order that is not apparent from the order's text.[22]

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[22] *See Assurance Co. of Am. v. BBB Serv. Co.* (Ga.Ct.App. 2003) 593 S.E.2d 7, 9 (policyholder showed in discovery through photos and testimony that hurricane damage was "a basis" for evacuation order in Florida that triggered coverage); *Narricot Indus.,* 2002 WL 31247972, at *5 (city orders "resulted from hurricane and flood," triggering civil authority coverage,

Third, there is no requirement in the policy that the relevant government orders must identify specific property that suffered physical loss or damage. Prior to 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. For instance, a Georgia appellate court concluded that an order requiring evacuation because of an approaching hurricane in Florida was issued because of property damage that the hurricane caused throughout the Bahamas. *See Assurance Co. of Am. v. BBB Serv. Co.* (Ga.Ct.App. 2003) 593 S.E.2d 7, 8–9; *see also Pathology Lab'y Inc. v. Mt. Hawley Ins. Co.* (W.D.La. 2021) 552 F.Supp.3d 617, 620, 624–625 (civil authority coverage triggered based on city-wide closure and evacuation orders because of Hurricane Laura).[23]

"[r]egardless of whether" city issued order "to prevent hurricane and flood damage or alleviate the perils caused by hurricane and flood damage").

[23] Fireman's Fund relies upon an out-of-state case predicting Louisiana law that, in turn, relied upon a case holding that an order requiring the closure of the Washington, D.C. airport on September 11, 2001 did not meet that policy's more stringent requirement that the civil order be "a direct result of damage to adjacent premises" because the airport was closed before the Pentagon was struck. Resp't Br. at 37–38 (citing *Dickie Brennan & Co., Inc. v. Lexington Ins. Co.* (5th Cir. 2011) 636 F.3d 683, 686–687). But that case is distinguishable because the damage to the Pentagon had not yet occurred and therefore the order could not be the "direct result" of such damage. *Dickie Brennan*, 636 F.3d at 686. Here, Saddle Ranch alleges that the COVID-19

Saddle Ranch has alleged that the orders were due to physical loss or damage from the COVID-19 virus, including properties within one mile from its restaurants such as nursing and elder care facilities, medical providers, and sports stadiums. AA006–007. Since the orders spanned these kinds of facilities, and others in California and Arizona, Saddle Ranch's allegations are sufficient.

B. The Orders Prohibited Access to Saddle Ranch's Restaurants

Saddle Ranch has also expressly alleged that the California and Arizona orders prohibited access to its properties: "These civil authority orders ... have barred access to the Plaintiffs' Saddle Ranch Chop House locations." AA024. In particular, the order closed the bars at the insured locations. AA023–024. Fireman's Fund asserts that Saddle Ranch has not alleged the order prohibited access by drawing a distinction between an order requiring Saddle Ranch to close and an order prohibiting access. But an ordinary layperson would understand that an order instructing Saddle Ranch to close its doors amounts to prohibiting access to its premises. Such an understanding would be consistent with the plain meaning of prohibit: "to prevent from doing something" or "to forbid by authority." *Prohibit*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/prohibit. Fireman's Fund contends that "prohibit" means to completely bar access to property, Resp't Br.

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virus had already caused physical loss or damage to property and the orders were issued thereafter.

at 38, but no such requirement is present in the policy. And, if any doubt were to exist, the Court must construe all inferences from Saddle Ranch's allegations in favor of stating a claim. *Perez v. Golden Empire Transit Dist.* (2012) 209 Cal.App.4th 1228, 1238.

Indeed, the Supreme Court of the United Kingdom held that a government order that prohibited insured restaurants from offering on-site dining prevented access to the insured properties, even though the restaurants could still offer take-out. *See Fin. Conduct Auth. v. Arch Ins. (UK) Ltd.* [2021] UKSC 1, ¶ 152, https://www.supremecourt.uk/cases/docs/uksc-2020-0177-judgment.pdf (finding a "prevention of access to (and inability to use) a discrete part of the premises, namely the dining area of the restaurant, and prevention of access to (and inability to use) the premises for the discrete business activity of providing a dining in service").

