No. A164412

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

ANCHORS AND WHALES LLC, ET AL.,

Plaintiffs and Appellants,

v.

CRUSADER INSURANCE COMPANY,

Defendants and Respondents.

On Appeal from the Superior Court for
the County of San Francisco
Hon. Richard B. Ulmer
Case No. CGC-21-590559

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 Anchors and Whales LLC, 55 Louie's SF LLC, Brooklyn Rose, LLC, Little's LLC, Lo Poc Group LLC, Maggie McGarry's, Inc., Namu Stonepot LLC, R Bar, Inc., The Welshman Group, Toe Dipping LLC, and Updog LLC in their appeal of an adverse judgment in their insurance coverage lawsuit against Respondent Crusader Insurance Company.

STATEMENT OF INTEREST OF *AMICUS CURIAE* UNITED POLICYHOLDERS

Founded in 1991, UP is a highly respected section 501(c)(3) non-profit organization that serves as a voice for the interests of insurance consumers across the country. Individuals 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 caused by the SARS-CoV-2 virus.[1]

Indeed, since it began spreading around the country in 2020, UP has assisted business owners whose operations have

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[1] Technically, COVID-19 refers to the disease caused by the SARS-CoV-2 virus. For ease of reference, both parties in their briefing appear to refer to the SARS-CoV-2 virus, its variants, and the coronavirus disease caused by them as COVID-19. Going forward, this application and accompanying brief replicate that practice.

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been interrupted by the COVID-19 virus. 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. 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 core purpose and function of insurance: *indemnification for unforeseen losses*. 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.*

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Cos. v. Jones (2017) 2 Cal.5th 376, 382-383 (favorably citing UP studies).[2]

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

UP'S *AMICUS CURIAE* BRIEF WILL ASSIST THIS COURT

The purpose of insurance is to protect against unexpected disasters. That is why people and business across the country pay substantial premiums every year to insurance companies, even though the contracts themselves, by design, have a negative net present value for policyholders at the time of purchase. Confidence that insurance will pay claims in the unlikely event losses materialize encourages individuals and businesses to take calculated risks and pursue innovation. It has long been recognized that the risk-spreading and indemnifying functions of insurance greatly spur economic growth and benefit the public good.

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. While the overall profitability and solvency of the insurance marketplace is of course important, as the Supreme Court has noted, the dominant purpose of insurance is "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

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

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Liability Ins. § 2, Reporters' Note c ("insurance policies are read to effect the policy's dominant purpose of indemnity"). Profit and loss considerations must not control 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 will help to define the law in California and provide guidance to federal courts as they attempt to predict how the California Supreme Court would rule. 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. 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

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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: December 27, 2022   Respectfully submitted,

UNITED POLICYHOLDERS

By: */s/ Richard Oatis*
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INTRODUCTION AND SUMMARY OF ARGUMENT

This brief addresses a dispute common to numerous COVID-19 insurance cases filed throughout California: whether viral contamination of a business premises that causes a cessation or slowdown of operations is sufficient to trigger a standard property insurance policy's promise of protection against risks of "direct physical loss of or damage" to property.

Here, the trial court granted Crusader Insurance Company's ("Crusader") motion for judgment on the pleadings. The trial court held that Anchors and Whales'[3] allegations relating to COVID-19 virus contamination did not constitute "direct physical loss of or damage to" property and could not be amended to do so.[4]

But recent published California appellate COVID-19 insurance decisions have reversed superior court decisions sustaining demurrers without leave to amend on the same grounds. *See Marina Pacific Hotel & Suites, LLC v. Fireman's Fund Insurance Co.* (2022) 81 Cal.App.5th 96, *Amy's Kitchen, Inc. v. Fireman's Fund Ins. Co.* (2022) 83 Cal.App.5th 1062, and

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[3] "Anchors and Whales" refers collectively to Appellants Anchors and Whales LLC, 55 Louie's SF LLC, Brooklyn Rose, LLC, Little's LLC, Lo Poc Group LLC, Maggie McGarry's, Inc., Namu Stonepot LLC, R Bar, Inc., The Welshman Group, Toe Dipping LLC, and Updog LLC.

[4] This brief does not address the alternative grounds for the trial court's decision relating to the operation of the specific exclusions at issue in this case, which are not generally shared by policyholders throughout California, besides to note that exclusions are interpreted narrowly under California law and must be clear, plain, and conspicuous to be enforceable.

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Tarrar Enterprises v. Associated Indemnity Co. (2022) 83 Cal.App.5th 685. These cases accord with longstanding pre-COVID precedent holding that physical perils such as chemical fumes, noxious odors, and viruses do in fact cause insured "physical loss or damage" when they prevent a business from using its property as it normally does.

