Case No. 21-55109

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BA LAX, LLC, CANDLEBERRY PROPERTIES, L.P.;
SUN BEVERLY, LLC; SUNSTONE CENTURY, LLC;
SVI AIRPORT, LLC; SVI HEALDSBURG, LLC; SVI LAX, LLC;
and SVI 6344 ARIZONA, LLC

Plaintiffs-Appellants,

vs.

HARTFORD FIRE INSURANCE COMPANY,

Defendant-Appellee

On Appeal from the United States District Court
for the Central District of California, Southern Division
Case No. 2:20-cv-06344-SVW-JPR
Honorable Stephen V. Wilson

APPELLANTS OPENING BRIEF

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DISCLOSURE STATEMENT

Plaintiffs-Appellants BA LAX, LLC, Candleberry Properties, L.P., Sun Beverly, LLC, Sunstone Century, LLC, SVI Airport, LLC, SVI Healdsburg, LLC, SVI LAX, LLC, and SVI 6344 Arizona, LLC state that they have no parent corporation and no publicly held corporation owns 10% of more of any of their stock.

Dated: June 11, 2021

Respectfully submitted,

CALLAHAN & BLAINE APLC

By: /s/ *Adrian L. Canzoneri*
Edward Susolik
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I. INTRODUCTION

As with thousands of businesses across the country, the COVID-19 pandemic and resulting government shut down orders have wreaked havoc on Plaintiffs-Appellants'[1] business, causing them to lose approximately 70% of their revenue, with losses continuing every day, to the tune of millions of dollars. Plaintiffs-Appellants paid substantial premiums to purchase the insurance Policy at issue with the expectation that such fortuitous business interruption losses would be covered. To Plaintiffs-Appellants' unfortunate surprise, Defendant-Appellee Hartford Fire Insurance Company ("Hartford" and/or "Defendant-Appellee") erroneously rejected their claim under the all-risk Policy, forcing Plaintiffs-Appellants to file the underlying lawsuit to recover the losses caused by COVID-19 and concomitant risk of contamination to the Properties, and the resulting government Shut-Down Orders that forced Plaintiffs-Appellants to effectively cease their business operations.

The District Court misinterpreted the language of the Policy and ignored case law holding that the "loss of use" of the Property constitutes "direct physical loss of" the Property to trigger coverage under the Policy in its process of concluding that summary judgment is warranted. The District Court committed

[1] "Plaintiffs-Appellants" means and refers to Plaintiffs BA LAX, LLC, Candleberry Properties, L.P., Sun Beverly, LLC, Sunstone Century, LLC, SVI Airport, LLC, SVI Healdsburg, LLC, SVI LAX, LLC, and SVI 6344 Arizona, LLC.

reversible error when it entered judgment despite evidence of a triable material issue of fact that the Policy covers Plaintiffs-Appellants' losses.

The District Court also committed reversible error by concluding as a matter of law that an exclusion in the Policy for loss or damage caused by the "[p]resence, growth, proliferation, spread or any activity of 'fungus', wet rot, dry rot, bacteria or virus" (the "Virus Exclusion") precludes Plaintiffs-Appellants' claims. Summary judgment should not have been entered when there is evidence of a triable material issue of fact as to whether the "predominating cause" of Plaintiffs-Appellants' losses was the COVID-19 virus itself, or the resulting government shutdown orders. Given the evidence that it was the latter, the District Court should not have extended the Virus Exclusion to exclude losses resulting from the government's actions that forced the closure of Plaintiffs-Appellants' business.

To compound its error, the District Court abused its discretion in refusing to allow Plaintiffs-Appellants to conduct discovery in connection with Hartford's motion for summary judgment, thereby preventing Plaintiffs-Appellants from being able to fully and sufficiently oppose the motion, in contravention of F.R.C.P. Rule 56(d). The District Court refused to allow Plaintiffs-Appellants to obtain Hartford's internal documents that were reasonably calculated to lead to admissible evidence that Hartford internally has interpreted the subject Policy provisions in a different manner than how Hartford publicly interprets those same provisions,

misrepresenting to Plaintiffs-Appellants and other policyholders in the same position the availability of coverage for the subject losses.

Plaintiffs-Appellants ask this Court to reverse the District Court's Order entering summary judgment and remand this action so that Plaintiffs-Appellants may proceed to trial on their claims that the COVID-19 pandemic and resulting government shut down orders caused crippling business interruption losses that they reasonably believed are covered under their high-priced Policy. The insurance industry must no longer be able to place profits over the interests of their insureds. Coverage for these losses is provided for under Plaintiffs-Appellants' Policy, despite the District Court's erroneous opinion to the contrary.

For all of these reasons, this Court should reverse the District Court's Order granting summary judgment and remand these proceedings back to the District Court for discovery and a jury trial.

II. JURISDICTIONAL STATEMENT

The District Court had diversity jurisdiction pursuant to 28 U.S.C. § 1332, following Hartford's removal to the District Court after Plaintiffs-Appellants originally filed this action in the Superior Court of California for the County of Los Angeles. Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction over this appeal from a final judgment entered by the District Court on January 12, 2021. Excerpts of Record ("ER") ER-3-11. Plaintiffs-Appellants timely filed a notice of appeal

pursuant to Federal Rule of Appellate Procedure 4(a)(1) on February 9, 2021. ER-173.

III. STATUTORY OR REGULATORY AUTHORITIES

All relevant statutory and regulatory authorities appear in the Addendum to this brief.

IV. ISSUES PRESENTED

1. Whether the District Court erred in interpreting the Policy to require a "distinct, demonstrable, physical alteration" to the subject Properties at issue, rather than focus on the fact and law that "loss of use" of the Properties is sufficient to trigger coverage under the Policy, as has been held by multiple courts examining the same and similar issues;

2. Whether the District Court erred in holding that the Policy's virus exclusion bars coverage under the Policy, notwithstanding that there is at least an issue of disputed fact whether such exclusion contemplated a worldwide, once-in-a hundred years pandemic, and notwithstanding case law holding that virus exclusions cannot be extended to apply to government action causing the subject losses; and

3. Whether the District Court abused its discretion in refusing to allow Plaintiffs-Appellants to conduct discovery on Hartford with which to oppose summary judgment, contrary to Plaintiffs-Appellants' rights under Fed. R. Civ. Proc. 56(d), and notwithstanding that the District

Court canceled the parties' Rule 26(f) conference and ordered Hartford to file the motion early.

V. STATEMENT OF THE CASE

A. Statement of Facts

Plaintiffs-Appellants own operate eight properties, seven hotels and one office rental facility (the "Properties"), that were devastated by the COVID-19 pandemic and the resulting governmental Stay at Home Orders. ER-165 (¶ 17). Beginning in approximately March 2020, the COVID-19 virus seeped into the Properties and affected their physical facilities. These included doors, handles, furniture, and other tangible items made of copper, cardboard, plastic, and stainless steel. Due to such dangers, state and local government authorities issued "Stay at Home" orders that compelled individuals to restrict their movements, such as not going to Plaintiffs' properties. The specific "Stay at Home" orders include, but are not limited to the following: California Governor Gavin Newsom's Order N-33-20 dated March 19, 2020; County of Los Angeles' Safer at Home Public Health Order of March 21, 2020; City of Los Angeles Safer at Home Emergency Order of March 19, 2020; and County of Sonoma Shelter in Place Order dated March 17, 2020 (collectively the "Stay at Home Orders."). ER-167 (¶ 30). The foregoing Stay at Home Orders, the damage caused by COVID-19, and the transmission of COVID-19, have had a devastating effect on Plaintiffs-Appellants' business that relies on

materials and customers from around the area, state, nation, and globe, resulting in the loss of millions and millions of dollars of income. ER-167 (¶ 32). Due to such circumstances and events, Plaintiffs have lost, and are continuing to lose, a significant amount of business income, to the tune of approximately 70% of their net income. *Id*.

