Docket No. 20-56020

In the

United States Court of Appeals

For the

Ninth Circuit

PLAN CHECK DOWNTOWN III, LLC,
a California limited liability company and others similarly situated,

Plaintiff-Appellant,

v.

AMGUARD INSURANCE COMPANY,
a Pennsylvania company,

Defendant-Appellee.

Appeal from a Decision of the United States District Court for the Central District of California, No. 2:20-cv-06954-GW-SK · Honorable George H. Wu

ANSWERING BRIEF OF DEFENDANT-APPELLEE AMGUARD INSURANCE COMPANY

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DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellee AmGUARD Insurance Company discloses that it is a wholly-owned subsidiary of WestGUARD Insurance Company, which is a wholly-owned subsidiary of National Indemnity Company, which is a wholly-owned subsidiary of Berkshire Hathaway Inc. Berkshire Hathaway Inc. has no parent company, and no publicly traded company owns more than 10% of Berkshire Hathaway Inc.'s stock.

By */s/ Chet A. Kronenberg*
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INTRODUCTION

The District Court correctly concluded that Plaintiff-Appellant Plan Check Downtown III, LLC ("Appellant") is not entitled to property insurance coverage for income it allegedly lost due to the COVID-19 virus, after the State of California and the City of Los Angeles issued social distancing orders limiting on-premises dining in restaurants to slow its spread. The Business Income coverage provision in the insurance policy that Defendant-Appellee AmGUARD Insurance Company ("AmGUARD") issued to Appellant applies only where there is "direct physical loss of or damage to property." Like many restaurant owners, Appellant was impacted by virus-related limitations on on-premises dining. But, Appellant did not allege any damage to its property in its complaint and does not assert any such damage in its Opening Brief. Because Appellant concedes that there was no damage to its property and makes no allegations supporting a claim for "direct physical loss," this is a simple case and the grounds for dismissal and affirmance are clear.

Appellant's primary argument on appeal is that "direct physical loss of" property encompasses changes imposed by the social distancing orders as to what can occur on property (*e.g.*, no on-premises dining) without any tangible alteration to the property itself. The District Court correctly rejected this argument as inconsistent with the plain meaning of the words "direct physical loss," decisions of California courts applying that policy language, and the terms of the Policy read as

a whole. The District Court followed the overwhelming California authority holding that, for a loss to be covered, the policy unambiguously requires "distinct, demonstrable, physical alteration" of the property. Some *external force* must have acted upon the insured property to cause a *physical change* in the condition of the property. The District Court correctly concluded that no such physical loss has been pled here and that dismissal of the complaint was required.

The District Court's conclusion that no coverage is available for Appellant's COVID-19-related losses can also be affirmed based on the insurance policy's virus exclusion, which the District Court did not reach. The exclusion expressly and unambiguously excludes loss or damage caused "directly or indirectly by . . . any virus . . . that induces or is capable of inducing physical distress, illness or disease." Appellant's losses indisputably resulted "directly or indirectly" from the COVID-19 virus and no other cause.

Significantly, more than 50 California district courts have denied similar COVID-19 business income insurance claims brought by insureds under policies with similar policy language on substantially similar allegations. This Court should affirm the District Court's judgment dismissing the complaint because no "direct physical loss of or damage to property" has been alleged and the virus exclusion precludes coverage for the COVID-19 virus-related losses at issue as a matter of law.

STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction in this case pursuant to 28 U.S.C. § 1332(a)(1) because there is complete diversity between the parties and the amount in controversy exceeds $75,000. 2-ER-017-20 ¶¶ 10-26. AmGUARD is a citizen of Pennsylvania. 2-ER-017 ¶ 12. Appellant is a California limited liability company with its principal place of business in Los Angeles, California. 2-ER-017 ¶ 11. Appellant's sole member/manager is a California limited liability company whose member/managers are California citizens. *Id.* The District Court also had subject matter jurisdiction in this case under the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d)(2), because this case is a putative class action and AmGUARD and Appellant are citizens of different states, the proposed class members number at least 100, and the amount in controversy exceeds $5,000,000. 2-ER-021-23 ¶¶ 28-38.

This Court has appellate jurisdiction under 28 U.S.C. § 1291. The District Court entered a tentative ruling granting AmGUARD's motion to dismiss on September 10, 2020 and entered a final judgment adopting that ruling and dismissing the Complaint with prejudice on September 16, 2020. 1-ER-002-12. Appellant timely filed its notice of appeal on September 30, 2020. 3-ER-412.

STATEMENT OF THE ISSUES

1. Whether the District Court correctly dismissed Appellant's complaint seeking property insurance coverage because limitations on on-premises restaurant dining stemming from COVID-19 government social distancing orders are not "direct physical loss of or damage to property" covered by the Policy.

2. Whether the judgment below can be affirmed on the alternative ground of the Policy's virus exclusion, which precludes coverage for "loss or damage caused directly or indirectly by . . . [a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease."

STATEMENT OF THE CASE

I. Appellant's Property Insurance Coverage

Appellant operates two restaurants in Los Angeles. 2-ER-035 at ¶ 9. Appellant purchased commercial property insurance from AmGUARD providing coverage from February 27, 2020 to February 27, 2021. 2-ER-036 at ¶¶ 14, 17. The governing insurance contract, Policy Number PLBP159547 (the "Policy"), was attached to the Complaint. 2-ER-036 at ¶ 14.

The Policy includes Business Income coverage for:

> the actual loss of Business Income you sustain due to the necessary suspension of your 'operations' during the 'period of restoration'. **The suspension must be caused by *direct physical loss of or damage to* property at the described**

> **premises**. The loss or damage must be caused by or result from a Covered Cause of Loss.

See 2-ER-222 (emphasis added). Put simply, to make an insurable claim pursuant to the Business Income provision, there must be a Covered Cause of Loss, such as a fire, which causes or results in "direct physical loss of or damage to" the policyholder's insured property, which in turn causes the policyholder to suspend its operations. AmGUARD will then pay the policyholder's actual loss of business income during the "period of restoration." The "period of restoration" begins "72 hours after the time of direct physical loss or damage" and ends on the earlier of "[t]he date when the property at the described premises should be **repaired, rebuilt or replaced** with reasonable speed and similar quality; or . . . [t]he date when business is resumed at a new permanent location." *See* 2-ER-246.

In addition, the Policy includes Extra Expense coverage for "necessary Extra Expense you incur during the 'period of restoration' that you would not have incurred if there had been no direct physical loss of or damage to the property at the described premises." *See* 2-ER-224. As with Business Income coverage, the "loss or damage must be caused by or result from a Covered Cause of Loss." *Id.*

Finally, the Policy includes Civil Authority coverage, which provides that "[w]hen a Covered Cause of Loss causes damage to property other than property at the described premises, we will pay for 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[.]" *Id.* Civil Authority coverage only applies where (1) "[a]ccess to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage" and the insured premises is within that area and not more than a mile from the damaged property; and (2) "[t]he action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property." 2-ER-225.

Business Income, Extra Expense, and Civil Authority coverage only respond to losses that result from a "Covered Cause of Loss." A Covered Cause of Loss is defined as "[r]isks of direct physical loss unless the loss is . . . [e]xcluded in Paragraph B. Exclusions in Section I." 2-ER-219. Paragraph B(1)(j) excludes from a Covered Cause of Loss any "**loss or damage caused directly or indirectly by . . . . [a]ny virus**, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." *See* 2-ER-231, 2-ER-234 (the "Virus Exclusion"). Further, the Policy provides that, if the Virus Exclusion is applicable, "[s]uch loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." *See* 2-ER-231.

II. Appellant Makes a Claim for COVID-19 Virus-Related Loss

Beginning in late January and into February 2020, the COVID-19 virus began to spread throughout California. 2-ER-039 at ¶¶ 31-33. On March 15, 2020, Eric Garcetti, the Mayor of Los Angeles, issued a "Public Order under City of Los Angeles Emergency Authority." 2-ER-040 at ¶ 39. The order was called "New City Measures to Address COVID-19" and stated that the World Health Organization characterized the COVID-19 virus as a pandemic and the Centers for Disease Control and Prevention advised that COVID-19 "spreads easily from person to person[.]" 2-ER-267. Thus, the Mayor wrote, "[i]t is absolutely critical that we as a City do everything we can to slow the pace of community spread and avoid unnecessary strain on our medical system." *Id.* "To aid in [those] efforts," the order prohibited restaurants in Los Angeles from "serving food for consumption on premises." *Id.* However, the order provided that "[r]estaurants and retail food facilities may continue to operate for purposes of preparing and offering food to customers via delivery service, to be picked up or for drive-thru." *Id.*

On March 19, 2020, Gavin Newsom, the Governor of California, issued an Executive Order requiring all individuals living in the State of California to stay home, except as needed to maintain continuity of operations in certain critical sectors. 2-ER-271. The order noted that "Californians must have access to such necessities as food, prescriptions and health care[,]" but when people leave their

homes to perform or obtain those functions, they should practice social distancing. 2-ER-272. The order stated that it was "issued to protect the public health of Californians . . . . and ensure that we mitigate the impact of COVID-19." *Id.*

Also on March 19, 2020, Mayor Garcetti issued an additional "Public Order Under City of Los Angeles Emergency Authority," adopting "additional emergency measures to further limit the spread of COVID-19." 2-ER-274. The order required Los Angeles residents to stay at home, but exempted certain business operations and activities, including "[r]estaurants and retail food facilities that prepare and offer food to customers, but only via delivery service, to be picked up, or drive-thru." 2-ER-279.