Moreover, nearly all published California appellate decisions sustaining demurrers in COVID-19 insurance cases have done in cases where the policyholder alleged that their businesses doors were shut because of government-issued closure orders rather than the presence of the COVID-19 virus. *See Inns by the Sea v. California Mutual Insurance Company* (2021) 71 Cal.App.5th 688 ("*Inns*"); *Musso & Frank Grill Co., Inc. v. Mitsui Sumitomo Insurance USA Inc.* (2022) 77 Cal.App.5th 753; and *Apple Annie, LLC v. Oregon Mutual Insurance Co.* (2022) 82 Cal.App.5th 919. Accordingly, these cases accept that a properly pleaded complaint that alleges that a business cessation or slowdown was caused by the presence of the COVID-19 virus should make it past the pleading stage.

United Policyholders is aware of only one published California appellate decision finding that contamination by the COVID-19 virus cannot cause physical loss of or damage to property. *See United Talent Agency v. Vigilant Insurance Co.* (2022) 77 Cal.App.5th 821. But *United Talent*'s reasoning is flawed and inconsistent with pre-COVID-19 case law. Moreover, its approach was appropriately considered and rejected in the later-decided *Marina Pacific* decision.

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

ARGUMENT

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

The superior court erred in holding that Anchors and Whales could not allege "direct physical loss of or damage" to property as a result of viral contamination. AA 506-507. Of all the published California appellate court decisions to consider the issue, only one poorly reasoned outlier, *United Talent*, has concluded that the COVID-19 virus cannot cause physical loss or damage.[5]

Rather than follow *United Talent*, this Court should follow *Inns by the Sea*, *Amy's Kitchen*, *Tarrar*, and *Marina Pacific* (which all held that the COVID-19 virus can cause physical loss of or damage to property) as well as a host of pre-pandemic cases that similarly hold that all manner of small or invisible noxious substances can trigger a property insurance policy's promise of coverage.

A. *Inns by the Sea* Acknowledged That A Broad Range Of Substances Can Cause "Physical Loss Or Damage"

The first California appellate case to address the issue found that the COVID-19 virus could cause physical loss or

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[5] 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 III.

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damage to property. *Inns by the Sea* 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.[6]

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[6] *Inns*, 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 *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"); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.* (D.N.J. Nov. 25, 2014) 2014 WL 6675934, at *16–17 (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. 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).

The pre-pandemic consensus should not be called into question by outcome driven COVID-19 cases. Policyholders must continue to be able to rely on the broad "all risks" property and liability insurance policies they purchase to provide protection against a range of unforeseen and potentially invisible perils, in the realms of environmental contamination, wildfire related smoke and toxin damage, and products liability, among others.

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Inns by the Sea called out the "central relevant California opinion," *Hughes v. Potomac Ins. Co.* (1962) 199 Cal.App.2d 239, which found that a building—overhanging a newly formed cliff after land behind it had eroded—had "'suffered real and severe damage" that triggered coverage "even though the structure of the house was undamaged."' *Inns*, 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 (abrogated on other grounds). *Inns by the Sea* and *Hughes* confirm 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.

American Alternative Insurance Corp. v. Superior Court (2006) 135 Cal.App.4th 1239, 1246–1247, similarly 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 unchanged 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*

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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 these cases, *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. "[I]f 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 (citations omitted). Elsewhere in its opinion, *Inns by the Sea* confirmed that the COVID-19 virus can cause insured physical loss and damage.[7]

Ultimately, *Inns by the Sea* ruled for the insurer, but critically only because the plaintiff there did not allege that its losses were caused by the virus on site but rather were the proximate result of governmental closure orders. *Id.* at 703–704.

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[7] *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* analyzed this issue, its holding that the COVID-19 virus can cause insured "direct physical loss or damage" is not *dictum*. *See, e.g.*, *United Steelworkers of Am. v. Bd. of Educ.* (1984) 162 Cal.App.3d 823, 834–835.

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B. *Marina Pacific* Holds COVID-19 Can Cause Physical Loss Or Damage To Property

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 plaintiffs must plead 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.

Marina Pacific held that the insured alleged "physical alteration" through allegations 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*, 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 physical loss or damage under the *MRI Healthcare* standard. 81 Cal.App.5th at 109.

