No. H048443

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE INNS BY THE SEA,

Plaintiff and Appellant,

v.

CALIFORNIA MUTUAL INSURANCE COMPANY,

Defendant and Appellee.

On Appeal from the Superior Court for
Monterey County
Hon. Lydia M. Villareal
Case No. 20CV001274

APPLICATION OF OAKLAND ATHLETICS BASEBALL COMPANY, SAN FRANCISCO GIANTS BASEBALL CLUB LLC, LOS ANGELES DODGERS LLC, ANGELS BASEBALL LP, AND PADRES L.P. FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANT THE INNS BY THE SEA

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April 20, 2021

Document received by the CA 6th District Court of Appeal.

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 8.200(c) of the California Rules of Court, Oakland Athletics Baseball Company (the d/b/a of Athletics Investment Group LLC), San Francisco Giants Baseball Club LLC, Los Angeles Dodgers LLC, Angels Baseball LP, and Padres L.P. (collectively, the "California Baseball Clubs") respectfully apply for this Court's permission to file the accompanying *amicus curiae* brief in support of Appellant The Inns by the Sea in its appeal of an adverse judgment in its insurance coverage lawsuit against Appellee California Mutual Insurance Company.

The brief, a copy of which is attached, brings to the Court's attention longstanding California precedents and principles of insurance law that bear directly on certain issues concerning whether coronavirus-related losses can fall within the insuring agreements of commercial property insurance policies, but which litigants and some lower courts have overlooked during this pandemic.[1]

[1] No party or counsel for any party was the author of any portion of the brief. No party or counsel for any party made a monetary contribution intended to fund the preparation or submission of the brief. No person or entity other than the *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of the brief. California Rules of Court, rule 8.520(f)(4).

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Interests of Proposed *Amici*

The California Baseball Clubs are the five Major League Baseball teams based in California and are a mainstay of the state's sports industry. Year after year, the Clubs brought in millions of baseball fans to their stadiums and to this state—that is, until the perils of the COVID-19 pandemic forced the cancellation of most of the 2020 baseball season and required that the California Baseball Clubs play the remaining games of that season without in-person attendance. When the California Baseball Clubs sought coverage from their "all risks" insurers for certain of their losses, their insurers failed to pay, forcing all 30 Major League Baseball clubs to file suit in Alameda County Superior Court for relief in the action *Oakland Athletics Baseball Co. v. AIG Specialty Ins. Co.*, Case No. RG20079003 (Superior Court, Alameda County).

The California Baseball Clubs have witnessed firsthand the physical ramifications of the coronavirus, the effect it has had on California businesses, and the unjustified resistance of the insurance industry to pay for such losses, no matter what their insurance policies provide. Therefore, and despite certain important differences between the language of the insurance policy issued to Appellant The Inns by the Sea and that of their own insurance program, the California Baseball Clubs are well-positioned to speak to and advocate for the insurability of the coronavirus-related losses that are the subject of the Inns' claim.

Document received by the CA 6th District Court of Appeal.

Specifically, in the attached brief, the California Baseball Clubs seek to fulfill the classic role of *amicus curiae* to "assist the court by broadening its perspective on the issues raised by the parties." *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 405, fn. 14. By submitting this brief and its analysis of California law, the California Baseball Clubs intend to "facilitate informed judicial consideration of a wide variety of information and points of view that may bear on important legal questions." *Id.* Further, *amici*, as leaders in the sports industry, offer "a different perspective from the principal litigants," which in turn will help this Court make a more "informed" decision "enriche[d]" by a "wide variety" of "points of view." *Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1177. Finally, *amici* seek to draw the Court's attention to California precedent about insured property damage and facts about the coronavirus's physical effects that demonstrate that the trial court erred in refusing to grant the Inns leave to file an amended complaint.

Accordingly, the California Baseball Clubs respectfully request leave to file the attached *amicus curiae* brief presenting additional authorities and analysis in support of Appellant Inns' arguments.

DATE: April 20, 2021 Respectfully submitted,

COVINGTON & BURLING LLP

By: /s/ David B. Goodwin
David B. Goodwin

Attorneys for *Amici Curiae*

Document received by the CA 6th District Court of Appeal.

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Document received by the CA 6th District Court of Appeal.

TABLE OF CONTENTS

Page

Document received by the CA 6th District Court of Appeal.

Document received by the CA 6th District Court of Appeal.

TABLE OF AUTHORITIES

Page(s)

Cases

Document received by the CA 6th District Court of Appeal.

Document received by the CA 6th District Court of Appeal.

Document received by the CA 6th District Court of Appeal.

Document received by the CA 6th District Court of Appeal.

Document received by the CA 6th District Court of Appeal.

Statutes

Other Authorities

Document received by the CA 6th District Court of Appeal.

Document received by the CA 6th District Court of Appeal.

Document received by the CA 6th District Court of Appeal.

Document received by the CA 6th District Court of Appeal.

INTRODUCTION

In the wake of the pandemic, some California businesses looked to their "all risks" property insurers for insurance coverage for at least part of their coronavirus-related losses. Of course, whether those insurers actually provide coverage turns on "the language of the policy itself, not upon 'general' rules of coverage that are not necessarily responsive to the policy language."[2] And property insurance policies differ from other types of coverages that this Court may have addressed (such as commercial general liability or automobile insurance) in that property insurance policy forms vary widely.

Some words that many property policies share, however, are "physical loss" or "damage," often in the context of an insuring agreement that covers "all risks of direct physical loss of or damage to property." The California Baseball Clubs submit this brief to bring to the Court's attention California authority and principles of insurance law bearing on whether insured real or personal property suffers "physical loss" or "damage" under an "all risks" property insurance policy when outbreaks of a deadly virus deprive such property of its intended use.

It plainly does. As detailed below, California courts have long adhered to the commonsense proposition that property is physically lost or damaged when its use or

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[2] *Am. Cyanamid Co. v. Am. Home Assur. Co.* (1994) 30 Cal.App.4th 969, 978.

Document received by the CA 6th District Court of Appeal.

function is materially impaired by an external peril, even if the property's basic structure remains intact. Further, settled California law also confirms that noxious substances that enter into and impair the safety of a building (including its air) or other property give rise to physical loss or damage for purposes of "all risks" insurance coverage. Under this established authority, and consistent with the plain meaning of the insurance policy language at issue here, a business suffers direct physical loss and damage when—as the Inns has alleged—coronavirus outbreaks in and around its premises undermine the safety and usability of its physical spaces.

California Mutual offers a much narrower interpretation of its insurance policy, one that would limit physical loss or damage to instances in which there is an alteration of the internal structure of property. But California Mutual draws this interpretation from decisions that typically construe narrower insurance policies (*e.g.*, "specified perils" or "open cover" policies), and that involve damage to *intangible* items (such as electronic data or business rights), or *internal* vice (such as defectively designed machines or counterfeit wine). Such cases are conceptual worlds apart from the instant "all-risks" property claim involving *physical* property that has been rendered unusable (or less usable) by the *external* physical perils of the deadly coronavirus.

Document received by the CA 6th District Court of Appeal.

The coronavirus-related trial court cases that California Mutual cites add nothing to the debate. They typically construe insurance policies with an Insurance Services Office "Loss Due to Virus or Bacteria" exclusion (not present here), or address complaints in which, unlike the current case, the plaintiff fails to plead physical loss or damage, or both. And *all* the cited trial court rulings fail to recognize not only the limited applicability of the cases described in the preceding paragraph but also the distinction in insurance policy language between the narrower types of insurance policies in those cases and a broad "all risks" policy like the one in this appeal.

Nor does the decision below assist the Court. It sustained California Mutual's demurrer in a three-line ruling that says no more than that the complaint does not state a claim. 2 AA 510-511. To the extent it determined that the coronavirus and COVID-19 could not have caused physical loss of or damage to property as a matter of law, the trial court erred, not just in its interpretation of the insurance policy but also as a factual matter. The physical effects of the coronavirus and COVID-19 are not something that one can determine by glancing at a door handle or a light switch and deciding that it looks undamaged. Instead, those physical effects will be established through factual and expert evidence, including through testimony by experts in the field of virology—evidence that the trial court did not consider, and

Document received by the CA 6th District Court of Appeal.

could not have considered, in ruling on California Mutual's demurrer to a brief complaint.

Moreover, the Inns' complaint was filed mere weeks after the pandemic began and the resulting government orders forced the Inns to shutter its hotels, and its pleadings on the nature of the physical loss or damage resulting from the coronavirus and COVID-19 were understandably sparse. Since then, a large and growing body of scientific studies of the coronavirus has confirmed that it physically alters property in several ways. The virus alters physical surfaces and can remain viable on common surfaces such as glass, stainless steel, and money for a month. The virus can be transmitted, and the COVID-19 disease contracted, through these objects, in a process known as "fomite transmission." Further, infected persons can generate virus-laden aerosols that remain in the air after the infected person has left the area and can infect others, thereby leaving the air and internal spaces of buildings physically unsafe. In addition, many businesses have had to physically reconfigure their layout and install physical safety features, such as partitions and improved ventilation systems, in order to mitigate viral spread and restore the use of physical premises. The trial court erred when it refused to grant the Inns leave to amend to allege these additional facts regarding the serious physical consequences of the coronavirus that would support its entitlement to coverage.

