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ATTORNEYS FOR *AMICUS CURIAE* UNITED POLICYHOLDERS	Case Number: 2024CA34

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BRIEF OF *AMICUS CURIAE* UNITED POLICYHOLDERS IN SUPPORT OF PLAINTIFFS-APPELLANTS

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of C.A.R. 28(a)(2) and (a)(3), C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 29(d). It contains 4,746 words.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

/s/ *Garth A. Gersten*

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae United Policyholders ("UP") incorporates by reference the Statement of Interest contained in its Motion for Leave to Submit Brief of *Amicus Curiae* United Policyholders in Support of Plaintiffs-Appellants, filed concurrently with this brief.

INTRODUCTION

The insurance policy at issue in this appeal promised coverage for all risks of "direct physical loss of or damage to" property, "[e]xcept as hereafter excluded." *Spectrum Ret. Communities, LLC v. Continental Cas. Co.*, Case No. 2021-CV-30695, slip op. at 2 (Colo. Dist. Ct. July 13, 2022) (hereinafter *Spectrum I*). Under longstanding Colorado law—which is widely cited by courts, commentators, insurance professionals, and coverage lawyers nationwide on this point—such "all-risk" policies cover risks that impair the safe use and occupancy of property, *whether or not* "some tangible injury to the physical structure itself could be detected." *Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 56 (Colo. 1968) (citation omitted). This is so, Colorado law holds, because a policyholder can suffer a "physical loss" (i.e., the loss of use of its physical property) where a condition—including a hazardous airborne substance, like the toxic gasoline fumes at issue in *Western Fire*—renders the insured property unsafe or uninhabitable. *Id.*

Consistent with this settled law, the court below initially and correctly sustained Plaintiffs' insurance coverage claim against the insurer's motion to

dismiss, based on Plaintiffs' well-pled allegations that COVID-19[1] was present at, and impaired the use of, Plaintiffs' nursing homes. *Spectrum I*, at 8. One year later, however, a different judge of the same court (following a docket rotation) reversed course and granted judgment on the pleadings in favor of Defendant Continental Insurance Company. The court inexplicably dismissed *Western Fire* as "inapplicable" and retreated from its correct, prior holding "that demonstrable or tangible physical alteration of property is not required in Colorado to support a claim for 'direct physical loss or damage.'" *Spectrum Ret. Communities, LLC v. Continental Cas. Co.*, Case No. 2021-CV-30695, slip op. at 5–6 (Colo. Dist. Ct. Nov. 20, 2023) (hereinafter *Spectrum II*). Instead, the court declared, disregarding Plaintiffs' well-pled allegations, that "COVID-19 does not physically injure or harm property *as a matter of law*," and thus dismissed Plaintiffs' Complaint. *Id.* at 6 (emphasis added). That was error, both substantively and procedurally.

<u>*First*</u>, for over 50 years under *Western Fire*, allegations that toxic substances—like COVID-19—in the air or on surfaces render insured property dangerous to use or uninhabitable have sufficed under Colorado law to state a

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[1] As used herein, "COVID-19" refers to the coronavirus SARS-CoV-2, whether suspended in air, deposited on surfaces, or present in aerosols or respiratory droplets, and, where the context suggests, to COVID-19, the disease caused by SARS-CoV-2 infection.

claim for "all risks" property insurance coverage, even in the absence of structural damage. Courts and commentators around the country have long recognized that *Western Fire* establishes this broad standard, and multiple courts even outside Colorado have followed *Western Fire* in sustaining COVID-19 property insurance coverage claims—or else have acknowledged their departure from Colorado law in ruling otherwise. Nothing about the *Western Fire* standard or controlling Colorado law has changed since *Spectrum I* correctly sustained Plaintiffs' well-pled insurance claim, and the authorities cited by the court below for the contrary proposition fail to justify its reversal of course.

<u>Second</u>, the court below departed from long-settled civil pleading standards in deciding, as a matter of law and without evidence, how COVID-19 operates in the air and on surfaces and physically affects property. The court disregarded Plaintiffs' well-pled and supported allegations detailing the effects of COVID-19 on Plaintiffs' premises, and instead, summarily pronounced that COVID-19 can *never* cause "physical loss or damage." But that is a factual determination disputed by the allegations of Plaintiffs' Complaint and prevailing science. Contrary to controlling law, the court thus acted as both scientific expert and fact-finder, at the pleadings stage and without any evidence.