Importantly, *Marina Pacific* recognized that its holding was at odds with many federal court decisions dismissing claims for pandemic-related business losses. But the federal cases for the most part did not involve similar factual allegations that the losses were caused by the presence of the COVID-19 virus as

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opposed to government closure orders alone. And to the extent the federal cases were analogous, federal pleading standards, unlike California's, permitted those district courts to dismiss the claims. *Marina Pacific* observed, "Unlike in federal court, the plausibility of the insureds' allegations has no role in deciding a demurer under governing state law standards, which ... require us to deem as true, 'however improbable,' facts alleged in a pleading—specifically here, that the COVID-19 virus alters ordinary physical surfaces transforming them into fomites through physicochemical processes, making them dangerous and unusable for their intended purposes unless decontaminated." *Id.* at 109-110.

C. *Amy's Kitchen* And *Tarrar* Further Confirm That COVID-19 Causes Physical Loss Or Damage

Other decisions confirm that COVID-19 can cause physical loss of or damage to property.

Amy's Kitchen addressed a claim for insurance coverage under a "communicable disease" insuring agreement covering "direct physical loss or damage to Property Insured caused by or resulting from a covered communicable disease event at a location." 83 Cal.App.5th at 1065. The Amy's Kitchen insurer argued that "direct physical loss or damage" requires structural alteration of property and contended that COVID-19 cannot cause structural alteration. *Id.* at 1069. But, as the Court of Appeal explained, by using "direct physical loss or damage" in an insuring agreement for communicable disease, the policy necessarily contemplated that communicable disease such as

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COVID-19 can cause direct physical loss or damage. *See id*. at 1070-1071. Accordingly, the trial court erred in sustaining the insurer's demurrer on the ground that COVID-19 cannot do so.

And in *Tarrar*, the insured alleged that it had closed its business because of the COVID-19 virus and to comply with COVID-19-related governmental orders issued due to the presence of the virus in the county where the insured was located. *See* 83 Cal.App.5th 685. The Court of Appeal surveyed previous California COVID-19 appellate decisions and explicitly recognized that the Marina Pacific insured had "pled the element missing from" the other cases—i.e., "direct physical loss or damage" resulting from the virus's presence on covered property. *See id*. (citing *Marina Pacific*, 81 Cal.App.5th at 108, 114). Based in part on this authority, the Court of Appeal held that the trial court had abused its discretion in denying the insured leave to amend. The Court stressed that "[d]enial of leave to amend is appropriate only when it conclusively appears that there is no possibility of alleging facts under which recovery can be obtained." *Id*. at 689 (quoting *Cabral v. Soares* (2007) 157 Cal.App.4th 1234, 1240).

Like *Marina Pacific*, *Tarrar* shows that an insured may plead "direct physical loss or damage" through allegations that the COVID-19 virus was present at insured property even when it also alleges that closure was required to comply with governmental orders. If the COVID-19 virus could not cause physical loss or damage as a matter of law, then amendment in *Tarrar* would necessarily have been futile because there would

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have been "no possibility of alleging facts under which recovery can be adopted." *See id.*

D. Anchors and Whales Alleges Facts Establishing Coverage And Should Be Given Leave to Amend for More Allegations

The Anchors and Whales complaint alleges that the COVID-19 virus was present on and around each of appellants' business properties and that their closure was a result of the presence of the virus. *See* AA 14-19, ¶¶ 26, 31, 36, 41, 46, 51, 56, 62, 67, 72, 77.

But even if the lower court believed that Anchors and Whales needed to allege physical loss or damage and other allegations with more specificity, it erred by refusing to give Anchors and Whales the opportunity to amend its original complaint. AA 506.

As the Court of Appeal recently ruled in *Tarrar*, it is an abuse of discretion to deny leave to amend when the complaint does not show it is "incapable of amendment" on its face. *Tarrar*, 83 Cal.App.5th at 689. The court also noted that "leave to amend is appropriate when issues," such as COVID-19 appellate law, "are developing." *Id.* at 688; *see also Contreras v. Blue Cross of California* (1998) 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 Systems 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

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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 id.* at 688-689.

For example, Anchors and Whales could amend to further clarify its allegations on the nature of the virus and how it interacts with and changes physical property and air, what locations of Appellants' restaurants and bars the virus was present in, and whether and when individuals known to be infected entered those bars and restaurants.

Allowing Anchors and Whales to amend with these allegations, and others, will make clear that its case falls squarely in line with the allegations in *Marina Pacific*.

II. *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*. That case held that it does not matter what the policyholder pleads in its complaint, the COVID-19 virus is incapable, as a matter of law, of causing physical loss or damage. The Court should decline to follow *United Talent*.

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

Crusader asks this Court to disregard Anchors and Whales' allegations, and any further allegations that could be added if

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given leave to amend, that it suffered loss of or damage to its property due to the presence of the COVID-19 virus.