VI. Saddle Ranch Alleged Facts Establishing Coverage And Should Be Given Leave To Amend For More Allegations

Even if the lower court believed that Saddle Ranch needed to allege physical loss or damage or other allegations with more specificity, it erred by refusing to give Saddle Ranch the opportunity to amend its original complaint. AA367 (order sustaining the demurrer without leave to amend); Opening Br. at 2 ("it's not sounding to me like plaintiff could amend to state a cause of action" (quoting RT 9)).

As the Court of Appeal recently ruled in *Tarrar*, it is an abuse of discretion to deny leave to amend when there is only an

original complaint, as there is for Saddle Ranch, and the complaint does not show it is "incapable of amendment" on its face. *Tarrar*, 2022 WL 4377163, at *2. The court also noted that "leave to amend is appropriate when issues," such as COVID-19 appellate law, "are developing." *Id.*; *see also Contreras v. Blue Cross of Cal.* (1988) 199 Cal.App.3d 945, 949 (proposed amended complaint was "a proper attempt to amend to state valid causes of action consistent with a complex and developing field of law"); *Cryoport Sys. v. CNA Ins. Cos.* (2007) 149 Cal.App.4th 627, 633 ("as a result of the new law's effect on [plaintiff's] case, [plaintiff] was specifically given the opportunity to amend its complaint"). As *Tarrar* makes clear in remanding the case with instructions to grant the plaintiff leave to amend, complaints based on the COVID-19 virus causing physical loss or damage when present on property are not "incapable of amendment." *See* 2022 WL 4377163, at *2.

Just like the plaintiff in *Tarrar*, Saddle Ranch has "maintained its request for leave to amend in its briefing [], in both its opening brief and reply briefs" on appeal. 2022 WL 4377163, at * 2; *see* Opening Br. at 53–55; Reply Br. at 38. Also like the *Tarrar* plaintiff, Saddle Ranch has set forth what it would allege in amended complaint. Saddle Ranch stated it could allege that "it is likely that customers, employees, and/or other visitors to the insured properties were infected with COVID-19 and thereby infected the insured properties with the virus." Opening Br. at 54.

Saddle Ranch could also amend to further clarify its allegations on the nature of the virus, such as including its discussion on how "viruses and communicable diseases is that they make surfaces, air, property, and the environment, and everything they come into contact with dangerous vectors for the disease." *Id.* at 32; Reply Br. at 25, fn. 2 ("At trial, Appellants can call expert witnesses who will be able to testify regarding the physical impact of COVID-19 on surfaces and other property."). Allowing Saddle Ranch to amend with these allegations, and others, will make clear that Saddle Ranch's case falls squarely in line with the allegations in *Marina Pacific*.

Similarly, if the Court determines that the "communicable disease" coverage requires an order specific to Saddle Ranch's property, the Court should give Saddle Ranch leave to amend so it can clarify the nature of the orders it alleges caused its premises to be "evacuated, decontaminated, or disinfected," as *Amy's Kitchen* did for its plaintiff. 2022 WL 4875656, at *6.

CONCLUSION

For the reasons discussed here and in Saddle Ranch's briefing, Saddle Ranch has alleged "physical loss or damage" sufficient to trigger its various coverage grants. It therefore was error for the Superior Court to sustain the insurers' demurrers without leave to amend, and this Court should reverse the judgment below.

DATE: October 10, 2022 Respectfully submitted,

COVINGTON & BURLING LLP

By: */s/ Rani Gupta*
Rani Gupta

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CERTIFICATE OF COMPLIANCE

The foregoing Amicus Curiae Brief contains 11,276 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: October 10, 2022 Respectfully submitted,

COVINGTON & BURLING LLP

By: */s/ Rani Gupta*
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PROOF OF SERVICE

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 St., Suite 5400, San Francisco, CA 94105. On October 10, 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] *AMICUS CURIAE* BRIEF 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 October 10, 2022; and

Hon. Steven Kleifield
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[x] (BY MAIL) By causing the document to be sealed in an envelope addressed to the recipients below, 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 October 10, 2022.

JEANETH DECENA