No. 20-56206

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

10E, LLC,

Plaintiff and Appellant,

v.

THE TRAVELERS INDEMNITY COMPANY OF CONNECTICUT,
a corporation,

Defendant and Appellee.

On Appeal from the United States District Court
for the Central District of California
Case No. 2:20-cv-04418-SVW-AS
The Honorable Stephen V. Wilson

ANSWERING BRIEF FOR DEFENDANT-APPELLEE THE TRAVELERS INDEMNITY COMPANY OF CONNECTICUT

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DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellee The Travelers Indemnity Company of Connecticut discloses that:

It is 100% owned by The Phoenix Insurance Company, which is 100% owned by The Travelers Indemnity Company, which is 100% owned by Travelers Insurance Group Holdings, Inc., which is 100% owned by Travelers Property Casualty Corp., which is 100% owned by The Travelers Companies, Inc. The Travelers Companies, Inc. (NYSE: TRV) is the only publicly held company in the corporate family. No individual or corporation owns 10% or more of the stock of The Travelers Companies, Inc.

/s/ Deborah L. Stein
Deborah L. Stein

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INTRODUCTION

10E LLC, a restaurant in Los Angeles, claims economic losses due to an executive order issued by Los Angeles Mayor Eric Garcetti to slow the spread of the Coronavirus. 10E sued its insurer, Travelers, seeking insurance coverage for these losses. The district court correctly dismissed 10E's second amended complaint for two reasons. First, its policy insures against only "direct physical loss of or damage to property"—not the indirect, intangible, and purely financial losses 10E claims. Second, the policy expressly excludes coverage for losses "caused by or resulting from" a virus. Because the Coronavirus is a virus, and because the losses claimed by 10E at least "result from" the Coronavirus, they are not covered.

10E sought coverage under the policy's Business Income and Extra Expense coverages. These coverages apply only where there is "direct physical loss of or damage to property" at the insured premises "caused by or resulting from a Covered Cause of Loss," requiring a suspension of operations. These coverages would apply where, for example, a fire damages the insured premises, requiring a suspension of operations. But here 10E does not claim that *anything* "direct" or "physical" happened to the insured property; instead, it claims only that Mayor Garcetti ordered that its restaurant limit operations to take-out and delivery service.

10E also sought coverage under its policy's Civil Authority provision, which broadens the Business Income and Extra Expense coverages, for up to three weeks, where a civil authority "prohibits access" to the insured premises "due to direct physical loss of or damage to property" at a non-insured location within 100 miles, "caused by or resulting from a Covered Cause of Loss." But Mayor Garcetti's order did not "prohibit access" to the restaurant; delivery and takeout services were permitted. And, given the virus exclusion, 10E does not even attempt to argue on appeal that Mayor Garcetti issued his order due to physical loss or damage from a "Covered Cause of Loss."

In Coronavirus-related insurance cases involving nearly identical coverage grants and virus exclusions, an "overwhelming consensus" of courts across the country have dismissed claims just like 10E's because they are barred by a virus exclusion, because the plaintiffs could not allege any "direct physical loss of or damage to property," or both. *Nguyen v. Travelers Cas. Ins. Co. of Am.*, 2021 WL 2184878, at *1, *10–12, *15, *17 (W.D. Wash. May 28, 2021) (citing dozens of cases dismissing similar claims with prejudice).

The district court correctly joined that consensus in dismissing 10E's second amended complaint without leave to amend. This Court should affirm the judgment.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction based on diversity jurisdiction. 28 U.S.C. §§ 1332, 1441, and 1446. 10E is a limited liability company whose members are citizens of California, Travelers is a citizen of Connecticut, and the amount in controversy exceeds $75,000.[1] 1-ER-11, 2-ER-131, ¶ 3.

This Court has appellate jurisdiction under 28 U.S.C. § 1291. The district court entered a final order dismissing all of 10E's claims with prejudice on November 13, 2020. 1-ER-7. On November 16, 2020, 10E filed its notice of appeal. 4-ER-912.

STATEMENT OF THE ISSUES

1. 10E's policy excludes coverage for all "loss or damage caused by or resulting from any virus . . . that induces or is capable of inducing physical distress, illness or disease." 10E's claimed losses all result from the Coronavirus, which is a virus capable of inducing illness and disease. Was the district court correct to

[1] Mayor Garcetti was initially named as a defendant. Following removal to federal court, 10E moved to remand for lack of complete diversity, because it and the mayor are both California residents. The district court denied the motion, holding that the mayor was fraudulently joined. 1-ER-11–12. 10E subsequently abandoned its claims against Mayor Garcetti, who was not named as a defendant in the second amended complaint, 2-ER-130, and whose counsel did not appear in the district court.

dismiss 10E's second amended complaint because all of its claimed losses are excluded from coverage by the virus exclusion?

2. 10E bought an insurance policy from Travelers covering business-income losses and extra expenses if its operations were suspended due to "direct physical loss of or damage to property . . . caused by or resulting from a Covered Cause of Loss." 10E claims it suffered financial losses as a result of the Coronavirus pandemic, but its property has not been physically lost or damaged. Was the district court correct to dismiss 10E's second amended complaint because 10E's claimed losses are not covered under its insurance policy?

3. 10E's policy provides Civil Authority coverage in certain circumstances where an action of civil authority "prohibits access" to the insured premises "due to direct physical loss of or damage to property at locations, other than described premises, that are within 100 miles of the described premises, caused by or resulting from a Covered Cause of Loss." Los Angeles Mayor Eric Garcetti's order did not prohibit access to restaurants like 10E, which provided take-out and delivery services. Nor was the order issued due to direct physical loss of or damage to property "caused by or resulting from a Covered Cause of Loss." Was the district court correct to conclude that 10E was not entitled to Civil Authority coverage?

4. The district court dismissed the second amended complaint with prejudice because further amendment was "futile." The court reasoned that 10E could not amend its complaint to circumvent the virus exclusion. Was the district court correct to dismiss the complaint with prejudice?

STATEMENT OF THE CASE

I. 10E buys a Travelers insurance policy that insures its property against risks of direct physical loss.

10E operates a restaurant in downtown Los Angeles. 2-ER-131 ¶ 1. It bought an insurance policy from Travelers that insured its property (furniture, equipment, and the like) against certain risks of direct physical loss, such as a fire or windstorm. 2-ER-132 ¶ 5. The policy is incorporated by reference in the second amended complaint. *See* 2-ER-132 ¶ 8; *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005).

The policy covers "direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from a Covered Cause of Loss." 3-ER-414. This is the policy's basic grant of coverage, which would apply, for example, if 10E's property were damaged in a fire or by a burst pipe. 10E makes no claim under this provision.

The policy provides three other types of coverage that are relevant to this case. First, there is coverage for lost business income. 3-ER-415–16. The policy

describes the circumstances in which such coverage will be available:

- Business-income losses must be "sustain[ed] due to the necessary 'suspension' of your 'operations' during the 'period of restoration'";
- "The 'suspension,'" in turn, "must be caused by direct physical loss of or damage to property at the described premises";
- and "[t]he loss or damage must be caused by or result from a Covered Cause of Loss."

3-ER-415–16. In other words, for 10E to make a valid claim for lost business income under its policy, a Covered Cause of Loss must have caused direct physical loss of or damage to property, and that physical loss of or damage to property must then have caused a suspension of business operations:

Covered Cause of Loss

↓

Direct physical loss of or damage to property

↓

Suspension of business operations during "period of restoration"

↓

Business Income losses

Second, there is coverage for certain extra expenses that may be incurred by 10E when there has been physical loss of or damage to its property. The policy imposes clear conditions on the availability of coverage: 10E's extra expenses are

covered only if they were incurred as a result of "direct physical loss of or damage to property caused by or resulting from a Covered Cause of Loss." 3-ER-416.

Coverage for business income lost and extra expenses incurred is limited not only in scope—to losses caused by a Covered Cause of Loss and inflicting physical loss of or damage to property requiring a suspension of operations—but also in time—to the "period of restoration," which is defined by the policy to begin with the date of the "direct physical loss or damage" and to end "when the property . . . should be repaired, rebuilt or replaced." 3-ER-450.

The third species of coverage—for losses sustained as a result of "civil authority action[s]" (such as government orders)—is narrower still. 3-ER-428. It extends coverage for business income lost and extra expenses incurred for three weeks, but *only* if the losses are caused by a government action "that prohibits access to the described premises" and only if the government action was "due to direct physical loss of or damage to property at locations, other than described premises, that are within 100 miles of the described premises, caused by or resulting from a Covered Cause of Loss." 3-ER-428. So, for example, if a fire damaged property near the 10E restaurant that required the fire department to block access to the restaurant, the policy would pay 10E for up to three weeks of business income lost and extra expenses incurred.

