No. D079927

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

BEST REST MOTEL INC. D/B/A HOLIDAY INN EXPRESS OLD TOWN,

Plaintiff and Appellant,

v.

SEQUOIA INSURANCE COMPANY

Defendant and Respondent.

On Appeal from the Superior Court for
San Diego County
Hon. Eddie C. Sturgeon
Case No. 37-2020-0001569

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 Best Rest Motel Inc. d/b/a Holiday Inn Express Old Town in its appeal of an adverse judgment in its insurance coverage lawsuit against Respondent Sequoia 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

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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 Best Rest Motel.

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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.

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

Policyholders across the country such as Best Rest 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

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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 may 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.

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.

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DATE: Sept. 28, 2022 Respectfully submitted,

COVINGTON & BURLING LLP

By: */s/ Rani Gupta*
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[PROPOSED] *AMICUS CURIAE* BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF APPELLANT

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Ben Zigterman, *Texas Jury Awards Baylor Med School $48M in a COVID First*, LAW360 (Sept. 2, 2022), https://www.law360.com/insurance-authority/articles/1527021/texas-jury-awards-baylor-med-school-48m-in-a-covid-first 25

Jon B. Eisenberg et al., *California Practice Guide: Civil Appeals and Writs* § 8:202 (The Rutter Group 2021) 35

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INTRODUCTION AND SUMMARY OF ARGUMENT

Best Rest's property insurance policy provides coverage if the motel suffers "direct physical loss of or damage to" insured property. 7 CT 001339. In its opposition to summary judgment, Best Rest offered extensive evidence that the COVID-19 virus had repeatedly caused direct physical loss or damage to its property. That evidence included employee declarations, deposition testimony, and positive tests documenting the actual presence of the virus on its property; detailed testimony from a virology expert explaining how the virus's presence made spaces within the motel dangerous and unusable; and proof that Best Rest was in fact unable to use those affected spaces, sometimes for as long as a week to ten days.

This evidence—that the virus's presence physically changed Best Rest's property, making it unfit for its intended purpose—must be accepted as true on summary judgment. *See* Code Civ. Proc., § 437c(c). It also is precisely the type of showing that has long been understood to support a finding of "direct physical loss or damage" under a property insurance policy. This is seen in a long line of cases involving other "noxious substances" that, as this Court held, are just "like" the COVID-19 virus in their ability to harm property. *See Inns by the Sea v. Cal. Mut. Ins. Co.* (2021) 71 Cal.App.5th 688, 703. Yet despite this extensive evidence creating a triable issue of material fact concerning the presence of direct physical loss or damage on site, the superior court held—without referencing *any* of Best Rest's evidence about the virus's harm, in contravention of Code of Civil Procedure Section 437c(g)—that the virus does not cause physical

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loss or damage. *See* 8 CT 001664–667. The court's conclusion does not hold up to scrutiny, and it is particularly improper for the court to make such a determination in the face of conflicting evidence at summary judgment.

This Court should reverse the superior court's judgment. Against Best Rest's showing that the virus did cause physical loss or damage to its property, Sequoia has offered no evidence that establishes it is entitled to summary judgment. Rather than citing to evidence in the record, Sequoia relies upon cases decided at the pleading stage where the insured, unlike Best Rest, did not allege that the virus was present and had physically harmed its property. Sequoia also relies on a faulty argument from the policy's "Period of Restoration" provision, which has no bearing on whether Best Rest has shown "physical loss of or damage to" its property. For all of these reasons, the trial court erred in granting summary judgment on the ground that the COVID-19 virus did not, or cannot, cause "direct physical loss or damage."

ARGUMENT

I. The Superior Court Disregarded Evidence Establishing A Dispute Of Material Fact Regarding Whether The COVID-19 Virus Caused "Direct Physical Loss Or Damage."

This Court found in *Inns by the Sea* that "the COVID-19 virus—like smoke, ammonia, odor, or asbestos"—"is a physical force," capable of "creat[ing] physical loss or damage in the same way some chemical contaminant might have." 71 Cal.App.5th at 703, 705. Consistent with *Inns by the Sea*, Best Rest introduced admissible expert and fact evidence in opposition to Sequoia's summary judgment motion that the COVID-19 virus affects

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property in the same way as other noxious substances that have been found to trigger insurance coverage. Yet the superior court, after overruling Sequoia's objections to Best Rest's evidence, disregarded the evidence in the record that created a triable issue of material fact, basing its ruling instead on facts recited in three federal trial court cases. This was error.