In that vein, Crusader cites *United Talent* and the federal cases on which it relied to hold that the COVID-19 virus cannot as a matter of law cause physical loss or damage. 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.

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). 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-findings 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

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"[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," *United Talent*, First Am. Compl. ¶ 47. *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 the federal case *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.* (7th Cir. 2021) 20 F.4th 327, 335. 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.*

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-

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19 virus can satisfy the standard for "direct physical loss or damage" articulated in *United Talent* as a factual matter, are neither part of the record in the present appeal nor are properly 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 "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).

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 to apply. *Marina Pacific*, 81 Cal.App.5th at 105, 109–110 (citing *Friends of Glendora v. City of Glendora* (2010) 182 Cal.App.4th 573, 576).

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" tailored to preclude COVID-19 coverage claims. These new requirements have no basis in insurance law

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decided prior to the pandemic nor in the language of the insurance policy that *United Talent* interpreted.

First, *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 were true, 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 interruption 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)

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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.

Second, *United Talent* is wrong to say that the virus cannot harm property because it only harms people. *United Talent* 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.

But 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.

Such a holding is consistent with the purpose of business 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*

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Eng'g Co. v. St. Paul Fire & Marine Ins. Co. (1970) 9 Cal.App.3d 270, 275.

Third, *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 the outset of the pandemic. In fact, from February through July 2020, the CDC advised *against* wearing a mask.[8] Moreover, the Crusader policy does not distinguish between an insured physical peril that is introduced into property through people or some other way.

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

United Talent and Crusader 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. 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 simply sets the end date of coverage. *See Ungarean, DMD v. CAN* (Pa.Com.Pl. Mar. 25, 2021) No. GD-20-006544, 2021 WL

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[8] *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.

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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").

Furthermore, the limited relevance of the period of restoration language to the meaning of an insurance policy's grant of coverage is consistent with court decisions finding coverage for noxious substances that can resolve or dissipate without specific remediation. *See Or. Shakespeare*, 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*, 71 Cal.App.5th at 702 (citing cases).

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

Hoping to pull this case into an entirely different line of precedent, Crusader argues that Anchors and Whales 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. Anchors and Whales alleges that the COVID-19 virus was on site and caused direct physical loss or damage *to its property*.

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The cases that Crusader 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 alone* has caused loss—specifically, loss of use—of an insured's business property.

The two published California appellate decisions *Musso* and *Apple Annie* fall into this category of rejecting the "loss of use" theory. Neither involve a plaintiff that alleged that the COVID-19 virus was present on its insured property (as Crusader does). *Musso*, Compl. ¶ 59, 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. *Musso*, 77 Cal.App.5th at 756; *Musso*, Aplt. Br. at *28–38, 2020 WL 4169380; *Apple Annie*, 82 Cal.App.5th at 924, fn. 2.

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 expressly distinguished this theory that an order causes physical loss from the separate argument that the virus causes physical loss or damage.[9]

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[9] *See Wakonda Club v. Selective Ins. Co. of Am.* (Iowa 2022) 973 N.W.2d 545, 553 (insured's "concession" that COVID-19 virus (continued…)

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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). However, because at oral argument Apple Annie's attorney stated as an officer of the court he could not state what facts he could allege in an amended complaint similar to those in *Marina Pacific*, the Court of Appeal concluded the owner did not meet its burden to obtain leave to amend. 82 Cal.App.5th at 936.

Moreover, 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 complaint to plead the existence of direct physical loss or damage in the community and on site. *Tarrar*, 83 Cal.App.5th at 689.

CONCLUSION

For the reasons discussed here and in Anchors and Whales' briefing, Anchors and Whales has alleged "physical loss or

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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).

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damage" sufficient to trigger its coverage. It therefore was error for the Superior Court to grant the insurers' motion for judgment on the pleadings without leave to amend, and this Court should reverse.

DATE: Dec. 27, 2022 Respectfully submitted,

UNITED POLICYHOLDERS

By: */s/ Richard Oatis*
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CERTIFICATE OF COMPLIANCE

The foregoing Amicus Curiae Brief contains 5026 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 365. 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: Dec. 27, 2022 Respectfully submitted,

UNITED POLICYHOLDERS

By: */s/ Richard Oatis*
RICHARD B. OATIS

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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 917 Irving Street, Suite 4, San Francisco, CA 94122. On December 27, 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

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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 December 27, 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 San Francisco, CA.

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, CA on December 27, 2022.

/s/ *Richard Oatis*
Richard B. Oatis

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