This Court should reverse the judgment below and remand to permit Plaintiffs' insurance claim to proceed.

ARGUMENT

I. Under Controlling Colorado Insurance Law, Plaintiffs Plausibly Alleged that COVID-19 Caused "Physical Loss or Damage"

In its original, correct ruling that Plaintiffs adequately alleged that COVID-19 caused "physical loss or damage" to their property (because "COVID-19 was physically present on and in each of Spectrum's covered properties" and impaired the usability of those properties), the court below followed settled Colorado Supreme Court precedent construing such policy language to encompass loss of use of property due to a physically hazardous substance. *Spectrum I*, at 7–8 (citing *Western Fire*). Courts and commentators around the country recognize that under *Western Fire*, Colorado law affords an expansive construction of "physical loss or damage" covered by property insurance policies.

Yet the court below, following a docket rotation, changed course a year after its initial decision, ruling that COVID-19 *cannot* cause "physical loss or damage" to property *as a matter of law*. The court inexplicably found that Colorado law had changed in the intervening year, but cited no new or contrary Colorado state appellate authority on point. *Spectrum II*, at 3, 5. Instead, the court relied on (a) a non-binding *federal* decision from the United States Court of Appeals that

fundamentally misstated Colorado law concerning "physical loss or damage," *see, e.g.*, *id.* at 4 (citing *Sagome, Inc. v. Cincinnati Ins. Co.*, 56 F.4th 931 (10th Cir. 2023)), and (b) a recent Colorado Supreme Court decision addressing a matter of state *tax law*—not property insurance, *id.* at 4–5 (citing *MJB Motels LLC v. Cnty. of Jefferson Bd. of Equalization*, 531 P.3d 1000 (Colo. 2023)). These cases neither alter the binding and sensible rule of *Western Fire* nor support the trial court's reversal of course.

A. "Physical loss or damage" has a broad and recognized meaning under "seminal" Colorado law.

The Colorado Supreme Court long ago established that the presence of harmful substances in the air of insured premises—which impairs the use or habitability of property—causes "physical loss" under an all-risk property insurance policy. *See Western Fire*, 437 P.2d at 55.

In *Western Fire*, fire authorities temporarily closed a church when gasoline vapors outside and under the church infiltrated the building. *Id.* at 54. The church sought coverage under its property policy, and its insurer denied the claim, arguing there had been no "direct physical loss." *Id.* The Court disagreed, as the conditions had caused the church "to be uninhabitable, making further use of the building highly dangerous," which "equates to a direct physical loss within the meaning" of an all-risk property insurance policy. *Id.* at 55. Citing a case that

found coverage for a home rendered unsafe by a landslide that did *not* impact the home's structure, but left the home perched "precipitously" on the edge of a cliff, the Supreme Court *expressly rejected* the argument relied upon by the court below: that no "loss or damage ha[s] occurred unless some tangible injury to the physical structure" of the property has occurred. *Id.* at 56 (quoting *Hughes v. Potomac Ins. Co.*, 18 Cal. Rptr. 650, 655 (Cal. App. 1962)).

Under Colorado law, there is a distinction between "physical loss," on one hand, and "physical damage," on the other, and a plaintiff alleges "physical loss" within the coverage of a property insurance policy by alleging facts plausibly showing that covered property was rendered "uninhabitable" or "dangerous" to use (i.e., there was a loss of use of the physical premises). *Id.* at 55. There can be no reasonable dispute that Plaintiffs *plausibly alleged* COVID-19 had that effect on their nursing homes, where infections among high-risk, senior residents "confirm[ed] the virus was physically present at all the covered properties" and necessitated substantial curtailments in core operations. *Spectrum I*, at 4–5.