A. *Inns* Recognized That The COVID-19 Virus Can Cause "Physical Loss Or Damage."

In *Inns by the Sea*, this Court analogized the COVID-19 virus to "noxious substances and odors" that courts have found for decades can cause direct physical loss or damage as those words are used in property insurance policies like Best Rest's, because they "rendered real property uninhabitable or unable to be used as intended." 71 Cal.App.5th at 701.

Inns cited to *Oregon Shakespeare Festival Association v. Great American Insurance Co.* (D.Or. June 7, 2016) 2016 WL 3267247, which held that wildfire smoke caused "physical loss or damage to property" when it infiltrated the insured theater. *Id.* at *9 (vacated by stipulation). Though the smoke did not structurally damage the property and was "invisible to the naked eye," the smoke contained an "unhealthy level of particulates," making the air dangerous to breathe and therefore rendering the insured property "unusable for its intended purpose." *Id.* at *5, *9.

In *Gregory Packaging, Inc. v. Travelers Property & Casualty Company of America*, another pre-pandemic example cited in *Inns*, an ammonia release on the property caused there to be an "unsafe amount of ammonia" in the air. (D.N.J. Nov. 25,

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2014), 2014 WL 6675934, at *2, *6. The court granted summary judgment for the insured, holding that "there is no genuine dispute that the ammonia release physically transformed the air within [the insured's] facility so that it contained an unsafe amount of ammonia or that the heightened ammonia levels rendered the facility unfit for occupancy until the ammonia could be dissipated," thus constituting insured "physical loss or damage." *Id.* at *6–7.[2]

Other cases recognize that viruses can cause insured physical loss or damage to property. *See Curtis O. Griess & Sons, Inc. v. Farm Bureau Insurance Co. of Nebraska* (Neb. 1995) 528 N.W.2d 329, 334 (insurer acknowledged that the insured had "sustained a physical loss" when its pigs were infected by the pseudorabies virus). The same is true of other bodily substances. A Pennsylvania appellate court held that "the splattering of human tissue, blood and other liquids" constituted "direct physical loss" to a rental property, where the insured had to respond with "cleanup" and could not rent the property for a time. *Weisman v. Green Tree Ins. Co.* (Pa.Super.Ct. 1996) 670

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[2] *Inns* cited a number of additional cases holding that "noxious substances" constituted physical loss or damage. *See Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.* (3d Cir. 2002) 311 F.3d 226 (asbestos); *Matzner v. Seaco Ins. Co.* (Mass.Super.Ct., Aug. 12, 1998) 1998 WL 566658 (carbon monoxide); *Farmers Ins. Co. of Oregon v. Trutanich* (Or.App. 1993) 858 P.2d 1332 (methamphetamine odor); *Mellin v. Northern Security Ins. Co., Inc.* (N.H. 2015) 115 A.3d 799 (urine odor); *Widder v. Louisiana Citizens Property Ins. Corp.* (La.Ct.App. 2011) 82 So.3d 294 (lead contamination); *TRAVCO Ins. Co. v. Ward* (E.D.Va. 2010) 715 F.Supp.2d 699 (sulfuric gas).

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A.2d 160-161; *id.* at 162 (Johnson, J., dissenting) (describing facts).

These cases and others like them involve harmful substances that enter property from some external source. The substance—although it may be invisible—makes contact with the air or surfaces within the property. And while the substance is present, the property is unfit for its normal business purpose until the substance dissipates or is removed.

B. Other Courts Have Held That The COVID-19 Virus Can Cause "Physical Loss Or Damage."

Although this Court did not have the opportunity to decide whether the virus had actually caused physical loss or damage under the facts alleged in *Inns*—the case was decided at the demurrer stage and on other grounds[3] —other California appellate courts have since confirmed that the harm caused by the COVID-19 virus squarely falls within the definition that the Court of Appeal applied to a more limited insuring agreement in certain property insurance policies. That limited insuring agreements covers "accidental direct physical loss," which refers to "an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly

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[3] The plaintiff in *Inns* pleaded that *government orders* had required the property to close and remain closed during the entire relevant period, before any physical loss or damage from the COVID-19 virus had occurred. 71 Cal.App.5th at 703. Thus, the Court explained that the Inns could not "reasonably allege that the presence of the COVID-19 virus on its premises is what *caused* the premises to be uninhabitable or unsuitable for their intended purpose." *Id.*