B. The Policy

Plaintiffs are insureds under a "Property Choice Elite" insurance policy issued by Hartford, policy number 72 UFJ ZX0084 (the "Policy"). ER-165 (¶ 18); ER-44-160. The Policy is effective for the period of August 1, 2019 to August 1, 2020. ER-44. The losses suffered by Plaintiffs-Appellants due to the risk of COVID-19 spread and contamination, and the resulting government Stay at Home Orders, triggered coverage under the following provisions of the Policy.

1. Business Income Coverage Form

Under the Policy's Business Income Coverage Form (PCE 00 21 01 19), Hartford "will pay up to the Business Income Limit of Insurance [here, up to $40 million]…for the actual loss of Business Income [Plaintiffs-Appellants] sustain due to the necessary interruption of [Plaintiffs-Appellants] business operations during the Period of Restoration due to direct physical loss of or direct physical damage to property caused by or resulting from a Covered Cause of Loss at 'Insured Premises.'" ER-53, 93-100.

"Covered Cause of Loss" is defined by the Policy as "direct physical loss or

direct physical damage that occurs during the Policy Period…" ER-82.

"Business Income" is defined by the Policy as, *inter alia*, "(a) Net Income (Net Profit or Net Loss before income taxes), including Rental Income and Royalties, that would have been earned or incurred; and (b) continuing normal operating expenses incurred, including Payroll Expenses…" ER-93.

"Interruption" is defined by the Policy as "the slowdown or cessation of any part of your business activities or the partial or total untenantabiltiy of the premises." *Id*.

There are a number of coverage extensions provided under the Business Income Coverage Form that apply in this case.

a. Civil Authority

This coverage extension applies to "the actual loss of Business Income you sustain when access to your 'Insured Premises' is specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property in the immediate area of your 'Insured Premises.'" ER-95.

b. Ingress or Egress

This coverage extension applies "to the actual loss of Business Income you sustain when ingress or egress to your 'Insured Premises' is specifically prohibited as the direct result of a Covered Cause of Loss to property at premises that is contiguous to your 'Insured Premises.'" ER-97.

c. Ordinance or Law – Increased Period of Restoration

This coverage extension applies to "include the amount of the actual loss of Business Income you sustain during the increased period of suspension of operations caused by or resulting from a requirement to comply with any ordinance or law that:…(3) is in force at the time of loss." ER-97-98.

2. Extra Expense Coverage Form

The Policy also contains an Extra Expense Coverage Form (PCE 00 24 01 19). ER-101-107. This coverage provides that Hartford will "pay up to the Extra Expense Limit of Insurance…for the actual, necessary and reasonable Extra Expense [Plaintiffs-Appellants] incur due to the necessary interruption of [their] business operations during the Period of Restoration due to direct physical loss of or direct physical damage to property caused by or resulting from a Covered Cause of Loss at 'Insured Premises.'" ER-101.

The Extra Expense Coverage Form also includes similar coverage extensions for "Civil Authority" and "Ingress and Egress." ER-102-104.

The losses sustained by Plaintiffs-Appellants are covered losses under each of the aforementioned coverages. However, Defendants-Appellees denied Plaintiffs-Appellants' claim when originally tendered. ER-169 (¶ 40).

C. Procedural History

On June 11, 2020, Plaintiffs-Appellants filed the underlying Complaint against Hartford in the Superior Court of California, County of Los Angeles.

Plaintiffs-Appellants alleged causes of action for (1) breach of insurance contract; (2) bad faith, *i.e.*, breach of the implied covenant of good faith and fair dealing; and (3) declaratory relief. ER-163-172.

On July 16, 2020, Hartford removed this action to the District Court under diversity jurisdiction. ER-184 (Dkt. No. 1). On June 23, 2020, Hartford filed an Answer to Plaintiffs' Complaint, as well as a Counterclaim for declaratory relief. ER-185 (Dkt. No. 9). On August 13, 2020, Plaintiffs filed an Answer to Hartford's Counterclaim. ER-185 (Dkt. No. 13).

The District Court had initially scheduled a status conference for September 21, 2020. ER-185 (Dkt. No. 8). However, on September 17, 2020, the Court took off-calendar that status conference, and ordered Hartford to file a motion for summary judgment within 45 days, or no later than November 2, 2020. ER-161-162 (Dkt. No. 15). This order was made before any party was able to conduct any discovery in the matter.

Hartford filed the motion for summary judgment (the "Motion") on October 30, 2020. ER-186 (Dkt. Nos. 17-19). On November 2, 2020, in preparation for their opposition to the Motion, Plaintiffs-Appellants served a document subpoena on Hartford. ER-14 (¶ 7); ER-26-34. The subpoena demanded documents such as the underwriting file for the Policy, the claim file, Hartford's internal communications regarding Plaintiffs' claim, documents reflecting Hartford's

decision to deny the claim, Hartford's guidelines for handling and adjusting this claim, Hartford's loss reserves for this claim, and any documents that support Hartford's position that Plaintiffs' claim was not covered under the Policy. *Id*.

On November 12, 2020, Hartford objected entirely to every document request in the subpoena. ER-14 (¶ 8); ER-36-39. Hartford took the position that "There is no reason for the parties to engage in discovery in this case until the motion for summary judgment is resolved." ER-36-39. Hartford's counsel also stated that "If Plaintiffs believe that they are unable to 'present facts essential to justify [their] opposition,' they are, of course, free to submit a Rule 56(d) affidavit to the Court that explains why discovery is needed in connection with their November 23, 2020 response [to the motion]." *Id*.

Plaintiffs-Appellants were therefore forced to file their opposition to the Motion on November 23, 2020, which included a declaration by their counsel attesting to the need for discovery to oppose the Motion. ER-186 (Dtk. No. 22); ER-12-39. In other words, Plaintiffs-Appellants had to file their opposition without the opportunity to conduct *any* discovery, let alone Rule 56 discovery geared strictly towards opposing Hartford's Motion.

The District Court issued its Order (the "Order") granting Hartford's Motion on January 12, 2021. ER-3-11. Plaintiffs-Appellants thereafter timely filed a Notice of Appeal, and this appeal followed. ER-173.

D. The District Court's Order

In granting Hartford's Motion, the District Court held that because Plaintiffs-Appellants failed to establish a "distinct, demonstrable, physical alteration, or permanent dispossession of property" that Plaintiffs-Appellants could not establish coverage under the Business Income, Extra Expense, Civil Authority, Ingress or Egress, or Ordinance of Law coverages under the Policy. ER-3-11. The District Court held that to establish "direct physical loss" or "direct physical damage" to the Properties, Plaintiffs-Appellants must establish that the Properties underwent "distinct, demonstrable, physical alteration." ER-8. The District Court held that Plaintiffs-Appellants failed to do so and, therefore, could not establish coverage under any of the terms of the Policy. The District Court failed to separately address each grant of coverage under the Policy, and instead summarily rejected Plaintiffs-Appellants' claims in error based upon its conclusion that there was no "direct physical loss" and upon the Virus Exclusion.

VI. SUMMARY OF THE ARGUMENT

The District Court's Order granting Hartford's Motion is premised on the mistaken notion that the presence of COVID-19, the contamination caused thereby, and the substantial impairment to businesses, here Plaintiffs-Appellants' multi-million dollar businesses, caused by COVID-19 and the resulting government Stay at Home Orders, did not cause "direct physical loss of or damage" to the Properties

within the meaning of the Policy. It is also premised on an improper liberal application of the Virus Exclusion. The District Court's Order is incorrect and should be reversed for at least the following reasons.

First, the requirement of "distinct, demonstrable, physical alteration" is found nowhere in the Policy. As such, the District Court erred in relying upon such a requirement to establish coverage under the Policy.