10E's policy also makes clear what it does *not* insure. It specifically

excludes any and all coverage for loss or damage "caused by or resulting from any virus." 3-ER-554 ("**EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA**"). This virus exclusion "applies to all coverage under all [property insurance] forms, . . . including but not limited to forms or endorsements that cover . . . business income, extra expense . . . or action of civil authority." 3-ER-554. The policy also excludes claims stemming from 10E's loss of the use of its property: Travelers "will not pay for loss or damage caused by or resulting from . . . loss of use or loss of market." 3-ER-437.

II. The Coronavirus disrupts 10E's business, and 10E reports a claim to Travelers.

This case arises from COVID-19 and an order issued by the City of Los Angeles in response to it. 2-ER-133–34 ¶¶ 15–16. In March 2020, Los Angeles Mayor Eric Garcetti issued "his 'Safer at Home Order,'" which "directed all so-called 'non-essential' businesses (such as 10E's) to close in Los Angeles." 2-ER-135 ¶ 19. 10E alleges that this order was "based on the dire risks of exposure with the contraction of COVID-19 and evidence of physical damage to property" allegedly caused by the Coronavirus. 2-ER-135–36 ¶¶ 19, 22. 10E also alleges that its business "ha[s] been shut down" because, "the Order and related closure orders had the effect of operating as a blockade that prevented Plaintiff's employees and patrons from entering the business for its intended purpose." 3-ER-

134–36 ¶ 16, 22. But 10E acknowledges that the order exempted restaurant take-out and delivery services from its restrictions. *Id.*; AOB at 4 n.1.

10E submitted a claim to Travelers seeking Business Income and Extra Expense coverage. 2-ER-140 ¶ 44. Travelers declined 10E's request for coverage. *Id.* ¶ 45.

III. 10E sues Travelers, Travelers moves to dismiss, and 10E files its first amended complaint.

10E sued Travelers and Mayor Garcetti on April 10, 2020, in Los Angeles Superior Court. 4-ER-905. Travelers removed this action to the Central District of California on May 15, 2020. 4-ER-921. In its notice of removal, Travelers asserted that Mayor Garcetti was fraudulently joined. 1-ER-11. The district court agreed. 1-ER-11–12. Travelers moved to dismiss 10E's original complaint on May 22, 2020. 3-ER-597. 10E responded by filing its first amended complaint on June 12, 2020. 4-ER-923. 10E sought damages and declaratory relief for breach of contract, breach of the covenant of good faith and fair dealing, and the violation of California's Unfair Competition Law. 1-ER-18–19.

IV. Travelers moves to dismiss the first amended complaint, and the district court grants the motion.

Travelers moved to dismiss the first amended complaint under Rule 12(b)(6). 2-ER-275. It argued that (1) the virus exclusion in 10E's policy barred any coverage; (2) 10E was not entitled to Civil Authority coverage because Mayor

Garcetti's order did not prohibit access to 10E's restaurant; and (3) 10E was not entitled to Business Income or Extra Expense coverage because it had not alleged facts establishing "direct physical loss of or damage to property" at the insured premises.

The district court granted the motion based on 10E's failure to allege facts that would establish any "direct physical loss of or damage to property," as required by the Business Income, Extra Expense, and Civil Authority coverages. 1-ER-13. The court held that, "[u]nder 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." 1-ER-14. Rather, "[p]hysical loss or damage occurs only when property undergoes a distinct, demonstrable, physical alteration" and, as such, "[d]etrimental economic impact does not suffice." 1-ER-14 (citations and internal quotation marks omitted). Accordingly, the court concluded that "[a]n insured cannot recover by attempting to artfully plead temporary impairment to economically valuable use of property as physical loss or damage." 1-ER-14.

Applying these principles to 10E's first amended complaint, the district court held that 10E had "attempt[ed] to make precisely this substitution of temporary impaired use or diminished value for physical loss or damage in seeking Business Income and Extra Expense coverage" insofar as 10E "only plausibly

allege[d] that in-person dining restrictions interfered with the use or value of its property – not that the restrictions caused direct physical loss or damage." 1-ER-14. Although 10E alleged that the "in-person dining restrictions" amounted to "labelling of the insured property as non-essential," that "does not physically alter any of Plaintiff's property." 1-ER-14. In addition, the "FAC d[id] not allege that [10E] was permanently dispossessed of any insured property"—i.e., "Plaintiff remained in possession of its dining room" and the personal property in it. 1-ER-15.

The district court dismissed 10E's claim for Civil Authority coverage because it did not "allege actual cases of 'direct physical loss of or damage to property at other locations." 1-ER-15.

Finally, though the district court granted Travelers' motion to dismiss 10E's first amended complaint without reaching the virus exclusion, the court expressed "its skepticism that Plaintiff can evade application" of the exclusion by arguing that "in-person dining restrictions are not attributable to 'any virus'"—a theory the court considered "implausible." 1-ER-16.

Because 10E failed to plead facts showing that it was entitled to coverage under any part of its policy, the district court dismissed 10E's declaratory-judgment and breach-of-contract claims. 1-ER-16-17. The court also dismissed 10E's claims for violation of the UCL and for breach of the implied covenant of

good faith and fair dealing, because such claims cannot survive absent an entitlement to benefits under an insurance policy. 1-ER-16. The court granted 10E leave to amend its complaint. 1-ER-17.

V. 10E files its second amended complaint.

In its second amended (and operative) complaint, 10E asserts the same four causes of action, all arising from Travelers' allegedly wrongful denial of coverage. 10E alleged that Mayor Garcetti's order "shut its business down," and that "[a]s a result of the Order and related closure orders, [10E] suffered significant business income losses." 2-ER-131, 2-ER-136 ¶ 22. 10E also asserts that it "experienced a 'Covered Cause of Loss' as provided for in its Policy by virtue of Garcetti's Order which denied use of the Insured Property." 2-ER-135 ¶ 20. 10E claims that "it is not the virus that has caused the implementation of" that order "but rather concern for the availability of hospital beds (a 'fear' that never actually materialized) and the desire to exert control over California citizens in order to influence politics during a national election year." 2-ER-135–136 ¶ 21. 10E did not explain why the virus exclusion would not bar coverage, but instead sought a declaration that its policy did not contain an exclusion for a "viral pandemic." 2-ER-139 ¶ 34.

VI. Travelers moves to dismiss 10E's second amended complaint, and the district court grants the motion.

Travelers moved to dismiss the second amended complaint under Rule 12(b)(6) for essentially the same reasons stated in its earlier motion to dismiss.

2-ER-94. The district court again granted Travelers' motion, this time without leave to amend, concluding that "Plaintiff's SAC fails to respond to the pleading deficiencies identified by the Court in its prior order" and that "[t]he SAC rests on the same allegations and legal theory rejected in the Court's prior Order." 1-ER-4. The court further concluded that the virus exclusion "provides an independent basis for granting the motion to dismiss as to Business Income, Extra Expense, and Civil Authority coverage." 1-ER-4–5 (citing other decisions dismissing similar claims on basis of virus exclusion). 10E, the court explained, "seeks to recover under the Policy for losses incurred as a result of in-person dining restrictions during the COVID-I9 pandemic," and "[b]ecause in-person dining restrictions result from a virus, the virus exclusion bars coverage for their consequences." 1-ER-5.

The district court further stated that it found implausible 10E's contention that the "business restrictions" imposed by Mayor Garcetti's order "had motives or causes independent of the COVID-19 virus"—for example, 10E's allegation that "outside factors and nefarious forces that are neither based in logic nor science . . . and a desire to exert control over California citizens in order to influence politics during a national election year." 1-ER-5 (citations and internal quotation marks omitted). The court further held that it "would stretch the virus exclusion beyond its plain meaning" to interpret the exclusion as inapplicable to losses attributed to a

"viral pandemic" or the mayor's order rather than the Coronavirus itself. 1-ER-5–6. The court specifically rejected 10E's argument that the virus exclusion must be narrow because it does not include the phrase "directly or indirectly"; the court observed that the exclusion explicitly applies to loss or damage "caused by or resulting from any virus" and cited a leading California decision reading the "term 'resulting from' broadly" in an insurance policy exclusion to "connote[] only a minimal causal connection or incidental relationship" between the cause and the result produced. 1-ER-6 (citing *Mosley v. Pac. Specialty Ins. Co.*, 49 Cal. App. 5th 417, 424 (2020)).

In light of those conclusions, the district court dismissed the second amended complaint's breach-of-contract claim and declaratory-relief claim. 1-ER-6. And because 10E had not alleged facts establishing an entitlement to coverage under its policy, the district court dismissed 10E's UCL claim and its claim for breach of the implied covenant of good faith and fair dealing. 1-ER-6. This time, the court denied 10E leave to amend, concluding that "a third round of briefing on the same flawed legal theories would be futile and prejudicial to Defendant." 1-ER-6.

10E filed a timely notice of appeal. 4-ER-912.