Document received by the CA 6th District Court of Appeal.

For all of these reasons, the Court should reverse the decision below and remand the case so that the Inns can file an amended complaint and have the chance to conduct discovery and establish the facts supporting its case.

THE GOVERNING LEGAL STANDARD

The trial court erred in three pertinent respects: (a) accepting California Mutual's interpretation of the insurance policy language as the one that necessarily governs even though alternative (and more reasonable) interpretations supporting coverage exist; (b) accepting California Mutual's pronouncement concerning the nature and effects of the coronavirus and COVID-19 on property, when the allegations in the complaint, or inferences from those allegations, support a fact-finding that would state a claim; and (c) refusing to grant leave to amend to plead additional bases for coverage. The standard that governs the Court's review of those errors is summarized below.

I. A Trial Court Cannot Sustain a Demurrer Directed to the Interpretation of Insurance Policy Language When an Interpretation Supporting Coverage Is Possible

An "insurer moving for a demurrer based on insurance policy language must establish conclusively that this language unambiguously negates beyond reasonable controversy the construction alleged in the body of the complaint." *Palacin v. Allstate Ins. Co.* (2004) 119 Cal.App.4th 855, 862. "To meet this burden, an insurer is required to demonstrate that the policy language supporting

Document received by the CA 6th District Court of Appeal.

its position is so clear that parol evidence would be inadmissible to refute it." *Id.* "Absent this showing, the court must overrule the demurrer and permit the parties to litigate the issue in a context that permits the development and presentation of a factual record, e.g., summary judgment or trial." *Id.*

The stringent standard for sustaining a demurrer in a case like this is based on the contract interpretation rules specific to insurance policies. It is black-letter law in California that insuring agreements must be "interpreted broadly so as to afford the greatest possible protection to the insured, whereas exclusionary clauses are construed narrowly against the insurer"—with the "burden rest[ing] upon the insurer to phrase exceptions and exclusions in clear and unmistakable language." *MacKinnon v. Truck Ins. Exch.* (2003) 31 Cal.4th 635, 648 (brackets, ellipses, and citations omitted).

An insurer seeking to deny coverage must therefore "establish that its interpretation" of the insurance policy "is the *only* reasonable one." *Id.* at 655 (emphasis in original). When insurance policy provisions read in context have more than one reasonable meaning, they are ambiguous and must be construed in favor of the policyholder and against the insurer that drafted the contract. *Powerine Oil Co. v. Superior Court* (2005) 37 Cal.4th 377, 390-391; *see also Fremont Indem. Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 114 ("An ambiguity may appear on the face of

Document received by the CA 6th District Court of Appeal.

a contract, or extrinsic evidence may reveal a latent ambiguity."). In other words, "even assuming that the insurer's suggestions are reasonable interpretations which would bar recovery," coverage nonetheless attaches "so long as there is any other reasonable interpretation under which recovery would be permitted." *MacKinnon*, 31 Cal.4th at 655.

II. A Trial Court Cannot Make Fact Findings Adverse to the Plaintiff on a Demurrer

A court ruling on a demurrer must assume the truth of the plaintiff's factual allegations and cannot sustain a demurrer merely because the court may question or disagree with the facts that the plaintiff alleged. *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967; *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 213-214; *Hacker v. Homeward Residential, Inc.* (2018) 26 Cal.App.5th 270, 280. A court must construe any inferences from the facts pleaded against the demurring party. *Perez v. Golden Empire Transit Dist.* (2012) 209 Cal.App.4th 1228, 1238.

III. A Trial Court Should Not Deny Leave to Amend When an Amendment Could Cure the Defects That Concern the Court

Finally, even if the complaint does not state a claim as pleaded, "[o]nly rarely should a demurrer to an initial complaint be sustained without leave to amend." *Cabral v. Soares* (2007) 157 Cal.App.4th 1234, 1240. Leave should be denied "only when it conclusively appears that there is no possibility of alleging facts under which recovery can be

Document received by the CA 6th District Court of Appeal.

obtained." *Id.* A court must grant leave if "the complaint, liberally construed, can state a cause of action under any theory or if there is a reasonable possibility the defect can be cured by amendment." *Id.* at 1240-1241 (citation omitted). As the discussion below reflects, an amended complaint could easily cure any defects the trial court perceived in the Inns' initial pleading.

ARGUMENT

The court below erred in holding, as a matter of law on a short pleading, that outbreaks of the coronavirus and COVID-19 do not cause "direct physical loss of or damage to" property as those words are used in the context of the California Mutual insurance policy.

Under an "all risks" commercial property policy such as that issued to the Inns, "all risks"—that is, all perils—"are covered unless specifically excluded in the policy." *Davis v. United Servs. Auto. Ass'n* (1990) 223 Cal.App.3d 1322, 1328.[3] A policyholder, of course, buys an "all risks" policy to protect it against a variety of risks. Some risks (like a global pandemic) may seem remote at the time, but it is far easier for an insurance company—whose entire business is founded on identifying and quantifying risks—to assess and draft its

[3] *See Fire Ins. Exchange v. Superior Court* (2004) 116 Cal.App.4th 446, 465, fn. 13 ("An 'all-risk' policy is one that covers all perils generally and without enumeration except those specifically excepted, as opposed to the typical policy which specifies both included and excluded perils.") (citation omitted).

Document received by the CA 6th District Court of Appeal.

policies to clearly and specifically exclude any perils that are not covered, as is required under California law to limit "all risks" coverage. *See Garvey v. State Farm Fire & Cas. Co.* (1989) 48 Cal.3d 395, 406. Especially pertinent here is California Mutual's decision not to include the Loss Due to Virus or Bacteria Exclusion in the Inns' policy, even though, as discussed below, that exclusion, or a similarly broad virus exclusion, was used in the vast majority of property and business income policies in effect when the pandemic began.

In that context, the Inns pleaded two separate grounds for coverage. First, the Inns alleged that it was forced to close its hotels, and then lost business income as a result, because of the presence of coronavirus and COVID-19 in and around the hotel premises, which constituted "physical loss of or damage to property" insured under its policy. 1 AA 21 & 26 ¶¶ 21, 47. Second, the Inns alleged that it was forced to close because of civil authority orders that prohibited access to the Inns' hotels due to the presence of coronavirus and COVID-19 at properties other than the Inns' insured properties, which constituted the "physical loss of or damage to property" required to trigger the policy's separate "civil authority" insuring agreement. 1 AA 21 & 26 ¶¶ 20, 47.

As detailed below, both coverage theories are amply supported in California precedent and both state claims for coverage.

Document received by the CA 6th District Court of Appeal.

I. California Law Broadly Defines "Physical Loss" and "Damage"

A. Physical Property Suffers "Physical Loss" and "Damage" When an External Peril Impairs the Property's Safe Use

California law provides that real or personal property may be physically lost or damaged under a property insurance policy when an external peril undermines the property's safe use and function.

To plead "physical" injury under California law, a plaintiff need only allege "an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property *causing it to become unsatisfactory for future use* or requiring that repairs be made to make it so." *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.* (2010) 187 Cal.App.4th 766, 779 (citation omitted and emphasis added) (construing an "open cover" policy).[4]

In keeping with this expansive standard, California courts and courts applying California law have found physical loss or damage in a wide range of circumstances involving perils that rob real or personal property of its use, often by rendering it unsafe, without also altering the property's internal physical structure. Such scenarios include changing

[4] An "open cover" policy insures "accidental direct physical loss to business personal property," *MRI Healthcare*, 187 Cal.App.4th at 771, rather than the broader insuring agreement for "all risks of direct physical loss of or damage to" covered property, as in the policy issued to the Inns.

Document received by the CA 6th District Court of Appeal.

soil conditions that render homes uninhabitable (or nearly so) by placing them at imminent risk of collapse, even though the homes themselves were not physically altered, *see Hughes v. Potomac Ins. Co. of D.C.* (1962) 199 Cal.App.2d 239, 248-249; *Strickland v. Fed. Ins. Co.* (1988) 200 Cal.App.3d 792, 799-801; the intermingling of unwanted substances with otherwise undamaged goods, rendering the goods unfit for use, even though, again, the goods themselves were not physically altered, *see Shade Foods, Inc. v. Innovative Products Sales & Mktg., Inc.* (2000) 78 Cal.App.4th 847, 865; the dispossession of property through theft or conversion (without an alteration of property), *see EOTT Energy Corp. v. Storebrand Int'l Ins. Co.* (1996) 45 Cal.App.4th 565, 569; *Pacific Marine Cntr., Inc. v. Philadelphia Indem. Ins. Co.* (E.D.Cal. 2017) 248 F.Supp.3d 984, 993; and the loss of property due to mistaken shipment (again, with no alteration of property), *see Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.* (C.D.Cal. July 11, 2018) 2018 WL 3829767, at *3-4.

The Court of Appeal's decision in *Hughes* provides an especially vivid illustration of how property rendered unusable and unsafe but otherwise intact suffers "loss or damage" within the plain meaning of the phrase. In that case, the policyholders awoke one morning to discover that the land next to their home had washed away into a creek, leaving their otherwise completely intact home on the edge of a newly created 30-foot cliff. 199 Cal.App.2d at 242-243. The

Document received by the CA 6th District Court of Appeal.

policyholders sought coverage for the cost of stabilizing their home under a property insurance policy that (much like the Inns' policy) insured them against "all risks of physical loss of and damage to" their dwelling. *Id.* at 242. The insurer denied coverage, essentially arguing that the home could "not be[] 'damaged' so long as its paint remains intact and its walls adhere to one another." *Id.* at 248.