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upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so." *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.* (2010) 187 Cal.App.4th 766, 779.[4]

In *Marina Pacific v. Fireman's Fund Insurance Co.* (2022) 81 Cal.App.5th 96, the Court of Appeal held that an insured seeking coverage based on the virus's presence on site had "unquestionably pleaded direct physical loss or damage to covered property within the definition articulated in *MRI Healthcare*—a distinct, demonstrable, physical alteration of the property." *Id.* at 109. Even more recently, in *Tarrar Enterprises, Inc. v. Associated Indemnity Corp.* (Cal.Ct.App. Sept. 22, 2022) 2022 WL 4377163, a different Court of Appeal reversed a trial court order denying the insured leave to amend to allege that the COVID-19 virus had caused physical loss or damage to its property, holding that the denial was an abuse of discretion. Because the Court would not have allowed leave to amend if doing so would have been futile, *Tarrar* again confirms that the COVID-19 virus *can* cause physical loss or damage as a matter of law. *See id.* at *2.

These California appellate decisions are consistent with recent high court and appellate decisions from other states. In *Huntington Ingalls Industries, Inc. v. Ace American Insurance Co.* (Vt., Sept. 23, 2022) 2022 WL 4396475, the Supreme Court of

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[4] The Sequoia policy, which omits "accidental" from the insuring agreement and adds "or damage," is necessarily broader than the *MRI Healthcare* policy's coverage grant.

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Vermont cited *Marina Pacific* with approval and held that "the complaint plausibly alleges 'direct physical damage'" where the insured alleged that the virus was present through infected individuals and physically altered property. *Id.* at *13. The court further stated it was "inclined to allow experts and evidence to come in to evaluate the validity of insured's novel legal argument before dismissing this case based on a layperson's understanding of the physical and scientific properties of a novel virus." *Id.* at *12. The Supreme Court indicated that such a ruling was consistent with Vermont's notice pleading standard, which—like California's notice pleading standard—favors resolution on the merits once the parties have had the opportunity to introduce evidence. *Id.* at *13; *see also Doheny Park Terrace Homeowners Ass'n, Inc. v. Truck Ins. Exch.* (2005) 132 Cal.App.4th 1076, 1099 (California applies only a "fair notice test" to pleadings); *Maynard v. Brandon* (2005) 36 Cal.4th 364, 371 (with regard to pleadings, "sound policy favors the determination of actions on their merits").

And in *Cajun Conti LLC v. Certain Underwriters at Lloyd's, London* (La.Ct.App. June 15, 2022) 2022 WL 2154863, a Louisiana appellate court held that "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." *Id.* at *8.

These authorities from California and other states' appellate courts—issued subsequent to the superior court's summary judgment decision—confirm that the superior court

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erred in ruling that the COVID-19 virus cannot cause direct physical loss or damage. *See Tarrar*, 2022 WL 4377163 at *1 (recognizing that briefing from November 2021 "has been overtaken by subsequent events"—namely, multiple California Courts of Appeal opinions clarifying the issues surrounding "physical loss or damage").

C. Best Rest Submitted Evidence Demonstrating That The Virus Renders Property Unusable For Normal Business Purposes.

Consistent with *Inns* and other California appellate authority, Best Rest submitted substantial evidence below that the COVID-19 virus harms property in much the same way as other noxious substances that have been found to trigger "direct physical loss or damage" coverage under property insurance policies.

Best Rest's evidence showed that infected individuals entered its motel on numerous occasions, as demonstrated by multiple confirmed positive cases on its property. *See* 6 CT 00116–118 (Declaration of Best Rest General Manager Yasmine Zaya, testifying to and detailing numerous confirmed cases of the COVID-19 virus on Best Rest's premises); 5 CT 000959 (Declaration of Best Rest President Evan Salem, testifying that multiple infected people were present on Best Rest's premises, including himself).

Best Rest's virology expert then testified that when infected individuals enter a space, they expel virus-containing droplets and aerosols into the air by "breathing, coughing, sneezing, talking, and singing," and spread the virus onto the surfaces by

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touch. *See* 5 CT000902, CT00906. Spaces that are filled with the COVID-19 virus are dangerous to use, because people who breathe air or touch surfaces contaminated with the virus may themselves become sick. *See* 5 CT 000902–906. Thus, Best Rest introduced evidence showing that the presence of the COVID-19 virus made property unusable for its normal business purposes, in the same way that smoke, ammonia, or other harmful substances do. This change to the property constitutes physical loss or damage even under more narrowly worded insurance policies. *See MRI Healthcare*, 187 Cal.App.5th at 779.