SUMMARY OF ARGUMENT

The policy's Business Income and Extra Expense provisions would cover 10E's financial losses only if 10E had suffered a necessary suspension of its operations due to (1) "direct physical loss of or damage to Covered Property" that was (2) "caused by or result[ed] from a Covered Cause of Loss." 3-ER-414. 10E's alleged losses do not satisfy either half of this test.

First, those losses were not caused by a Covered Cause of Loss. To the contrary, they were caused by an expressly *excluded* cause of loss. The virus exclusion unambiguously excludes coverage for all losses caused by or resulting from viruses, and 10E's alleged losses resulted from the Coronavirus. Because the virus exclusion applies to all coverages 10E seeks, the judgment can be affirmed on this basis alone.

Second, the losses 10E suffered were not direct and physical. They were purely financial. The Coronavirus and the government orders issued to stop its spread restricted 10E's use of its property—but they did not damage or destroy the property or anything in it. Under California law, "direct physical loss" means some "distinct, demonstrable, physical alteration of the property." *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779 (2010) (quotation marks omitted). If nothing physically happens to the insured's property, there is no coverage. *Doyle v. Fireman's Fund Ins. Co.*, 21 Cal. App. 5th

33, 38–39 (2018). The "period of restoration" provision in 10E's policy further confirms this intent—unless there is loss or damage that can be "repaired, rebuilt or replaced," there is no "direct physical loss of or damage to property." Here, none of 10E's property was physically lost, stolen, or damaged, and nothing happened to the building where it is located. That makes this case like the dozens of others in which courts have dismissed claims for Coronavirus-related losses brought under property-insurance policies. Put simply, property insurance insures *property*; if the property is not lost (such as by theft) or damaged (such as by fire), there cannot be a covered claim.

Nor can 10E satisfy the requirements for Civil Authority coverage. That coverage insures certain business-income losses and expenses "caused by action of civil authority" that is "due to direct physical loss of or damage to property" at non-insured locations within 100 miles, "caused by or resulting from a Covered Cause of Loss." 3-ER-428. The "action of civil authority" must "*prohibit[] access* to the described premises" for there to be any potential of coverage. *Id.* (emphasis added). Here, access to 10E's restaurant was not prohibited—it was actually permitted for takeout and delivery service—and, in any event, 10E's claimed losses were caused by or resulted from the Coronavirus, an expressly excluded cause of loss.

This is a straightforward case that can and should be decided under settled law. There is no "direct physical loss" here—and therefore no coverage. And even if 10E had suffered such a loss, it would make no difference, for the virus exclusion unambiguously bars coverage for all of its claims.

The Court should affirm the judgment for Travelers.

STANDARD OF REVIEW

This Court reviews an order granting a Rule 12(b)(6) motion to dismiss *de novo*. *Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204, 1208 (9th Cir. 2020). A complaint should be dismissed when "there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A complaint must "state a claim to relief that is plausible on its face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), and a claim is facially plausible only "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

"A court's denial of leave to amend is reviewed for an abuse of discretion." *Ebner v. Fresh, Inc.*, 838 F.3d 958, 963 (9th Cir. 2016).

ARGUMENT

I. The virus exclusion bars coverage for all of 10E's claimed losses.

10E's policy excludes coverage for all claimed losses arising from any virus that, like the Coronavirus, induces or is capable of inducing illness. 10E itself

alleges that its losses were caused by the Coronavirus. That means those losses are not covered. The Court can affirm the judgment on that basis alone, without reaching the other questions presented by 10E's opening brief.

A. The virus exclusion unambiguously bars coverage.

10E's policy covers business-income losses or extra expenses only if the predicate physical loss or damage is "caused by or result[s] from a Covered Cause of Loss." 3-ER-414. The cause of 10E's claimed loss of use is the Coronavirus, and a virus is not a "Covered Cause of Loss." To the contrary, the policy's virus exclusion bars coverage for all loss and damage "caused by or resulting from any virus . . . that induces or is capable of inducing physical distress, illness or disease." 3-ER-554. The Coronavirus, of course, is such a virus, and 10E's amended complaint makes plain that its claimed losses were caused by or resulted from the Coronavirus. *See, e.g.*, 1-ER-136 ¶ 22 (Mayor Garcetti issued order because of "the dire risks of exposure with the contraction of COVID-19").

Under California law, the plain language of an insurance policy controls when it is "is clear and explicit," as it is here. *Palmer v. Truck Ins. Exch.*, 21 Cal. 4th 1109, 1115 (1999) (quotation marks omitted); Cal. Civ. Code § 1638 ("The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."). The district court thus properly concluded that the virus exclusion bars all coverage for 10E's claimed losses

because, as 10E admits in its second amended complaint, the in-person dining restrictions to which 10E attributes those losses "result[ed] from a virus." 1-ER-5.

Legions of courts in California and elsewhere have enforced the *very same* virus exclusion to dismiss lawsuits against Travelers and other insurers seeking business-income and extra-expense coverage attributable to the Coronavirus and government orders issued to slow its spread. In each case, the court held the exclusion was unambiguous and dismissed the claims against the insurers. *See, e.g.*, *L.A. Cty. Museum Nat. History v. Travelers Indem. Co. of Conn.*, 2021 WL 1851028, at *5–6 (C.D. Cal. Apr. 15, 2021), *appeal pending*, No. 21-55497 (9th Cir.); *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Conn.*, 492 F. Supp. 3d 1051, 1057 (C.D. Cal. 2020), *appeal pending*, No. 20-56031 (9th Cir.); *Travelers Cas. Ins. Co. of Am. v. Geragos & Geragos*, 495 F. Supp. 3d 848, 852–53 (C.D. Cal. 2020); *Real Hospitality, LLC v. Travelers Cas. Ins. Co. of Am.,* 2020 WL 6503405, at *8 (S.D. Miss. Nov. 4, 2020); *Pez Seafood DTLA, LLC v. Travelers Indem. Co.*, 2021 WL 234355, at *7 (C.D. Cal. Jan. 20, 2021), *appeal pending*, No. 21-55100 (9th Cir.); *Ballas Nails & Spa, LLC v. Travelers Cas. Ins. Co. of Am.*, 2021 WL 37984, at *6 (E.D. Mo. Jan. 5, 2021); *Riverwalk Seafood Grill Inc. v. Travelers Cas. Ins. Co. of Am.*, 2021 WL 81659, at *3 (N.D. Ill. Jan. 7, 2021) (courts have "nearly unanimously determined that these exclusions bar

coverage of similar claims") (quotation marks omitted).[2] This Court should do the same.

B. 10E's attempts to circumvent the virus exclusion are meritless.

10E tries to avoid application of this overwhelming authority against its position in three ways, all of which are meritless and have been rejected by numerous courts.

First, 10E argues, without citing any authority, that courts cannot determine the meaning of exclusions in insurance policies without making factual determinations—in other words, that it is impossible to dismiss a case on the basis of an exclusion "at the 12(b)(6) stage." AOB at 20. But well-settled law is to the contrary. *E.g.*, *Biltmore Assocs., LLC v. Twin City Fire Ins. Co.*, 572 F.3d 663, 668 (9th Cir. 2009) (affirming dismissal based on exclusion); *see also Prince v. United Nat'l Ins. Co.*, 142 Cal. App. 4th 233, 235 (2006) (affirming order sustaining demurrer based on exclusion).

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[2] There are many more such cases besides these. *See, e.g.*, *Travelers Cas. Ins. Co. v. Geragos & Geragos*, 2021 WL 1659844, at *5–6 (C.D. Cal. Apr. 27, 2021) (applying California and New York law); *Karen Trinh, DDS, Inc. v. State Farm Gen. Ins. Co.,* 2020 WL 7696080, at *3–4 (N.D. Cal. Dec. 28, 2020); *Healthnow Med. Ctr., Inc. v. State Farm Gen. Ins. Co.*, 2020 WL 7260055, at *2 (N.D. Cal. Dec. 10, 2020); *Toppers Salon & Health Spa, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2020 WL 7024287, at *3 (E.D. Pa. Nov. 30, 2020); *Natty Greene's Brewing Co., LLC v. Travelers Cas. Ins. Co. of Am.*, 2020 WL 7024882 (M.D.N.C. Nov. 30, 2020); *Edison Kennedy, LLC v. Scottsdale Ins. Co.*, 2021 WL 22314, at *7–8

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Second, 10E argues that the virus exclusion applies only to "viral contamination or outbreak on the subject premises" and "**does not** preclude coverage for losses **caused by city mandated shutdowns under civil authority**." AOB at 21 (bolding in original). But that is not what its policy provides. The virus exclusion expressly states that it "applies to *all* coverage under *all* [property insurance] forms, . . . *including but not limited to* forms or endorsements that cover . . . *action of civil authority*." 3-ER-554 (emphasis added). This Court should decline 10E's invitation to rewrite the virus exclusion. *Palmer*, 21 Cal. 4th at 1115; Cal. Civ. Code § 1638.