Second, under California principles of law governing the interpretation of insurance contracts, such contracts are read to effectuate broad coverage and narrow exclusions for insureds. Additionally, policy terms are interpreted by giving them their plain meaning as a layperson would understand them. Applying these principles and given the applicable case law, the District Court should have interpreted the Policy, and the phrase "direct physical loss of," as applying to the losses suffered by Plaintiffs-Appellants due to COVID-19 and the resulting Stay at Home Orders. At the very least, the District Court should have found the phrase "direct physical loss of" ambiguous, and in turn, read the ambiguity in favor of finding coverage for Plaintiffs-Appellants as a result of the loss of use of the Properties, as it was required to do under the applicable principles of insurance contract interpretation.

The District Court instead did the opposite and imposed the aforementioned "distinct, demonstrable, physical alteration" requirement upon the Policy despite

such a requirement not being contained in the Policy itself, and despite the extensive case law establishing that loss of use or deprivation of property qualifies as "direct physical loss of" under the terms of the Policy. "Direct physical loss of" does not require physical alteration or physical change to the Properties, and the District Court erred in finding to the contrary. Indeed, the District Court's interpretation ignores the fact that the same phrase may be and has been reasonably interpreted to trigger coverage under the Policy—an interpretation that was reasonably made and an expectation held by Plaintiffs-Appellants. The District Court should have found that the losses suffered by Plaintiffs-Appellants due to COVID-19 and the resulting Stay at Home Orders triggered coverage under the Policy's Business Income, Extra Expense, Civil Authority, Ingress or Egress, and Ordinance of Law coverages—but it erroneously did not.

Third, the purported Virus Exclusion in the Policy does not preclude coverage of Plaintiffs-Appellants as a matter of law. In fact, the ambiguity of the exclusion alone renders the interpretation of the Policy in favor of finding coverage. The Virus Exclusion was not intended to cover once-in-a-lifetime global pandemics. Had Hartford intended to exclude pandemics, it could have expressly done so. Furthermore, the Virus Exclusion cannot be so far extended as to apply to the government mandated Stay at Home Orders, which are the proximate cause of Plaintiffs-Appellants' losses. The Policy does not contain a government action

exclusion either, which Hartford could have expressly included, had it intended for all such resulting losses to be excluded. The Virus Exclusion does not apply because there is at least a material dispute that Plaintiffs-Appellants' losses were proximately caused by the Stay at Home Orders, and not the virus itself.

Fourth, the District Court abused its discretion in disallowing Plaintiffs-Appellants' efforts to conduct F.R.C.P. Rule 56 discovery in connection with Hartford's Motion. Plaintiffs-Appellants attempted to obtain highly relevant discovery from Hartford via Rule 56(d), and requested that the District Court refrain from ruling on the Motion until after the discovery was conducted. However, the District Court erroneously disagreed and denied Plaintiffs-Appellants' efforts to conduct necessary discovery, which was an abuse of its discretion.

The District Court erred in granting Hartford's Motion, and this Court should correct this error and reverse the District Court's Order and remand for further proceedings accordingly.

VII. STANDARD OF REVIEW

A. De Novo Review

The Ninth Circuit reviews a district court's grant of a motion for summary judgment de novo. *See Bravo v. City of Santa Maria*, 665 F.3d 1076, 1083 (9th Cir. 2011); *FTC v. Stefanchik*, 559 F.3d 924, 927 (9th Cir. 2009); *Rene v. MGM Grand*

Hotel, Inc., 305 F.3d 1061, 1064 (9th Cir. 2002) (en banc). The Ninth Circuit's review is governed by the same standard used by the district court under Fed. R. Civ. Proc. 56(c). *See Suzuki Motor Corp. v. Consumers Union, Inc.*, 330 F.3d 1110, 1131 (9th Cir. 2003). On review, the appellate court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *See Olsen v. Idaho State Bd. of Medicine*, 363 F.3d 916, 922 (9th Cir. 2004). The court must not weigh the evidence or determine the truth of the matter but only determine whether there is a genuine issue for trial. *See Balint v. Carson City*, 180 F.3d 1047, 1054 (9th Cir. 1999).

B. Abuse of Discretion

Also at issue here is the District Court's denial of Plaintiffs-Appellants' request to conduct discovery in connection with the motion for summary judgment. The District Court's discovery orders are reviewed under the abuse of discretion standard of review. Under this standard, first this Court must "determine *de novo* whether the trial court identified the correct legal rule to apply to the relief requested," and the trial court has abused its discretion if it failed to do so. *United States v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009). Next, this Court must "determine whether the trial court's application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be

drawn from the facts in the record." *Id*. The District Court abused its discretion if it identified the correct legal standard but then applied a faulty analysis to the underlying facts. *Id*.

VIII. ARGUMENT

A. The District Court Erred in Its Interpretation of the Policy

It is well-settled law in California that "[a]n insurance policy's coverage provisions must be interpreted broadly to afford the insured the greatest possible protection." *Energy Ins. Mutual Ltd. v. Ace American Ins. Co.*, 14 Cal. App. 5th 281, 291 (2017). Interpretation of an insurance policy under California law, as with any contract, is a question of law governed by "the mutual intention of the parties at the time the contract is formed. *AIU Ins. Co. v. Super. Ct.*, 51 Cal. 3d 807, 821(1990) (citing Cal. Civ. Code §1636).

The intent of the parties to the insurance contract is ascertained, if possible, solely from the contract's written provisions. *Ibid*. at 822 (citing Cal. Civ. Code §§ 1638). "The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage'…, controls judicial interpretation." *Id*. (citing Cal. Civ. Code §§ 1638, 1644). As such, an insurance policy must be read "as a [layperson] would read it, interpreting the terms in an ordinary and popular sense as a person of average intelligence and experience would understand them." *Underwriters Ins. Co. v. Purdie*, 145 Cal. App. 3d 57, 66 (1983); *Reserve Ins. Co.*

v. Pisciotta, 30 Cal.3d 800, 807 (1982) (policy terms must be construed "according to plain meaning which a [layperson] would ordinarily attach to them").

Where the policy terms are subject to more than one reasonable interpretation, one of which produces coverage, the terms are deemed "ambiguous." *See Minkler v. Safeco Ins. Co.*, 49 Cal. 4th 315, 321 (2010). "If the terms are ambiguous, we interpret them to protect the objectively reasonable expectations of the ***insured***." *See id.* (emphasis added). When construing ambiguous terms, the court's job is not "to select one 'correct' interpretation from the variety of suggested readings." *See MacKinnon v. Truck Ins. Exchange*, 31 Cal. 4th 635, 655 (2003). Rather, "under settled principles[,] so long as coverage is available under *any reasonable interpretation* of an ambiguous clause, the insurer cannot escape liability." *State Farm Mut. Auto. Ins. Co. v. Jacober*, 10 Cal. 3d 193, 197 (1973).

Courts typically resolve policy ambiguities in favor of finding coverage because insurance contracts are written by the insurer, with no meaningful opportunity for an insured to bargain for modifications. *AIU Ins. Co.*, 51 Cal. 3dat 822. "This rule, as applied to a promise of coverage in an insurance policy, protects not the subjective beliefs of the insurer but, rather, the objectively reasonable expectations of the insured." *E.M.M.I. Inc. v. Zurich Am. Ins. Co.*, 32 Cal. 4th 465, 470 (2004).

It is for these same reasons that insurance coverage is "interpreted broadly so as to afford the greatest possible protection to the insured, [whereas] exclusionary clauses are interpreted narrowly against the insurer." *White v. W. Title. Ins. Co.*, 40 Cal. 3d 870, 881 (1985). An exception to coverage must be "conspicuous, plain and clear," which is a rule that "applies with particular force when the coverage portion of the insurance policy would lead an insured to reasonably expect coverage for the claim purportedly excluded." *MacKinnon*, 31 Cal. 4th at 648.