The Court of Appeal rejected this interpretation. The Court explained that "[c]ommon sense requires that a policy should not be ... interpreted" in such a way that an insured home "might be rendered completely useless to its owners," yet the insurer "would deny that any loss or damage had occurred unless some tangible injury to the physical structure itself could be detected." *Id.* at 248-249; *accord Strickland*, 200 Cal.App.3d at 799-801 (a "significant risk" that property will "collapse[] or become uninhabitable" in the future is "the type of risk" a property insurer is "paid to assume").

In approving coverage for the cost of stabilizing a home before it collapses, *Hughes* vindicated the statutory rule that "[a]n insurer is liable" if "a loss is caused by efforts to rescue the thing insured from a peril insured against." Ins. Code § 531(b); *see also State of Cal. v. Allstate Ins. Co.* (2009) 45 Cal. 4th 1008, 1026 ("[T]he evident threat of property damage ... leads naturally to acts, whether by the insured or others, to prevent or mitigate the damage.").

Shade Foods is another case that found the existence of physical loss or damage because the functionality of the

Document received by the CA 6th District Court of Appeal.

property was materially harmed by an external peril, even though the property itself was structurally intact.

In that case, the policyholder had purchased 80,000 pounds of almonds, which were tainted by roughly a quarter pound of wood splinters. *Shade Foods*, 78 Cal.App.4th at 862. Although the almonds themselves were undamaged, the policyholder was unable "to remove the injurious splinters" from its supply of almond products and thus could not "restor[e] it to use." *Id.* at 866-867. The Court found it "obvious that the contamination of the almonds with wood splinters, requiring their destruction, constituted physical loss of the stock." *Id.* at 874; *see also id.* at 866 (holding that "the presence of wood splinters in the diced roasted almonds caused property damage to the nut clusters and cereal products in which the almonds were incorporated").

Those property insurance precedents align with authority in the liability insurance context holding that property is physically harmed when noxious substances, even in small or merely threatened quantities, disturb the safe use of the property. *See Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.* (1996) 45 Cal.App.4th 1, 91 (when a policyholder is deemed liable for "the release of asbestos fibers, whatever the level of contamination," or for the "health hazard ... of the potential for *future* releases" in the air, the "injury to the buildings is a physical one") (emphasis in original). Likewise, these California property insurance decisions find support in (and are often cited by) persuasive

Document received by the CA 6th District Court of Appeal.

out-of-state authorities that find insured physical loss or damage based on losses of use flowing from the fortuitous presence of external perils, such as gases, fumes, odors, and other noxious airborne and/or surface-tainting substances, in and around the subject property.[5]

B. California Cases Concerning Intangible Property or Inherently Defective Property Are Inapposite

To the extent that published California appellate decisions have placed limits on coverage for "physical" loss or damage, those limits have been relatively modest. To date, California appellate courts have declined to find insured physical loss or damage only when (a) the alleged property in question is itself not physical under the terms of the policy, or (b) the property is physical but has not been altered by an external peril. Neither characteristic applies here.

In the first of these lines of cases, the subject matter of the claim was intangible property and thus was not property covered under the policy. They include, for example, (i) lost electronic computer data, *Ward Gen. Ins. Servs., Inc. v.*

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[5] *See, e.g.*, *W. Fire Ins. Co. v. First Presbyterian Church* (Colo. 1968) 437 P.2d 52 (gasoline fumes) (citing *Hughes*); *Matzner v. Seaco Ins. Co.* (Mass. Super. Ct. Aug. 12, 1998) 1998 WL 566658 (carbon monoxide) (citing *Hughes*); *TRAVCO Ins. Co. v. Ward* (E.D. Va. 2010) 715 F.Supp.2d 699 (toxic drywall gases) (citing *Hughes*); *Mellin v. N. Sec. Ins. Co.* (N.H. 2015) 115 A.3d 799 (urine odor); *Farmers Ins. Co. of Oreg. v. Trutanich* (Or. App. 1993) 858 P.2d 1332 (methamphetamine odor); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.* (D.N.J. Nov. 25, 2014) 2014 WL 6675934 (ammonia gas).

Document received by the CA 6th District Court of Appeal.

Employers Fire Ins. Co. (2003) 114 Cal.App.4th 548, 555-556[6]; (ii) cancelled business contracts, *Simon Mktg., Inc. v. Gulf Ins. Co.* (2007) 149 Cal.App.4th 616, 623; and (iii) leaked trade secrets, *id.* at 623-624 (citing *U.S. Gypsum Co. v. Ins. Co. of N. Am.* (7th Cir. 1987) 813 F.2d 856) (*dicta*). None of these cases involved real, physical, tangible property susceptible to physical loss or damage. *See Simon Mktg.*, 149 Cal.App.4th at 622 ("While in the modern setting 'just about any type of property' may be insured, the insured item must nonetheless be property."). In addition, *Simon Marketing* involved a much narrower "named perils" insurance policy, rather than broad "all risks" coverage like that at issue here.

The second line of cases involves claims premised on *internal* property defects, as opposed to property that had been lost or damaged by an *external* peril. This includes (i) an MRI machine that could not turn on because of a defect "inherent" in "the machine itself," *MRI Healthcare*, 187 Cal.App.4th at 780; (ii) an "internal defect in a building, such as bad title or bad paint," *id.* (citing *Pirie v. Fed. Ins. Co.* (Mass.App. 1998) 696 N.E.2d 553, 555) (*dicta*); (iii) wine that was discovered to be counterfeit and thus of lesser value than expected, *Doyle v. Fireman's Fund Ins. Co.* (2018) 21

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[6] Some property insurance policies, including those insuring the California Baseball Clubs, expressly cover loss or damage to electronic data. Therefore, *Ward General*'s conclusion about what constitutes "property" is not applicable to insurance policies in which the insurer has agreed to insure a broader range of property than that covered under the policy in *Ward General*.

Document received by the CA 6th District Court of Appeal.

Cal.App.5th 33, 38-40; and (iv) a condominium that contained "latent defects, faulty workmanship and construction code violations," all perils that the insurance policy excluded, *State Farm Fire & Cas. Co. v. Superior Court* (1989) 215 Cal.App.3d 1436, 1439, 1442-1443.

The courts that rejected the insurance claims in those "internal defect" cases did so on the ground that they concerned property that was inherently defective, and the policyholders' economic loss arose from the discovery or manifestation of the defect that existed in the property all along. In none of these cases was there an external peril that caused loss or damage to previously undamaged property.

The above lines of cases are thus readily distinguishable from a matter involving both *physical* property, such as the Inns' rooms and hotels, and *external* perils, such as unprecedented viral outbreaks spurring changes to property (as discussed below) and forcing the substantial shutdown of businesses.

II. The Inns Has Alleged (and Can Further Allege) Facts Showing That the Coronavirus Causes Direct Physical Loss of and Damage to Property

The coronavirus is a rare and uniquely dangerous physical peril. Outbreaks of the coronavirus have caused physical loss of and damage to business properties under California law by altering the surfaces of property and the air inside property so that formerly safe property is rendered dangerous and deadly. Also, actual or imminent viral infiltration has caused physical loss and damage by rendering

Document received by the CA 6th District Court of Appeal.

business premises and their physical spaces unsafe for their intended use, at least absent restorative or mitigation measures. These consequences arise from an external, fortuitous, once-in-a-lifetime pandemic that is acting upon real and personal (*i.e.*, tangible) property of the type insured against by commercial property policies.

As set forth below, the Inns' complaint alleges the foregoing with respect to the Inns' own hotel properties, or can be readily amended to do so. The Inns should therefore be permitted to amend its complaint and proceed to prove its insurance claim.

A. The Coronavirus Physically Alters the Conditions and Safe Use of Property

The physical consequences of the coronavirus are manifold. *First*, as alleged in the Inns' complaint, the coronavirus alters the physical surfaces of property. *See* 1 AA 21 ¶ 19 ("Emerging research on the virus and recent reports from the Center[s] for Disease Control indicate that COVID-19 strains physically infect and can stay alive on surfaces for extended periods, a characteristic that renders property exposed to the contagion potentially unsafe and dangerous."). These allegations must be accepted as true at the demurrer stage, *see Requa v. Regents of the Univ. of Cal.* (2012) 213 Cal.App.4th 213, 223, but in any event, they would be borne out in discovery and in expert testimony from virologists.

For example, the World Health Organization and researchers funded by the National Institutes of Health have

Document received by the CA 6th District Court of Appeal.

advised that people can become infected with the coronavirus by touching virus-laden objects and surfaces, and then touching their eyes, nose, or mouth.[7] This mode of transmission—indirect transmission via objects and surfaces—is known as "fomite transmission." A study of a COVID-19 outbreak identified indirect transmission via objects such as elevator buttons and restroom taps as an important possible cause of a "rapid spread" of the coronavirus in a shopping mall in China.[8] Additional research has shown that the coronavirus remained viable for up to 28 days on a range of common surfaces—such as glass, stainless steel, and money—left at room temperature.[9]

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[7] WHO, *Transmission of Sars-CoV-2: Implications for Infection Prevention Precautions* (July 9, 2020), https://www.who.int/news-room/commentaries/detail/transmission-of-sars-cov-2-implications-for-infection-prevention-precautions (last viewed Apr. 20, 2021); Alicia Kraay et al., *Risk for Fomite-Mediated Transmission of SARS-CoV-2 in Child Daycares, Schools, Nursing Homes, and Offices*, 27(4) Emerging Infectious Diseases 1229, https://wwwnc.cdc.gov/eid/article/27/4/20-3631_article (last viewed Apr. 20, 2021).