Indeed, courts applying Colorado law have sustained COVID-19 insurance claims based on *Western Fire* and its sensibly broad interpretation of "direct physical loss." Two Colorado state trial court judges (each of whom was later replaced by a different judge who decided to reverse course) have done exactly

that, following *Western Fire* and its reasoning and rejecting out-of-state rulings dismissing COVID-19 insurance claims because they "depart from the binding precedent" of *Western Fire*. *Spectrum I*, at 9; *Regents of the Univ. of Colo. v. Factory Mut. Ins. Co.*, 2022 WL 245327, at *4 (Colo. Dist. Ct. Jan. 26, 2022). Likewise, a Maine court applying Colorado law sustained a COVID-19 coverage complaint based on the "broader reading" of "physical loss or damage" embodied by "Colorado's leading case," *Western Fire*. *Prime Hospitality, Inc. v. Acadia Ins. Co.*, 2022 WL 17251587, at *6 (Me. Bus. & Consumer Ct. Nov. 2, 2022) (Colorado law). These courts correctly recognized that, under *Western Fire*, a policyholder plausibly alleges "physical loss" where COVID-19 impaired the policyholder's ability to use or occupy insured property.

These decisions are not novel or aberrant: they reflect longstanding Colorado law. Colorado courts have long accepted that infectious substances cause covered "direct physical loss or damage." In *Brand Management*, for example, a commercial sushi kitchen sustained "direct physical loss or damage" when it became contaminated with listeria—i.e., a microscopic, tasteless, odorless bacteria—that had to be "cleaned and sanitized." *Brand Mgmt., Inc. v. Maryland*

Cas. Co., 2007 WL 1772063, at *1 & n.1 (D. Colo. June 18, 2007).[2] Plaintiffs here similarly allege that the physical presence of COVID-19 necessitated "enhancing infection control" and "sterilization procedures and equipment." *Spectrum I*, at 5.

Outside Colorado, courts have looked to *Western Fire* in sustaining COVID-19 insurance claims. The Vermont Supreme Court, for instance, described *Western Fire* as a "seminal case" holding that coverage may be triggered "when property is unusable due to a health hazard." *Huntington Ingalls Indus., Inc. v. ACE Am. Ins. Co.*, 287 A.3d 515, 529 (Vt. 2022). In Pennsylvania, a court denied an insurer's motion for judgment on the pleadings as to a COVID-19 insurance claim, relying on the "seminal" *Western Fire* and its progeny in finding coverage where "non-visual sources made property uninhabitable or unusable, or nearly destroyed or eliminated its functionality." *SWB Yankees, LLC v. CAN Fin. Corp.*, 2021 WL 3468995, at *10, *21 (Pa. Ct. Comm. Pleas Aug. 4, 2021).

Even courts declining to follow *Western Fire* have acknowledged its broad construction of "physical loss." A North Carolina federal court, for instance, acknowledged that *Western Fire* adopted a "broadened" reading of "physical loss

[2] That many courts have dismissed COVID-19 property insurance claims under policies containing exclusions for loss or damage caused by viruses also makes the point. A virus exclusion, like any other, "operates to exclude coverage for [losses that] are otherwise insured." Barry R. Ostrager & Thomas R. Newman, HANDBOOK ON INS. COVERAGE DISPUTES § 10.02 (10th ed. 2000).

or damage" under which "invisible contaminants" (such as viruses) trigger property coverage where they "rendered physically unaltered premises 'uninhabitable'"; that court declined to follow *Western Fire* because of contrary, controlling North Carolina precedent. *Palm & Pine Ventures, LLC v. Certain Underwriters at Lloyd's London*, 2022 WL 533073, at *6 (E.D.N.C. Feb. 22, 2022). Likewise, the District of Columbia Court of Appeals acknowledged that *Western Fire* stands for the proposition "physical loss" may occur where a substance renders property "uninhabitable," but noted that (unlike Plaintiffs here) the policyholders there had made no such allegations. *See Rose's 1, LLC v. Erie Ins. Exch.*, 290 A.3d 52, 59 & n.16, 63-64 & n.21 (D.C. 2023). And a three-judge dissent from an Oklahoma Supreme Court decision that refused coverage for COVID-19 losses faulted the majority for declining to follow *Western Fire*'s holding that "all risk" property coverage is triggered when a building is forced to close "due to risk of harm and danger from contamination," despite a lack of "permanent[]" or "tangible damage." *Cherokee Nation v. Lexington Ins. Co.*, 521 P.3d 1261, 1271 & n.1 (Okla. 2022) (Edmondson, J., dissenting).