D. The Superior Court Improperly Resolved Disputed Fact Issues In Sequoia's Favor.

Despite Best Rest's substantial evidence that the virus was present and harmed its property, the superior court stated simply that "[t]his court disagrees" that the "presence of COVID-19 at a property is sufficient to trigger coverage when direct physical loss of or damage to property is required under a policy." 8 CT 001666.

As the source for its disagreement, the court did not cite deficiencies in Best Rest's evidence, or suggest that Best Rest's expert testimony was inadmissible. *See, e.g., Garrett v. Howmedica Osteonics Corp.* (2013) 214 Cal.App.4th 173, 187–89. Nor could it: the court overruled all objections to Best Rest's evidence (*see* 8 CT 001668), a ruling that Sequoia does not challenge on appeal. Instead of basing its decision on "the entire record," as our Supreme Court has instructed, *Regents of the Univ. of Cal. v. Super. Ct.* (2018) 4 Cal.5th 607, 618, the superior

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court disregarded the record in favor of purported "facts" recited in three federal trial court cases decided at the pleading stage.

The Court of Appeal criticized this type of judicial fact determination in *Marina Pacific*, which held that whether the virus could cause physical loss or damage must be decided with "evidence." 81 Cal.App.5th at 114. *Marina Pacific* expressly disagreed with *United Talent Agency*—where, in an appeal following an order sustaining a demurrer, the appellate court ruled on the basis of facts recited in other cases and did not accept the allegations in the complaint as true, as a court is required to do at the demurrer stage. *Id.* at 111 (citing *United Talent Agency v. Vigilant Ins. Co.* (2022) 77 Cal.App.5th 821, 838). *United Talent* reached the conclusion that the COVID-19 virus could not cause "direct physical loss or damage" by substituting its own "general belief" about the virus's properties for the insured's allegations. *Id.* at 111; *see also Tarrar*, 2022 WL 4377163, at *1 (judgment "based on the trial court's disbelief" is improper (quoting *Marina Pacific*, 81 Cal.App.5th at 114)).

The superior court's ruling here was based on the same type of improper judicial fact determination that *Marina Pacific* repudiated, except that here, the court's ruling was based on a record that includes actual evidence, rather than mere allegations. For example, the superior court quoted statements from one trial court that "the virus harms human beings, not property." 8 CT 001666 (quoting *Wellness Eatery La Jolla LLC v. Hanover Ins. Grp.* (S.D.Cal. Feb. 3, 2021) 517 F.Supp.3d 1096, 1106). But this assertion ignores the testimony of Best Rest's

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virology expert, who explained that the virus harms people *because* it first harms property, in that can be transmitted through contaminated air and surfaces. *See* 5 CT 000904 ("The virus is indirectly transmitted when a host touches a physically damaged object or surface that is infectious with the SARs-CoV-2 virus…."); 5 CT 00902 ("[S]mall droplets [containing the COVID-19 virus] remain in the air as an aerosol…infecting people directly through contact with, and inhalation of, the aerosol.").

Likewise, the superior court relied on another federal court's statement that "it would strain credulity" to accept that a surface covered in "COVID-19 particulates" had suffered physical loss or damage. 8 CT 001666–667 (quoting *Unmasked Mgmt., Inc. v. Century-Nat'l Ins. Co.* (S.D. Cal. 2021) 514 F.Supp.3d 1217, 1225–26). But whether another court is "credul[ous]" from its review of the pleadings—all that was before the courts in the cases that the superior court cited—has no bearing on whether a party has created a triable issue of material fact at summary judgment, where a court must accept the opposing party's evidence as true. *See, e.g., Horn v. Cushman & Wakefield Western, Inc.* (1999) 72 Cal.App.4th 798, 805.

Worse, the facts recited in the opinions on which the superior court relied were not in the record on summary judgment, and they are not the type of fact that can be judicially noticed. *See, e.g., O'Neill v. Novartis Consumer Health, Inc.* (2007) 147 Cal.App.4th 1388, 1405; *Lockley v. Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 885.