[8] Jing Cai et al., *Indirect Virus Transmission in Cluster of COVID-19 Cases, Wenzhou, China, 2020*, 26 Emerging Infectious Diseases 1343 (2020), https://wwwnc.cdc.gov/eid/article/26/6/20-0412_article (last viewed Apr. 20, 2021).

[9] Shane Riddell et al., *The Effect of Temperature on Persistence of SARS-CoV-2 on Common Surfaces*, 17 Virology J. 145 (2020), https://virologyj.biomedcentral.com/articles/10.1186/s12985-020-01418-7 (last viewed Apr. 20, 2021).

Document received by the CA 6th District Court of Appeal.

Further, cleaning of surfaces normally does not fully remove the virus, and thus, even after cleaning, some physical residue of the virus, and some alteration of the surface caused by the virus, remains.[10]

Second, as the CDC has recognized, an infected person can generate virus-laden aerosols that linger in the air even after the person has left the vicinity. Moreover, the virus can migrate substantial distances through a building's ventilation systems. One study found the presence of the coronavirus within the HVAC system servicing hospital ward rooms of COVID-19 patients. This study detected SARS-CoV-2 RNA in ceiling vent openings, exhaust filters, and central ducts that were located more than 50 meters from the patients' rooms.[11] Another study of an outbreak at a restaurant in China concluded that the spread of the coronavirus "was prompted by air-conditioned ventilation," with persons who sat at tables downstream of the HVAC system's air flow becoming infected.[12] Based on "epidemiological evidence suggestive of

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[10] Nicolas Castaño et al., *Fomite Transmission and Disinfection Strategies for SARS-CoV-2 and Related Viruses*, arXiv:2005.11443 (2020), https://arxiv.org/ftp/arxiv/papers/2005/2005.11443.pdf (last viewed Apr. 20, 2021).

[11] Karolina Nissen et al., *Long-Distance Airborne Dispersal of SARS-CoV-2 in Covid-19 Wards*, 10 Sci. Rep. 19589 (2020), https://www.nature.com/articles/s41598-020-76442-2 (last viewed Apr. 20, 2021).

[12] Jianyun Lu et al., *COVID-19 Outbreak Associated with Air Conditioning in Restaurant, Guangzhou, China*, 26 Emerging Infectious Diseases 1628, 1629 (2020),

Document received by the CA 6th District Court of Appeal.

[coronavirus] transmission through aerosol,"[13] federal agencies have recommended that facilities improve their ventilation and HVAC systems by, for example, increasing ventilation with outdoor air and air filtration.[14]

Although the Inns did not allege any of these specific facts about the alteration of air, such facts would be captured by the Inns' general allegations of loss and damage caused by the virus. Furthermore, such scientific evidence demonstrates that, at minimum, the Inns could add such allegations to its complaint on remand. *See* Reply Br. 9, fn. 1.

Third, as the Inns alleged, albeit briefly, the actual or imminent threat of viral intrusion onto the surfaces and air of business properties has materially impaired the safe use and function of those properties. 1 AA 21 ¶¶ 19, 21.

Fourth, the physical impact of the coronavirus and COVID-19 on business premises is demonstrated by the

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https://wwwnc.cdc.gov/eid/article/26/7/20-0764_article (last viewed Apr. 20, 2021).

[13] EPA, *Indoor Air and COVID-19 Key References and Publications*, https://www.epa.gov/coronavirus/indoor-air-and-covid-19-key-references-and-publications (last viewed Apr. 20, 2021) (capitalization omitted).

[14] EPA, *Indoor Air and Coronavirus* (COVID-19), https://www.epa.gov/coronavirus/indoor-air-and-coronavirus-covid-19 (last viewed Apr. 20, 2021); CDC, *COVID-19 Employer Information for Office Buildings* (Oct. 29, 2020), https://www.cdc.gov/coronavirus/2019-ncov/community/office-buildings.html (last viewed Apr. 20, 2021); OSHA, *Guidance on Preparing Workplaces for COVID-19* 12 (2020), https://www.osha.gov/Publications/OSHA3990.pdf (last viewed Apr. 20, 2021).

Document received by the CA 6th District Court of Appeal.

numerous physical remedial and mitigation measures that businesses have undertaken to make their unsafe premises safe and fit for some operations. Such measures include (a) spatial reconfigurations of premises to avoid crowding, create physical distance between customers, and promote outdoor use, (b) repairs or modifications of heating and air conditioning systems to improve ventilation, (c) installation of physical barriers to limit viral spread, (d) intensive cleaning and disinfecting, (e) the modification of physical behaviors by requiring social distancing, and various other steps set forth in government guidance. *See supra*, fn. 14. Although the Inns' complaint was filed at an early stage in the pandemic when these response measures were still in their nascent stages, the Inns could allege facts about these measures on remand if given leave to amend.

Finally, due to the property damage caused by the coronavirus, government officials have issued orders that prohibited access to the Inns and other properties. As alleged in the complaint, Monterey and San Mateo Counties compelled the cessation of non-essential operations at physical locations—thereby prohibiting the Inns' hotels from being normally operated, used, and accessed for hotel room stays. *See* 1 AA 18 & 21 ¶¶ 2, 20. Elsewhere in California, localities from Los Angeles to San Diego to San Francisco issued similar civil closure orders and resolutions based on the oft-cited concern that the "COVID-19 virus can spread easily from person to person and is *physically causing*

Document received by the CA 6th District Court of Appeal.

property loss or damage due to its tendency to attach to surfaces for prolonged periods of time."[15]

B. The Coronavirus Causes "Physical Loss" and "Damage" as Those Terms Are Used in the Inns' "All Risks" Policy

The above-described physical alteration caused by the coronavirus to the surfaces, air, and usability of property, and by related response measures, readily satisfies the "physical loss of or damage to property" condition under the Inns' policy.

Just as the home in *Hughes* was held to be physically harmed when the imminent risk of collapse rendered it "useless" but otherwise "intact," 199 Cal.App.2d at 248-249, and the almonds in *Shade Foods* were held to have suffered physical loss and property damage when they were mixed with a small quantity of "injurious" wood chips and were no longer safe to use, 78 Cal.App.4th at 865-866, 874, so too does

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[15] Mayor Eric Garcetti, *Public Order Under City of Los Angeles Emergency Authority* (issued Mar. 19, 2020 and revised May 27, 2020) (emphasis added), https://www.lamayor.org/sites/g/files/wph1781/files/page/file/20200527%20Mayor%20Public%20Order%20SAFER%20AT%20HOME%20ORDER%202020.03.19%20%28REV%202020.05.27%29.pdf (last viewed Apr. 20, 2021); *accord* Mayor of the City of San Diego, Executive Order No. 2020-3 (Apr. 30, 2020), https://www.sandiego.gov/sites/default/files/mkf_executive_order_2020-04-30-2020_3.pdf (last viewed Apr. 20, 2021); Board of Supervisors of the City and County of San Francisco, Resolution No. 153-20 (Apr. 20, 2020), https://sfbos.org/sites/default/files/r0153-20.pdf (last viewed Apr. 20, 2021).

Document received by the CA 6th District Court of Appeal.

a building experience physical loss and damage when it is rendered unusable or less usable due to the presence of a deadly virus in and around it. And, much like the findings of coverage for the costs of stabilizing the at-risk home in *Hughes* and the losses related to destroying the unsafe almond stock in *Shade Foods*, the physical response measures necessary to contain and limit viral spread fall squarely within the broad coverage of the Inns' "all risks" policy (which is not subject to the expansive Insurance Services Office "Loss Due to Virus or Bacteria" exclusion).

Further, just as *Armstrong* reasoned that a building sustains "physical injury" when its components are such that "common daily activities may cause asbestos fibers [*i.e.*, a harmful condition] to be released," 45 Cal.App.4th at 91, a business likewise suffers physical loss and damage when its common daily function of hosting employees and patrons at its physical premises suddenly becomes a health hazard due to the risk of intrusion of a deadly disease that physically transforms safe surfaces into dangerous, virus-carrying fomites. And, like the asbestos in *Armstrong*, and the gasoline fumes, drywall gases, and carbon monoxide releases at issue in *Hughes*' (out-of-state) progeny (*see supra*, fn. 5), coronavirus particles physically and powerfully corrupt the breathable air in buildings.

Critically, the physical buildings, surfaces, air, and internal spaces that comprise the Inns' insured hotels are the type of real or personal property that is insured under the

Document received by the CA 6th District Court of Appeal.

Inns' policy, and California Mutual does not argue to the contrary. Therefore, California Mutual's cases holding that electronic computer data and business contracts and other intangible items are not covered "property" are not apposite.