According to Appellant, these orders (together, the "social distancing orders"), "effectively caused the loss of business income from [Appellant's] restaurants[.]" 2-ER-040 at ¶ 41. On March 18, 2020, Appellant submitted a claim to AmGUARD via telephone to recover its lost income through the Policy. 2-ER-042 at ¶ 50. AmGUARD subsequently denied the claim. *Id.* at ¶ 52.

III. Appellant Sues AmGUARD

On June 16, 2020, Appellant filed its Complaint against AmGUARD in Los Angeles Superior Court. 2-ER-033. The Complaint purported to bring suit on behalf of "[a]ll restaurants in California that purchased comprehensive business insurance coverage from [AmGUARD] which includes coverage for business

income, filed a claim for lost business income following California's Stay at Home Order, and were denied coverage by Defendant on the same or similar grounds." 2-ER-044 at ¶ 64.

Appellant asserted four causes of action in the Complaint: (i) declaratory judgment; (ii) breach of contract; (iii) bad faith breach of implied covenant of good faith and fair dealing; and (iv) unfair business practices under California Business & Professions Code § 17200, *et seq.*, 2-ER-048-54, and sought coverage under the Policy's Business Income, Extra Expense, and Civil Authority provisions.[1]

With respect to its claim for Business Income coverage, the Complaint alleged that "[w]ith the closure of its restaurants on the order of the Mayor and Governor, [Appellant] suffered a direct physical loss of or damage to its properties, causing a 'suspension' of its 'operations,' as those terms are defined in the Policy."

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[1] In Appellant's Opening Brief (the "Opening Brief" or "Br."), Appellant does not address its claims under the Extra Expense or Civil Authority provisions of the Policy or its causes of action for bad faith and unfair business practices. Therefore, AmGUARD does not address such claims in its Answering Brief. *See West v. State Farm Mut. Auto. Ins. Co.*, 489 F. App'x 153, 154 (9th Cir. 2012) ("Federal Rule of Appellate Procedure 28(a)(9)(A) provides that the appellant's opening brief must have an argument that contains the 'appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies.' We have held that '[i]ssues not raised in the opening brief usually are deemed waived.'") (internal citations omitted).

2-ER-037 at ¶ 21. However, Appellant did not allege that any physical change to its property caused it to suspend its operations. Instead, Appellant alleged that it suspended its operations in compliance with the social distancing orders issued to stop the spread of COVID-19. *See* 2-ER-048 at ¶ 80 ("As a result of the orders, the covered property of [Appellant] lost some or all of its functionality and/or became useless or uninhabitable, resulting in substantial loss of business income.").

The Virus Exclusion went entirely unmentioned in the Complaint, except for an allegation that "there are no applicable, enforceable or unambiguous exclusions or definitions in the Policy that preclude coverage for these losses." 2-ER-049-50 ¶¶ 82, 91.

IV. AmGUARD Moves to Dismiss Appellant's Complaint and Its Motion Is Granted

On August 7, 2020, after removing this case from Los Angeles Superior Court to the District Court, AmGUARD filed a motion to dismiss Appellant's causes of action pursuant to Federal Rule of Civil Procedure 12(b)(6). 3-ER-313. AmGUARD argued that Appellant failed to allege facts establishing "direct physical loss of or damage to" its property, as required for business income coverage to apply. 3-ER-327-29. AmGUARD further argued that the Virus Exclusion barred coverage. 3-ER-325-27.

On September 10, 2020, the District Court issued a tentative ruling granting AmGUARD's motion to dismiss in its entirety. 1-ER-002. In its tentative

ruling, the District Court noted that Appellant conceded that its properties did not suffer any "physical damage," 1-ER-006, but instead argued that the Policy extends to "physical *loss of* property" or "physical *damage to* property." *Id.* (emphasis in original). After discussing various authorities, the District Court held that, with respect to the "direct physical loss of or damage to" language in the Policy, "[t]he weight of California law . . . appears to require some tangible alteration, no matter whether the trigger language uses 'loss' or 'damage.'" 1-ER-008.

The District Court observed that Appellant's interpretation of the Policy to cover its loss of desired use of property without tangible physical alteration "is not a reasonable one because it would be a sweeping expansion of insurance coverage without any manageable bounds." 1-ER-009. By way of example, the District Court noted that Appellant's interpretation "would mean that potentially any regulation that limits a business's operations would trigger coverage[,]" such as an ordinance requiring that restaurants located in residential zones operate only during specified hours. 1-ER-009-10. The District Court further held that the unmanageable scope of coverage Appellant proposed is not limited to government action, but encompasses anything that interrupts the permitted physical activities on a property, such as a snowstorm that interferes with a restaurant's outdoor dining service. 1-ER-010.

The District Court concluded by stating that "[Appellant's] theory of relief is a major departure from established California law." 1-ER-010. Because the District Court held that Appellant's loss was not covered by the Policy because it did not suffer any "physical loss of or damage to its property," the District Court did not address AmGUARD's argument that the Virus Exclusion also barred coverage. 1-ER-010 at n.7.

A hearing was held on September 10, 2020. 3-ER-392. At the hearing, when the District Court indicated that it intended to adopt its tentative ruling as its final ruling, the parties discussed whether dismissal should be with prejudice or without prejudice. 3-ER-404-05. Appellant asked for and was granted more time to consider whether it wanted the dismissal to be without prejudice or with prejudice so Appellant could instead file this appeal. 3-ER-405. On September 15, 2020, Appellant filed a "Status Report" with the District Court, stating it "accepts dismissal of this action with prejudice."[2] 1-ER-012. On September 16, 2020, the District Court adopted its tentative ruling and dismissed the Complaint with prejudice. *Id.*

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[2] Because Appellant elected not to seek to amend its complaint and instead accepted dismissal of this action with prejudice, amicus United Policyholders' argument that this Court should remand this case back to the District Court with instructions to grant leave to amend (Amicus Br. at 8) is without merit. In addition, contrary to amicus United Policyholders' argument, Appellant would not, on remand, "be in a stronger position to plead a nexus between its business losses and the physical viral perils posed by the pandemic." Amicus Br. at 8. In its Opening Brief, Appellant conceded that it "has not experienced an outbreak at its restaurant, nor does it have specific reason to believe virus

STANDARD OF REVIEW

The standard of review on a dismissal pursuant to Rule 12(b)(6) is *de novo*. *Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204, 1208 (9th Cir. 2020).

SUMMARY OF ARGUMENT

The Policy provides coverage for Business Income only where there is a suspension of operations due to "direct physical loss of or damage to property" that is "caused by or result[ing] from a Covered Cause of loss."

The theory of the Complaint is that the social distancing orders put in place in California and Los Angeles limited how Appellant could utilize its restaurant space, which resulted in a loss of income. But, under California law, "direct physical loss" requires some "distinct, demonstrable, physical alteration of the property." *See MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779 (2d Dist. 2010). Indeed, the Policy only provides coverage for business income losses during the "period of restoration," which ends on the date the property has been "repaired, rebuilt or replaced." Appellant's alleged loss of its ability to use property in one particular way—serving customers on its property—is not a *physical* loss of *property*. The property was physically unchanged, remained within Appellant's possession, and required no repairs,

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matter has actually been present inside its premises." Br. at 30 n.9. Having so stated, Appellant may not now amend its complaint to claim the opposite, as amicus United Policyholder proposes.

rebuilding, or replacement. There is no coverage under a property insurance policy for this kind of intangible or incorporeal type of loss. This is consistent with the common sense proposition that property insurers are not responsible any time some factor exogenous to the premises, such as a government regulation, limits a policyholder's operations in a way that reduces profitability.

Moreover, even if the social distancing orders could constitute "direct physical loss of or damage to property," Appellant's losses were not caused by a Covered Cause of Loss. Rather, they were caused by the COVID-19 virus, which is unambiguously excluded. The Policy defines "Covered Cause of Loss" to ***exclude*** "loss or damage caused directly or indirectly by . . . . [a]ny ***virus***, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." The Policy also states that "[s]uch loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." The only plain, ordinary and reasonable reading of these provisions is that the Policy does not cover losses arising from the COVID-19 virus, including government directives issued in response to the virus.

ARGUMENT

I. The Absence of Direct Physical Loss of or Damage to Appellant's Property Precludes Business Income Coverage.

For Business Income coverage to apply, Appellant must have sustained a loss of income due to a suspension of its operations. 2-ER-222. "The suspension

must be caused by direct physical loss of or damage to the property" at the insured premises. *Id.* Here, the Complaint fails to allege any "direct physical loss of or damage to" Appellant's property that caused the suspension. While Appellant claims its ability to use its property in a particular way (*i.e.*, to provide on-premises service to its customers) was temporarily impaired by social distancing orders implemented in response to COVID-19, Appellant's theory is insufficient to trigger coverage. At all relevant times, Appellant's property—the subject of Appellant's insurance—was physically unaltered and remained entirely in Appellant's possession.