In the context of an "all-risk" policy, such as the Policy at issue here, "the insured does not have to prove that the peril proximately causing his loss was covered by the policy." *Strubble v. United Sers. Auto. Ass'n*, 35 Cal. App. 3d 498, 504 (Ct. App. 1973). Instead there is a "presumption of coverage." *Travelers Cas. & Sr. Co. v. Super. Ct.*, 63 Cal. App. 4th 1440, 1454 (Ct. App. 1998). The insurer, "since it is denying liability under the policy, must prove the policy's noncoverage of the insured's loss – that is, that the insured's loss was proximately caused by a peril specifically excluded from the coverage of the policy." *Strubble*, 35 Cal. App. 3d at 504; *see Aydin Corp. v First State Ins. Co.*, 18 Cal. 4th 1183, 1190 (1998).

Here, the District Court erred in its interpretation of the Policy language. The District Court interpreted the Policy through a lens providing the broadest

possible protection for the *insurer*, not the *insured/policyholder*. The ambiguous nature of the Policy language requires a contrary interpretation, and coverage should be afforded to Plaintiffs-Appellants. Indeed, a reasonable interpretation of the Policy would lead one to believe that coverage is provided for Plaintiffs-Appellants' losses—which alone should render a decision in favor of finding coverage pursuant to the aforementioned principles of interpretation. At the very least, there is a material dispute as to the meaning and import of the subject provisions, such that a jury acting as factfinder must then decide whether Plaintiffs-Appellants should be covered for their losses.

B. The Policy Does Not Require "Distinct, Demonstrable, Physical" Alteration to Trigger Coverage, Rather Loss of Use of the Properties Alone Triggers Coverage Under the Plain Meaning of the Policy Terms

Based upon the foregoing principles of insurance policy interpretation, and in the context of the Complaint's allegations, this Court should hold there is at least a disputed issue of material fact that Plaintiffs-Appellants' all-risk Policy covers the business losses arising from Plaintiffs-Appellants' inability to operate their business due to the COVID-19 pandemic and resulting government Stay at Home Orders.

The District Court points out that the critical language at issue in the insuring provision is "direct physical loss *of*" or "direct physical damage." ER-7-8 (emphasis added). Neither of these terms is defined under the Policy and, as such,

they are ambiguous at best and must be construed in favor of coverage for Plaintiffs-Appellants. Additionally, these phrases must be accorded their ordinary and plain meaning. The focus must be upon the language "direct physical loss ***of***," as there is no dispute that Plaintiffs-Appellants lost the use ***of*** the Properties as a direct result of COVID-19 spread and contamination risk, and the resulting government Stay at Home Orders. This Court should also focus on the disjunctive nature of the word "or", *i.e.* "direct physical loss of" ***or*** "direct physical damage." A reasonable interpretation of the plain meaning of "direct physical loss of" under the Policy is that it includes and provides coverage for the losses incurred by Plaintiffs-Appellants due to the *loss of use* and deprivation of the Properties caused by COVID-19 and the resulting Stay at Home Orders.[2]

Rather than rely on the plain meaning of the terms of the Policy, the District Court incorrectly interpreted the provisions of the Policy to require a "distinct, demonstrable, physical alteration" to the Property to trigger coverage under any of the coverages discussed above. ER-7-8. However, that condition and requirement is found nowhere in the Policy itself. In other words, the District Court imposed a baseless requirement upon Plaintiffs-Appellants in denying them coverage under their high-priced Policy for millions of dollars in losses, when the Policy should

[2] "Loss" is defined as "…deprivation from failure to keep…", "something that is lost," and the state of being deprived of or being without something that one has had." *See* dictionary.com/browse/loss.

have been read and interpreted "broadly to afford the insured the greatest possible protection." *Energy Ins. Mutual Ltd.*, 14 Cal. App. 5th at 291.

Notwithstanding the District Court's error, overwhelming case law suggests that "loss of use" of the Properties also qualifies as "direct physical loss of or direct physical damage" to the Properties so as to trigger the coverages provided for under the Policy.

In fact, a recent Central District of California case held that "dispossession is a form of loss." *Kingray, Inc. v. Farmers Group, Inc.*, 2021 WL 837622 at 7 (C.D. Cal. March 4, 2021). Specifically, the Court in *Kingray* stated the following:

> [I]t is possible that either the coronavirus which causes COVID-19 or New York's 'stay at home orders' caused 'direct physical loss' at [the property]. At various points during the pandemic, [the property] was forced to shutter, rendering its property unusable for its only purpose—the operation of a business. If Plaintiff was not allowed to operate or invite others onto its property, it was dispossessed in some way. Dispossession is a form of loss.

Id.

The *Kingray* Court concluded: "…it is plausible that 'direct physical loss of' property includes physical dispossession because of dangerous conditions (a virus in the air) or a civil authority order requiring [Plaintiff] to close." *Id*. at *8. Other California courts have reached similar results. *See PF. Chang's China Bistro, Inc. v. Certain Underwriters at Lloyd's of London*, 2021 WL 818659, at *1-2 (Cal. Sup. Ct. Feb. 4 2021) (holding that plaintiff's interpretation of BI [business income]

policy is "reasonable" under California law where the "physical loss of or damage to property" requirement was satisfied by physical loss from the "actual or potential presence" of coronavirus, modification of physical behaviors through "the use of social distancing" and "avoiding confined indoor spaces," government orders requiring plaintiff's "dining rooms be shut-down," and/or mitigation of the "threat or actual presence of virus" on restaurant property); *Goodwill Indus. Of Orange Ct. v. Phila. Indem. Co*., 2021 WL 476268, at *2-2 (Cal. Sup. Ct. Jan. 28, 2021) (declining to require "a physical change in the property or permanent dispossession of the property to qualify as 'direct physical loss.'").

A highly significant ruling was recently issued in a Pennsylvania state Court case, which held that the plaintiff did not need to sustain physical damage to have suffered a direct physical loss or damage to property as covered under its policy. *See Macmiles, LLC v. Erie Insurance Exchange*, Case No. GD-20-7753 (Ct. of Common Pleas of Allegheny Cnty., Penn., May 25, 2021) ("As this Court determined that it is, at the very least, reasonable, to interpret the phrase 'direct physical loss of…property' to encompass the loss of use of Plaintiff's property due to the spread of COVID-19 absent any actual damage to property…").

There are growing numbers of state and federal cases nationwide that have also ruled in favor of policyholders on this issue. *See, e.g.*, *Ungarean v. CNA*, No. GD-20-006544, slip op. at 16 (Pa. Ct. Com. Pl. Mar. 26, 2021) (holding it is

"reasonable to interpret the phrase 'direct physical loss of… property' to encompass the loss of use of Plaintiff's property due to the spread of COVID-19 absent any actual damage," and granting summary judgment in favor of policyholder); *Derek Scott Williams PLLC v. Cincinnati Ins. Co.*, 2021 WL 767617, at *4 (N.D. Ill. Feb. 28, 2021) (concluding "a reasonable factfinder could find that the term 'physical loss' is broad enough to cover… a deprivation of the use of its business premises" under Texas law); *In re: Soc'y Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, 2021 WL 679109, at *9 (N.D. Ill. Feb. 22, 2021) ("Plaintiffs did suffer a direct 'physical' loss of property on their premises…the pandemic-caused shutdown orders do impose a *physical* limit…Plaintiffs cannot use (or cannot fully use) the physical space."); *Salon XL Color & Design Grp., LLC v. W. Bend Mut. Ins. Co.*, 2021 WL 391418, at *2 (E.D. Mi. Feb. 4, 2021) (holding plaintiffs "plausibly alleged that the COVID-19 particles have infected their property, exposed their staff and patrons, and therefore Salon XL 'has been unable to use its property for its intended purpose,"' which satisfied direct-physical-loss requirements at the pleading stage); *N. State Deli v. Cincinnati Ins. Co.*, 2020 WL 6281507 (N.C. Super. Ct. Oct. 9, 2020) (concluding plaintiffs' loss "is unambiguously a 'direct physical loss"' where closure orders "expressly forbid[] [them] from accessing and putting their property to use for the income-generating purposes for which the property was insured"); *Studio 417, Inc.*

v. Cincinnati Ins. Co., 478 F. Supp. 3d 794, 802 (W.D. Mo. 2020) (concluding plaintiffs satisfied "direct physical loss" requirement where they "plausibly alleged that COVID-19 particles attached to and damaged their property, which made their premises unsafe and unusable").