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It was particularly inappropriate for the superior court to rely on another trial court's unsupported credulity conclusions about surface damage when the record had ample evidence of how the virus *does* harm surfaces. This evidence included imagery "of the virus on a surface, made possible with electron microscopy," and expert testimony that "the virus can survive on hard and soft surfaces for a period of time ranging from a few hours to a few days," and that "[m]erely cleaning surfaces may reduce but does not altogether eliminate the risk of SARS-CoV-2 transmission." 5 CT 000903–904.

Indeed, Best Rest's evidence showed that the COVID-19 virus is far more deadly than other harmful substances such as invisible smoke particles and molecules of ammonia gas, which have been found to cause physical loss or damage because they affect property in the same way that the COVID-19 virus does—by physically affecting the air (even at a microscopic level) so that the property is no longer safe for normal use. *See* 5 CT 000905 ("If the space or object is used prior to remediation, there will be more COVID-19 cases and deaths.").

Sequoia introduced no contrary evidence in the record, and the superior court's findings were not the type of facts that can be the subject of judicial notice, given the virologist's contrary evidence. *See* Evid. Code, § 452; Code Civ. Proc., § 437c(c) ("[T]he court shall consider all of the evidence set forth in the papers, except that to which objections have been made and sustained by the court…."). Because summary judgment must be supported by evidence in the record, the superior court's decision was error.

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See Jameson v. Desta (2018) 5 Cal.5th 594, 609 & fn. 11; *West v. Sundown Little League of Stockton, Inc.* (2002) 96 Cal.App.4th 351, 363.

At minimum, there are disputed fact issues that "may not be taken from the trier of fact and resolved by the court itself in the defendants' favor and against the plaintiff." *Aguilar v. Atl. Richfield Co.* (2001) 25 Cal.4th 826, 857; *see also Johnson v. Am. Standard, Inc.* (2008) 43 Cal.4th 56, 64 (where the defendant has moved for summary judgment, courts "liberally construe plaintiff's evidentiary submissions and strictly scrutinize defendant's own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiff's favor"). Yet that is exactly what the superior court did.[5]

II. Sequoia's Nonphysical "Loss Of Use" Cases Are Inapposite.

Sequoia asks this Court to affirm the decision below based on federal court cases addressing a claim for mere "loss of use" of property absent any presence of the virus at the property or in

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[5] That trial is needed to resolve fact disputes about whether the virus actually caused physical loss or damage to Best Rest's property is underscored by the recent jury verdict in *Baylor College of Medicine v. XL Insurance America, Inc.* (Harris Cnty. Dist.Ct.) Case No. 2020-53316. After weighing the parties' evidence, the jury concluded that the COVID-19 virus had in fact caused physical loss or damage, and awarded damages to the insured for its business interruption losses. *See* Ben Zigterman, *Texas Jury Awards Baylor Med School $48M in a COVID First*, LAW360 (Sept. 2, 2022), https://www.law360.com/insurance-authority/articles/1527021/texas-jury-awards-baylor-med-school-48m-in-a-covid-first.

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the vicinity. *See* Respondent's Br. at 51. But in support of its argument, Sequoia primarily cites cases involving claims based solely on government orders untethered to direct physical loss or damage caused by the COVID-19 virus.[6] Sequoia cites these inapplicable cases for the proposition that "'loss of use' without actual, perceptible, physical alteration of property is insufficient" for coverage." *Id.* Sequoia's argument is irrelevant here, since Best Rest *did* introduce evidence showing that the virus was present and physically harmed its property. Thus, neither Sequoia's "loss of use" cases nor the argument it derives from them apply to Best Rest's claim.

Best Rest's policy covers "direct physical loss or damage" to property. As this Court recognized in *Inns*, this policy language provides coverage for two different kinds of "physical" harms:

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[6] *See Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.* (9th Cir. 2021) 15 F.4th 885, 889 ("Mudpie did not allege that COVID-19 was present in its storefront premises during the relevant period."); *O'Brien Sales & Mktg., Inc. v. Transp. Ins. Co.* (N.D. Cal. 2021) 512 F.Supp.3d 1019, 1023–24 (Insured "has not…alleged COVID-19 was present in the covered premises"); *Plan Check Downtown III, LLC v. AmGuard Ins. Co.* (C.D. Cal. 2020) 485 F.Supp.3d 1225, 1229 ("Plan Check concedes that its properties did not suffer any 'physical damage.'"). Other cases that Sequoia cites are also distinguishable because the plaintiffs did not allege that the virus was present at insured property. *See Kevin Barry Fine Art Assocs. v. Sentinel Ins. Co., Ltd.* (N.D. Cal. 2021) 513 F. Supp. 3d 1163, 1170 (Plaintiff "has not alleged that COVID-19 has actually damaged its property."); *Wellness Eatery La Jolla LLC v. Hanover Ins. Grp.* (S.D. Cal. 2021) 517 F.Supp.3d 1096, 1105–06 ("Plaintiffs do not plausibly allege that that their business income losses were due to the presence of COVID-19 on their property.").