The District Court correctly held that Appellant failed to allege facts sufficient to show its claims are covered by the Policy. 1-ER-010-11. In reaching its conclusion, the District Court applied well-established rules of contract interpretation and recognized that "the weight of California law . . . appears to require some tangible alteration" to the insured property to trigger coverage. 1-ER-008. The District Court further held that Appellant's proposed interpretation of the Policy—that tangible alteration to its property is not required—was "not a reasonable one" and a "major departure from California law," noting the effect would be "a sweeping expansion of insurance coverage without any manageable bounds." 1-ER-009-10.

The District Court's opinion is supported by California precedent, the plain, unambiguous language of the Policy, and the overwhelming majority of decisions finding that the Policy language at issue here does not provide the coverage that Appellant seeks.

A. Appellant's Argument That "Direct Physical Loss of or Damage to Property" Encompasses Non-Physical Temporary Loss of Use Is Contrary to Plain Language and Law

The Policy requires "direct physical loss of or damage to property" to trigger Business Income coverage. Appellant concedes that its property was not damaged. Instead, Appellant asks this Court to find that "direct physical loss of or damage to property" encompasses changes imposed by the social distancing orders as to what can occur on the property (*e.g.*, no on-premises dining) without any tangible alteration to the property itself. Appellant's argument is inconsistent with the plain language of the Policy and California law.

California courts have consistently held that, "[f]or [a] loss [under a business property policy] to be covered, there must be a 'distinct, demonstrable, physical alteration' of the property." *MRI Healthcare*, 187 Cal. App. 4th at 779. "The requirement that the loss must be 'physical,' given the ordinary definition of that term is widely held to exclude alleged losses that are intangible or incorporeal." *Doyle v. Fireman's Fund Ins. Co.*, 21 Cal. App. 5th 33, 38 (4th Dist. 2018) (quoting *Simon Mktg. v. Gulf Ins. Co.*, 148 Cal. App. 4th 616, 622-23 (2d Dist. 2007). Rather,

"[f]or there to be a 'loss' within the meaning of the policy, some *external force* must have acted upon the insured property to cause a *physical change* in the condition of the property, i.e., it must have been 'damaged' within the common understanding of that term." *MRI Healthcare*, 187 Cal. App. 4th at 780 (emphasis in original). In addition, the phrase "loss of" has been interpreted in the context of business personal property to include "the permanent dispossession of something." *Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 17-cv-4908-AB-KSx, 2018 WL 3829767, at *4 (C.D. Cal. July 11, 2018).

Here, Appellant indisputably is seeking coverage untethered to a tangible, physical alteration of its restaurants. Specifically, Appellant alleges that the social distancing orders issued by the Mayor of Los Angeles and the Governor of California—which were generally-applicable orders implemented "to protect members of the public . . . from an undue risk of contracting the COVID-19 virus" (*see*, *e.g.*, 2-ER-267)—caused it to lose income because they inhibited Appellant's use of its property. 2-ER-040 at ¶ 41. Appellant does not allege that there was any physical, tangible change to its property. Indeed, Appellant does not allege its property was contaminated with COVID-19, damaged in some other way, stolen, or otherwise taken from Appellant's possession. To the contrary, the social distancing orders explicitly allowed Appellant to continue to access its property to offer takeout and delivery. *See, e.g.*, 2-ER-279. Appellant's loss of ability to use its property in

one particular way—to offer on-premises service to its customers—is a purely economic loss and has nothing to do with any change to the physical condition of its property for which coverage may be available. *See MRI Healthcare*, 187 Cal. App. 4th at 779 (holding no "direct physical loss" had occurred "when the structure of the property itself is unchanged to the naked eye and the insured claims its usefulness for its normal purposes has been destroyed or reduced" because no "distinct, demonstrable, physical alteration of the property" had occurred); *Meridian Textiles, Inc. v. Indem. Ins. Co. of N. Am.*, No. CV06-4766 CAS, 2008 WL 3009889, at *2, *6 (C.D. Cal. Mar. 20, 2008) (holding no coverage for the diminution of value of undamaged yarn because under the policy, which "cover[ed] against all risks of physical loss or damage," the loss must be physical, *i.e.*, the yarn must be damaged or have undergone "some tangible" or "detectable physical change"); *Doyle*, 21 Cal. App. 5th at 38 (holding no coverage for wine that lost value when it was found to be counterfeit because requirement under the policy that the loss be physical "preclude[s] any claims against the property insurer where the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property").

Appellant, in attempting to distinguish some of the cases above, argues that tangible alteration of its property is not necessary for coverage to apply so long as its losses have a "physical manifestation" (lack of patrons in premises). Br. at 20-

21. Appellant describes its alleged "physical loss of" its property as follows: "corporeal restaurant patrons used to sit at tables and now they do not." *Id.* at 15. But, the Policy requires that the loss itself be physical ("direct physical loss of or damage to property")—not that the loss have some ultimate physical manifestation. The loss of an ability or a right to use property is not a *physical* loss of *property*. Indeed, it is precisely the type of "intangible or incorporeal loss" that Appellant concedes is not included in coverage. *See* Br. at 21.

Appellant attempts to avoid the conclusion that its loss was not physical by arguing that "direct physical loss of or damage to property" cannot require tangible alteration of the property because such requirement fails to give separate meanings to the phrases "loss of" and "damage to." *See* Br. at 16-17. According to Appellant, the requirement of tangible alteration of property only is relevant to "damage to" property, but not to "loss of" property. Therefore, Appellant argues that "loss of . . . property" must mean a loss of property that occurs without a tangible alteration of the property. *Id.* at 22.

However, as numerous courts have recognized, both "loss of" and "damage to" can readily be assigned separate meanings while still requiring physical, tangible change to the insured property. Under the case law, "direct physical loss of . . . property" occurs when the owner has been permanently dispossessed of the property, such as when it is irretrievably lost or entirely

destroyed, requiring the property to be rebuilt or replaced, while "direct physical . . . damage to property" occurs when the property has been harmed in some way such that it must be repaired. *See, e.g.*, *Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co.*, No. 20-CV-03750-WHO, 2020 WL 6562332, at *6 (N.D. Cal. Nov. 9, 2020), *appeal pending*, 21-15366 (9th Cir.) (noting that multiple courts have "conclude[d] that there needs to be some *physical* tangible injury (like a total deprivation of property) to support 'loss of property' or a *physical* alteration or active presence of a contaminant to support 'damage to' property") (emphasis in original). Put simply, if a fire breaks out injuring a restaurant, that is damage to property, but if someone steals equipment from the restaurant, while that property may not be damaged, the property is lost. In either case, there has been a "distinct, demonstrable, physical alteration" of the property. *MRI Healthcare*, 187 Cal. App. 4th at 779.

Appellant's interpretation—that a change in what activities can physically occur in a space that causes a loss to the insured constitutes "direct physical loss of . . . property[,]" even without any tangible alteration of the property itself—writes out the requirement that the loss be physical, that the loss be of property, or both. Consider a situation in which Los Angeles County issues an order that all bars, which had previously been permitted to serve customers until two a.m., now must stop serving patrons at midnight for the next two months. It is plainly

unreasonable for a bar owner to make an insurance claim on a *property* insurance policy under a theory that it suffered a "direct physical loss of" its property every night from the hours of midnight until two. While it is true that there has been a change in what can physically occur in the bar (corporeal bar patrons used to sit on stools and now they do not) and a loss to the insured, this scenario is not a "direct physical loss of . . . property." The property is unaltered and remains within the bar owner's possession to use in any number of ways except, of course, to seat customers. The Court of Appeal recognized there is no coverage in this circumstance in *Doyle*, where wine lost its value but was physically unchanged, holding that "given the fundamental nature of property insurance, the policy Doyle purchased only insured him against potential harms to the wine itself, such as fire, theft, or abnormal spoilage; Doyle did not insure himself against any potential financial losses. Doyle did not buy a *provenance* insurance policy; Doyle bought a *property* insurance policy." *Doyle*, 21 Cal. App. 5th at 39 (emphasis in original). The same is true here.

The District Court recognized the flaw in Appellant's argument, listing out a number of scenarios that would trigger coverage if Appellant's interpretation were to apply. 1-ER-009-10. Appellant now quibbles with the scenarios themselves, arguing that they are largely subject to limitations or exclusions elsewhere in the Policy. Br. at 26-27. But Appellant misses the point. While an

insurance policy may have any number of limitations or exclusions that could pertain to a specific set of facts (such as the Virus Exclusion discussed in more detail below), such limitations or exclusions are irrelevant to the question of whether coverage is contemplated in the first instance. *See Stanford Ranch, Inc. v. Md. Cas. Co.*, 89 F.3d 618, 626 (9th Cir. 1996) ("It is well established in California that an exclusion cannot act as an additional grant or extension of coverage.").

What the District Court was illustrating is that Appellant seeks to expand the basic insuring agreement—what the policy sets out to cover before any exclusions are addressed—from insuring only direct physical losses of property to insuring any interference with what physical activities occur on the property. The results of Appellant's attempt to expand coverage beyond the terms of the Policy are patently absurd. For example, as Appellant concedes, under its own formulation, a restaurant would suffer a direct physical loss of property every time it cannot serve customers in an outside dining area because of snow and that, unless there is a separate policy limitation for snow, it would expect coverage to apply.[3] Br. at 26.