Leading insurance law treatises similarly recognize the breadth of *Western Fire*. For example, COUCH ON INSURANCE notes that, while some courts construe the "physical loss or damage" requirement in standard-form property insurance

policies to require a "physical alteration of the property," the Colorado Supreme Court reached the "*opposite result*" in *Western Fire*, finding coverage for property rendered "uninhabitabl[e]" "despite the lack of physical alteration of the property." Steven Plitt et al., 10A COUCH ON INSURANCE § 148:46 & n.7 (emphasis added). Likewise, a pre-COVID survey of insurance law authorities observed that *Western Fire* "broadly interpreted the physical loss or damage requirement" and has been relied on in subsequent decisions finding coverage for "loss of use from bacteria, odor, or noxious gases." Scott G. Johnson, *What Constitutes Physical Loss or Damage in A Property Insurance Policy?*, 54 TORT TRIAL & INS. PRAC. L.J. 95, 101–02, 114 (2019). Loss of use due to a virus, including COVID-19, fits squarely within *Western Fire* and its progeny.

B. Non-binding Tenth Circuit case law neither compels nor supports the decision below.

Notwithstanding the Colorado Supreme Court's "seminal" and well-established interpretation of "physical loss or damage," the court below erroneously concluded that "recent cases demonstrate that the rule announced in *Western Fire* is inapplicable." *Spectrum II*, at 6. The court, however, relied on a non-binding decision by the United States Court of Appeals for the Tenth Circuit for the purported rule that, under *Western Fire*, a plaintiff must allege COVID-19 made property "uninhabitable and unsafe and unusable for *any and all purposes*

whatsoever." *Id.* (citing *Sagome*, 56 F.4th at 937) (emphasis added). That is not Colorado law, and the court below was under no obligation to follow this erroneous decision.

First, it is "well settled that a state court is not bound by federal court interpretation of state law." *Nat'l Bank in Ft. Collins v. Rostek*, 514 P.2d 314, 316 n.1 (Colo. 1973). To the contrary, under the *Erie* doctrine, a federal court applying state law is bound by decisions of the state's highest court. *McAuliffe v. Vail Corp.*, 69 F.4th 1130, 1143 (10th Cir. 2023). The Tenth Circuit gave short shrift to these linchpins of state sovereignty and our federal Constitutional system in *Sagome*. When that case was decided, *both* of the Colorado state courts that had addressed COVID-19 property insurance claims by that point had found that the policyholders sufficiently alleged "physical loss or damage" in light of *Western Fire*, a decision of Colorado's highest court. *See supra* Section I.A. While both of those courts—including the court below—subsequently reversed course, *both* did so in wrongful reliance on *Sagome*. *See Spectrum II,* at 6; *Regents of the Univ. of Colo. v. Factory Mut. Ins. Co.*, 2023 WL 6003526, at *5 (Colo. Dist. Ct. Aug. 29, 2023). This is a clear case of the tail wagging the dog, with *state* courts taking cues on a matter of *state* law from a flawed *federal* decision contrary to binding Colorado authority.

Second, *Sagome*'s requirement that property be "unusable for any and all purposes whatsoever"—essentially, an "absolute uselessness" standard—appears nowhere in *Western Fire*. Instead, the Tenth Circuit imported it from Maryland. *See Sagome*, 56 F.4th at 937 (quoting *GPL Enter., LLC v. Certain Underwriters at Lloyd's*, 276 A.3d 75, 87 (Md. Ct. Spec. App. 2022)). This was a manifest error of law, both in the application of the *Erie* doctrine and in the substantive result reached.

Regarding the former, only when state law is silent may a federal court look to "appellate decisions in other states with similar legal principles." *McAuliffe*, 69 F.4th at 1143. Here, Colorado's highest court has construed the term "physical loss" in relation to a toxic airborne substance in *Western Fire*. Further, Maryland courts do *not* apply "similar legal principles," as they have rejected the *Western Fire* standard. *See Tapestry, Inc. v. Factory Mut. Ins. Co.*, 286 A.3d 1044, 1055 (Md. 2022) (holding, contrary to *Western Fire*, that "physical loss" requires "disappearance or destruction" of property). Relying on intermediate Maryland appellate decisions to depart from Colorado Supreme Court authority that Maryland courts have rejected is not defensible under *Erie*.