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physical loss and physical damage. *See Inns*, 71 Cal.App.5th 688, 699 (the insured "must establish that *either* 'direct physical…damage to' property at the premises, or 'direct physical loss of' property at the premises caused its suspension of operations" (alterations in original)). Coverage for physical damage is triggered where the property is injured in some way—for example, by being covered in a harmful substance, as in the pre-pandemic "noxious substances" cases discussed above. *Id.* at 701, 706 fn. 19. Coverage for physical loss is triggered in other situations where, *inter alia*, the insureds lose the use of their property due to the presence of a fortuitous external physical peril. *See id.* at 706–707.

Courts and litigants have disagreed about the degree of "physicality" that is required to trigger coverage for physical loss. Pre-pandemic California appellate decisions held that none at all is required. 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

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or damage had occurred to an unsafe but structurally undamaged house.

Even in pandemic-era cases, courts found physical loss when the deprivation is caused by some "physical impact on the property." *Inns*, 71 Cal.App.5th at 706. Here, Best Rest offered evidence that the COVID-19 virus—which this Court characterized as a "physical force" in *Inns*, *id.* at 703—harmed its property, making it unfit for use. *See supra* pp. 20–21. As a result, the superior court should have concluded that Best Rest offered sufficient facts to trigger coverage under its property policy, regardless of whether the virus's harm is considered physical loss or physical damage.

Because Best Rest claims that the virus's physical presence caused its loss, its claim is different from many others in which the insured has sought coverage for loss of use solely as a result of government orders that prevented use of the insured property, untethered from direct physical loss or damage caused by the virus.

For example, Sequoia relies upon *Musso & Frank Grill Co. v. Mitsui Sumitomo Insurance USA Inc.* (2022) 77 Cal.App.5th 753. But *Marina Pacific* correctly distinguished *Musso & Frank* because it "involved allegations of loss of use of insured property as a result of government closures to limit the spread of COVID-19, rather than, as expressly alleged here, a claim the presence of the virus on the insured premises caused physical damage to covered property." 81 Cal.App.5th at 110. In *Musso & Frank*, the insured alleged that the virus was *not* present "on its

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premises." Compl. ¶ 59, *Musso & Frank*, 77 Cal.App.5th 753. Instead, the insured—whose policy contained a virus exclusion not present in Best Rest's policy—contended only that the government orders caused "direct physical loss or damage." 77 Cal.App.5th at 757, 760. Therefore, *Musso & Frank*'s statement about "coverage for losses incurred by reason of the pandemic," *id.* at 760, refers only to its rejection of the inapplicable legal theory that mere loss of use of property from a government order—or the pandemic at large—constitutes "direct physical loss or damage" to property.

Similarly, in *Apple Annie, LLC v. Oregon Mutual Insurance Co.*, (Cal.Ct.App. Sept. 2, 2022) 2022 WL 4007516, the insured did not allege that the COVID-19 virus was present on its property, but instead argued that government orders caused "direct physical loss or damage" by merely depriving the insured of use of the insured property. *Id.* at *2. The parties in *Apple Annie* therefore recognized that *Marina Pacific* was irrelevant because it held that the COVID-19 virus at the insured property (rather than an order) *can* cause direct physical loss or damage.[7] The same appellate court in *Tarrar* confirmed the crucial distinction between COVID-19 insurance claims that are based on the physical loss or damage caused by the virus and those that

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[7] The insured in *Apple Annie* admitted that *Marina Pacific* "does not directly implicate its theory of coverage," 2022 WL 4007516, at *10 (brackets omitted), and the insurer acknowledged that *Marina Pacific*—unlike *Apple Annie*—"illustrates what kind of allegations could support a legally viable claim for coverage at the pleading stage," Respondent's Suppl. Br. at 6, *Apple Annie*, 2022 WL 4007516.

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are not by permitting the plaintiff to amend its complaint to allege a claim based on physical damage from the virus. 2022 WL 4377163, at *2.