[3] Appellant claims that a "snowstorm interfering with outdoor service is explicitly anticipated in the Policy" because the Policy contains a limitation for snow. Br. at 26. Not so. The Policy provides that "[w]e will not pay for loss of or damage to . . . [t]he *interior* of any building or structure caused by or resulting from rain, snow, sleet, ice, sand, or dust[.]" *See* 2-ER-219. Thus, the District Court correctly noted that accepting Appellant's interpretation of "direct physical loss of or damage to property" would provide for coverage

This example only further demonstrates that Appellant's interpretation of the "direct physical loss of or damage to property" makes no sense.

B. Appellant's Argument That "Direct Physical Loss of or Damage to Property" Encompasses the Temporary Loss of Use of Property Makes No Sense When the Terms of the Policy Are Read as a Whole

The District Court correctly recognized that California courts must interpret the terms of an insurance policy "in context, and give effect to every part of the policy with each clause helping to interpret the other." *See* 1-ER-006 (quoting *Palmer v. Truck Ins. Exch.*, 21 Cal. 4th 1109, 1115 (1999)). The Policy is clear that it only covers losses stemming from a physical, tangible change to property and Appellant's argument is inconsistent with a plain reading of the Policy as a whole.

First, beginning with the basic coverage grant, Business Income coverage under the Policy covers income losses that result when a business suspends its operations so long as "*[t]he suspension [is] caused by* direct physical loss of or damage to property at the described premises." 2-ER-222 (emphasis added). Instead of alleging a suspension caused by direct physical loss as the plain language requires, Appellant argues that its loss of patrons sitting at tables in its restaurants is physical loss of property. Br. at 15. But the Court should not be swayed by this sleight of

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under the Policy in the situation that a restaurant cannot seat patrons in an outdoor sitting area because of poor weather.

hand. As an initial matter, Appellant's patrons are not "property at the described premises" under the Policy.[4] Moreover, for coverage to apply, the Policy requires that the suspension of business be caused by direct physical loss. Appellant has not identified a direct physical loss that caused its suspension of operations. Appellant's interpretation of the Policy, which conflates the result of the suspension with the necessary "direct physical loss of or damage to property" that causes the suspension, obviates the "direct physical loss or damage to property" requirement altogether and therefore must be rejected.[5] *See Air Liquide Am. Corp. v. Protection Mut. Ins. Co.*, 132 F.3d 38, at *2 (9th Cir. 1997) (holding that a proposed interpretation of an insurance policy "is impermissible because it renders [another] phrase 'a dead appendage to the policy'").

Second, Business Income coverage only covers losses during the "period of restoration," which ends on the earlier date of the date when the property is "repaired, rebuilt or replaced" or when business is resumed at a new permanent

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[4] Appellant argues that "'[p]roperty' . . . is a bundle of rights," including the "right to sell food and service to patrons." Br. at 21 n.7. The property insured by Appellant's Policy, however, is not a theoretical "bundle of rights." The Policy defines the "Covered Property." It consists of buildings and business personal property. *See* 2-ER-218.

[5] Indeed, any time a customer-facing business suspends its operations there will be a "physical manifestation" of the suspension—no customers on the premises. The question here is whether "direct physical loss of or damage to" Appellant's property *caused* that suspension. It did not.

location. 2-ER-246. Here, there is nothing to repair, rebuild, or replace because nothing about Appellant's property itself has been physically altered. Because Appellant's restaurants do not require any repair, rebuilding or replacement, Appellant's assertion that loss of use of property constitutes a covered loss makes no sense.

Numerous California courts in the context of COVID-19 business interruption insurance litigation have taken note of the definition of period of restoration in holding that physical alteration of the property is necessary for "direct physical loss of or damage to property" to occur. *See, e.g.*, *W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos.*, No. 2:20-CV-05663-VAP-DFMx, 2020 WL 6440037, at *4 (C.D. Cal. Oct. 27, 2020) (granting motion to dismiss claim against AmGUARD where "Plaintiffs' Complaint establishes that they suffered a temporary loss of economically valuable use of their hotels due to a decrease in patronage or the Executive Orders" without any property having undergone a "physical alteration" or needing to be "repaired, rebuilt, or replaced"); *Wellness Eatery La Jolla LLC v. Hanover Ins. Grp.*, No. 20CV1277-AJB-RBB, 2021 WL 389215, at *6 (S.D. Cal. Feb. 3, 2021) ("Interpreting the Policy in context and with the assistance of surrounding terms, the Court finds that without some tangible physical alteration to the property, there would be no need to restore, repairs, rebuild, or replace."); *see also Michael Cetta, Inc. v. Admiral Indem. Co.*, No. 20 Civ. 4612

(JPC), 2020 WL 7321405, at *7 (S.D.N.Y. Dec. 11, 2020), *appeal pending*, 21-57 (2d Cir.) ("[Plaintiff's] reading of the Policy—that 'loss of use' is covered—additionally would render the two possible end dates of the 'period of restoration' provision meaningless when applied to circumstances like those presented in this case. The alleged loss of use here requires no physical repair or rebuilding to end the suspension of [plaintiff's] operations. And there is no suggestion that [plaintiff] is considering opening a 'new permanent location,' . . . especially when its flagship Midtown restaurant has nothing physically wrong with it.").

Third, it is clear that social distancing orders are not themselves "direct physical loss of or damage to property" because they do not tangibly change the property. Moreover, the Policy actually includes an "additional coverage" for business income losses caused by actions taken by civil authorities. 2-ER-224-25. If, as Appellant argues, government social distancing orders that inhibited certain operations on its premises constitute "direct physical loss of or damage to property" themselves, thus triggering the Business Income coverage, then this additional Civil Authority coverage for business income losses (with its many attendant requirements) is entirely superfluous.[6]

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[6] The complaint invoked Civil Authority coverage, but Appellant has abandoned the coverage on this appeal, perhaps in recognition that it is inconsistent with its reading of the general Business Income coverage and because its allegations meet none of the requirements for Civil Authority coverage. That coverage is limited to situations where (i) the civil authority

Fourth, the Policy contains at least two exclusions that further illustrate the intent not to cover intangible, temporary, loss of a desired use of property. One such exclusion is for "loss or damage caused directly or indirectly by . . . the enforcement of any ordinance or law" that "[r]egulat[es] the construction, *use* or repair of any property[.]" *See* 2-ER-232 (emphasis added). The Ordinance or Law exclusion reaffirms that a generally applicable law, such as the social distancing orders insofar as they regulate the "use of" property, is not a Covered Cause of Loss, which undermines Appellant's argument that the Business Income provision of the Policy was intended to cover loss of use or functionality of property absent any tangible alteration. *See Visconti Bus Serv., LLC v. Utica Nat'l Ins. Grp.*, No. EF005750-2020, 2021 WL 609851, at *13 (N.Y. Sup. Ct. Feb. 12, 2021), *appeal pending*, 2021-01716 (N.Y. App. Div.) (holding that the insurance policy "explicitly excludes 'loss or damage caused by or resulting from . . . loss of use' . . . undermines [the policyholder's] primary argument in this [COVID-19 business interruption]

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prohibits access to the insured's premises, (ii) such action is taken in response to damage to property *other than* the insured's premises, (iii) access to the area immediately surrounding the damaged property is prohibited and the insured premises is within that area but not more than one mile away from the damaged property, and (iv) the action of civil authority is taken in response to a dangerous physical condition or in order to enable the civil authority to have access to the damaged property. *See* 2-ER-224-25.

case, i.e., that a loss of use or functionality of its property is a covered loss under the policy.").[7]

Another exclusion in the Policy is for "loss or damage caused by or resulting from . . . [d]elay, *loss of use* or loss of market." *See* 2-ER-234 (emphasis added). As the court in *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 487 F. Supp. 3d 834 (N.D. Cal. 2020), *appeal pending*, 20-16858 (9th Cir.), noted with regard to the same exclusion in a COVID-19 business interruption case, "[t]he separate provision for loss of use suggests that the 'direct physical loss of . . . property' clause was not intended to encompass a loss where the property was rendered unusable without an intervening physical force[,]" which undermined the retail store's claim that "a reasonable purchaser of insurance would read the policy as providing coverage for a loss of functionality." *Mudpie*, 487 F. Supp. 3d at 842-43.

Finally, Appellant's reliance on the definition of "property damage" in the liability section of the Policy (Br. at 15-16)—purportedly to show that the Policy's drafters could have included a similar "physical injury to tangible property" requirement in the coverage grant in the property damage section of the Policy—is misplaced. It is black letter law that the scope of coverage under liability and

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[7] Appellant admits that the Ordinance or Law exclusion applies to "scenarios . . . in which government edicts change permitted occupancy or hours for restaurants on an ongoing basis" (Br. at 26), but fails to explain why the exclusion would not equally apply to the loss that Appellant alleges.

property damage policies are "different" and "should be treated as such." *Garvey v. State Farm Fire & Cas. Co.*, 48 Cal. 3d 395, 406 (1989). In addition, Appellant ignores the fact that the term "property damage" in the liability section of the Policy covers both "[p]hysical injury to tangible property" and "[l]oss of use of tangible property that is not physically injured." 2-ER-262. Significantly, the phrase "loss of use of tangible property that is not physically injured" does not appear in the coverage grant in the property damage section of the Policy.