Substantively, the *Sagome* "absolute uselessness" standard is (in addition to having no basis in the insurance policy text) contrary to Colorado law. Under

Western Fire, "physical loss" occurs where property becomes "uninhabitable" or its "continued use" becomes "dangerous." 437 P.2d at 55. Colorado law makes clear that property may be "uninhabitable" where it cannot be used for its *intended* purpose—not *any* purpose whatsoever. *See Mulhern v. Hederich*, 430 P.2d 469, 470 (Colo. 1967). In *Mulhern*, decided less than one year before *Western Fire*, the Colorado Supreme Court affirmed a trial court's finding that a home builder breached the implied warranty of habitability by delivering to the buyer an "uninhabitable" house. *Id.* at 470. The condition of the house left the buyer unable to finish the basement (i.e., build interior walls therein) and caused doors to jam on the upper floor. *Id.* The court found that the house was uninhabitable and that the basement in particular "became uninhabitable" when it "*could not be used for the purposes for which it had been designed*." *Id.* (emphasis added).

Mere months later, when *Western Fire* ruled that "physical loss" occurs where property is "uninhabitable," it did not suggest this term had a narrower or different meaning than in *Mulhern*—let alone, that it was limited to the "absolute uselessness" standard that *Sagome* imported from Maryland. The court below erred in adopting this erroneous, foreign standard. Read together, *Western Fire* and *Mulhern* confirm that "physical loss" may occur where a property cannot be used for its intended purpose—i.e., becomes "uninhabitable." Common experience

of the COVID-19 pandemic confirms the plausibility of COVID-19 rendering property unsafe to use for its intended purpose, *especially* prior to the advent of effective vaccines and treatments.

C. The tax-law question in *MJB Motels* has no bearing on the meaning of "physical loss or damage" in a property insurance policy.

In addition to *Sagome*, the court below relied on *MJB Motels* to conclude that developments in Colorado law mandated reversal of its prior decision. *Spectrum II*, at 4–5. But *MJB Motels* does not address whether COVID-19 causes "physical loss *or* damage" under a property insurance policy. That issue was addressed by *Western Fire*. Instead, *MJB Motels* concerned whether, under Colorado tax law, the economic effects of the COVID-19 pandemic were "unusual conditions in or related to real property" that entitled property owners to a reduction in tax liability. While *MJB Motels* answered that question in the negative, its reasoning—if applied to the context of property insurance—would be in direct conflict with *Western Fire*. It is not tenable to suggest that the Colorado Supreme Court intended to overrule a nationally recognized, "seminal" property insurance precedent, *sub silentio*, in a tax case.

In *MJB Motels*, commercial property owners asserted a right, under the Colorado tax code, to a revaluation of their properties and a consequent reduction

of their property tax assessments for 2020 to "account for the economic impacts of the COVID-19 pandemic." 531 P.3d at 1004. To prevail, the plaintiffs were required to show that the pandemic and responses thereto were "unusual conditions in or related to real property," as defined in the tax code, that would "result in an increase or decrease in actual value." *Id.* at 1005 (quotation omitted). The definition of "unusual conditions" included, in pertinent part, "any detrimental acts of nature," which plaintiffs contended applied to the pandemic. *Id.* (emphasis omitted). The Court disagreed, finding the pandemic did not meet this prong of the "unusual conditions" definition for two reasons, *id.* at 1007, both of which show that *MJB Motels* has no application in the property insurance context and thus, no effect on the vitality and application of *Western Fire*.

<u>*First*</u>, the Court found COVID-19 is not a "detrimental act of nature," which the Court construed to mean "direct, *tangible* forces," such as "forest fires, landslides, and immediate erosion problems." *Id.* at 1007–08 (emphasis added). By contrast, "all-risk" property insurance policies extend to perils beyond "fires," "landslides," and the like; "recovery is allowed [under such policies] *for all losses* … unless the policy contains a specific provision" *excluding* coverage. *Kane v. Royal Ins. Co. of Am.*, 768 P.2d 678, 679 n.1 (Colo. 1989) (emphasis added). And *Western Fire* expressly rejected the argument that, under an all-risk policy,

"physical loss" requires "tangible" impacts on property. 437 P.2d at 55–56. Thus, whether the COVID-19 pandemic is a "detrimental act of nature" has no bearing on whether COVID-19 causes "physical loss" for property insurance purposes under *Western Fire*.