This "loss of use" concept finds additional historical support in *Hughes v. Potomac Insurance Co. of District of Columbia*, 199 Cal. App. 2d 239 (1962). In that decision, the court held that the insured's house suffered a loss of a physical nature when the creek behind it caused the adjacent land to fall away, leaving the house perched on a cliff, though the house itself was undamaged. *See id.* at 249. This holding has been relied on by courts to find that there has been a "physical loss" of property when the property becomes unusable by the insured, even if the property itself has not been damaged or altered. *See, e.g., Sentinel Mgt. Co. v. New Hampshire Co.*, 563 N.W.2d 296, 300-01 (Minn. Ct. App. 1997) (presence of asbestos particles within building constituted "direct physical loss"); *Farmers Ins. Co. of Or. v. Trutanich*, 858 P.2d 1332, 1334-35 (Or. Ct. App. 1993) (odor caused by tenant's illegal manufacturing operation at property was "direct physical loss" even absent structural damage to property); *Western Fire Ins. v. First Presbyterian Church*, 437 P.2d 52, 54-55 (Colo. 1968) ("direct physical loss" to church when it became unusable because of accumulation of gasoline under building); *accord Murray v. State Farm*, 509 S.E.2d 1, 17 (W.Va. 1998) (potential damage to house

caused by boulders that could fall from negligently-constructed highwall constituted "direct physical loss").

That a policyholder's inability to make use of its property is a "physical loss" of that property further finds support in *American Alternative Insurance Corp. v. Superior Court*, 135 Cal. App. 4th 1239 (2006). There, a company whose insured airplane was wrongfully seized by the government filed a claim under an aviation-insurance policy that covered "direct and accidental physical loss of or damage to" the aircraft. *See id.* at 1242-43. The court held that coverage was available based on the phrase "physical loss of," since "[o]n its face, such a coverage promise could reasonably extend to governmental seizure or confiscation." *See id.* at 1246. Based on such term, it was "objectively reasonable" for the policyholder to expect that such losses fell within the scope of the insuring clause. *See id.*

Here, this reading of the insuring clause is bolstered by the fact that the Policy covers both "loss of" ***and*** "damage to" covered property. An interpretation of "loss of" that assigns it the same meaning as "damage to" would be inconsistent with the language of the Policy by rendering the former term surplusage. *See Farmers Ins. Exchange v. Knopp*, 50 Cal. App. 4th 1415, 1421 (1996) ("contracts, including insurance contracts, are to be construed to avoid rendering terms surplusage") Hence, the Policy covers ***either*** "loss of" ***or*** "damage to" the insured

premises. *See also*, *Nautilus Group, Inc. v. Allianz Global Risks US*, 2012 WL 760940 at *7 (W.D. Wash. March 8, 2012) ("[I]f 'physical loss' was interpreted to mean 'damage,' then one or the other would be superfluous. The fact that they are both included in the grant of coverage evidences an understanding that physical loss means something other than damage.").

Properly read, "physical loss of" must mean something different that "physical damage" when they are joined by the disjunctive "or." *See Derek Scott Williams PLLC v. Cincinnati Ins. Co.*, 2021 WL 767617, at *4 (N.D. Ill. Feb. 28, 2021) ("Specifically, even though the term loss is defined in the policy to mean *either* physical loss *or* physical damage, Cincinnati contends that it requires physical damage. This interpretation writes the term 'loss' out of the definition, which contradicts the basic principle that 'each word [in a contract] has some significance and meaning.'" (applying Texas law) (emphasis in original)); *In re Society Ins. Co. COVID-19 Business Interruption Protection Ins. Lit.*, 2021 WL 679109, at *8 (N.D. Ill. Feb. 22, 2021) ("Remember here that the operative text is 'direct physical loss of or damage to covered property.' The disjunctive 'or' in that phrase means that 'physical loss' must cover something different from 'physical damage.' '[I]t is axiomatic that courts interpret contracts so as to give effect to all of their provisions.'" (citations omitted)); *Studio 417, Inc., v. Cincinnati Ins. Co.*, 2020 WL 4692385, at *5 (W.D. Mo. Aug. 12, 2020) ("Defendant conflates 'loss'

and 'damage' in support of its argument that the Policies require a tangible, physical alteration. However the Court must give meaning to both terms.")

The proper reading of the insuring clause that Plaintiffs-Appellants contend the District Court *should* have applied to the terms of the Policy is further supported by *Total Intermodal Services Inc. v. Travelers Property Casualty Co. of America*, 2018 WL 3829767, at *1 (C.D. Cal., July 11, 2018). In that case, plaintiff policyholder was sued by a third-party customer for negligently sending the customer's shipment back to China where it was lost, instead of delivering it. The policy included language very similar to the Hartford Policy here. Its insuring clause promised to pay "those sums you become legally obligated to pay as damages … for direct physical loss of or damage to Covered Property caused by or resulting from a Covered Cause of Loss." *See id.* at *2. A "covered cause of loss" was defined as "risks of direct physical loss or damage from an external cause, except for those causes of loss listed in the Exclusions." *Id.* The insurer in *Total Intermodal* sought summary judgment, arguing that the policy provided no coverage unless the insured property was physically damaged. *See id.* at *4. The court rejected that view and denied summary judgment. It first noted that because the insuring clause promised coverage for both "physical loss of" and "damage to" property, these two terms had to be given separate meanings. *See id.* at *3 ("to interpret 'physical loss of' as requiring 'damage to' would render the 'damage to'

portion of the same clause meaningless, thereby violating a black letter canon of contract interpretation – that every word be given a meaning."). The court found that the policy's promise of coverage for "physical loss of" the property did not require that the property be damaged. *See id.* at *4.

The position that "loss of use" of the Property triggers coverage finds additional support throughout the country, where multiple Courts have agreed that "physical loss" does not require structural damage, or as the District Court here held, "distinct, demonstrable, physical alteration," and this Court should follow the reasoning of these cases, and those referenced above. *See, e.g.*, *Essex v. BloomSouth Flooring Corp.*, 562 F.3d 399, 406 (1st Cir. 2009) (unpleasant odor was physical injury to property); *Motorists Mutual Ins. Co. v. Hardinger*, 131 Fed. Appx. 823, 825-27 (3d Cir. 2005) (bacteria contamination of well water would constitute direct physical loss to house if it rendered it unusable); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934 (D.N.J. Nov. 25, 2014) (presence of ammonia constitutes physical loss or damage because "property can sustain physical loss or damage without experiencing structural alteration"); *Am. Guarantee & Liab. Ins. Co. v. Ingram Micro, Inc.*, 2000 WL 726789, at *2 (D. Ariz. April 18, 2000) ("'physical damage' is not restricted to the physical destruction of harm … but includes loss of access, loss of use, and loss of functionality"); *Stack Metallurgical Servs., Inc. v. Travelers Indem. Co. of Conn.*,

2007 WL 464715 (D. Or. Feb. 7, 2007) (insured suffered "direct physical loss of or damage to" covered property when property could not be used for its "ordinary expected purpose" even though property could still be used for other income-generating purposes); *Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, 2016 WL 3267247 (D. Or. June 7, 2016) (coverage for loss of business income when smoke infiltrated theater and rendered it "unusable for its intended purpose" and caused loss of "essential functionality," as theater had to be cleaned, and air filters replaced repeatedly, before business could resume); *Prudential Prop. & Cas. Ins. Co. v. Lilliard-Roberts*, CV-01-1362-ST, 2002 WL 31495830, at *9 (D. Or. June 18, 2002) (citing case law for the proposition that "the inability to inhabit a building [is] a 'direct, physical loss' covered by insurance"); *General Mills, Inc. v. Gold Medal Ins. Co*, 622 N.W. 2d 147, 152 (Minn. Ct. App. 2001) ("We have held that direct physical loss can exist without destruction of property or structural damage to property; it is sufficient to show that insured property is injured in some way."); *Port Auth. Of N.Y. & N.J. v. Affiliated FM Ins. Co.*, 311 F. 3d 226, 235 (3d Cir. 2002) ("Although neither the building nor its elements were demonstrably altered, its function was eliminated.").