C. The District Court Decision Is in Accord with Other District Court Decisions Within the Ninth Circuit and Around the Country

Dozens of California district courts presented with cases and insurance policies substantially similar to the one at issue in this case have reached the same conclusion as the District Court did here: business income losses attributed to social distancing orders implemented in response to COVID-19 do not constitute "direct physical loss of or damage to property" under California law. *See, e.g.*, *Rialto Pockets, Inc. v. Certain Underwriters at Lloyd's, Including Beazley Furlonge Ltd*, No. CV 20-7709 DSF (JPRx), 2021 WL 267850, at *1 (C.D. Cal. Jan. 7, 2021), *appeal pending*, 21-55196 (9th Cir.) ("The Court, along with the vast majority of courts to have considered the issue, agrees with Defendant that Plaintiffs have not suffered physical loss or damage."); *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, 487 F. Supp. 3d 937, 943 (S.D. Cal. 2020) ("Most courts have rejected these claims, finding that the government orders did not constitute direct physical loss or

damage to property."). These decisions recognize that "[a]n insured cannot recover by attempting to artfully plead temporary impairment to economically valuable use of property as physical loss or damage." *10E LLC v. Travelers Indem. Co. of Conn.*, 483 F. Supp. 3d 828, 836 (C.D. Cal. 2020), *appeal pending* 20-56206 (9th Cir).

For example, in addition to this case, two other California district courts dismissed COVID-19 business interruption insurance coverage actions against AmGUARD under the same Policy at issue here, holding that the loss of the ability to use property in a particular way does not constitute "direct physical loss of or damage to property." *See W. Coast Hotel Mgmt.*, 2020 WL 6440037, at *6; *Posh Cafe Inc. v. AmGUARD Ins. Co.*, No. CV208037FMOPVCX, 2020 WL 8184062, at *2 (C.D. Cal. Dec. 21, 2020). In *West Coast Hotel Management*, the district court relied on *MRI Healthcare* and *Doyle*, holding that "the loss of *use* of . . . properties . . . . is not compensable under a property insurance contract." *W. Coast Hotel Mgmt.*, 2020 WL 6440037, at *4. Similarly, in *Posh Café*, the district court held that, under California law, "losses from inability to use property do not amount to 'direct physical loss of or damage to property' within the ordinary and popular meaning of that phrase.'" *Posh Cafe*, 2020 WL 8184062, at *2.

Many other district court decisions within the Ninth Circuit are in accord. *See, e.g., Kevin Barry Fine Art Assocs. v. Sentinel Ins. Co.*, No. 20-CV-04783-SK, 2021 WL 141180, at *4 (N.D. Cal. Jan. 13, 2021), *appeal pending*, 21-

15240 (9th Cir.) (holding that "direct physical loss of property does not include the temporary loss of use due to the governmental Stay-at-Home Orders," noting that plaintiff "d[id] not allege that it lost access to the properties, but merely that it was not allowed to operate its business out of the properties"); *Rialto Pockets*, 2021 WL 267850, at *1 ("Nothing physical has happened to Plaintiffs' property, and, presumably, the property could be repurposed for other uses. Plaintiffs are complaining about a loss of intended use, not a physical loss of, or damage to, their property."); *Travelers Cas. Ins. Co. of Am. v. Geragos & Geragos*, No. 20-cv-3619-PSG, 2020 WL 6156584, at *4 (C.D. Cal. Oct. 19, 2020) (rejecting policyholder's argument that deprivation of its "typical foot traffic, visibility, and ability to interface with clients" constituted direct physical loss or damage to property).

California district courts also have recognized that the social distancing orders do not amount to a "dispossession" of property, either permanent or otherwise, such that coverage would apply. *See, e.g.*, *Water Sports Kauai*, 2020 WL 6562332, at *6 ("[Plaintiff] has not been dispossessed or deprived of any specific property; its inventory and equipment remain. Instead, it complains of loss of use, meaning its inability to operate its stores.") (emphasis in original omitted); *10E*, 483 F. Supp. 3d at 836 ("[W]hile public health restrictions kept the restaurant's 'large groups' and 'happy-hour goers' at home instead of in the dining room or at the bar,

Plaintiff remained in possession of its dining room, bar, flatware, and all of the accoutrements of its [restaurant.]").

Finally, California courts have rejected Appellant's argument that its alleged loss must be covered or the phrases "loss of" and "damage to"—within "direct physical loss of or damage to property"—will be improperly conflated. *See, e.g.*, *Robert W. Fountain, Inc. v. Citizens Ins. Co. of Am.*, No. 20-CV-05441-CRB, 2020 WL 7247207, at *4 (N.D. Cal. Dec. 9, 2020), *appeal pending*, 21-15053 (9th Cir.) (recognizing that the insured property was not damaged, but also not lost, because "'loss of' contemplates that the property is unrecoverable"). Instead, they have recognized that the definition of period of restoration in fact makes clear that only physical, tangible alteration of property can trigger coverage. *Kevin Barry Fine Art Assocs*, 2021 WL 141180, at *5 ("There are no repairs or replacements needed to be made here. [Plaintiff] can continue operating its business as soon as the Stay-at-Home Orders are lifted. Interpreting direct physical loss of property to include [Plaintiff's] loss of use would rend[er] the language 'period of restoration' meaningless."); *Baker v. Or. Mut. Ins. Co.*, No. 20-CV-05467-LB, 2021 WL 24841, at *3 (N.D. Cal. Jan. 4, 2021) ("The end date for the period of restoration—when the property is repaired, rebuilt, or replaced—also shows that the damage covered by the policy is physical and that the plaintiffs are not entitled to Business Income coverage.").

The vast majority of Courts throughout the country, indeed too many to list here, are in agreement with the California district courts. *See, e.g., DeMoura v. Continental Cas. Co.*, No. 20-cv-2912, 2021 WL 848840, at *6 (E.D.N.Y. Mar. 5, 2021) (holding that "'direct physical loss or damage to property' requires actual, tangible harm to the property" and loss of use is therefore not covered); *Prime Time Sports Grill, Inc. v. DTW 1991 Underwriting Ltd.*, No. 8:20-cv-771, 2020 WL 7398646, at *6 (M.D. Fla. Dec. 17, 2020) (holding "there must be tangible damage to property for a 'direct physical loss' to exist" and impact of government orders was "an economic loss that did not result from tangible damage"); *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, 488 F. Supp. 3d 690, 693 (N.D. Ill. 2020) ("The words 'direct' and 'physical,' which modify the word 'loss,' ordinarily connote actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons extraneous to the premises themselves, or adverse business consequences that flow from such closure."); *Hajer v. Ohio Sec. Ins. Co.*, No. 6:20-cv-00283, 2020 WL 7211636, at *2 (E.D. Tex. Dec. 7, 2020) ("[T]he term 'physical loss' . . . is only reasonably read in context as meaning a distinct, demonstrable, physical alteration of the property.") (internal quotations omitted).

D. The Cases Relied On By Appellant Do Not Compel a Different Result

Unable to cite any substantive California court decisions that have found coverage for business income losses caused by the COVID-19 social

distancing orders, Appellant instead largely relies on a small handful of cases from other jurisdictions. Each one of these cases in easily distinguishable and, in some cases, has been explicitly rejected by California courts or even other courts within the same district.

In *Studio 417, Inc. v. Cincinnati Insurance Co.*, 478 F. Supp. 3d 794, 797, 802 (W.D. Mo. 2020), decided under Missouri law, the relevant policy did not include a virus exclusion, and the policyholder's complaint "expressly allege[d] physical contamination" by COVID-19 virus cells and that the policyholder's loss of income arose from that contamination.[8] Here, by contrast, Appellant explicitly disavowed any contamination of its property by COVID-19 virus cells (Br. at 30 n.9), presumably because of the Virus Exclusion in its Policy.

In addition, since the *Studio 417* decision was issued, two judges in the same court have distinguished that decision on the same basis, finding that "[t]he term 'direct physical loss of or damage to property' plainly requires physical loss of or some form of physical damage to the insured property[,]" and therefore,

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[8] Amicus United Policyholders cites to *P.F. Chang's China Bistro, Inc. v. Certain Underwriters at Lloyd's of London*, No. 20STCV17169, Minute Order (Super. Ct. L.A. Cnty. Feb. 4, 2021) and *Goodwill Indus. of Orange Cnty., Cal. v. Phila. Indem. Ins. Co.*, No. 30-2020-01169032-CU-IC-CXC, Dkt. 79 (Super. Ct. Orange Cnty. Jan. 28, 2021). *See* Amicus Br. at 12-13. In those cases, however, the policyholders, unlike Appellant, alleged that their property was contaminated with the COVID-19 virus. These cases are thus inapposite.