Best Rest's claim—like the ones in *Marina Pacific* and *Tarrar*, and unlike those in *Musso & Frank*, *Apple Annie*, and *Inns*—is based on the actual presence of the virus combined with evidence in the record that the virus caused physical loss or damage to Best Rest's property. Thus, statements that these other courts have made about coverage for "loss of use" in the absence of physical damage provides no support for affirmance of the superior court's erroneous ruling.

III. The "Period Of Restoration" Provision Does Not Transform The Sequoia Policy's Broad Insuring Agreement Into A Limited Grant Of Coverage.

The superior court further suggested that the policy's "Period of Restoration" provision "underscored" the requirement that "the damage or loss be physical in nature" under the policy's coverage trigger. 8 CT 001665. As discussed above, Best Rest introduced evidence of physical harm from the virus. Thus, regardless of what role this provision plays in interpreting the policy, Best Rest has shown that there is at least a fact dispute regarding whether it is entitled to coverage.

Sequoia also goes beyond the lower court's reading of the Period of Restoration provision as underscoring the "physical" requirement. It argues that the provision further limits coverage to only those harms that "must be repaired, rebuilt, or replaced." Respondent's Br. at 58. Under Sequoia's reasoning, a definition of the period during which lost profits might be covered in an

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entirely separate section of the policy should jump over to the policy's main insuring agreement many pages earlier and, without ever saying so expressly or even impliedly, should turn the words "direct physical loss or damage" to "physical alteration of property."

That is not what Sequoia's insurance policy provides, and an objectively reasonable insured would not construe the policy's main insuring agreement in such a convoluted manner.

To begin, Sequoia misconstrues how the policy works. Under the policy's trigger, an insured that suffers physical loss or damage leading to a suspension of operations is entitled to business interruption coverage, full stop. *See* 7 CT 001339. The Period of Restoration provision—placed much later in the policy, and separate from the coverage trigger—addresses only the *duration* of business income coverage provided. *See* 7 CT 001346. Thus, regardless of *how much* coverage the insured is entitled to, the insured has triggered coverage—and is thus entitled to *at least some* coverage—so long as there has been "physical" loss or damage. *See Marina Pacific*, 81 Cal.App.5th at 112 ("[T]he duration of exposure may be relevant to the measure of policy benefits; it does not negate coverage."). That the insured undertook repairs, or even that the property harm is of the kind that can be effectively repaired, is irrelevant to whether the harm triggered coverage in the first place.

Both recent and pre-pandemic cases confirm that the existence of repairs is irrelevant to whether the property suffered physical loss or damage. *Marina Pacific* and *Inns* both involved

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the same policy form as the one at issue here, containing an identical "Period of Restoration" provision. *See Marina Pacific*, 81 Cal.App.5th at 100; *Inns*, 71 Cal.App.5th at 695. Yet *Marina Pacific* held that the insured hotel had "unquestionably pleaded direct physical loss or damage to covered property." 81 Cal.App.5th at 109. And although *Inns* cited the Period of Restoration provision as evidence that the policy envisioned some kind of "physical" harm to property, as opposed to mere economic detriment, 71 Cal.App.5th at 707, it did not consider repairs at all in its separate section on "direct physical damage," in which it held that the virus is a "physical force" that can cause "direct physical damage to property," *id.* at 703, 705.

Sequoia's proposed limitation is also inconsistent with pre-pandemic case law. For example, wildfire smoke that could not be fully removed from the air by mechanical means had to merely "dissipate before business could be resumed," yet the policy covered losses for the period before the smoke dissipated. *Oregon Shakespeare*, 2016 WL 3267247, at *6. Similarly, the COVID-19 virus often resists even intensive cleaning and sanitizing. *See* 5 CT 000904 ("Merely cleaning surfaces may reduce but does not altogether eliminate the risk of SARS-CoV-2 transmission. There may be surfaces with residual infectious virus, and aerosolized infectious particles in the air."). It would be a counterintuitive reading of the policy if the virus's persistent nature—one of the very characteristics that makes it so harmful to property—meant that it does not cause "physical loss or damage."

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In any case, Best Rest *did* submit evidence showing that it undertook repairs to restore its property to its condition before it was harmed by the virus. Best Rest has offered evidence that it "deep clean[ed]" and "aired out" and all areas in the motel where infected persons had been. 6 CT 001117. These are the same kinds of measures that courts have recognized constitute "repairs" to covered physical loss or damage. Most relevant, *Inns* stated that a business "could successfully allege that the virus created physical loss or damage in the same way that some chemical contaminant might have" if the virus's presence "requir[ed] the entire facility to be thoroughly sanitized." 71 Cal.App.5th at 705.