Second, the Court found that the economic effects of the pandemic were not "in or related to real property." *MJB Motels*, 531 P.3d at 1008. This is consistent with the nature of the loss that the plaintiffs there asserted—namely, a decrease in the *market value* of property for *tax* purposes. The Court indicated that pandemic-related economic fluctuations responsible for a decrease in value were not conditions specific to the property itself, but macroeconomic forces with a generalized effect. *E.g., id.* at 1008 ("[R]equiring a mid-cycle revaluation based on a global pandemic would be absurd ... because *every* property would be at least indirectly affected by it."); *id.* at 1010 (similar). By contrast, whether COVID-19 has rendered a policyholder's property "uninhabitable" or "dangerous" for its intended use, and thus, caused "physical loss" under *Western Fire*, is necessarily specific to the conditions in or related to that property.

MJB Motels is, therefore, inapposite. Neither it nor *Sagome* marks a change in Colorado law that forecloses a COVID-19 coverage claim under an all-risk property insurance policy. Rather, the trial court got it right in its first decision:

under black-letter pleading standards and settled Colorado insurance law, a policyholder plausibly alleges that COVID-19 causes "physical loss or damage" for purposes of property insurance coverage by alleging, as Spectrum has here, that the virus adversely affected the air, surfaces, and safe use or occupancy of physical property and was physically present at the property.

II. Whether COVID-19 Causes "Physical Loss or Damage" Is a Fact-Bound Issue that Cannot Be Decided Against a Plaintiff on the Pleadings and as a Matter of Law.

In ruling *as a matter of law* at the pleadings stage that COVID-19 cannot plausibly cause "physical loss or damage" under an all-risks property insurance policy, the court below also departed from well-settled procedural law by resolving, without evidence, a factual question concerning the *physical* effects of a phenomenon on property. Such questions inherently require scientific proof, and the effect of COVID-19 on the surfaces of, and air within, property has been the subject of intense study by experts. Rather than permitting the parties to marshal their respective evidence on this issue, the court below substituted its own views for those of the experts. This clearly departs from applicable pleadings standards and contravenes Colorado law restraining courts from usurping the roles of fact and expert witnesses and fact-finders.

Courts assessing the adequacy of pleadings may not resolve disputed factual issues—especially complex scientific questions. Instead, courts must "accept all factual allegations in the complaint as true and view them in the light most favorable to the non-moving party" to assess whether the plaintiff has "allege[d] sufficient facts that, if taken as true, show plausible grounds to support a claim for relief." *Jagged Peak Energy Inc. v. Okla. Police Pension & Ret. Sys.*, 523 P.3d 438, 446 (Colo. 2022); *see also Paradine v. Goei,* 463 P.3d 868, 869–70 (Colo. App. 2018) (holding same standards apply under Rule 12(c) and Rule 12(b)(5)). Courts may consider only the facts alleged or incorporated into the pleadings and matters properly subject to judicial notice, *Walker v. Van Laningham*, 148 P.3d 391, 397 (Colo. App. 2006); they may not "weigh potential evidence that the parties might present at trial" or engage in "conjecture that [p]laintiffs will be unable to prove their claims." *Clinton v. Sec. Benefit Life Ins. Co.*, 63 F.4th 1264, 1276 n.12 (10th Cir. 2023) (citations omitted); *see also Warne v. Hall*, 373 P.3d 588, 595 (Colo. 2016) (holding Colorado follows federal pleading standards).

The court below departed from this well-settled standard by making speculative factual determinations *contrary* to the allegations in Plaintiffs' Complaint and the fairest inferences drawn therefrom. For example, the court concluded that "COVID-19 infects people; it does not cause physical harm or loss

to property," and COVID-19 cannot render property uninhabitable. *Spectrum II*, at 5, 6. But these conclusory determinations directly contradict the allegations in Plaintiffs' Complaint and the scientific literature cited therein. *Spectrum I*, at 5. And they certainly are not judicially noticeable facts. *Cf. Timm v. Reitz*, 39 P.3d 1252, 1258 (Colo. App. 2001) (judicial notice is generally limited to "matters of common knowledge that cannot reasonably be disputed," e.g., "calendar date[s]"). Rather, this was a foray into fundamental factual questions about COVID-19's physical attributes, behavior, and effects on property. And the questions were resolved *against* Plaintiffs, when they needed to be resolved against the insurer.