C. *MRI Healthcare* Is Inapposite

California Mutual (and the federal trial court cases it cites) also rely heavily on *MRI Healthcare*, which addressed economic losses that an insured suffered because of an inherent property defect. But *MRI Healthcare* concerned a very different factual scenario and involved materially different insurance policy language.

1. *MRI Healthcare* Turns on Different Facts

In *MRI Healthcare*, the insured sought coverage for a defective MRI (magnetic resource imaging) machine that refused to "ramp up" after it was intentionally "ramped down" (demagnetized). 187 Cal.App.4th at 770. The machine was already known to be defective before it was ramped down and, according to the Court, the "failure of the MRI machine to satisfactorily 'ramp up' emanated from the inherent nature of the machine itself rather than actual physical 'damage.'" *Id.* at 780-781. The Court construed the policy language to require that "some *external force* must have acted upon the insured property to cause a *physical change* in the condition of the property." *Id.* at 780 (emphasis in original). Because the MRI machine failed to ramp up due to a known "inherent"

Document received by the CA 6th District Court of Appeal.

defect rather than an external force, the Court held there was no "'loss' within the meaning of the policy." *Id.*

As the court below in this case recognized, however, the Inns' case is factually distinct in that it is not about an internal peril, and it does not involve property that was inherently defective. *See* 2 AA 538:23-539:1 ("[O]nce you get to the facts of the *MRI* [case] and the ramping up, the ramping down and all that, it really is not at all like our case here."). Rather, the external force of the coronavirus and COVID-19 physically changed the relevant properties by making the once-safe surfaces and the air of those properties into deadly agents of transmission of a dangerous virus and disease. Even under *MRI Healthcare*, this is sufficient to establish physical loss or damage—or at minimum confirms that California Mutual has not negated that construction of the insurance policy beyond reasonable controversy.

In its brief, California Mutual mischaracterizes *MRI Healthcare*, paraphrasing snippets of the opinion to propose six supposedly "essential element[s]" for pleading insured physical loss or damage under California law. Answering Br. 35. In particular, California Mutual alludes to *MRI Healthcare*'s citation to a treatise that discussed insured physical injury in terms of "distinct, demonstrable, physical alteration of the property." 187 Cal.App.4th at 779. Yet later in the decision, *MRI Healthcare* makes clear that such a "physical alteration" merely "contemplates an actual change in insured property then in a satisfactory state, occasioned by

Document received by the CA 6th District Court of Appeal.

accident or other fortuitous event directly upon the property *causing it to become unsatisfactory for future use* or requiring that repairs be made to make it so." *Id.* at 779 (emphasis added; citation omitted). In other words, under *MRI Healthcare*, a fortuitous force that impairs the ability to use property would suffice to trigger coverage under the insurance policy before that court.

MRI Healthcare did not hold that the "physical alteration" language requires "destruction of the building," as California Mutual proposes. Answering Br. 30. Nor did that court hold that the demonstrable physical alteration be visible to the naked eye: There is no indication that the defect in the MRI machine was visible to the naked eye, but *MRI Healthcare* never relied upon that as a basis for holding that there was no coverage under the policy.

2. *MRI Healthcare* Construed Materially Different Insurance Policy Language

MRI Healthcare's holding is, moreover, not a one-size-fits-all ruling divorced from the language of the specific insurance policy at issue.

Property insurance policies vary widely in their language. While small and medium-sized businesses often purchase property policies that incorporate provisions drafted by the Insurance Services Office, an industry trade group, even these policies differ widely, such that two policies are rarely exactly the same. ISO currently has 200 different types of property policies and coverages, including 16

Document received by the CA 6th District Court of Appeal.

different business income coverage policies and more than 170 endorsements that may be added to a basic policy to modify the coverages. As noted below, the vast majority of policies include ISO's exclusion for "Loss Due to Virus or Bacteria" or a variant of that exclusion with equally expansive exclusionary language, but the policy purchased by the Inns does not. Furthermore, some policyholders, particularly businesses facing more significant risks, may purchase broader, non-ISO "all risks" forms coupled with express coverage for "communicable disease," such as those in the "all risks" policies that insure the California Baseball Clubs.

MRI Healthcare never purported to interpret every conceivable property insurance policy wording, nor would that be consistent with California law, which provides that in "questions of insurance coverage the court's initial focus must be upon the language of the policy itself, not upon 'general' rules of coverage that are not necessarily responsive to the policy language." *Am. Cyanamid Co.*, 30 Cal.App.4th at 978.

The relevant insuring agreement in *MRI Healthcare* differs in important respects from the one before this Court: Whereas the *MRI Healthcare* "open cover" policy insured only "accidental direct physical loss to business personal property," 187 Cal.App.4th at 771, the Inns' policy responds to "**all risks**" of "direct physical loss of ***or*** damage to" property. Because "loss of" and "damage to" in the Inns' policy are stated in the disjunctive, those two terms cannot mean the

Document received by the CA 6th District Court of Appeal.

same thing, *see E.M.M.I. Inc. v. Zurich Am. Ins. Co.* (2004) 32 Cal.4th 465, 473, and thus their scope cannot be limited to the meaning that *MRI Healthcare* gave to a variant of just one of those terms.

Ultimately, neither "physical loss of" nor "damage to" is defined in the Inns' policy and California courts must give undefined insurance policy terms their plain meaning, *AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 825-826, often ascertained by consulting a dictionary. *See Barnett v. State Farm Gen. Ins. Co.* (2011) 200 Cal.App.4th 536, 544. The plain meaning of "physical" is "having a material existence" or "perceptible"; "loss" is "destruction, ruin," or "the act of losing possession" or "deprivation"; and damage is "loss or harm resulting from injury to person, property, or reputation."[16] The allegations in the Inns' complaint (or those that can be pleaded if leave to amend is granted)—outbreaks of a virus with a material existence, depriving property of its use and thereby causing harm—easily satisfy the plain meaning of those terms.

Finally, in contrast to the "open cover" policy in *MRI Healthcare*, the Inns' policy covers "all risks," and "[u]nder an 'all risk' policy, the limits of coverage are defined [not by the insuring agreement, which covers 'all risks" but] by the *exclusions*." H. Walter Croskey, et al., *California Prac. Guide:*

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[16] Merriam-Webster, https://www.merriam-webster.com/dictionary/physical; https://www.merriam-webster.com/dictionary/loss; https://www.merriam-webster.com/dictionary/damage.

Document received by the CA 6th District Court of Appeal.

Insurance Litig. (Rutter Group rev. ed. 2020), ¶¶ 6:251, 6:253 (citing cases) (emphasis in original). There are no virus or other pertinent exclusions in the Inns' policy that might limit the interpretation of the "all risks" of "physical loss of or damage to property" in the policy's insuring agreement when the latter is read in the context of the entire policy.

D. The Federal District Court Cases California Mutual Relies Upon Are Inapposite and Unpersuasive

Lacking support for its argument in binding California authority, California Mutual cites to federal trial court cases that have rejected coverage for pandemic claimants. Even if they were on point, those cases are not persuasive.

As a preliminary matter, in cases based on diversity jurisdiction, the federal courts are supposed to apply California law as set forth in published appellate precedent from the California state courts. *See, e.g.*, *Ins. Co. of State of Penn. v. Assoc. Int'l Ins. Co.* (9th Cir. 1990) 922 F.2d 516, 520. And yet, many of the federal court rulings that California Mutual cites rely primarily on other federal district court cases, rather than on pertinent California appellate authority. *See, e.g., Unmasked Mgmt., Inc. v. Century-Nat'l Ins. Co.* (S.D.Cal. Jan. 22, 2021) 2021 WL 242979, at *5; *see also Selane Products, Inc. v. Cont'l Cas. Co.* (C.D.Cal. Feb. 8, 2021) 2021 WL 609257, at *3-4 (relying heavily on "voluminous authority from California [federal] district courts" to justify dismissal of coronavirus-related insurance claim, and leaving largely unaddressed policyholder's appeal to "'controlling'

Document received by the CA 6th District Court of Appeal.

California law"). It comes as little surprise then that, as the Inns notes, California state trial courts overruling insurer demurrers as to coronavirus-related insurance claims have declined to follow contrary federal court "authority." Reply Br. 13-14; *see also Castaneda v. Dep't of Corr. & Rehab.* (2013) 212 Cal.App.4th 1051, 1074 ("a decision of a federal district court has no precedential value in this court; at best, it is persuasive authority only") (citation omitted).

Moreover, all of the federal trial court decisions that California Mutual relies upon are factually and legally inapposite because, *inter alia*, they: (1) construe insurance policies containing the standard-form Insurance Services Office's "of Loss Due to Virus or Bacteria" exclusion, which California Mutual chose not to include in the Inns' "all risks" policy[17]; (2) ignore controlling California authority like

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[17] *See, e.g.*, *10E, LLC v. Travelers Indem. Co. of Conn.* (C.D.Cal. 2020) 483 F.Supp.3d 828, 832; *Kevin Barry Fine Art Assocs. v. Sentinel Ins. Co. Ltd.* (N.D.Cal. Jan. 13, 2021) 2021 WL 141180, at *2; *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Conn.* (C.D.Cal. 2020) 492 F.Supp.3d 1051, 1057; *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.* (N.D.Cal. 2020) 487 F.Supp.3d 834, 836-37; *Pappy's Barber Shops, Inc. v. Farmers Group, Inc.* (S.D.Cal. 2020) 487 F.Supp.3d 937, 941; *Travelers Cas. Ins. Co. of Am. v. Geragos & Geragos* (C.D.Cal. Oct. 19, 2020) 2020 WL 6156584, at *2; *Plan Check Downtown III, LLC v. AmGuard Ins. Co.* (C.D.Cal. 2020) 485 F.Supp.3d 1225, 1228; *Robert W. Fountain, Inc. v. Citizens Ins. Co. of Am.* (N.D.Cal. Dec. 9, 2020) 2020 WL 7247207, at *4; *W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Co.* (C.D.Cal. Oct. 27, 2020) 2020 WL 6440037, at *5-6.