"depriv[ation] of the use of the property because of COVID-19 and related government shutdown orders" did not warrant coverage. *See Zwillo V. Corp. v. Lexington Ins. Co.*, No. 4:20-339-CV-RK, 2020 WL 7137110, at *4–5 (W.D. Mo. Dec. 2, 2020); *see also BBMS, LLC v. Continental Cas. Co.*, No. 20-cv-353-W-BP, 2020 WL 7260035, at *5 (W.D. Mo. Nov. 30, 2020). Further, in reaching its conclusion in *Zwillo V*, the court explicitly disagreed with the holding of *Studio 417* to the extent it implied loss of use was sufficient to warrant coverage. *Zwillo V*, 2020 WL 7137110, at *8.

Numerous California courts also have distinguished or declined to follow *Studio 417*, including the District Court. *See* 1-ER-010-11 at n.8; *see also, e.g.*, *Pappy's Barber Shops*, 487 F. Supp. 3d at 943 n.2 (S.D. Cal. Sept. 11, 2020) (distinguishing *Studio 417* because "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."); *Water Sports Kauai,* 2020 WL 6562332, at *4 (same).

North State Deli, LLC v. Cincinnati Insurance Company, No. 20-CVS-02569, 2020 WL 6281507 (N.C. Super Ct. Oct. 9, 2020) is a state trial-court order applying North Carolina law. Like *Studio 417*, the policy at issue did not contain a virus exclusion. Moreover, the court cited the dictionary definition of "physical" as meaning "of or relating to natural or material things" and "pertaining to real, tangible

objects[,]" but nonetheless found "physical loss" under the policy at issue to involve loss of the intangible "full range of rights and advantages of using or accessing their business property" as they wished. *Id.* at *3. This decision is incorrectly reasoned, contrary to California law, and failed to address controlling North Carolina appellate authority directly contrary to the outcome reached. Indeed, in *Summit Hospitality Group, Ltd. v. Cincinnati Insurance Co.*, No. 5:20-cv-254-BO, 2021 WL 831013 (E.D.N.C. Mar. 4, 2021), *appeal pending*, 21-1362 (4th Cir.), the court correctly applied North Carolina law to dismiss a similar claim for business income coverage. *See id.*, 2021 WL 831013, at *4 ("In *Harry's Cadillac-Pontiac-GMC Truck Company v. Motors Insurance Corporation*, . . . the North Carolina Court of Appeals interpreted a similar policy which provided business interruption coverage and which required that loss of income be caused by a direct physical loss. Because the loss of business income was caused by a snowstorm which prevented access to the dealership, but which did not cause any physical loss or damage to the property, there would be no coverage. The same result is dictated here by the plain and unambiguous terms of the policy."); *see also Kevin Barry Fine Art Assocs.*, 2021 WL 141180, at *5 n.1 (rejecting *North State Deli*).

Henderson Road Restaurant Systems, Inc. v. Zurich American Insurance Co., No. 1:20 CV 1239, 2021 WL 168422, at *1 (N.D. Ohio Jan. 19, 2021), applies Ohio law and interprets a policy that is meaningfully different from

the AmGUARD policy at issue here. In *Henderson Road*, the period of restoration ended on the "date when the location where the loss or damage occurred could have been physically capable of resuming the level of 'operations' which existed prior to the loss or damage[.]" *Id.* at *2. Here, there is no issue of "resuming operations," as the Policy requires the property to be "repaired, rebuilt or replaced." *See supra* at 5. In addition, to date, at least two judges in the same district have explicitly disagreed with the holding in *Henderson Road*. *See Ceres Enters., LLC v. Travelers Ins. Co.*, No. 1:20-CV-1925, 2021 WL 634982, at *11 (N.D. Ohio Feb. 18, 2021), *appeal pending*, 21-3232 (6th Cir.) ("After careful review of the plain and ordinary meaning of the policy language at issue in this case, the Court is not persuaded by the reasoning in *Henderson Road* or that decision's determination that the policy language at issue is ambiguous."); *Equity Plan. Corp. v. Westfield Ins. Co.*, No. 1:20-CV-01204, 2021 WL 766802, at *13 (N.D. Ohio Feb. 26, 2021), *appeal pending*, 21-3229 (6th Cir.) ("[T]he Court respectfully disagrees with the *Henderson Road* court's determination . . . . [W]hen read together, the plain, ordinary meanings of 'direct,' 'physical,' 'loss,' and 'damage' clearly indicate that coverage is triggered when an insured property experiences some kind of tangible, material destruction or deprivation in full, or tangible, material harm in part."). And, because *Henderson Road* is contrary to California law, the court in *Protege Restaurant Partners LLC v.*

Sentinel Insurance Co., No. 20-CV-03674-BLF, 2021 WL 428653, at *5 (N.D. Cal. Feb. 8, 2021), declined to follow it as well.

Appellant and amicus United Policyholders inexplicably cite to *Hughes v. Potomac Insurance Co. of D.C.*, 199 Cal. App. 2d 239 (1962), but *Hughes* only provides further support that the insured property must be physically altered for insurance coverage to apply. *See* Br. at 23; Amicus Br. at 14-15. In *Hughes*, the court found the "dwelling building" covered by the insurance policy included the land underlying the dwelling and concluded that the dwelling had suffered "real and severe damage" when the soil slid away leaving the building overhanging a 30-foot cliff. 199 Cal. App. 2d at 248-49. Thus, while the dwelling was rendered "completely useless," the court also found the property had, in fact, been damaged. *See id.* at 248; *see also Ward Gen. Ins. Servs., Inc. v. Emps. Fire Ins. Co.*, 114 Cal. App. 4th 548, 558 (4th Dist. 2003) ("[*Hughes*] does *not* stand for the proposition that loss of or damage to intangible property can constitute a physical loss. Quite clearly, the loss of the backyard *was* a physical loss of tangible property. The essential question decided by the *Hughes* court was whether the insured 'dwelling' included the ground under the building."). No such physical alteration has been alleged here. Indeed, Appellant's property cannot even be construed as "useless," as was the case in *Hughes*: Appellant was at all times permitted to use its property to offer takeout and delivery services.

Appellant and amicus United Policyholders also rely on *Total Intermodal Services Inc. v. Travelers Property Casualty Co. of America*, No. 17-cv-4908, 2018 WL 3829767 (C.D. Cal. July 11, 2018) (Birotte, Jr., J.), arguing that it stands for the proposition that property does not need to be damaged for coverage to apply. In *Total Intermodal*, a shipment of goods was mistakenly returned to China, rendering it unrecoverable. *Total Intermodal*, 2018 WL 3829767, at *3. The court held this loss of property was covered because "the phrase 'loss of' includes the permanent dispossession of something." *Id.* at *4. *Total Intermodal* only further undermines Appellant's argument that Plan Check's interpretation of the Policy improperly conflates "loss of" and "damage to" because it assigns separate meaning—permanent dispossession of property that is not damaged—to the term "loss of."[9] Moreover, as numerous courts have noted, including the district court judge that authored *Total Intermodal*, "[e]ven if the Policy covers 'permanent dispossession' in addition to physical alteration, that does not benefit Plaintiff here. Plaintiff's [complaint] does not allege that it was permanently dispossessed of any insured property." *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of*

[9] *Hill and Stout PLLC v. Mut. of Enumclaw Ins. Co.*, No. 20-2-07925-1 SEA, 2020 WL 6784271, at *3 (Wash.Super. Nov. 13, 2020), a Washington state trial-court order cited by Appellant, failed to recognize that "loss of" property encompasses permanent dispossession in finding that the insurer assigned the same meaning to "loss of" and "damage to."

Conn., No. 2:20-CV-04423-AB-SK, 2020 WL 5938689, at *3 (C.D. Cal. Oct. 2, 2020) (Birotte, Jr., J.), *appeal pending*, 20-56031 (9th Cir.) (quoting *10E*, 483 F. Supp. 3d at 836); *Karen Trinh, DDS, Inc. v. State Farm Gen. Ins. Co.*, No. 5:20-cv-04265-BLF, 2020 WL 7696080, at *5 (N.D. Cal. Dec. 28, 2020), *appeal pending*, 21-15147 (9th Cir.) (holding that because plaintiff has not alleged any "unrecoverable" property stemming from social distancing orders, its allegations of direct physical loss or damage "do not even fall within an expansive interpretation of the phrase").

Appellant argues that *Total Intermodal* does not actually require the dispossession of insured property be permanent for coverage to apply, asking this Court to disregard "this scrap of descriptive language" because the Policy, according to Appellant, does not require or reference permanent loss. Br. at 22-23. Appellant is wrong. The Policy covers business income losses caused by "direct physical loss of or damage to property" for a period of time ending when the property is "repaired, rebuilt or replaced." *See supra* at 5. In the case of dispossession that is merely temporary, there is plainly nothing to "replace." In any event, Appellant did not lose its restaurants, nor is it seeking to recover the value of lost restaurants. At all times, Appellant's dining rooms, along with the rest of the restaurants and everything inside

of them, was in Appellant's possession. It could access its dining rooms and use them, just not to seat customers for on-premises dining.[10]

E. The Doctrine of *Contra Proferentem* Does Not Apply

In dismissing Appellant's Complaint, the District Court wrote "[w]hile Appellant's *argument* is not inconceivable, the Court finds that it places too much weight on the need to avoid surplusage, and asks a handful of words – 'loss,' 'of,' and 'to' – to do too much work." *See* 1-ER-007 (emphasis added). Appellant twists this one sentence to argue that the District Court's dismissal order was erroneous because it purportedly recognized that Appellant's *interpretation* was "conceivable." Br. at 11. The court recognized no such thing and this is not the law.