In a variation on the same theme, 10E argues that its losses "flowed from the effects of Mayor Garcetti's shutdown orders" and were not "*directly* caused by Coronavirus on it's [sic] premises." AOB at 24. But that is a distinction without a difference; the orders were, obviously, issued *because of* the Coronavirus. 10E seems to suggest that Mayor Garcetti's order should be treated as a cause of loss separate from the Coronavirus, and that only the order matters. But California courts have consistently interpreted exclusions like the virus exclusion here

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(M.D. Fla. Jan. 4, 2021); *Musso & Frank Grill Co., Inc. v. Mitsui Sumitomo Ins. USA Inc*., 2020 WL 7346569 (Cal. Super. Ct. Nov. 9, 2020).

broadly—especially those barring coverage for any losses "resulting from" an excluded cause of loss.

In one recent case, for example, which the district court cited in its order dismissing the second amended complaint, 1-ER-6, the Court of Appeal explained that "[t]he term 'resulting from' broadly links a factual situation with the event creating liability, and connotes only a minimal causal connection or incidental relationship." *Mosley v. Pac. Specialty Ins. Co.*, 49 Cal. App. 5th 417, 424 (2020) (quotation marks omitted). The phrase is "generally equated" with "origination, growth or flow from the event." *Id.* (quotation marks omitted). In *Mosley*, the insurance policy excluded losses "resulting from any manufacturing, production or operation, engaged in . . . [t]he growing of plants." *Id*. at 423 (quotation marks omitted). Applying "common sense," the court held that this exclusion applied to fire losses caused by alterations to a property's electrical system that were made to power a marijuana-growing operation. *Id*. at 424 (quotation marks omitted). The immediate cause of the fire was the substandard electrical work, but that work was done in the service of growing plants—an excluded cause of loss. Because there was at least a "'minimal causal connection' between [the plaintiff's] growing marijuana, the fire, and the resulting loss," any losses were not covered. *Id.*; *accord, e.g.*, *Atlas Assurance Co. v. McCombs Corp.*, 146 Cal. App. 3d 135, 142

n.3, 149 (1983) (enforcing exclusion for losses "[c]aused by or resulting from" specified non-covered risks).

10E argues that the virus exclusion in its policy cannot be read so broadly because it does not include the phrase "directly or indirectly." AOB at 24–26. But, as *Mosley* and other cases make clear, "resulting from" is broad enough to exclude coverage here. *Mosley*, 49 Cal.App.5th at 423–24; *Atlas*, 146 Cal. App. 3d at 142 n.3.

Here, 10E's own complaint makes clear, repeatedly, that its claimed losses "result from" the Coronavirus:

- Mayor Garcetti's order was issued because of "the dire risks of exposure with the contraction of COVID-19 and evidence of *physical damage to property*" allegedly caused by the Coronavirus. 2-ER-136 ¶ 22 (emphasis in original).
- 10E seeks declaratory relief "due to physical loss or damage from the Coronavirus." 2-ER-139 ¶ 35.

In short, 10E's claimed losses were caused by, or result from, the Coronavirus. And because the Coronavirus is a virus, it is not a Covered Cause of Loss, and 10E is not entitled to coverage.

Courts across the country have repeatedly held as much, rejecting arguments, just like the one 10E makes here, that a virus exclusion does not apply

to government shutdown orders issued because of the Coronavirus. Here are but a few of many examples:

- *Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.*, 2020 WL 5642483, at *2 (N.D. Cal. Sept. 22, 2020): "[U]nder Plaintiffs' theory, the loss is created by the Closure Orders rather than the virus, and therefore the Virus Exclusion does not apply. Nonsense."
- *L.A. Cty. Museum*, 2021 WL 1851028, at *5: "Many courts have rejected precisely this argument . . . . Plaintiff cannot plausibly allege that government restrictions intended to mitigate the spread of the COVID-19 virus did not 'result from' a virus."
- *Pez Seafood DTLA, LLC v. Travelers Indem. Co.*, 2021 WL 234355, at *7 (C.D. Cal. Jan. 20, 2021): "[W]hether framed as a response to a general public health threat in the form of a global pandemic, or to a specific viral intrusion, Plaintiff cannot escape that a virus is the root cause of the Orders. 'Pandemic' merely describes the geographical scope and effect of the virus on the population. Whether a global pandemic or a single infection, the Virus Exclusion clearly and unambiguously applies, as courts applying similar virus exclusions to COVID-19 have consistently found."

- *BA LAX, LLC v. Hartford Fire Ins. Co.*, 2021 WL 144248, at *4 (C.D. Cal. Jan. 12, 2021), *appeal pending*, No. 21-55109 (9th Cir.): "Numerous California courts have concluded that similar virus exclusions preclude coverage for business losses resulting from the spread of COVID-19 in society and from public health restrictions intended to mitigate that spread."

Third, 10E asserts—for the first time—that the virus exclusion in its policy was not "conspicuous, plain, and clear." AOB at 22. 10E waived that argument by not raising it in the district court. 2-ER-63–80; *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1321 (9th Cir. 1998) (applying "'general rule' against entertaining arguments on appeal that were not presented or developed before the district court"). And the argument is incorrect in any event. The virus exclusion is the subject of its own separate endorsement, with a bold-face, large-font heading: "**EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA**." 3-ER-554. An exclusion cannot be much clearer or more conspicuous than that. The exclusion is also referenced on the listing of policy forms near the beginning of the policy. 2-ER-318.

A court recently rejected a similar challenge to a similar virus exclusion, concluding that "the Virus Exclusion is plainly stated in language free of jargon," and "[t]he Virus Exclusion is also conspicuous within the Policy." *W. Coast Hotel*

Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos., 498 F. Supp. 3d 1233, 1241 (C.D. Cal. 2020); *see also, e.g.*, *Mission Viejo Emergency Med. Assocs. v. Beta Healthcare Grp.*, 197 Cal. App. 4th 1146, 1157 (2011) (arbitration provision was fairly presented to insured because "[i]t is conspicuous in both the table of contents and the policy itself, and clearly explained in language that is understandable to a layperson").

The Court should reject 10E's unreasoned, unsupported efforts to evade the plain language of the virus exclusion in its policy. Dozens of courts in California and across the country have rejected similar arguments in recent Coronavirus-related insurance cases. This Court should do the same and should affirm the judgment because all of 10E's claimed losses are excluded from coverage.

II. 10E is not entitled to coverage because it has not suffered any "direct physical loss of or damage to property."

Under California law, 10E bears "the burden . . . to prove facts establishing that [its] claimed loss falls within the coverage provided by the policy's insuring clause." *MRI Healthcare Ctr.*, 187 Cal. App. 4th at 777. 10E tries to flip that standard, arguing that there is a "presumption of coverage" under a so-called "all-risks" policy—i.e., a policy that covers risks of direct physical loss that are not excluded. AOB at 11 (bolding omitted). But California law is clear that the "direct physical loss requirement is part of the policy's insuring clause and accordingly falls within [the insured's] burden of proof." *MRI Healthcare Ctr.*,

187 Cal. App. 4th at 778; *see also Garvey v. State Farm Fire & Cas. Co.*, 48 Cal. 3d 395, 406 (1989).

Thus, the question is whether 10E has alleged facts showing that it suffered some "direct physical loss of or damage to Covered Property . . . caused by or resulting from a Covered Cause of Loss." 3-ER-414. The district court correctly held that it has not. 10E's loss of the full use of its restaurant (because of Mayor Garcetti's order limiting its operations to delivery and take-out) did not constitute "direct physical loss of or damage to property." The district court gave those words their "ordinary and popular sense" and let the "clear and explicit" policy language govern. *Palmer*, 21 Cal. 4th at 1115–17 (quotation marks omitted); Cal. Civ. Code § 1638.

The district court's decision is supported by the fundamental nature and purpose of property insurance, the uniform decisions of California appellate courts interpreting the phrase "direct physical loss," and an overwhelming majority of decisions specifically holding that insureds are not entitled to coverage for Coronavirus-related business interruptions under similar or identical policies. The decision is also consistent with a plain reading of the policy as a whole (which California law requires).

A. The requirement of "physical" loss of or damage to the insured property is fundamental to property insurance.

As California courts have recognized, there can be no coverage under a property-insurance policy when the insured sustains a financial loss but "nothing happened *to the covered property*." *Doyle*, 21 Cal. App. 5th at 38. To state the obvious, "property insurance is insurance of *property*," and "[g]iven this premise, the threshold requirement for recovery under a contract of property insurance is that the insured property has sustained physical loss or damage." *Simon Mktg., Inc. v. Gulf Ins. Co.*, 149 Cal. App. 4th 616, 622–23 (2007).