The same is the case here. Based on the following paragraphs in Plaintiffs-Appellants' Complaint, the truth of which Hartford did not challenge for the purposes of its Motion (the only "fact" introduced by Hartford was a copy of the

Policy), there are at least material disputes of fact that (i) the COVID-19 virus had physical effects on tangible things inside of Plaintiffs' Properties; (ii) such physical effects made the Properties unusable; (iii) the extent to which the Properties was made unusable was also contributed to by governmental action similar to that sufficient to find coverage in the above *American Alternative* decision, 135 Cal. App. 4th at 1239:

> 25. Not only does COVID-19 spread by human-to-human transfer, but it can exist on contaminated objects or surfaces.
>
> 26. COVID-19 is detectable in aerosols for up to three hours, up to four hours on copper, up to 24 hours on cardboard, and up to three days on plastic and stainless steel. It also persists on wood, ceramic, and cloth. In other words, while infected droplets and particles carrying COVID-19 may not be visible to the naked eye, they are ***physical*** objects which travel to other objects and cause harm. (emphasis in orig.)
>
> 27. In fact, the Center for Disease Control reported on March 27, 2020 that Covid-19 was identified on the surfaces of cabins onboard the Diamond Princess cruise ship 17 days after the cabins were vacated but before they were disinfected. Numerous other scientific studies and articles have identified the persistence of Covid-19 on doorknobs, toilets, faucets and other high touch points.
>
> 28. All of the foregoing materials are used by Plaintiffs throughout the Properties and their operations. Accordingly, individuals could become infected with COVID-19 through indirect contact with surfaces or objects used by an infected person, whether they were symptomatic or not.
>
> 29. In an effort to slow the spread of COVID-19 and as a consequence of physical damage caused by COVID-19, state and local governments have imposed unprecedented directives

> prohibiting travel into the United States; discouraging domestic travel; requiring certain businesses to close; and requiring residents to remain in their homes unless performing "essential" activities, like shopping for food or seeking medical treatment (together, "Stay At Home Orders").
>
> ..
>
> 31. Stay at Home Orders remain wholly or partially in effect with respect to the Properties.
>
> 32. As facilities that rely on materials and customers from around the area, state, nation, and globally, the foregoing Stay at Home Orders, the damage caused by COVID-19, and the transmission of COVID-19, have had a devastating effect on the Properties' business…
>
> ,,,
>
> 34. Among the "Covered Causes of Loss" is "direct physical loss or direct physical damage that occurs during the Policy Period...." As stated above, the Properties did suffer direct physical loss and/or direct physical damage caused by the Covid-19 virus, from March 2020 to the present, which is within the "Policy Period."

ER-166-168.

At the very least, given the ambiguity in the Policy's language, the District Court should have adopted the view that supports coverage over one denying coverage given that there is at least a plausible and reasonable interpretation of the phrase "direct physical loss of" to mean loss of use of the Properties. *See MacKinnon*, 31 Cal. 4th at 655.

The District Court premised most of its order on the issue of "direct physical loss", and based upon the above discussion the District Court erred in its

interpretation of the same in denying coverage under the Policy's Business Income, Extra Expense, Civil Authority, Ingress or Egress, and Ordinance of Law coverages. Since "loss of use" of the Properties qualifies as "direct physical loss", coverage was triggered under each of these coverages provided by the Policy.

For these reasons, this Court should reverse the District Court's Order finding that as a matter of law, and without the need for factual discovery, the insuring clause in the Hartford Policy conclusively disallows the losses claimed by Plaintiffs-Appellants, and remand the case for further proceedings.

C. The Purported Virus Exclusion Does Not Preclude Coverage

Contrary to Hartford's position and the District Court's agreement with the same, the purported Virus Exclusion in the Policy does not, as a matter of law, preclude coverage under these circumstances. First, the subject Virus Exclusion was not intended to cover an unforeseen global pandemic such as COVID-19. Second, there are at least material disputes of fact whether the "predominating causes" of Plaintiffs-Appellants' losses were the government's Stay at Home Orders affecting Plaintiffs' Properties, not the virus itself. Third, the virus exclusion does not extend to the government acts intended to curb the spread of COVID-19 by means of executive orders of general applicability.

As discussed above, "exclusions are construed narrowly and must be proven by the insurer." *See Waller v. Truck Ins. Exchange, Inc.* 11 Cal. 4th 1, 16 (1995).

As a result, an insurer "may rely on an exclusion to deny coverage only if it provides ***conclusive evidence*** demonstrating that the exclusion applies." *See Atlantic Mutual Ins. Co. v. J. Lamb, Inc.* 100 Cal. App 4th 1017, 1038-39 (2002) (emphasis added).

Provisions that exclude or limit coverage reasonably expected by an insured must be "conspicuous, plain and clear" to be enforceable. *See De May v. Interinsurance Exch. of Auto. Club*, 32 Cal. App. 4th 1133, 1137 (1995). "[A]n insurer cannot escape its basic duty to insure by means of an exclusionary clause that is unclear." *State Farm Mut. Auto. Ins. Co. v. Jacober*, 10 Cal. 3d 193, 201-02 (1973); *Haynes v. Farmers Ins. Exch.*, 32 Cal. 4th 1198, 1204 (2004); *Essex Ins. Co. v. City of Bakersfield*, 154 Cal. App. 4th 696, 705 (2007).

"[A]n ambiguity may be construed against an insurer…" *Clarendon America Ins. Co. v. North American Capacity Ins. Co.*, 186 Cal.App.4th 556, 573 (2010); *see also Nissel v. Certain Underwriters at Lloyd's of London*, 62 Cal. App. 4th 1103, 1111-12 (1998); *Lee v. Fidelity Nat'l Title Ins. Co.*, 188 Cal.App.4th 583, 595 (2010). "The rule applies with particular force when the coverage portion of the insurance policy would lead an insured to reasonably expect coverage for a claim purportedly excluded." *MacKinnon*. 31 Cal. 4th at 648. Such reasonable expectations control even if the parties had no actual mutual understanding regarding the disputed policy provision given that, often, the insured has not even

considered the issue that has arisen. See *Cooper Cos. v. Transcontinental Ins. Co.*, 31 Cal. App. 4th 1094, 1104 (1995).

1. The Exclusion Does Not Apply To Global Pandemics

Under the purported Virus Exclusion, Hartford will not cover loss or damage caused by the "[p]resence, growth, proliferation, spread or any activity of 'fungus', wet rot, dry rot, bacteria or virus." ER-83. However, the Policy also confusingly states the following:

> This Exclusion does not apply:
>
> (1) When "fungus," wet rot, dry rot, bacteria or virus results from fire or lightning; or
>
> (2) To the extent that coverage is provided in the Coverage Extension(s) – "Fungus," Wet Rot, Dry Rot, Bacteria or Virus – Limited Coverage with respect to loss or damage by a cause of loss other than fire or lightning.

ER-83. This purported exclusion is vague, at best, because the above clause (2) can be read to mean that if another provision provides for coverage (in cases beyond fire and lightning), the Virus Exclusion does not apply.