Colorado law cannot tolerate this radical change of the operative pleading standard. Courts are "not equipped to make plausibility determinations on complex scientific issues" on a motion to dismiss, "in the absence of a developed factual record." *Adinolfe v. United Techs. Corp.*, 768 F.3d 1161, 1175 (11th Cir. 2014). And a trial court has no "authority to fashion its own summary judgment-like filter and dismiss claims during the early stages of litigation," "before a plaintiff can exercise its full rights of discovery under the Colorado Rules." *Antero Res. Corp. v. Strudley*, 347 P.3d 149, 151 (Colo. 2015) (reversing trial court's pre-discovery disposition of disputed medical causation issues). Nor may a court "assume[] the role of an expert" and supply its own "independent research and

interpretation" of scientific matters "which properly should be interpreted only by experts in the appropriate field." *Prestige Homes, Inc. v. Legouffe*, 658 P.2d 850, 854 (Colo. 1983).

Courts routinely decline to address, at the pleadings stage, whether scientific evidence adequately supports allegations about, for example, the accuracy of claims about medical, therapeutic, or other products. *E.g.*, *In re GNC Corp.*, 789 F.3d 505, 517 (4th Cir. 2015) (finding dispute over "the efficacy of the challenged [health supplement] products" to be "not susceptible to resolution at the motion-to-dismiss stage," citing cases); *Johnson-Jack v. Health-Ade LLC*, 587 F. Supp. 3d 957, 970 (N.D. Cal. 2022) (similar). Likewise, whether a chemical poses a risk of physical harm is "more appropriately resolved … after the parties have summarized and presented the scientific evidence supporting their positions, rather than at the motion to dismiss stage." *Food & Water Watch, Inc. v. U.S. EPA*, 291 F. Supp. 3d 1033, 1054 (N.D. Cal. 2017). Courts cannot decide an issue as a matter of law based on "arbitrary deductions from scientific laws as applied to evidence except where the conclusions reached are so irrefutable that no room is left for the entertainment by reasonable minds of any other conclusion." *Anderson v. Lett*, 374 P.2d 355, 357 (Colo. 1962). *A fortiori*, courts may not resolve a

disputed scientific issue at the pleadings stage, with *no evidence* at all. But the court below did exactly that.

The ability of COVID-19 to cause "physical loss or damage" to property is precisely the kind of "complex scientific issue" that courts are forbidden to resolve summarily and without evidence. *E.g.*, *Huntington Ingalls*, 287 A.3d at 535 (holding COVID-19 insurance claims cannot be dismissed based on "a layperson's understanding of the physical and scientific properties of a novel virus"); *see also Sonrisa Holding, LLC v. Circle K Stores, Inc.*, 835 F. App'x 334, 341 (10th Cir. 2020) (finding the effect of gasoline vapors on property "is an inherently scientific and technical question"). Abundant scientific literature examines the chemical interactions COVID-19 forms with property surfaces,[3] its persistence on such surfaces and in the air within property,[4] and the risk it presents in such circumstances.[5] While courts need not—and indeed, must not—decide at the

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[3] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7409833/ (accessed June 18, 2024).

[4] https://virologyj.biomedcentral.com/articles/10.1186/s12985-020-01418-7 (accessed June 18, 2024); https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10124653/ (accessed June 18, 2024).

[5] https://archive.cdc.gov/www_cdc_gov/coronavirus/2019-ncov/science/science-briefs/sars-cov-2-transmission.html (accessed June 18, 2024); https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8007300/ (accessed June 18, 2024).

pleadings stage whether this ultimately demonstrates "physical loss or damage," they can and should take judicial notice that there is "relevant discussion in the scientific community," *Abdin v. CBS Broadcasting Inc.*, 971 F.3d 57, 60 n.2 (2d Cir. 2020), and recognize that it is inappropriate to decide, from the bench and as a matter of law, that COVID-19 cannot cause "physical loss or damage" without the benefit of a developed record on the subject.

CONCLUSION

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

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on June 20, 2024, a true and correct copy of the foregoing was filed and served via the Colorado Courts E-Filing system on all counsel of record.

/s/ Shannon Salcedo
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