Business Income and Extra Expense coverages, like those in 10E's policy, are secondary to coverage for direct physical loss of or damage to property that requires repair or replacement. In other words, the insured's "*operations* are not what is insured—the building and the personal property in or on the building are." *Real Hospitality*, 2020 WL 6503405, at *8. "One does not buy simply 'business interruption insurance.' Policyholders are not insuring against 'all risks' to their income—they are insuring against 'all risks' *to their property*." *Id.* at *5 n.9 (emphasis added). Coverage for business financial losses is available only when there is a "loss of or damage to the building or any personal property" that causes the insured to "suspend[] operations" and undertake repairs—not when, for some reason having nothing to do with physical loss or damage, a business's income happens to fall. *Id.*

10E's policy is perfectly consistent with "the fundamental nature of property insurance," as it insures only "against potential harms to the [property] itself"—not against "any potential financial losses" in the absence of any physical impact on property. *Doyle*, 21 Cal. App. 5th at 39. 10E's brief amounts to a request for this Court to "rewrite a policy to bind the insurer to a risk that it did not contemplate and for which it has not been paid." *Safeco Ins. Co. v. Gilstrap*, 141 Cal. App. 3d 524, 533 (1983); *see also Certain Underwriters at Lloyd's of London v. Superior Court*, 24 Cal. 4th 945, 968 (2001) ("[W]e do not rewrite any provision of any contract, including the [insurance policy at issue], for any purpose").

B. Under the uniform decisions of California courts, 10E has not alleged "direct physical loss of or damage to property."

California courts consistently interpret the plain meaning of "direct physical loss" to require "distinct, demonstrable, physical alteration of the property." *MRI Healthcare Ctr.*, 187 Cal. App. 4th at 779 (quotation marks omitted). "That the loss needs to be 'physical,' given the ordinary meaning of the term, is 'widely held to exclude alleged losses that are intangible or incorporeal.'" *Id.* (quoting 10A COUCH ON INSURANCE § 148:46). "For 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." *Id.* at 780. "The word 'direct' used in conjunction with the word 'physical' indicates the change in the

insured property must occur by the action of the fortuitous event triggering coverage." *Id.* at 779. Alternatively, the property must be permanently lost, as through theft or a similar form of dispossession. *See, e.g.*, *Total Intermodal*, 2018 WL 3829767, at *3–4 (cargo was mistakenly returned to China, where it became unrecoverable). There is no "direct physical loss of or damage to property" here: "Government orders aimed at slowing the spread of a virus do not pose a risk of physical loss or damage." *Westside Head & Neck v. Hartford Fin. Servs. Grp., Inc.*, 2021 WL 1060230, at *5 (C.D. Cal. Mar. 19, 2021).

Economic loss alone does not qualify as direct and physical. In *MRI Healthcare Center of Glendale, Inc. v. State Farm General Insurance Co.*, for example, a company that performed MRI scans had to shut down its MRI machine so that the building housing it could be repaired. 187 Cal. App. 4th at 772. When the company turned the machine back on, it did not work properly and took months to be repaired. *Id.* The company made an insurance claim, but the Court of Appeal held that the insurer correctly denied it. The insurance policy there, like the one here, covered only "direct physical loss," and there had been no "'distinct, demonstrable, [or] physical alteration' of the MRI machine." *Id.* at 778–79. "The failure of the MRI machine" to work after being turned back on "emanated from the inherent nature of the machine itself rather than actual physical 'damage.'" *Id.*

at 780. "[T]he machine was turned off and could not be turned back on. This does not constitute a compensable 'direct physical loss' under the policy." *Id.*

In *Doyle v. Fireman's Fund Insurance Co.*, too, the loss was only economic rather than direct and physical. There, a wine collector who was deceived into buying counterfeit wine attempted to recover under his property insurance policy. 21 Cal. App. 5th at 36. The Court of Appeal affirmed the dismissal of his complaint "because nothing happened *to the covered property* (i.e., the wine that [the insured] purchased and insured)." *Id.* at 38. The policy insured only "against potential harms to the wine itself, such as fire, theft, or abnormal spoilage; [the insured] did not insure himself against any potential financial losses." *Id.* at 39. In other words, he "did not buy a *provenance* insurance policy; [he] bought a *property* insurance policy." *Id.*

This case is much the same as *Doyle*, because nothing physically happened to the covered property (the restaurant). Nothing disappeared or was physically lost, stolen, or damaged. 10E has suffered a purely *financial* loss that did not result from any *physical* loss of or damage to property. As the district court correctly reasoned, "[a]n insured cannot recover by attempting to artfully plead temporary impairment to economically valuable use of property as physical loss or damage," and 10E "attempts to make precisely this substitution of temporary impaired use or diminished value for physical loss [of] or damage." 1-ER-14 (dismissing first

amended complaint); 1-ER-4 (dismissing second amended complaint "for the reasons explained in the Court's prior Order"). The "'labeling of the insured property as non-essential'" did not "physically alter any of Plaintiff's property," and "Plaintiff remained in possession" of its property. 1-ER-14–15. That means there was no "direct physical loss of or damage to property" within the meaning of the policy.

MRI Healthcare and *Doyle* are hardly anomalies. Many other cases likewise hold that the temporary loss of use of property—without any physical impact on it—does not constitute a "direct physical loss of . . . property" under a property-insurance policy. *See, e.g.*, *Ward Gen. Ins. Servs., Inc. v. Emp'rs Fire Ins. Co.*, 114 Cal. App. 4th 548, 556 (2003) ("[T]he loss of [a] database, with its consequent economic loss, but with *no loss of or damage to tangible property*, was not a 'direct physical loss of or damage to' covered property," and therefore not covered) (emphasis added); *Pentair, Inc. v. Am. Guarantee & Liab. Ins. Co.*, 400 F.3d 613, 616 (8th Cir. 2005) (power outage was not "direct physical loss of or damage to property"); *Com. Union Ins. Co. v. Sponholz*, 866 F.2d 1162, 1163 (9th Cir. 1989) (defective title to a vessel was not "physical loss or damage"). 10E's argument, "if adopted, would mean that direct physical loss or damage is established *whenever* property cannot be used for its intended purpose." *Pentair*, 400 F.3d at 616.

10E tries to evade all these cases by claiming that the district court's interpretation of the phrase "direct physical loss" is inconsistent with an insured's "reasonable expectations" of coverage. AOB at 9. But when, as in this case, "the pertinent policy language is not ambiguous . . . there is no reason to look to the insured's reasonable expectations." *Merrill & Seeley, Inc. v. Admiral Ins. Co.*, 225 Cal. App. 3d 624, 626 (1990). California courts have consistently held that the phrase "direct physical loss" is unambiguous and requires something more than what 10E has alleged or could allege. For that reason, courts have consistently rejected insureds' invocation of their reasonable expectations in Coronavirus-related cases like this one. *E.g.*, *Boxed Foods Co. v. Cal. Cap. Ins. Co.*, 497 F. Supp. 3d 516, 523 (N.D. Cal. 2020); *Franklin EWC, Inc.*, 2020 WL 7342687, at *6.

In short, under California law, 10E has not alleged a "direct physical loss," and therefore its claimed losses are not covered under its policy.

C. An overwhelming majority of courts across the country, including in California, have agreed with the district court's decision.

10E does not even acknowledge that the decision below is strongly supported by an "overwhelming majority of courts" addressing the same issue presented here and reaching the same result. *Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co.*, 499 F. Supp. 3d 670, 673 (N.D. Cal. 2020). "In policies with similar language and scope, numerous courts have now held that neither the

presence of COVID-19 in society nor government restrictions can by themselves constitute direct physical loss or damage to property under California law." *L.A. Cty. Museum*, 2021 WL 1851028, at *3 (collecting cases).

For example, in one recent Coronavirus-related case involving an affiliate of Travelers and policy provisions similar to those at issue here, the court held that public-health orders did not lead to any "direct physical loss of or damage to property." *L.A. Cty. Museum*, 2021 WL 1851028, at *4. Alleging that a business had to close because of those orders was "plainly insufficient to constitute direct physical loss or damage because a business closure is an interference with Plaintiff's use of its [property] but is not itself a distinct, demonstrable, physical alteration of its property." *Id.* Many other cases involving the same Travelers policy language have ended in dismissal for the same reason. *Pez Seafood DTLA, LLC*, 2021 WL 234355, at *4–5; *Geragos & Geragos*, 495 F. Supp. 3d at 853–54; *Jonathan Oheb MD, Inc. v. Travelers Cas. Ins. Co. of Am.*, 2020 WL 7769880, at *3–4 (C.D. Cal. Dec. 30, 2020); *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 487 F. Supp. 3d 834, 838–43 (N.D. Cal. 2020), *appeal pending*, No. 20-16858 (9th Cir.).

Courts have dismissed cases involving other insurers' policies on the same grounds. In *Water Sports Kauai*, for example, the court held that "deprivation of the functionality of the property" as a result of Coronavirus-related government

orders was not "direct physical loss of or damage to property" because the insured "has not alleged any *direct physical* anything that happened to or at its specific properties. Moreover, it has not been dispossessed or deprived *of* any specific property; its inventory and equipment remain." 499 F. Supp. 3d at 676–77.