Document received by the CA 6th District Court of Appeal.

Hughes, *Shade Foods*, and *Armstrong*, and instead (at most) rely on inapposite cases such as *Ward General* and *MRI Healthcare* without acknowledging that they were construing different insurance policy language in inapposite factual scenarios[18]; and/or (3) consider factual allegations vastly different than those in the Inns' complaint, including some that expressly disavow reliance on viral spread as a basis for coverage or that do not allege that the coronavirus was on the insured premises.[19]

Though no California appellate court has yet considered this issue, several instructive pandemic precedents in other states have held that a policyholder sufficiently pleads "direct

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[18] *See, e.g., 10E*, 483 F.Supp.3d at 835-36; *Pappy's*, 487 F.Supp.3d at 943-44; *O'Brien Sales & Mktg., Inc. v. Transp. Ins. Co.* (N.D.Cal. Jan. 12, 2021) 2021 WL 105772, at *3-4; *Unmasked Mgmt., Inc. v. Century Nat'l Ins. Co.* (S.D.Cal. Jan. 22, 2021) 2021 WL 242979, at *4-5.

[19] *See, e.g., 10E*, 483 F.Supp.3d at 837 ("Plaintiff asserts that it is 'is not attempting to recover any losses from COVID-19 or its proliferation.'"); *Pappy's*, 487 F.Supp.3d at 943, fn. 2 ("Plaintiffs expressly allege that COVID-19 did not cause physical loss of or damage to their properties, alleging and arguing only that that the government orders themselves constitute direct physical loss of or damage to the properties"); *Mudpie*, 487 F.Supp.3d at 841, fn. 7 ("Had Mudpie alleged the presence of COVID-19 in its store, the Court's conclusion about an intervening physical force would be different."); *Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co.* (N.D.Cal. Nov. 9, 2020) 2020 WL 6562332, at *4 (although "Defendants do not dispute that actual presence of a contaminant at a covered property might trigger coverage," there are "no facts plausibly alleging an actual [coronavirus] exposure at one or more Sand People stores").

Document received by the CA 6th District Court of Appeal.

physical loss and/or damage to property" by alleging "the presence of COVID-19 at or near" premises. *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.* (Nev.Dist.Ct. Nov. 30, 2020) 2020 WL 7258108, at *2-3; *accord Studio 417, Inc. v. Cincinnati Ins. Co.* (W.D.Mo. 2020) 478 F.Supp.3d 794, 800. Indeed, some of the most careful decisions have involved grants of summary judgment to policyholders. *See, e.g.*, *Ungarean DMD v. CNA*, (Pa.Ct.Cmn.Pleas Mar. 25, 2021) 2021 WL 1164836, at *7 ("Plaintiff's loss of use of its property was both 'direct' and 'physical.' The spread of COVID-19, and a desired limitation of the same, had a close logical, causal, and/or consequential relationship to the ways in which Plaintiff materially utilized its property and physical space."); *Cherokee Nation v. Lexington Ins. Co.* (Okla.Dist.Ct. Jan. 28, 2021) 2021 WL 506271; *N. State Deli, LLC v. The Cincinnati Ins. Co.* (N.C.Super. Oct. 9, 2020) 2020 WL 6281507; *Perry Street Brewing Co., LLC v. Mut. of Enumclaw Ins. Co.* (Wash.Super. Nov. 23, 2020) 2020 WL 7258116.

E. California Mutual Cannot Obtain the Benefit of the Industry-Standard Virus Exclusion That It Omitted From the Policy

Another fundamental flaw in California Mutual's argument is that it was aware of, and could have included in its policy, an industry-standard exclusion for virus-related risks, but did not do so.

In 2006, the Insurance Services Office drafted a broad exclusion for "loss or damage caused by or resulting from any

Document received by the CA 6th District Court of Appeal.

virus," which the office published and made available to insurers as a standard form exclusion.[20] That this industry trade group drafted such an exclusion is evidence that insurers recognized that viruses could well cause covered physical loss or damage, because of course the "very purpose of an exclusion is to withdraw coverage which, but for the exclusion, would otherwise exist." *Century Transit Sys., Inc. v. Am. Empire Surplus Lines Ins. Co.* (1996) 42 Cal.App.4th 121, 129. With that in mind, approximately 83 percent of commercial property and business income policies sold in recent years have used the ISO exclusion or a similarly expansive exclusion.[21] But the "all risks" policy that California Mutual drafted and sold the Inns is not one of them.[22]

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[20] *See* ISO Circular, *New Endorsements Filed To Address Exclusion Of Loss Due To Virus Or Bacteria*, LI-CF-2006-175 (July 6, 2006) [hereinafter ISO Virus Exclusion Circular] https://www.propertyinsurancecoveragelaw.com/wp-includes/ms-files.php?file=2020/03/ISO-Circular-LI-CF-2006-175-Virus.pdf (last viewed Apr. 20, 2021).

[21] *See* National Association of Insurance Commissioners, *Business Interruption / Businessowner's Policies (BOP)* https://content.naic.org/cipr_topics/topic_business_interruptionbusinessowners_policies_bop.htm (last viewed April 20, 2021).

[22] Some policies have exclusions that use the word "virus," but they are either very limited in scope (*e.g.,* applying only to property damage costs and not to business interruption losses) or in application (*e.g.*, applying only to "classic" pollution) or both. *See, e.g.*, *The Villa Los Alamos Homeowners Ass'n v. State Farm Gen. Ins. Co.* (2011) 198 Cal.App.4th 522, 526 (pollution exclusions in property policies

Document received by the CA 6th District Court of Appeal.

California Mutual's decision to omit that standard virus exclusion affects the construction of its insurance policy. Because California Mutual "chose not to have [that] exclusion," it cannot ask this Court to "read into the policy what [it] has omitted. To do so would violate the fundamental principle that in interpreting contracts, including insurance contracts, courts are not to insert what has been omitted." *Safeco Ins. Co. of Am. v. Robert S.* (2001) 26 Cal.4th 758, 763-764; Reply Br. 16-17.

Put simply, if California Mutual did not want to cover the risk of virus-induced loss of use, it had to say so "specifically," with a clear and on-point virus exclusion—not with an *ex post* attempt to narrow the insuring agreement's coverage for "physical loss of or damage to" property. *See Hughes*, 199 Cal.App.2d at 248-249 (declining to hold that a property rendered "useless" but otherwise intact is not lost or damaged, and explaining that "a policy should not be so interpreted in the absence of a provision *specifically* limiting coverage in this manner") (emphasis added).

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only apply to "events commonly regarded as environmental pollution"); *Thor Equities, LLC v. Factory Mut. Ins. Co.* (S.D.N.Y. Mar. 31, 2021) 2021 WL 1226983, at *3-4 (in the context of a coronavirus claim, contamination exclusion in Factory Mutual form is ambiguous and limited)*; Boxed Foods Co., LLC v. Cal. Cap. Ins. Co.* (N.D.Cal. Oct. 26, 2020) 2020 WL 6271021, at *7, fn. 8 ("The [ISO] Virus Exclusion casts an exceptionally wide net relative to other virus exclusions because it lacks relevant limitations and ambiguous language."). Notably though, California Mutual's policy omits *any* sort of virus exclusion.

Document received by the CA 6th District Court of Appeal.

III. The Inns Has Also Alleged Facts Supporting Coverage Under the Civil Authority Provision

In addition to the general coverage grant for lost business income owing to physical loss of or damage to the Inns' hotels, the Inns has pleaded all the requisite elements for coverage under its "civil authority" insuring agreement. This is an independent reason that the demurrer should have been overruled, or at minimum, that the Inns should have been granted leave to amend its complaint to allege further facts establishing its entitlement to civil authority coverage.

The civil authority insuring agreement covers the "actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss." 1 AA 20 ¶ 13. The Inns pleaded that it suffered business income losses due to an "action of civil authority" (*i.e.*, closure orders issued by the Counties of San Mateo and Monterey) that "prohibit[ed] access" to the Inns' hotels (*i.e.*, by barring them from being accessed for normal business purposes), due to "direct physical loss of or damage to property, other than at" the hotels (*i.e.*, viral outbreaks at properties around the Inns' hotels), due to a "Covered Cause of Loss" (*i.e.*, non-excluded viral perils). 1 AA 20-22 ¶¶ 13, 20-22.

Such allegations sufficiently state a claim for civil authority coverage under California's lenient notice pleading

Document received by the CA 6th District Court of Appeal.

standards. *See McKell v. Wash. Mut., Inc.* (2006) 142 Cal.App.4th 1457, 1469. In any event, California Mutual's assertions that the Inns failed to plead certain allegations regarding civil authority coverage provide no basis for sustaining the demurrer without leave to amend. *See* Answering Br. 49 (arguing that the Inns has not sufficiently alleged "physical loss or damage to 'other' property"). Instead, California Mutual's arguments simply confirm that the Superior Court abused its discretion in denying leave to amend.