This ambiguity must be read in a light most favorable to Plaintiffs-Appellants. In any event, there is no basis for the proposition that this broad, vague, and ambiguous policy language applies to cover global pandemics such as the current COVID-19 pandemic. Indeed, if Hartford intended for the purported Virus Exclusion to encompass pandemics, it could have expressly stated as much in the Policy – as was the case in *Meyer Natural Foods, LLC v. Liberty Mutual*

Fire Insurance Co., 218 F. Supp. 3d 1034 (D. Neb. 2016).

In *Meyer*, the insurer expressly excluded from coverage "[t]he actual or suspected presence or threat of any virus, organism or like substance that is capable of inducing disease, illness, physical distress or death, whether infectious or otherwise, including but not limited to any ***epidemic***, ***pandemic***, influenza, plague, SARS, or Avian flu. *See id.* at 1038 (emphasis added). Here, Hartford failed to include any such language, but surely could have done so if it really intended the purported virus exclusion to include global pandemics such as COVID-19.

Additionally, the plain language of the purported Virus Exclusion excluding "'fungus', wet rot, dry rot, bacteria or virus" only contemplates the contamination of a property, not a global pandemic resulting in statewide government shut-down orders as is the case here. At least one court has construed an identical provision in that manner and against the insurer. As the Court in *Urogynecology Specialist of Florida, LLC v. Sentinel Insurance Co.*, 2020 WL 5939172 (M.D. Fla. Sept. 24, 2020), held:

> [I]t is not clear that the plain language of the policy unambiguously and necessarily excludes Plaintiff's losses. The virus exclusion states that [insurer] Sentinel will not pay for loss or damage caused directly or indirectly by the presence, growth, proliferation, spread, or any activity of "fungi, wet rot, dry rot, bacteria or virus." ***Denying coverage for losses stemming from***

> ***COVID-19, however, does not logically align with the grouping of the virus exclusion with other pollutants such that the Policy necessarily anticipated and intended to deny coverage for these kinds of business losses***… [¶] In arguing that the Court should give the virus exclusion a straightforward application to exclude coverage for losses caused by COVID-19, Sentinel cites cases dealing with pollution exclusions and sewage backups, damage caused by mold, and claims resulting from illness or disease, all of which fell under policy exclusions…Importantly, none of the cases dealt with the unique circumstances of the effect COVID-19 has had on our society—a distinction this Court considers significant. *See id.* at *4 (emphasis added).

The same reasoning applies here. Hartford cannot show that the purported Virus Exclusion was intended to apply to global pandemics such as the COVID-19 pandemic. Had Hartford intended as much, it could have included express language in the Policy to that effect – but it did not.

2. <u>There is a Material Dispute As to Whether the "Predominating" Cause of Plaintiffs-Appellants' Losses Were the Stay at Home Orders, Not the Virus</u>

Hartford's reliance on the purported Virus Exclusion is also unwarranted because there is a material factual dispute whether something other than the virus is the predominating cause of Plaintiffs-Appellants' loss – an issue that the District Court incorrectly addressed. In other words, the exclusion will not bar coverage if the loss was the product of a nonexcluded peril that was the "efficient proximate cause" (*i.e.*, the "predominating cause") of the loss. *See Garvey v. State Farm Fire*

& Casualty Co., 48 Cal. 3d 395, 403 (1989). Whether a given cause is the predominating cause is a factual issue for the trier of fact. *State Farm Fire & Casualty Co. v. Von Der Lieth* 54 Cal.3d 1123, 1131 (1991) ("the question of what caused the loss is generally a question of fact.").

By its terms, the Policy does not exclude losses caused by government action. *See*, Sec. III(c), below. Here, there is at least a material dispute of fact whether Plaintiffs' losses were predominantly caused by the Stay at Home Orders.

As set forth in the Complaint, and uncontroverted by Hartford for the purposes of the Motion, the Stay at Home Orders imposed extraordinary directives prohibiting certain travel into the United States; discouraging domestic travel; requiring certain businesses to close; and requiring residents to remain in their homes unless performing "essential" activities, such as shopping for food or seeking medical treatment. As businesses that rely upon materials and customers from around the area, state, nation, and globally, the Stay at Home Orders had a devastating effect on Plaintiffs' business. Without the Stay at Home Orders, it is reasonable to infer that Plaintiffs' losses may not have occurred.

Given that Hartford's policy does not exclude losses caused by government action, and that there is at least a material dispute of fact whether the Stay at Home Orders are the predominant cause of Plaintiffs' losses, Hartford's demand for summary judgment based on the purported Virus Exclusion should have been

denied.

3. The Virus Exclusion Does Not Extend to the Government Stay At Home Orders

The District Court's granting of summary judgment based on the Virus Exclusion is also incorrect based on the developing caselaw concerning COVID-19 and the attempts of other insurers to deny coverage on the same ground.

This Court should follow the recent ruling in *Kenneth Seifert dba The Hair Place, et al. v. IMT Insurance Company*, 2021 WL 2228158 (D. Minn. June 2, 2021) which addressed the applicability of a similar virus exclusion to government shut down orders. Specifically, the *Seifert* Court held that the virus exclusion did not preclude coverage, concluding that "the policies' virus exclusion is intended to preclude coverage only when there has been some direct or indirect contamination of the business premises, not whenever a virus is circulating in a community and a government acts to curb its spread by means of executive order." *Id*. at *6. The Court continued: "Extending the causal chain beyond situations involving a direct or indirect contamination of business premises would extend the chain too far; in this case, it would transform a virus exclusion into a government-order or pandemic exclusion, which is not what the parties intended." *Id*.

Similar reasoning was applied in *Henderson Road Restaurant Systems, Inc. v. Zurich American Ins. Co.* [--F.Supp.3d--, 2021 WL 168422 (N.D. Ohio January 19, 2021)], wherein the Court refused to extend a "microorganism" exclusion to

preclude coverage to plaintiff. The *Henderson* Court specifically stated the following:

> The insurer, being the one who selects the language in the contract, must be specific in its use; an exclusion from liability must be clear and exact in order to be given effect. *Lane v. Grange Mut. Cos.*, 45 Ohio St. 3d at 65, 543 N.E.2d 488, citing *American Financial Corp. v. Fireman's Fund Ins. Co.*, 15 Ohio St. 2d 171, 239 N.E. 2d 33 (1968). Here, **Plaintiffs' argument prevails because the Microorganism exclusion does not clearly exclude loss of property caused by a government closure.** Plaintiffs' restaurants were not closed because there was an outbreak of COVID-19 at their properties; they were closed as a result of governmental orders. Because Zurich's Microorganism exclusion did not identify the possibility that, even absent "the presence, growth, proliferation, spread, or any activity of "microorganisms" damaging the Plaintiffs' properties, the Plaintiffs may be required to close their dine-in restaurants due to government orders responding to a public health crisis, the Microorganism Exclusion does not apply.

Id. at *15 (emphasis added); *see also*, *Atwells Realty Corp. v. Scottsdale Insurance Company*, C.A. No. PC-2020-04607 (Providence County Superior Court of Rhode Island, June 4, 2021) ("the Court is not convinced…that the Virus Exclusion precludes Civil Authority coverage when Atwells did not allege that its 'loss or damage [was] caused by or result[ed] from a virus,' as contemplated by the exclusion, but rather was caused by the Executive Orders that suspended operations due to a pandemic and presence of COVID-19 throughout the state.").

The same reasoning applies here given that Plaintiffs-Appellants' losses were proximately caused by the government's Stay at Home Orders. Plaintiffs-Appellants do not seek coverage for, *e.g.*, a claimant's bodily injury from acquiring the COVID-19 virus. There is no government-order exclusion and there is surely no pandemic exclusion in the Policy. The Virus Exclusion requires the "[p]resence, growth, proliferation, spread or any activity of 'fungus', wet rot, dry rot, bacteria or virus" at the Properties. It was not intended by the parties that such exclusion would extend to government action of general applicability intended to respond to a public health crisis.