Another court persuasively explained that the same interpretation advocated by 10E here "is not a reasonable one because it would be a sweeping expansion of insurance coverage without any manageable bounds." *Plan Check Downtown III, LLC v. AmGuard Ins. Co.*, 485 F. Supp. 3d 1225, 1231 (C.D. Cal. 2020). If a governmental order restricting the use of property amounted to a direct physical loss of property, it would not be hard to imagine absurd results. Insureds could make claims "[i]f a building's elevator system had a software bug that temporarily shut down all the elevators," or if "a snowstorm . . . interfere[d] with a restaurant's outdoor dining service." *Id.* at 1232. "The list of losses that do not fit within the parties' expectations of what property insurance should cover would be a very, very long one," and 10E's theory would be "a major departure from established California law." *Id.* Numerous other California federal district court decisions are in accord with these decisions.[3]

[3] *Caribe Rest. & Nightclub, Inc. v. Topa Ins. Co.*, 2021 WL 1338439, at *3–4 (C.D. Cal. Apr. 9, 2021), *appeal pending*, No. 21-55405 (9th Cir.); *Kevin Barry Fine Art Assocs. v. Sentinel Ins. Co.*, 2021 WL 141180, at *3–6 (N.D. Cal. Jan. 13, 2021); *Robert W. Fountain, Inc. v. Citizens Ins. Co. of Am.*, 2020 WL 7247207, at

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The long line of decisions resoundingly rejecting 10E's position is not limited to California, but includes scores of cases nationwide arising from the Coronavirus—far too many to cite here. "[N]early every court to address this issue has concluded that loss of use of a premises due to a governmental closure order does not trigger business income coverage premised on physical loss to property." *Michael Cetta, Inc. v. Admiral Indem. Co.*, 2020 WL 7321405, at *8 (S.D.N.Y. Dec. 11, 2020) (collecting cases); *see also Promotional Headwear Int'l v. Cincinnati Ins. Co.*, 2020 WL 7078735, at *6 (D. Kan. Dec. 3, 2020) ("[T]he overwhelming majority of cases to consider business income claims stemming from COVID-19 with similar policy language hold that 'direct physical loss or damage' to property requires some showing of actual or tangible harm to or intrusion on the property itself."); *Nguyen v. Travelers Cas. Ins. Co. of Am.*, 2021 WL 2184878, at *1 (W.D. Wash. May 28, 2021) ("Like the overwhelming consensus that has formed, this Court determines that COVID-19 does not cause

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*4 (N.D. Cal. Dec. 9, 2020), *appeal pending*, No. 21-15053 (9th Cir.); *Palmdale Estates, Inc. v. Blackboard Ins. Co.*, 2021 WL 25048, at *2–3 (N.D. Cal. Jan. 4, 2021); *Baker v. Or. Mut. Ins. Co.*, 2021 WL 24841, at *2–3 (N.D. Cal. Jan. 4, 2021); *Mortar & Pestle Corp. v. Atain Specialty Ins. Co.*, 2020 WL 7495180, *3–4 (N.D. Cal. Dec. 21, 2020); *Selane Prods., Inc. v. Cont'l Cas. Co.*, 2020 WL 7253378, at *4–6 (C.D. Cal. Nov. 24, 2020), *appeal pending*, No. 21-55123 (9th Cir.); *Long Affair Carpet & Rug, Inc. v. Liberty Mut. Ins. Co.*, 2020 WL 6865774, at *2–3 (C.D. Cal. Nov. 12, 2020).

the physical loss or damage to property required as a condition precedent to trigger coverage in all the relevant policies.").

D. The cases 10E cites in an effort to circumvent the requirement of physical harm only underscore that dismissal was proper.

Rather than trying to dig itself out of the avalanche of contrary authorities discussed above, 10E focuses on a small group of cases purportedly showing that "direct physical loss" can mean indirect, metaphysical loss. AOB at 19–20. In fact, those cases only reinforce that physical loss or damage is a prerequisite to coverage.

Some involve physical damage to real property. In one case, for example, leaking gasoline contaminated the foundation, walls, and rooms of a church. *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 55 (Colo. 1968). The court acknowledged that "the so-called 'loss of use' of the church premises, standing alone, does not in and of itself constitute a 'direct physical loss,'" but concluded that the "direct physical loss" requirement was met because the church "became so infiltrated and saturated as to be uninhabitable, making further use of the building highly dangerous." *Id.* In other words, as one California court explained the case, "[a] physical loss occurred when the foundations became saturated with gasoline." *Ward Gen. Ins. Servs.*, 114 Cal. App. 4th at 558. Here, by contrast, 10E does not claim its property became physically contaminated, by the Coronavirus or otherwise.

There was also physical damage to real property in *Hughes v. Potomac Insurance Co.*, 199 Cal. App. 2d 239 (1962). 10E's own summary of the case makes that clear: "a landslide left a policyholder's home perched on the edge of a cliff." AOB at 15. "It goes without question," the court concluded, that the house "suffered real and severe damage when the soil beneath it slid away and left it overhanging a 30-foot cliff." 199 Cal. App. 2d at 249. "Until such damage was repaired and the land beneath the building stabilized, the structure could scarcely be considered a 'dwelling building' in the sense that rational persons would be content to reside there." *Id.* As a California court later explained, "[q]uite 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." *Ward Gen. Ins. Servs.,* 114 Cal. App. 4th at 558; *see also Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 16–17 (W. Va. 1998) (relying on *Hughes*, in case involving unstable retaining wall that damaged and physically threatened homes); *Strickland v. Fed. Ins. Co.*, 200 Cal. App. 3d 792, 801 (1988) (evidence indicated that insureds were "living atop a land mass which is close to the point of failure, including the hazard of more ruptured gas lines, and possible total collapse during an earthquake or even a rainstorm").

Similarly, in *Manpower Inc. v. Insurance Co. of the State of Pennsylvania*, 2009 WL 3738099, at *6 (E.D. Wis. Nov. 3, 2009), the collapse of the building

that housed the insured's offices "created a *physical barrier* between the insured and its property"— which amounted to a "direct physical loss." (Emphasis added.) Here, unlike in all those cases, 10E does not allege that *anything* has physically happened to any property at its restaurant.

Some of 10E's other cases involved physical damage to personal property. For example, in *General Mills, Inc. v. Gold Medal Insurance Co.*, 622 N.W.2d 147, 150–52 (Minn. Ct. App. 2001), there was coverage for food products that were physically treated by an unapproved pesticide and therefore could not be sold. Similarly, in *Pepsico, Inc. v. Winterthur International America Insurance Co.*, 806 N.Y.S.2d 709, 711 (App. Div. 2005), bottled soda was "'physically damaged'" because faulty raw ingredients supplied by third-party suppliers gave it an "off-taste." Here, unlike in those cases, there is no physical alteration of property that could give rise to a valid claim.

10E also relies on *Total Intermodal Services, Inc. v. Travelers Property Casualty Co. of America*, 2018 WL 3829767 (C.D. Cal. July 11, 2018), claiming that it stands for the proposition that "direct physical loss" can be the same thing as loss of use. AOB at 16, 19–20. But that is not what *Total Intermodal* says. There, cargo was mistakenly shipped to China and held by Chinese authorities, who refused to release it for months. *Total Intermodal,* 2018 WL 3829767, at *1. The insured argued that the property was "in effect lost" because it was "unrecoverable

from China." *Id.* at *3. The court held that "the '*loss of*' property contemplates that the property is misplaced and unrecoverable**,** without regard to whether it was damaged," and that "the phrase 'loss of' includes the permanent dispossession of something." *Id.* at *3–4. Here, by contrast, as the author of *Total Intermodal* explained in dismissing a similar Coronavirus-related complaint filed by a restaurant against Travelers, *none* of 10E's property has been misplaced or is unrecoverable, nor has 10E been dispossessed (permanently or otherwise) of any of its property. *Mark's Engine*, 492 F. Supp. 3d at 1056. What 10E alleges is a *financial* loss from being required to temporarily limit some of its restaurant's services to slow the spread of a virus. That proposed interpretation of "direct physical loss of" would lack "any manageable bounds." *Id.*

In a related attempt to fit its claims within the policy language, 10E's argues that it suffered a "physical loss," which is as much a basis for coverage under its policy as "physical damage." *See* AOB at 18–19. There is no dispute that "physical loss" can mean something different from "physical damage," as many courts have acknowledged Coronavirus-related insurance cases. *See, e.g.*, *Mark's Engine*, 429 F. Supp. 3d at 1056; *Islands Rests., LP v. Affiliated FM Ins. Co.*, 2021 WL 1238872, at *5 (S.D. Cal. Apr. 2, 2021). A theft, for example, is a "physical loss" that typically does not involve "physical damage." But, "[e]ither way, 'property' is involved. The property is either physically lost, *i.e.*, the insured

suffers a permanent dispossession of the property, or it is damaged. After all, it is a commercial 'property' policy." *Real Hospitality*, 2020 WL 6503405, at *5. There is no lost or damaged property in this case, and 10E's argument that "direct physical loss" should be construed to mean mere loss of use "is an untenable leap in logic." *Michael Cetta, Inc.,* 2020 WL 7321405, at *9.