California Mutual's argument against civil authority coverage is based on two faulty premises. First, California Mutual argues that the coronavirus and COVID-19 cannot result in physical loss or damage. Answering Br. 48-50. That argument fails for the many reasons described above. *See* Section II *supra*.

Second, California Mutual asserts that there was no "prohibition of access" to the Inns' insured hotels because the Inns could accommodate limited guests (such as homeless people) and employees. Answering Br. 50-51. However, the complaint does not allege that employees or paying guests could, or did, access the properties; California Mutual just supposes that to be the case, which is improper on a demurrer, where inferences in the evidence must be construed in favor of the complaint. *Perez*, 209 Cal.App.4th at 1238.

Document received by the CA 6th District Court of Appeal.

In any event, these supposed facts do not establish beyond reasonable controversy that the allegations in the complaint are incapable of triggering the civil authority coverage. *See Palacin*, 119 Cal.App.4th at 862. The basic purpose of business interruption-type coverages is to insure against disruptions to "the normal"—not total—"operation and functions of [one's] business." *Pacific Coast Eng'g Co. v. St. Paul Fire & Marine Ins. Co.* (1970) 9 Cal.App.3d 270, 275. A hotel's normal function is to service paying customers, and so it would thwart the objectively reasonable expectations of the insured if a civil authority order prohibited access to paying customers and yet the order did not trigger coverage merely because it might allow for employees to come on-site to secure the building.

In that regard, although California courts have not interpreted civil authority provisions in this context, other courts have held that "the phrase 'prohibits access'" should be interpreted to focus on "the extent to which the action of civil authority prevented the insured from accessing its premises in a manner that would normally produce actual and regular business income." *Ungarean*, 2021 WL 1164836, at *10; *see also id.* (holding that the policy "does not clearly and unambiguously state that any such prohibition must completely and totally bar *all* persons from *any* form of access to Plaintiff's property whatsoever") (emphasis in original); *Studio 417*, 478 F.Supp.3d at 803-804 ("[T]he Policies require that the 'civil authority prohibits access,' but does not specify

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'all access' or 'any access' to the premises."). Here, there is no dispute that the government orders broadly prohibited normal access to the Inns' insured premises even if those orders did not absolutely prohibit access as to all persons. 1 AA 21 ¶¶ 20-21.

Similarly, the Supreme Court of the United Kingdom recently rejected an insurer argument that policy language covering loss resulting from "[p]revention of access to the Premises due to the actions or advice of a government or local authority" applied only to "complete closure" of the premises in the context of COVID-19-related claims. *The Financial Conduct Authority v Arch Insurance (UK) Ltd & others* [2021] UKSC 1, ¶¶ 147-148. Instead, that Court held that such provisions cover "prevention of access to a discrete part of the premises and/or for the purpose of carrying on a discrete part of the policyholder's business activities," providing the example of a restaurant that was prohibited from offering in-person dining but could permit takeaway or delivery. *Id.* ¶¶ 148, 151. To the extent this Court reaches that issue here, it should reach the same result.

IV. California Mutual's Other Arguments Against Coverage Lack Any Basis in the Facts, Law, or Policy Language

California Mutual seeks to defend the one-sentence order sustaining the demurrer based on a litany of objections that have no grounding in the subject insurance policy, reasonable policyholder expectations, the facts of the pandemic, or controlling California precedent.

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A. The Coronavirus Damages People *and* Property

California Mutual argues that there is no coverage because "[t]he virus COVID-19 harms people, not property." Answering Br. 46.[23] This contention is legally unsound and contrary to the allegations in the complaint, which must be accepted as true on a demurrer.

First, a peril covered under a property policy can harm both people *and* property, as is true of fires, hurricanes, and countless other perils. As relevant here, coronavirus particles have been shown to injure the surfaces, air, and interior spaces of buildings, as well as the people that occupy those buildings. *See* Section II *supra*.

Second, to the extent that California Mutual argues that a property's fitness for use by people is irrelevant to the coverage inquiry, it ignores controlling California law holding that property suffers an insured "physical" injury when an external peril renders the property "unsatisfactory for future use." *MRI Healthcare*, 187 Cal.App.4th at 779; *see also Armstrong*, 45 Cal.App.4th at 91 (where a building is unsafe "because of the potential for *future* releases of asbestos

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[23] COVID-19 is a disease caused by the SARS-CoV-2 virus, not a virus itself. *See* WHO, *Naming the coronavirus disease (COVID-19) and the virus that causes it*, https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it (last viewed Apr. 20, 2021).

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fibers, ... the injury to the buildings is a physical one") (emphasis in original).

Third, to the extent California Mutual argues as a matter of scientific fact that the coronavirus *only* harms people, its argument is not only contrary to various government orders and expert studies, but it also impermissibly asks this Court to make fact findings that are inconsistent with the allegations in the Inns' complaint. *See Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 840 (facts alleged in complaint must be accepted as true on demurrer); Section II, *supra* (describing the Inns' allegations). If California Mutual wants to dispute these allegations, the resolution of such disputes must "await expert testimony at trial." *Saunders*, 27 Cal.App.4th at 840.

B. The Coronavirus' Physical Harms Cannot Be Eliminated Through Routine Cleaning

California Mutual asserts—before any discovery or expert testimony has taken place—that "disinfectant and other cleaning methods can be used to remove or lessen the virus from surfaces," and that therefore the virus cannot plausibly cause physical loss or damage. Answering Br. 46 (citation omitted). California Mutual's argument is flawed on multiple levels.

First, because Inns has not alleged that a simple cleaning can remove the coronavirus—and that is not the type of "common knowledge" that is subject to judicial notice under

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Evidence Code section 452(g)—the Court cannot affirm the judgment below based on that assertion.

Second, California Mutual's argument ignores that, irrespective of whether a single tainted surface can be wiped down, many other factors—such as the unique prevalence of the virus, the particular ease with which it spreads (often without detection), the danger of imminent viral re-entry if premises fully reopen during the pandemic, and various government restrictions, *see* Section II.A *supra*—mean that a virus-affected business premises can (even after cleaning) remain "unsatisfactory for future use" in its normal capacity, and thus be "physically" harmed under California law. *MRI Healthcare*, 187 Cal.App.4th at 779; *accord Hughes*, 199 Cal.App.2d at 248-249; *Shade Foods*, 78 Cal.App.4th at 865. Stated simply, this is not a case involving a routine substance that can be quickly wiped off a countertop; this case concerns unexpected outbreaks of a lethal virus that have triggered unprecedented government restrictions and that (despite their best cleaning efforts) have shut down far too many California businesses.

Third, California Mutual's argument rests on a faulty factual predicate, as the cleaning and remedial measures required to effectively eliminate, or at least begin to manage, the coronavirus, are far more intensive and wide-ranging than California Mutual conjectures. Studies have found coronaviruses to be "much more resilient to the cleaning than most respiratory viruses so tested," and have recommended

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applying "a complex disinfectant solution" to combat those viruses.[24] Accordingly, businesses, including the California Baseball Clubs—and presumably the Inns—have had to implement extensive cleaning and disinfectant protocols (as well as numerous other measures) to ensure the safety of their staff and patrons. Beyond cleaning, many businesses—in keeping with guidance from federal agencies—have had to, among other things, reconfigure their spaces to facilitate social distancing, modify their HVAC systems to improve ventilation, and install physical barriers to limit viral spread. *See supra*, fn. 14.

That policyholders must take indisputably physical measures (like cleaning and careful hand washing) to respond to the virus demonstrates that the virus is not intangible and incorporeal as California Mutual argues; that complex cleaning and disinfection is *part of* the response to the coronavirus demonstrates that the damage and loss it inflicts is physical in nature.[25]

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[24] Nevio Cimolai, *Environmental and decontamination issues for human coronaviruses and their potential surrogates*, J. Med. Virology (June 12, 2020), https://doi.org/10.1002/jmv.26170 (last viewed Apr. 20, 2021).

[25] *See Columbiaknit, Inc. v. Aff'd FM Ins. Co.* (D.Or. Aug. 4, 1999) 1999 WL 619100, at *6 ("[I]f an article of retail clothing has an odor strong enough that it must be washed to remove it, (and the garment therefore cannot be sold as new) it has sustained physical damage and would be covered under an 'all-risk' property insurance policy.").

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C. The Policy's "Period of Restoration" Provision Does Not Serve as a Hidden Bar to Coverage

California Mutual next asserts that the policy's "Period of Restoration" provision—which provides coverage through the time that the property should be "repaired, rebuilt, or replaced"—"confirms" the inapplicability of property coverage as to COVID-affected claimants, since there is supposedly no "physical damage" that "needs to be repaired, rebuilt, or replaced as a result of COVID-19." Answering Br. 38. California Mutual is mistaken.

First, the Period of Restoration definition does not apply at all to the California Mutual policy's "civil authority" insuring agreement, which has its own loss period.