Inns' conclusion that cleaning from the COVID-19 virus would constitute repairs is consistent with *Gregory Packaging*, which held that there was "no genuine dispute that the ammonia release physically changed the facility's condition to an unsatisfactory state needing repair" where ammonia in the air and on the surfaces of the property required the policyholder to hire a "clean-up service," to circulate air with "fans" and "[w]ash down" surfaces. 2014 WL 6675934, at *4, *7. Other cases find that physical perils that can be resolved through cleaning or other means cause insured physical loss or damage.[8]

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[8] *See also, e.g.*, *Graff v. Allstate Ins. Co.*, (Wash.App. 2002) 54 P.3d 1266, 1267 ("physical loss" where policyholder had 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, *6 (oil spray "caused physical damage to the building roof (necessitating cleaning)"); *Weisman v. Green*

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Thus, even though "repairs" are not required to establish physical loss or damage under the policy, Best Rest has introduced sufficient evidence of "repairs" it made in response to the virus to defeat summary judgment.

IV. Best Rest Introduced Sufficient Evidence To Establish Causation.

Sequoia also asks the Court to affirm on the alternative grounds that Best Rest did not allege that its losses were caused by the COVID-19 virus on site. That argument should be rejected for the reasons described in Best Rest's briefs. *See* Appellant's Opening Br. at 9–10, 12; Appellant's Reply Br. at 4, 9.

If, however, the Court does decide to affirm the superior court's judgment on this basis, it should do so on narrow grounds, and without deciding the issue of physical loss or damage. Appellate courts often refrain from opining on issues unnecessary to their narrow holdings. *See Facebook, Inc. v. Super. Ct. of San Diego Cnty.* (2020) 10 Cal.5th 329, 338 ("[W]e are generally reluctant to address significant substantive legal issues when, due to underlying factual and related problems, it may prove unnecessary to do so."); *Palermo v. Stockton Theatres* (1948) 32 Cal.2d 53, 65 ("We are of the view that this issue, unnecessary to the decision, should not be decided here or made the subject of a dictum."); *Shaw v. Cnty. of Santa Cruz* (2008) 170 Cal.App.4th

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Tree Ins. Co. (Pa.Super.Ct. 1996) 670 A.2d 160, 161 ("direct physical loss" where splatter from human tissue, blood, and other liquids required "emergency cleanup"); *Farmers Ins. Co. of Oregon v. Trutanich* (Or.App. 1993) 858 P.2d 1332, 1334, 1336 ("direct physical loss" where methamphetamine residue required owner to "clean the house").

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229, 259 ("[W]e do not see these matters as necessary to our appellate decision and we accordingly decline to resolve them."); *see also* Jon B. Eisenberg et al., *California Practice Guide: Civil Appeals and Writs* § 8:202 (The Rutter Group 2021) ("Appellate courts generally will not address issues whose resolution is unnecessary to disposition of the appeal.").

As the other California appellate opinions involving COVID-19 insurance claims illustrate, the many cases that are working their way through the courts involve differing facts, policies, and legal theories. *See Tarrar*, 2022 WL 4377163, at *2 (recognizing that "issues are developing" in California case law involving COVID-19 property insurance claims). Because these differences matter, it would be prudent to limit any opinion to the specific issue presented.

CONCLUSION

For the reasons discussed here and in detail in Best Rest's briefs, the superior court erred in granting summary judgment in favor of Sequoia. This Court should reverse the judgment below.

DATE: Sept. 28, 2022 Respectfully submitted,

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By: */s/ Rani Gupta*______
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CERTIFICATE OF COMPLIANCE

The foregoing Amicus Curiae Brief contains 5,300 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: Sept. 28, 2022 Respectfully submitted,

COVINGTON & BURLING LLP

By: */s/ Rani Gupta*________
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PROOF OF SERVICE
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I am a resident of the State of California and over the age of eighteen years, and not a party to the within action. My business address is 1999 Avenue of the Stars, Suite 3500, Los Angeles, CA 90067. On September 28, 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 September 28, 2022; and

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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 Los Angeles, 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 Los Angeles, California on September 28, 2022.

Denis Listengourt

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