Other cases cited by 10E turned on quirks of policy language substantially different from the policy language at issue here. *Wakefern Food Corp. v. Liberty Mutual Fire Insurance Co.*, 968 A.2d 724, 734–35 (N.J. Super. Ct. App. Div. 2009), for instance, was decided based on a special "Services Away Extension" in the policy—not the "direct physical loss" coverage provision at issue here. The court also noted that a loss caused by a government order would *not* be covered. *Id.* at 734 n.7, 739. And in *Southwest Mental Health Center, Inc. v. Pacific Insurance Co.*, 439 F. Supp. 2d 831, 833–39 (W.D. Tenn. 2006), the court held that electrical and telephone outages were *not* "direct physical loss of or damage to property," but allowed a claim based on "direct physical damage" to a computer to proceed because the policy there "contemplate[d] coverage for business losses due to the loss of electronic media."

Finally, 10E purports to rely on "voluminous decisions enforcing coverage for COVID-19 losses," AOB at 19, but it offers no support for this assertion. There should be little wonder why: "Courts are nearly unanimous in their

agreement that [similar] claims have no merit." *St. Julian Wine Co. v. Cincinnati Ins. Co.*, 2021 WL 1049875, at *1 (W.D. Mich. Mar. 19, 2021). Although 10E argues that the policy language must be ambiguous because a tiny handful of courts have ruled in favor of insureds in cases like this one, AOB at 10, California law says otherwise. "The mere fact that judges of diverse jurisdictions disagree does not establish ambiguity under the particular principles which govern the interpretation of insurance contracts in California." *ACL Techs., Inc. v. Northbrook Prop. & Cas. Ins. Co.*, 17 Cal. App. 4th 1773, 1787 n.39 (1993).

In short, the motley collection of authorities cited by 10E does not remotely demonstrate that "direct physical loss" means "indirect metaphysical harm" or "financial injury." The policy covers only "direct physical loss," 10E hasn't alleged any such loss, and so the district court was correct to dismiss its amended complaint.

E. 10E's argument is contrary to a plain reading of its policy as a whole.

The district court's interpretation of direct physical loss of or damage to property is consistent with the rule that California courts "interpret contracts (including insurance policies) as a whole, with each clause lending meaning to the others," and "in a manner which gives force and effect to every clause rather than to one which renders clauses nugatory." *Titan Corp. v. Aetna Cas. & Sur. Co.*, 22 Cal. App. 4th 457, 473–74 (1994); *see also* Cal. Civ. Code § 1641 ("The whole of

a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."). This rule strongly supports Travelers' position, because various policy provisions that 10E ignores belie its argument that its losses are covered.

1. 10E's interpretation conflates or reorders the requirements of Business Income and Extra Expense coverage.

The Policy requires that direct physical loss of or damage to property result in a suspension of business operations, like this:

Covered Cause of Loss

↓

Direct physical loss of or damage to property

↓

Suspension of business operations during "period of restoration"

↓

Business Income losses and Extra Expenses

In other words, the policy contemplates that a covered "risk of direct physical loss" (e.g., wildfire or tornado) acts upon the property, causing direct physical loss of or damage to that property. In turn, because of that loss or damage, the insured is forced to suspend its business until the property can be rebuilt, repaired, or replaced during the "period of restoration."

10E muddles these distinct requirements, or at least flips their order. It argues that the shutdown orders suspended its business and that this suspension

rendered it unable to use its restaurant for in-person dining. AOB at 18. In other words, rather than starting from a Covered Cause of Loss that results in physical damage or loss, which in turn requires a suspension of its business, 10E starts with the suspension of its business and then labors to explain why that suspension was itself a physical loss. That argument is inconsistent with the policy; the direct physical loss or damage must cause the suspension, not the other way around. And the limitation on 10E's operations cannot be both the suspension of operations and "direct physical loss."

2. The "period of restoration" provision underscores the need for *physical* loss or damage.

10E seeks payment from Travelers under the Business Income and Extra Expense coverages in its policy. Those coverages are available only for the "period of restoration," which generally ends on "[t]he date when the property at the described premises should be *repaired, rebuilt or replaced* with reasonable speed and similar quality." 3-ER-450 (emphasis added).

Before the pandemic, courts cited similar or identical definitions of the "period of restoration" in holding that a mere loss of use of property does not constitute "direct physical loss . . . of property" under property-insurance policies. *E.g.*, *Roundabout Theatre Co. v. Cont'l Cas. Co.*, 751 N.Y.S.2d 4, 8 (N.Y. App. Div. 2002); *Harry's Cadillac-Pontiac-GMC Truck Co. v. Motors Ins. Corp.*, 486

S.E.2d 249, 251 (N.C. Ct. App. 1997); *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323, 332 (S.D.N.Y. 2014).

And in recent Coronavirus-related decisions, courts have reached the same conclusion. For example:

- *Tralom, Inc. v. Beazley USA Servs., Inc.*, 2020 WL 8620224, at *3 (C.D. Cal. Dec. 29, 2020): "The 'repair, rebuilt, or replaced' requirement shows that the loss of or damage to property [is] physical in nature."
- *Water Sports Kauai, Inc.*, 499 F. Supp. 3d at 679: "[H]ere there is nothing on any of [the insured's] premises that allegedly needs to be repaired, rebuilt or replaced."
- *W. Coast Hotel Mgmt., LLC*, 2020 WL 6440037, at *4: "Plaintiffs do not claim that any property has undergone a physical alteration or needs to be 'repaired, rebuilt, or replaced.'"
- *Real Hospitality*, 2020 WL 6503405, at *6: "If there is no requirement that physical loss of or physical damage to the property be involved, the definition of the time period for paying the claim makes no sense."

10E never explains how its position could reasonably be squared with the expectation that the lost or damaged property be "repaired, rebuilt or replaced" during the "period of restoration." In this case, there is nothing to repair, rebuild, or replace over any period.

3. The policy's loss-of-use exclusion further supports the district court's decision.

The Policy also provides that Travelers "will not pay for loss or damage caused by or resulting from . . . loss of use or loss of market." 3-ER-437. As another California district court explained, this loss-of-use exclusion "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," and "[t]he provision also undermines [the insured'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. Other recent Coronavirus-related decisions have agreed with this analysis. *E.g.*, *Ballas Nails & Spa, LLC v. Travelers Cas. Inc. Co. of Am.*, 2021 WL 37984, at *4 (E.D. Mo. Jan. 5, 2021) ("construing the policy's requirement of 'direct physical loss or damage' to include the mere loss of use of insured property with nothing more would negate the 'loss of use' exclusion."); *accord Mortar & Pestle Corp. v. Atain Specialty Ins. Co.*, 2020 WL 7495180, *4 (N.D. Cal. Dec. 21, 2020).

4. The Civil Authority provision further supports the district court's decision.

10E maintains that a partial loss of the use of its restaurant resulting from a governmental order constitutes "direct physical loss of or damage to property," triggering coverage under its policy's Business Income and Extra Expense

provisions. But if this argument were correct, "there would be no need for a separate Civil Authority provision granting coverage when civil authority orders bar access to premises under more limited circumstances." *Moody v. Hartford Fin. Group, Inc.*, 2021 WL 135897, at *6 (E.D. Pa. Jan. 14, 2021). A "coverage extension," such as the one in 10E's policy for governmental closure orders, "gives additional coverage *not available elsewhere* under the Policy." *Sierra Pac. Power Co. v. Hartford Steam Boiler Inspection & Ins. Co.*, 665 F.3d 1166, 1173 (9th Cir. 2012) (emphasis added). Under 10E's view, the Civil Authority provision would provide *no* additional coverage—which would violate the longstanding interpretive rule that policies should not be construed in a manner that renders any of their provisions superfluous. *Titan Corp.*, 22 Cal. App. 4th at 473–74; Cal. Civ. Code § 1641.

III. The district court properly concluded that 10E's claimed losses are not covered under the Civil Authority provision either.

10E's policy includes a Civil Authority provision that extends Business Income and Extra Expense coverages for three weeks in the event that certain requirements are met: (1) an "action of civil authority" (for example, a government order or police roadblock) (2) "prohibits access to the described premises" (here, the restaurant) (3) "due to direct physical loss of or damage to property at locations, other than described premises," within 100 miles (4) "caused by or resulting from a Covered Cause of Loss" (e.g., a fire nearby). 3-ER-428. In other

words, a Covered Cause of Loss has to cause physical loss of or damage to nearby property, resulting in government action prohibiting 10E from using its restaurant. The district court correctly concluded that 10E has not alleged facts satisfying this test. And, even if it could, 10E's claimed losses all were caused by or resulted from the Coronavirus and are therefore excluded from coverage by the virus exclusion. 3-ER-554 (virus exclusion); *see, e.g.*, 4-ER-908 ¶ 18 (Mayor Garcetti issued order because of risks created by the Coronavirus); *see also* Part I, *supra*.