"[A]n insured's reasonable expectation of coverage is merely an interpretive tool used to resolve an ambiguity once it is found to exist and cannot be relied upon to create an ambiguity where none exists." *Cal. Traditions, Inc. v.*

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[10] Amicus United Policyholders also cites to *Strickland v. Fed. Ins. Co.*, 200 Cal. App. 3d 792, 799-801 (2d Dist. 1988), *EOTT Energy Corp. v. Storebrand Int'l Ins. Co.*, 45 Cal. App. 4th 565, 569 (2d Dist. 1996), and *Pac. Marine Ctr., Inc. v. Phila. Indem. Ins. Co.*, 248 F. Supp. 3d 984, 993 (E.D. Cal. 2017). *See* Amicus Br. at 14. However, like *Hughes* and *Total Intermodal*, these cases all involve circumstances where the insured property was actually damaged, rendered entirely useless, or in fact lost or stolen. As such, they are similarly inapplicable to the case at bar. *Armstrong World Industries, Inc. v. Aetna Casualty & Surety Co.*, 45 Cal. App. 4th 1, 91 (1st Dist. 1996), also is inapposite because it dealt with actual contamination by asbestos. As described *supra* at 34, Appellant does not allege that its property was contaminated.

Claremont Liab. Ins. Co., 197 Cal. App. 4th 410, 420 (4th Dist. 2011) (internal quotations and citations omitted). A policy provision is considered ambiguous "when it is capable of two or more constructions, both of which are reasonable." *Ward*, 114 Cal. App. 4th at 552. Here, the District Court explicitly held that Appellant's construction of "direct physical loss of or damage to property" was "not a reasonable one." S*ee* 1-ER-009. Thus, there were no two competing, *reasonable* constructions of the insurance provision—an ambiguity—to be resolved in Appellant's favor. Instead, the District Court applied the unambiguous terms of the Policy and (correctly) held that it did not provide coverage for Appellant's alleged losses as a matter of law.

This Court should do the same. Indeed, "[i]f contractual language is clear and explicit, it governs." *Bank of the W. v. Superior Ct.*, 2 Cal. 4th 1254, 1264 (1992). The fact that a term is not defined in a policy does not render it ambiguous, "[n]or does '[d]isagreement concerning the meaning of a phrase,' or 'the fact that a word or phrase isolated from its context is susceptible of more than one meaning." *Meridian Textiles*, 2008 WL 3009889, at *3 (quoting *Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co.*, 18 Cal. 4th 857, 868 (1998)). And, "[c]ourts will not adopt a strained or absurd interpretation in order to create an ambiguity where none exists." *Reserve Ins. Co. v. Pisciotta*, 30 Cal. 3d 800, 807 (1982).

Appellant seeks to flip the standard for enforcing the reasonable expectations of the insured on its head, arguing that where the insured's construction of an insurance provision is "semantically permissible" it *creates* a reasonable expectation of coverage that must be enforced. Br. at 13. But California courts have explicitly rejected this standard, as *Bank of the West* "made it clear that it was no longer enough to find an abstract ambiguity or a meaning for a disputed word or phrase which was simply 'semantically permissible.'" *Nissel v. Certain Underwriters at Lloyd's of London*, 62 Cal. App. 4th 1103, 1111 (2d Dist. 1998). Instead, whether the policy is ambiguous is determined based on "the insured's *objectively reasonable expectations*[,]" determined based on "the disputed policy language . . . examined *in context*[.]" *Id.* (emphasis in original). In other words, "an abstract ambiguity based on a semantically permissible interpretation of a word or phrase cannot create coverage where none would otherwise exist." *State Farm Gen. Ins. Co. v. JT's Frames, Inc.*, 181 Cal. App. 4th 429, 444 (2d Dist. 2010).

California courts have interpreted the phrase "direct physical loss of or damage to," and variations on the same, many times over, applying its plain and ordinary meaning to require a "distinct, demonstrable, physical alteration of the property." *See supra* at 16. Appellant's allegation that it had an expectation that it would be covered under its property insurance policy for purely economic losses unrelated to the physical condition of its property is objectively unreasonable given

the plain language of the policy. *Bank of the W.*, 2 Cal. 4th at 1265 ("[A] court that is faced with an argument for coverage based on assertedly ambiguous policy language must first attempt to determine whether coverage is consistent with the insured's *objectively* reasonable expectations. In so doing, the court must interpret the language in context, with regard to its intended function in the policy.") (emphasis added).

II. The Virus Exclusion Bars Coverage

While Appellant's failure to allege a "direct physical loss of or damage to property" is fatal to its claim, coverage also does not apply because the Policy's Virus Exclusion bars coverage. While the District Court declined to address the application of the Virus Exclusion, fully briefed before it, this Court "can affirm on any ground supported by the record." *Biltmore Assocs., LLC v. Twin City Fire Ins. Co.*, 572 F.3d 663, 668 (9th Cir. 2009) (affirming dismissal based on an exclusion where the district court dismissal was based on whether the insurance claim was within the policy's coverage). As such, this Court also can affirm the District Court's dismissal on the basis of the Virus Exclusion.

A. The Virus Exclusion Unambiguously Applies

To reiterate, Business Income coverage applies where "direct physical loss of or damage to property" causes a suspension of operations, resulting in income losses. 2-ER-222. Appellant has failed to allege this occurred here. But even if

Appellant had, the predicate to coverage is that the "[t]he loss or damage must be caused by or result from a Covered Cause of Loss." *Id.* "Covered Cause of Loss" is specifically defined to exclude "loss or damage caused *directly or indirectly* by . . . [a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." 2-ER-219, 2-ER-231, 2-ER-234 (emphasis added). Losses caused directly or indirectly by a virus are not covered "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." 2-ER-231.

Here, the social distancing orders, which inhibited Appellant's ability to serve customers on-premises, indisputably were caused "directly or indirectly" by the COVID-19 virus, an excluded peril. Each of the three orders cited in the Complaint plainly state as much. In the March 15 Order, Mayor Garcetti imposed "a number of measures to be taken . . . to protect members of the public and City workers from an undue risk of contracting the COVID-19 virus." 2-ER-267. The two March 19 Orders also were implemented to mitigate the spread of the Coronavirus. *See* 2-ER-272 ("Our goal is simple, we want to . . . disrupt the spread of the virus."); 2-ER-274 ("[N]ow the City must adopt additional emergency measures to further limit the spread of COVID-19."). In light of the above, the Virus Exclusion precludes coverage in this case.

Every California district court to construe a virus exclusion in the context of the fact pattern presented here has reached the same conclusion. *See*, *e.g.*, *10E, LLC v. Travelers Indem. Co. of Conn.*, No. 2:20-cv-04418-SVW-AS, 2020 WL 6749361, at *2 (C.D. Cal. Nov. 13, 2020), *appeal pending* 20-56206 (9th Cir) ("Because in-person dining restrictions result from a virus, the virus exclusion bars coverage for their consequences."); *BA LAX, LLC v. Hartford Fire Ins. Co.*, No. 2:20-cv-06344-SVW-JPR, 2021 WL 144248, at *4 (C.D. Cal. Jan. 12, 2021), *appeal pending*, 21-55109 (9th Cir.) ("[P]ublic health measures intended to mitigate the spread of COVID-19 are directly or indirectly caused by the activity of a virus. Plaintiffs' claimed losses therefore fall squarely within the scope of the virus exclusion."); *Roundin3rd Sports Bar LLC v. The Hartford*, No. 2:20-cv-05159-SVW-PLA, 2021 WL 647379, at *8 (C.D. Cal. Jan. 14, 2021) (finding the virus exclusion "entirely bars Plaintiff's claim for coverage" where plaintiff alleged business income losses due to social distancing orders implemented to prevent the spread of COVID-19); *Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.*, No. 20-cv-04434-JSC, 2020 WL 7342687, at *2 (N.D. Cal. Dec. 14, 2020) ("[T]he [Complaint] alleges that the coronavirus is the direct or indirect cause of Plaintiffs' economic loss, and thus the Virus Exclusion bars coverage under its plain and unambiguous language[.]").

In fact, in *West Coast Hotel Management*, the U.S. District Court for the Central District of California interpreted the same AmGUARD policy at issue in this case in the context of a COVID-19 business interruption claim, and found that the Virus Exclusion was "plainly stated in language free of jargon," "conspicuous and clear," and "precludes coverage." *W. Coast Hotel Mgm't.*, 2020 WL 6440037 at *5-6. The court reasoned that "[e]ven if Plaintiffs were to argue that their losses were caused solely by the Executive Orders and not 'directly or indirectly' by the virus, Plaintiffs have already admitted that the Orders were issued 'to halt the physical spread of COVID-19'" and "the text of the Orders . . . allows no other conclusion." *Id.* at *6.