Second, for the insuring agreements to which the definition does apply, the Period of Restoration definition spells out the *duration* of coverage for a business interruption loss. It does not purport to affect the *trigger* of coverage, namely, "direct physical loss of or damage to property." *See, e.g., Ungarean*, 2021 WL 1164836, at *8 ("The 'period of restoration' does not somehow redefine or place further substantive limits on types of available coverage.").

Of course, if California Mutual had wanted the Period of Restoration to function as an exclusionary provision, limiting coverage for "physical loss of or damage to" property to loss or damage involving certain types of repairs, then it had to say so with "*conspicuous, plain and clear*" language. *MacKinnon*, 31 Cal.4th at 648 (emphasis in original; citation

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omitted). An insurer cannot eliminate coverage by stealth, as California Mutual proposes.

Third, the measures a business must take to respond to the coronavirus fit comfortably within the Period of Restoration framework. The plain meaning of "repair," "replace," and "rebuild," respectively, are "to make good," "to restore to a former place or position," or "to restore to a previous state."[26] If a policyholder restores unsafe physical spaces to a safe and usable condition by, *e.g.*, installing new partitions or ventilation systems, reconfiguring physical space to permit social distancing, or engaging in deep cleaning and sanitizing, it naturally effects a repair, replacement, or rebuild of its property. The Inns can so allege if given leave to amend.

D. The Policy Does Not Require Complete or Total Loss of Property to Trigger Coverage

At various points, California Mutual suggests that for loss of use of physical property to qualify as insured physical loss or damage, the subject loss must be "complete," "permanent," or tantamount to "destruction of the building." Answering Br. 30, 41, 42, 46-47. But nothing in the policy requires "complete" or "permanent" deprivations in order to trigger coverage, let alone imposes those conditions by the requisite "clear and unmistakable language," *MacKinnon*, 31

[26] *Merriam-Webster Dictionary*, https://www.merriam-webster.com/dictionary/repair; https://www.merriam-webster.com/dictionary/replace; https://www.merriam-webster.com/dictionary/rebuild (last viewed Apr. 20, 2021).

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Cal.4th at 648 (citation omitted). Had California Mutual wanted to limit coverage to complete and permanent loss of use, it needed to say so expressly, but it did not.

California Mutual's position is, in any event, at odds with controlling precedents and statutes. Imposing an atextual "permanent" deprivation requirement on insureds would conflict with *Hughes*, which found as a matter of "common sense" that a building was physically harmed after a landslide rendered it unsafe to occupy—even though the building had been "completely stabiliz[ed]" by the time the insurance claim reached the Court of Appeal. 199 Cal.App.2d at 248-249. Similarly, a "complete" deprivation condition would ignore the Court of Appeal's recent holding that when a policy covers "loss of use," "the reasonable expectations of the insured would be that 'loss of use' means the loss of *any* significant use of the premises, not the total loss of all uses." *Thee Sombrero, Inc. v. Scottsdale Ins. Co.* (2018) 28 Cal.App.5th 729, 737 (liability insurance) (emphasis in original).[27] Furthermore, California's statutory rule that "[a]n insurer is liable" where "a loss is caused by efforts to rescue

[27] Of course, few if any claims for truly fleeting or insignificant losses of use are likely to make their way to an insurance company's door—given that policy deductibles, transaction costs, and the risk of premium increases will almost always render such claims worthless or economically ill-advised. Here, however, the extensive closure of the Inns' hotels represents a significant and costly loss of use of physical property to which California Mutual's policy does and should respond.

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the thing insured from a peril insured against," *see* Ins. Code § 531(b), would be a dead letter if a policyholder could not obtain coverage for efforts to temporarily and/or partially close down its premises in order to stave off widespread viral intrusion onto its property.

Finally, the civil authority coverage further confirms that the policy does not require a permanent dispossession of property for the Inns to receive coverage. That coverage is triggered by "action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss." 1 AA 103 § A.5.a. That coverage, which applies for a limited number of days, necessarily assumes that the action of civil authority would effect a non-permanent prohibition of access to the insured hotels.

V. The Trial Court Erred in Denying Leave to Amend

As the foregoing shows, there are extensive facts that the Inns could plead in an amended complaint (and develop in discovery) that could confirm its right to coverage.

At the hearing, the trial court recognized that case law holds that smoke damage, E. coli, gasoline vapors, and asbestos constitute physical damage and stated that it was "just wondering whether or not COVID is enough like these other things such that it should be covered." 2 AA 530:3-5. But that colloquy confirms that the court should have allowed

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Inns leave to amend to plead how the coronavirus alters surfaces and air. It is more than a little presumptuous for California Mutual to insist that this Court declare *as a matter of law* that the coronavirus cannot possibly inflict damage to property, when this implicates complex issues of virology and scientists themselves are only beginning to understand this novel virus.

Additionally, the Inns should be afforded the opportunity to account for safety measures that it, like many other businesses, has undertaken to restore the use and function of its physical spaces. If the Inns reconfigured its property layout, upgraded its ventilation systems, installed physical barriers, or took other remedial steps as to its physical property, it ought to be allowed to plead as much in order to further establish physical loss and damage.

Moreover, the Inns should be permitted to discover evidence regarding the drafting history of the California Mutual policy, insurer interpretations of relevant policy provisions, and other extrinsic evidence that courts normally consider in construing policies.[28] For instance, when ISO circulated its "Loss Due to Virus and Bacteria" exclusion, it explained that viruses and bacteria could be argued to physically alter the interior of buildings, leading to property

[28] *See, e.g., Montrose Chem. Corp. of Calif. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 670-671 (considering drafting history); *Maryland Cas. Co. v. Reeder* (1990) 221 Cal.App.3d 961, 971-972 (considering insurance industry publications).

Document received by the CA 6th District Court of Appeal.

and business interruption claims absent a broad exclusion.[29] Such evidence could constitute extrinsic evidence establishing that because California Mutual omitted this exclusion, a reasonable policyholder would understand the policy to cover losses resulting from a deadly virus. *See, e.g.*, *Cunningham v. Universal Underwriters* (2002) 98 Cal.App.4th 1141, 1153 (holding that a "definition of an insurance term contained in an insurance industry bulletin may be relevant to defeat an insurer's contention that the term" in a policy should be "narrowly construed"). The Inns should be able to discover this and other extrinsic evidence on remand.

CONCLUSION

For all the foregoing reasons, and the reasons set forth in the Inns' briefs, the Court should reverse the Superior Court's judgment and remand with instructions to allow the Inns to file an amended complaint and for its claims to proceed to discovery.

[29] *See* ISO Virus Exclusion Circular at 5 of 12 ("Disease-causing agents may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property."); *id.* at 6 of 12 ("the nature of the property itself would have a bearing on whether there is actual property damage" from viruses and bacteria).

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DATE: April 20, 2021 Respectfully submitted,

COVINGTON & BURLING LLP

By: /s/ David B. Goodwin
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Attorneys for *Amici Curiae*

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rule of Court 8.208, the undersigned counsel for *amici curiae* certifies as follows:

- Athletics Holdings, LLC has an ownership interest of 10 percent or more in *amicus* Athletics Investment Group LLC.
- San Francisco Baseball Associates LLC has an ownership interest of 10 percent or more in *amicus* San Francisco Giants Baseball Club LLC.
- Bay Ball, Inc. has an indirect ownership interest of 10 percent or more in *amicus* San Francisco Giants Baseball Club LLC.
- Los Angeles Dodgers Holding Company LLC has an ownership interest of 10 percent or more in *amicus* Los Angeles Dodgers LLC.
- LA Holdco LLC has as an indirect ownership interest of 10 percent or more in *amicus* Los Angeles Dodgers LLC.
- No publicly traded corporation has an ownership interest of 10 percent or more in *amicus* Angels Baseball LP.
- SoCal SportsNet LLC has an ownership interest of 10 percent or more in *amicus* Padres L.P.
- Padre Time, LLC has an indirect ownership interest of 10 percent or more in *amicus* Padres L.P.

DATE: April 20, 2021 Respectfully submitted,

COVINGTON & BURLING LLP

By: /s/ David B. Goodwin
David B. Goodwin

Attorneys for *Amici Curiae*

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CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies that pursuant to Rule California Rules of Court, rule 8.204(c)(1), the enclosed Brief *Amicus Curiae* of Oakland Athletics Baseball Company, San Francisco Giants Baseball Club LLC, Los Angeles Dodgers LLC, Angels Baseball LP, and Padres L.P. in Support of Appellant is produced using 13-point Century Schoolbook type, including footnotes, and contains 11,348 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

DATE: April 20, 2021 Respectfully submitted,

COVINGTON & BURLING LLP

By: /s/ David B. Goodwin
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PROOF OF SERVICE
NO. H048443

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 415 Mission Street, Suite 5400, San Francisco, California 94105. On April 20, 2021, I served the following document(s) described as:

- **APPLICATION OF OAKLAND ATHLETICS BASEBALL COMPANY, SAN FRANCISCO GIANTS BASEBALL CLUB LLC, LOS ANGELES DODGERS LLC, ANGELS BASEBALL, LP, AND PADRES, L.P. FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF APPELLANT AND BRIEF *AMICUS CURIAE***
- **BRIEF *AMICUS CURIAE* 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 the document will be sent electronically to the eservice list on or before April 20, 2021.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this proof of service is executed at San Francisco, California on April 20, 2021.

Dawn Halverson

Dawn Halverson

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