A. 10E cannot demonstrate that Mayor Garcetti's order was issued due to damage to property within 100 miles "caused by or resulting from a Covered Cause of Loss."

An "action of civil authority" can give rise to coverage only when it is due to direct physical loss of or damage to property at other locations, "caused by or resulting from a Covered Cause of Loss." 3-ER-428. An *excluded* risk—like the Coronavirus—is not a Covered Cause of Loss. 3-ER-416–17 ("Covered Causes of Loss" are "RISKS OF DIRECT PHYSICAL LOSS unless the loss is . . . [e]xcluded.").

10E does not even acknowledge this language in its opening brief, let alone attempt to explain how these requirements could possibly be met here. 10E seeks a declaration "that the Policy provides coverage to Plaintiff for any current and future civil authority closures of restaurants in California *due to physical loss or damage from the Coronavirus*." 2-ER-139 ¶ 35 (emphasis added). Even if the

second amended complaint were read to allege that Mayor Garcetti issued his order due to damage to property within 100 miles of the restaurant from the Coronavirus, 10E would run headlong into the virus exclusion: The damage must have been caused by or resulting from a Covered Cause of Loss, and the Coronavirus is an excluded Cause of Loss.

B. Mayor Garcetti's order did not "prohibit access" to 10E's restaurant.

The allegations in the amended complaint also do not satisfy the other requirements for Civil Authority coverage.

The Civil Authority provision requires that a government order "*prohibit*[] access to the described premises," not *limit* access. 3-ER-428 (emphasis added). 10E, however, acknowledges that Mayor Garcetti's order permitted it to provide delivery and take-out services, and it did so. AOB at 4 n.1. 10E has also alleged that those services were "exempt" from the order's requirements. 4-ER-908 ¶ 19. Courts interpreting civil-authority provisions have held that the phrase "prohibit access" means to "formally forbid" or "prevent" *any* access to property. *See, e.g.*, *S. Hospitality, Inc. v. Zurich Am. Ins. Co.*, 393 F.3d 1137, 1140 (10th Cir. 2004) (quotation marks omitted).

In Coronavirus-related insurance cases, California courts have repeatedly held that similar government orders did not outright prohibit access to insured premises. *See, e.g.*, *Protege Rest. Partners LLC v. Sentinel Ins. Co.,* 2021 WL

428653, at *4 (N.D. Cal. Feb. 8, 2021) ("Plaintiff was never disposed of its property, as it was the customers, and not Plaintiff, who were prohibited from access."); *Wellness Eatery La Jolla LLC v. Hanover Ins. Grp.*, 2021 WL 389215, at *7 (S.D. Cal. Feb. 3, 2021) ("Simply stated, the Closure Orders alleged in the complaint prohibit the on-site dining operation of Plaintiffs' business; they do not prohibit physical access to Plaintiffs' premises."); *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, 487 F. Supp. 3d 937, 945 (S.D. Cal. 2020). The same is true here: 10E never lost access to its own property, and so there is no coverage for its claimed losses under the Civil Authority provision in its policy.

IV. The district court was right to dismiss the complaint with prejudice.

The district court did not abuse its discretion in dismissing the second amended complaint with prejudice. After explaining why there was no coverage under the policy, the district court concluded that "a third round of briefing on the same flawed legal theories would be futile and prejudicial to Defendant." 1-ER-6. The district court based this conclusion on the fact that 10E had already amended its complaint (with the benefit of having seen the arguments raised in Travelers' motion to dismiss the first amended complaint) yet still failed to "cure the deficiencies in its pleading of 'direct physical loss or damage.'" *Id.* 10E also effectively conceded in its second amended complaint that the virus exclusion precludes coverage. 1-ER-6.

The cases 10E itself cites (AOB at 26) support the district court's decision to dismiss the complaint with prejudice. *See Ebner v. Fresh, Inc.*, 838 F.3d 958, 968 (9th Cir. 2016) (affirming decision denying leave to amend); *Branch Banking & Tr. Co. v. D.M.S.I., LLC*, 871 F.3d 751, 764–65 (9th Cir. 2017) (affirming decision denying defendants leave to amend affirmative defenses); *Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355–56 (9th Cir. 1996) (affirming decision denying leave to amend because proposed claim "would be redundant and futile" and "[i]t [was] time for this litigation to end").

10E already amended its complaint twice, and it fails to identify or describe any proposed further amendment that might save its claims. Given the overwhelming authority rejecting 10E's position, "leave to amend would be futile" because "[t]he deficiencies in [10E's] complaint result not from poor drafting or insufficient detail but from an incurably flawed legal theory." *L.A. Cty. Museum*, 2021 WL 1851028, at *6; *AmerisourceBergen Corp. v. Dialysist W., Inc.,* 465 F.3d 946, 951 (9th Cir. 2006) ("[A] district court need not grant leave to amend where the amendment . . . is futile.").

CONCLUSION

The district court correctly dismissed the complaint, and the Court should affirm the judgment.

Dated: June 9, 2021

Respectfully submitted,

/s/ Deborah L. Stein
Deborah L. Stein

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STATEMENT OF RELATED CASES

Under Ninth Circuit Rule 28-2.6, Travelers states that it is aware of related cases currently pending in this court:

1. The following cases pending in this Court involve Coronavirus-related insurance claims made in California under property-insurance policies issued by affiliates of Travelers, and may raise some of the same or closely related issues:

   a. *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 20-16858

   b. *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Conn.*, No. 20-56031

   c. *Pez Seafood DTLA, LLC v. Travelers Indem. Co.*, No. 21-55100

   d. *Los Angeles Cty. Museum Natural History v. Travelers Indem. Co. of Conn.*, No. 21-55497

2. The following cases pending in this Court involve Coronavirus-related insurance claims made in California under property-insurance policies *not* issued by affiliates of Travelers, and may raise some of the same or closely related issues:

   a. *Chattanooga Prof'l Baseball LLC v. Nat'l Cas. Co.*, No. 20-17422

   b. *Plan Check Downtown III, LLC v. AmGUARD Ins. Co.*, No. 20-56020

   c. *HealthNOW Med. Ctr., Inc. v. State Farm Gen. Ins. Co.*, No. 21-15054

   d. *Robert W. Fountain, Inc. v. Citizens Ins. Co. of Am.*, No. 21-15053

   e. *Trinh v. State Farm Gen. Ins. Co.*, No. 21-15147

f. *Kevin Barry Fine Art Assocs. v. Sentinel Ins. Co.*, No. 21-15240

g. *O'Brien Sales & Mktg, Inc. v. Transp. Ins. Co.*, No. 21-15241

h. *Colgan v. Sentinel Ins. Co.*, No. 21-15332

i. *Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co.*, No. 21-15366

j. *Circus Circus LV, LP v. AIG Specialty Ins. Co.*, No. 21-15367

k. *Founder Inst., Inc. v. Hartford Fire Ins. Co.*, No. 21-15404

l. *Levy Ad Grp., Inc. v. Fed. Ins. Co.*, No. 21-15413

m. *Fink v. Hanover Ins. Grp., Inc.*, No. 21-15421

n. *Egg & I, LLC v. U.S. Specialty Ins Co.*, No. 21-15545

o. *Out W. Rest. Grp. Inc. v. Affiliated FM Ins. Co.*, No. 21-15585

p. *Baker v. Oregon Mutual Ins. Co.*, No. 21-15716

q. *Unmasked Mgmt., Inc. v. Century-National Ins. Co.*, No. 21-55090

r. *BA LAX, LLC v. Hartford Fire Ins. Co.*, No. 21-55109

s. *Selane Prods. Inc. v. Cont'l Cas. Co.*, No. 21-55123

t. *Rialto Pockets, Inc. v. Certain Underwriters at Lloyd's*, No. 21-55196

u. *Gym Mgmt. Servs., Inc. v. Vantapro Specialty Ins. Co.*, No. 21-55231

v. *Daneli Shoe Co. v. Valley Forge Ins. Co.*, No. 21-55374

w. *Caribe Rest. & Nightclub, Inc. v. Topa Ins. Co.*, No. 21-55405

x. *Islands Rests., LP v. Affiliated FM Ins. Co.*, No. 21-55409

y. *Motive Grp. v. Cont'l Cas. Co.*, No. 21-55415

Dated: June 9, 2021

/s/ Deborah L. Stein
Deborah L. Stein

CERTIFICATE 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 12,081 words, 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: June 9, 2021

/s/ Deborah L. Stein
Deborah L. Stein

CERTIFICATE OF SERVICE

Under Federal Rule of Appellate Procedure 25(d), I certify that on this ninth day of June, 2021, the foregoing brief was electronically filed with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system. Service was accomplished on all registered CM/ECF users.

Dated: June 9, 2021

/s/ Deborah L. Stein
Deborah L. Stein