Courts around the country have reached the same conclusion, including in decisions interpreting the same AmGUARD policy at issue here. *See, e.g., LJ New Haven LLC v. AmGUARD Ins. Co.*, No. 3:20-cv-00751, 2020 WL 7495622, at *5 (D. Conn. Dec. 21, 2020) (dismissing claim pursuant to AmGUARD's virus exclusion because government orders impacting plaintiff's restaurant were tied "to the emergence of the virus and the need to stop its spread" and "[t]he causal links represented by the virus and the Order are interlocking—even intertwined"); *Colby Rest. Grp., Inc. v. Utica Nat'l Ins. Grp.*, No. 20-cv-5927, 2021 WL 1137994, at *5 (D.N.J. Mar. 12, 2021) (dismissing claims against AmGUARD and another defendant insurer because "the virus is alleged to be the cause of the governmental

action, and the governmental action is asserted to be the cause of the loss"); *Michael J. Redenburg, Esq., PC v. Midvale Indem. Co.*, No. 20-cv-5818, 2021 WL 276655, at *7 (S.D.N.Y. Jan. 27, 2021) (holding the alleged loss "falls squarely within the Policy's virus exclusion" because the government orders which limited plaintiff's operations "were prompted by the virus"); *Hajer*, 2020 WL 7211636, at *5 (holding the virus exclusion bars plaintiff's claims because "[w]herever it falls in the sequence of events, COVID-19 played a significant and substantial role in plaintiff's losses").

B. The Efficient Proximate Cause Doctrine Is Inapplicable

The efficient proximate cause doctrine "applies only when two or more conceptually distinct perils combine to cause the loss," one of which applies and one of which is excluded. *Brown v. Mid-Century Ins. Co.*, 215 Cal. App. 4th 841, 855 (2d Dist. 2013) (citation omitted). For example, in *Garvey v. State Farm Fire & Casualty. Co.*, relied upon by Appellant, the issue was whether the insured's home was damaged by contractor negligence, a covered peril, or earth movement, an excluded peril. *Garvey*, 48 Cal. 3d at 412. The court held that issues of fact existed as to which peril was the efficient proximate cause of the insured's loss. *Id.*[11] The efficient proximate cause doctrine has no applicability here.

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[11] The other cases cited by Appellant also involve two separate and distinct perils. *See*, *e.g.*, *Boardwalk Condo. Ass'n v. Travelers Indem. Co.*, No. 03-cv-505-WQH (WMc), 2007 WL 1989656, at *6 (S.D. Cal. July 3, 2007)

First, this case does not involve two distinct causes of loss, one of which is covered by the Policy and one of which is excluded. The Policy defines the term "Covered Cause of Loss" as "[r]isks of direct physical loss unless the loss is . . . excluded . . . or limited." 2-ER-219. Virus is not a Covered Cause of Loss and it is the only cause of loss. Social distancing orders are not a "Covered Cause of Loss" under the Policy because, as explained above, they do not cause "direct physical loss." This is evidenced by the Civil Authority coverage, which requires damage to another nearby property caused by a "Covered Cause of Loss." 2-ER-224-25. If Appellant was correct and an action of civil authority itself was a "Covered Cause of Loss," the requirement of damage to other, nearby property would be entirely nonsensical. *See Westside Head & Neck v. Hartford Fin. Servs. Grp.*, No. 2:20-cv-06132 JFW (JCx), 2021 WL 1060230, at *5 (C.D. Cal. Mar. 19, 2021) ("Government orders are not a 'Covered Cause of Loss' (as that term is defined and used in the Policy), and, even if they were, they were not the efficient proximate cause of Plaintiff's losses.").

Second, it is well-settled that a policyholder cannot avoid an exclusion by narrowly re-characterizing the cause of loss as something that is "inextricably

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(issue was whether mold, an excluded peril, or water intrusion, a covered peril, caused the loss); *Gillis v. Sun Ins. Off., Ltd.*, 238 Cal. App. 2d 408, 423 (1st Dist. 1965) (issue was whether water damage, an excluded peril, or wind, a covered peril, caused the loss).

bound up with" or that "necessarily implicates" the excluded cause. *Sapiro v. Encompass Ins.*, No. C 03-4587 MHP, 2004 WL 2496090, at *5-6 (N.D. Cal. Nov. 2, 2004) (granting insurer's motion to dismiss where the policyholder attempted to invoke the efficient proximate cause doctrine by redefining the cause of loss as the third party's alleged failure to warn about defective materials rather than the defective materials themselves, an excluded peril); *Film Allman, LLC v. N.Y. Marine & Gen. Ins. Co.*, No. 2:14-CV-7069-ODW(KSx), 2016 WL 7167854, at *5 (C.D. Cal. Dec. 8, 2016) (where the policy excluded criminal activity, policyholder could not characterize a "train striking people and objects" as a peril distinct from the film production crew's illegal presence on the tracks for purposes of invoking the efficient proximate cause doctrine). Here, the social distancing orders indisputably are "inextricably bound up with" the excluded COVID-19 virus, as is clear from the social distancing orders themselves.

Finally, numerous California courts have rejected Appellant's argument that the "efficient proximate cause" doctrine can be used to avoid the virus exclusion in identical COVID-19 business interruption cases at the motion to dismiss stage. *See Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.*, 488 F. Supp. 3d 904, 908 (N.D. Cal. 2020) (rejecting proximate cause argument and finding the virus exclusion applied to bar coverage); *Boxed Foods Co. v. Cal. Cap. Ins. Co.*, No. 20-cv-04571-CRB, 2020 WL 6271021, at *4 (N.D. Cal. Oct. 26, 2020) (holding that

"under California law, COVID-19 is the 'efficient proximate cause' of Plaintiffs' losses" because the Orders would not exist absent the presence of COVID-19); *Robert W. Fountain*, 2020 WL 7247207, at *5 (plaintiff "cannot plead around this reality" that "COVID-19 is . . . the 'efficient proximate cause'"); *Karen Trinh, DDS*, 2020 WL 7696080, at *4 ("Here, but-for COVID-19, the civil authority orders would not exist, and Plaintiff would not have lost business revenue, making the virus—an exclusion under the Policy—the efficient proximate cause of Plaintiff's losses."); *Colgan v. Sentinel Ins. Co.*, No. 20-CV-04780-HSG, 2021 WL 472964, at *4 (N.D. Cal. Jan. 26, 2021), *appeal pending*, 21-15332 (9th Cir.) ("Plaintiff's invocation of the efficient proximate cause doctrine is unavailing, because the virus is the efficient proximate cause of Plaintiff's losses.").

CONCLUSION

Based on the foregoing, AmGUARD respectfully requests that this Court affirm the judgment.

Dated: April 9, 2021

SIMPSON THACHER & BARTLETT LLP

By */s/ Bryce L. Friedman*
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Attorney for Defendant-Appellee
AmGUARD Insurance Company

STATEMENT OF RELATED CASES

Under Ninth Circuit Rule 28-2.6, AmGUARD states that it is aware of the following cases involving COVID-19-related insurance claims. While the claims are not made pursuant to insurance policies issued by AmGUARD, the cases may raise some of the same or closely related issues:

1. *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 20-16858
2. *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Prop. Cas. Co. of Am.*, No. 20-56031
3. *10E LLC v. Travelers Indem. Co. of Conn.*, No. 20-56206
4. *Robert W. Fountain, Inc. v. Citizens Ins. Co. of Am.*, No. 21-15053
5. *HealthNOW Med. Ctr., Inc. v. State Farm Gen. Ins. Co.*, No. 21-15054
6. *Karen Trinh, DDS, Inc. v. State Farm Gen. Ins. Co.*, No. 21-15147
7. *Kevin Barry Fine Art Assocs. v. Sentinel Ins. Co.*, No. 21-15240
8. *O'Brien Sales & Mktg., Inc. v. Transp. Ins. Co.*, No. 21-15241
9. *Colgan v. Sentinel Ins. Co.*, No. 21-15332
10. *Palmdale Estates, Inc. v. Blackboard Ins. Co.*, No. 21-15258
11. *Unmasked Mgmt., Inc. v. Century-Nat'l Ins. Co.*, No. 21-55090
12. *Pez Seafood DTLA, LLC v. Travelers Indem. Co.*, No. 21-55100
13. *BA LAX, LLC v. Hartford Fire Ins. Co.*, No. 21-55109
14. *Selane Prods., Inc. v. Continental Cas. Co.*, No. 21-55123

15. *Rialto Pockets, Inc. v. Certain Underwriters at Lloyd's, Including Beazley Furlonge Ltd*, No. 21-55196

Dated: April 9, 2021

/s/ Chet A. Kronenberg
Chet A. Kronenberg

CERTIFICATION OF COMPLIANCE

I certify that under Federal Rule of Appellate Procedure 32(a)(7)(B) and Ninth Circuit Rule 32-1, this brief is proportionately spaced, has a typeface of 14 points, and contains 12,505, excluding the portions excepted by Federal Rule of Appellate Procedure 32(f), according to the word-count feature of Microsoft Word used to generate this brief.

Dated: April 9, 2021

/s/ Chet A. Kronenberg
Chet A. Kronenberg

CERTIFICATE OF SERVICE

I hereby certify that on April 9, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: April 9, 2021

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