For the foregoing reasons, the Virus Exclusion does not preclude coverage under the Policy. At the very least, there is a disputed material fact regarding whether this exclusion precludes coverages for Plaintiffs-Appellants' losses. As such, this Court should reverse the District Court's Order and remand for further proceedings accordingly.

D. <u>The District Court Abused Its Discretion In Refusing to Allow Plaintiffs-Appellants' Request to Conduct Discovery In Connection with the Motion</u>

Finally, the result below should be reversed because the District Court abused its discretion in refusing to allow Plaintiffs-Appellants' discovery efforts prior to issuing its Order granting summary judgment. Specifically, Plaintiffs-Appellants, pursuant to F.R.C.P Rule 56(d), submitted a request to the District

Court requesting that the Court defer ruling on summary judgment until after Plaintiffs-Appellants had the opportunity to take discovery. ER-12-15. The District Court denied that request. ER-10. It is also worth repeating that the District Court ordered the early filing of the motion for summary judgment altogether prior to the parties having a reasonable opportunity to conduct discovery. ER-161. Not only did Plaintiffs-Appellants not have time to meaningfully conduct any discovery, but the Court expressly rejected Plaintiffs-Appellants request to conduct discovery specific to Hartford's Motion. As such, the matter should be reversed and remanded accordingly.

The abuse of discretion standard specifically applies upon review of a district court's denial of an application made pursuant to F.R.C.P. 56(d) to continue a hearing on a summary judgment motion in order to permit discovery. *See InteliClear, LLC v. ETC Global Holdings, Inc.*, 978 F.3d 653, 661 (9th Cir. 2020). Here it was an abuse of discretion to deny Plaintiffs-Appellants' Rule 56(d) application, particularly given the early nature of the motion for summary judgment generally. The Court essentially ordered Hartford to file the motion prior to the parties having any meaningful opportunity to conduct *any* discovery, and then subsequently denied Plaintiffs-Appellants attempt to take summary judgment-specific discovery. Summary judgment should not be granted if there are relevant facts yet to be discovered. *See Zell v. InterCapital Income Secur., Inc.*, 675 F.2d

1041, 1045 (9th Cir. 1982); *see also See Burlington N. Santa Fe Ry. Co. v. Assiniboine & Sioux Tribes of Fort Peck Reserv.*, 323 F.3d 767, 773-74 (9th Cir. 2003) (vacating summary judgment and ordering discovery where defendant moved for summary judgment shortly after suit was filed, no discovery had taken place, and there was possible existence of documentation relevant to key questions in case); *Head v. Wilkie*, 784 F. App'x 503, 506 (9th Cir. 2019) (trial court abused discretion in disallowing discovery to oppose summary judgment where nonmoving party identified relevant information and basis for believing that information sought existed and why it was necessary); *Crossfit, Inc. v. Nat'l Strength & Conditioning Ass'n*, 2015 WL 12434308, at *7 (S.D. Cal. July 20, 2015) (denying summary judgment where plaintiff sufficiently identified specific facts it seeks from further discovery, and such information could show triable issue of fact).

As made clear in Plaintiffs-Appellants' opposition to the Motion, and supporting declaration of counsel, among the factors that support denial of summary judgment, or at least a grant to the nonmoving party of an opportunity for discovery to further oppose the Motion, include whether the summary judgment motion was made early in the litigation; whether the material facts are within the exclusive knowledge of the movant; and whether discovery requests seeking relevant information are outstanding to the movant. *See Garrett v. San Francisco*,

818 F.2d 1515, 1518-19 (9th Cir. 1987); *Weir v. Anaconda Co.*, 773 F.2d 1073, 1081-82 (10th Cir. 1985); *accord Trask v. Franco*, 446 F.3d 1036, 1042 (10th Cir. 2006) ("movant's exclusive control of information is a factor favoring relief" under Rule 56(d)).

Here, all of the above factors were shown to the District Court to exist and warranted a denial of Hartford's Motion, or at least an opportunity for Plaintiffs-Appellants to conduct sufficient discovery with which to further oppose the Motion. This Motion was filed by Hartford before any discovery was exchanged, as the Court took off-calendar the initial status conference that would have triggered the early exchange of information under Rule 26(f). ER-161.

Then, one business day after Harford filed the Motion, Plaintiffs-Appellants served a document subpoena on Hartford for documents relevant to their claims and Hartford's defenses. ER-13-28. Instead of complying with that subpoena, which requested documents to be produced to Plaintiffs-Appellants before their deadline to oppose the Motion, Hartford objected to all of such requests in their entirety. In support of its objections, Hartford argued that "There is no reason for the parties to engage in discovery in this case until the motion for summary judgment is resolved." At the same time, Hartford stated that "If Plaintiffs believe that they are unable to 'present facts essential to justify [their] opposition,' they are, of course, free to submit a Rule 56(d) affidavit to the Court..." ER-37.

All of the requested documents and materials are within the exclusive possession of Hartford. Among the documents sought by Plaintiffs-Appellants and rejected by Hartford were internal documents of Hartford interpreting the insuring clause or the Virus Exclusions at issue, which may be different than its public interpretation of such provisions in this and related litigation. This is the exact situation that Rule 56(d) is designed to prevent — unfairly preventing a party from sufficiently opposing a case-ending Motion. The District Court abused its discretion in granting the Motion without allowing Plaintiffs-Appellants the opportunity to conduct discovery necessary to fully and sufficiently oppose the same.

Accordingly, the District Court's ruling must be reversed and the matter remanded. Either summary judgment should be denied outright, or Plaintiffs-Appellants should be allowed the opportunity to conduct the necessary discovery to fully oppose Hartford's motion for summary judgment.

IX. CONCLUSION

For the foregoing reasons, the District Court's Order granting Hartford's Motion for Summary Judgment should be reversed and the case remanded for further proceedings consistent with this Court's ruling.

Dated: June 11, 2021

Respectfully submitted,

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9th Cir. Case Number(s) 21-55109

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This brief contains 10,255 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- (•) complies with the word limit of Cir. R. 32-1.
- ( ) is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ( ) is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ( ) is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ( ) complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one):*
  - ( ) it is a joint brief submitted by separately represented parties;
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  - ( ) a party or parties are filing a single brief in response to a longer joint brief.
- ( ) complies with the length limit designated by court order dated _____.
- ( ) is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/Adrian L. Canzoneri **Date** Jun 11, 2021

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

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9th Cir. Case Number(s) 21-55109

The undersigned attorney or self-represented party states the following:

- (•) I am unaware of any related cases currently pending in this court.
- ( ) I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.
- ( ) I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

Signature s/Adrian L. Canzoneri **Date** Jun 11, 2021

*(use "*s/[typed name]*" to sign electronically-filed documents)*

STATUTORY ADDENDUM

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Addendum

Cal. Civ. Code § 1636:
A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.

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.

Cal. Civ. Code § 1644:
The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed.

Fed. R. Civ. Proc. 56:

(a) MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) TIME TO FILE A MOTION. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) PROCEDURES.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) *Objection That a Fact Is Not Supported by Admissible Evidence.* A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) *Materials Not Cited.* The court need consider only the cited materials, but it may consider other materials in the record.

(4) *Affidavits or Declarations.* An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) WHEN FACTS ARE UNAVAILABLE TO THE NONMOVANT. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) FAILING TO PROPERLY SUPPORT OR ADDRESS A FACT. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) JUDGMENT INDEPENDENT OF THE MOTION. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) FAILING TO GRANT ALL THE REQUESTED RELIEF. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

(h) AFFIDAVIT OR DECLARATION SUBMITTED IN BAD FAITH. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court — after notice and a reasonable time to respond — may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 11, 2021.

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

Dated: June 11, 2021

Respectfully submitted,

CALLAHAN & BLAINE APLC

By: /s/ *Adrian L. Canzoneri*
Adrian L. Canzoneri