No. 21-55196

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Rialto Pockets, Inc., et al.,

Plaintiffs-Appellants,

v.

Beazley Underwriting Limited,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
No. 2:20-cv-7709-DSF (JRPx)
Hon. Dale S. Fischer

APPELLANTS' OPENING BRIEF

Stanley H. Shure
Peter E. Garrell
Salvatore Picariello
Fortis LLP
650 Town Center Drive, Suite 1530
Costa Mesa, CA 92626
Telephone: (714) 839-3800
Attorneys for Appellants
Rialto Pockets, Inc., et al.

CORPORATE DISCLOSURE STATEMENT

Appellants make the following disclosure pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure.

Appellants are non-governmental corporate parties. There are no corporate parents or publicly traded companies that own 10% or more of any of the twenty-four Appellants:

(1) Rialto Pockets, Inc.

(2) Brookhurst Venture, LLC

(3) City of Industry Hospitality Venture, Inc.

(4) Farmdale Hospitality Services, Inc.

(5) High Expectations Hospitality, LLC

(6) Inland Restaurant Venture I, Inc.

(7) Kentucky Hospitality Venture, LLC

(8) K-Kel, Inc.

(9) L.C.M., LLC

(10) Midnight Sun Enterprises, Inc.

(11) Nitelife, Inc.

(12) Olympic Avenue Venture, Inc.

(13) The Oxnard Hospitality Services, Inc.

(14) Penn Ave Hospitality, LLC

(15) Platinum SJ Enterprise

(16) PNM Enterprises, Inc.

(17) Rouge Gentlemen's Club, Inc.

(18) Santa Barbara Hospitality Services, Inc.

(19) Santa Maria Restaurant Enterprises, Inc.

(20) Sarie's Lounge, LLC

(21) The Spearmint Rhino Adult Superstore, Inc.

(22) World Class Venues, LLC

(23) Washington Management, LLC

(24) W.P.B. Hospitality, LLC

Date:June 7, 2021 FORTIS LLP

/s/ Stanley H. Shure
Stanley H. Shure
Peter E. Garrell
Salvatore Picariello
FORTIS LLP
650 Town Center Dr., Suite 1530
Costa Mesa, CA 92626
Tel. (714) 839-3800
Attorneys for Appellants

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT 2
INTRODUCTION AND SUMMARY OF ARGUMENT 15
A. "Physical Loss" as Used in the Phrase "Physical Loss or Physical Damage" Refers to a "Loss of Possession".....17
B. Beazley Admits "Physical Loss" Can Be Interpreted as Meaning a "Loss of Possession" 19
C. Beazley's "Physical Loss" Permanent/Temporary Distinction is Devoid of Merit.....................................19
D. Both of Beazley's No-Coverage Positions Are Contrary to California's Rules of Policy Interpretation 20
JURISDICTIONAL STATEMENT.......................................21
STATEMENT OF AUTHORITY 23
STATEMENT OF ISSUES 23
STATEMENT OF THE CASE 25
A. Beazley "All Risk" Commercial Property Policy 25
B. The Pandemic and Covid-19 Governmental Orders....27
C. Rialto's Insurance Claim and Beazley's Denial...........28
D. The District Court Litigation 29
ARGUMENT...30
I. STANDARD OF REVIEW 33
II. THE DISTRICT COURT ERRED IN GRANTING BEAZLEY'S MOTION TO DISMISS RIALTO'S FAC 34
A. The *Erie* Doctrine 34
B. California's Rules of Policy Interpretation 35

C. "Physical Loss" as Used in the Term "Direct Physical Loss or Physical Damage" Means a Loss of Possession of Tangible Property 37

1. The "Plain Meaning" of the Words Used in an Insurance Policy, Interpreted in Context, Here Favor Coverage 38

2. The District Court's Unreasonable Interpretation of "Direct Physical Loss or Physical Damage"....41

3. Other Provisions of the Policy Support Rialto's Interpretation..44

a) Exclusions A. 2) and 3) 44

b) The "Property Insured by this Policy" Provision... 45

c) The "Gross Earnings" Provision........................46

d) The Policy Does Not Treat the Terms "Physical Loss" and "Physical Damage" Interchangeably 477

e) The Time Element "Period of Liability" Provisions are Susceptible to an Interpretation that Give "Physical Loss" and "Physical Damage" Distinct Meanings..488

4. The California Supreme Court Would Find Coverage Here..52

5. California Court of Appeal Decisions Also Support Rialto's Interpretation...........................53

6. Authorities Interpreting the Phrase "Direct Physical Loss or Physical Damage" Support Coverage in This Case 59

7. Beazley's Reliance on the "Period of Liability" Provision is Misplaced 62

8. Beazley's "Loss of Use" is Not Physical Damage Interpretation is Unavailing 64

9. Beazley's Argument that the Loss of Possession of Property Must Be Permanent to Be Covered is Without Merit 66

10. The California Supreme Court Will Not Follow the Cases Upon Which Beazley Relies................70

11. Even if Beazley's Interpretation Were Reasonable, the Presence of Two Reasonable Interpretations Means there is an Ambiguity that Must Be Resolved Against Beazley.....................72

III. THE COVID-19 GOVERNMENTAL ORDERS ARE A COVERED CAUSE OF LOSS & NO POLICY EXCLUSIONS APPLY TO PRECLUDE COVEARGE AS A MATTER OF LAW..73

A. The Covid-19 Governmental Orders Are a Covered Cause of Loss 73

1. Beazley's Reliance Upon its "Law or Ordinance" Exclusion (General Exclusion A.6.) Lacks Merit.... 74

2. Beazley's Specious "Civil Authority" Argument Asserts an Extension of Coverage is Really an Exclusion 78

B. Beazley's "Mold Exclusion" Defense Lacks Merit........79

1. Beazley's Interpretation of "Microorganism" is Unavailing...80

2. Determining the "Efficient Proximate Cause" of Rialto's Losses Is a Jury Question 84

IV. IN THE ALTERNATIVE, THIS COURT SHOULD CERTIFY RIALTO'S PROPOSED QUESTIONS TO THE CALIFORNIA SUPREME COURT 87

V. CONCLUSION 89

STATEMENT OF RELATED CASES 90

CERTIFICATE OF COMPLIANCE 91

ADDENDUM 93

TABLE OF AUTHORITIES

Cases **Page(s)**

10e v. Travelers Indem. Co.,
No. 2:20-cv-04418-SVW-AS, 2020 WL 5359653 (C.D. Cal. Sept. 2, 2020) 69, 70, 71

Aetna Cas. & Sur. Co. v. Superior Court,
778 P.2d 1333 (Ariz. Ct. App. 1989) 72

AIU Ins. Co. v. Superior Court,
51 Cal.3d 807 (1990) .... *passim*

Am. Alt. Ins. Corp. v. Superior Court,
135 Cal.App.4th 1239 (2006) 45, 53

Anthem Elecs., Inc. v. Pac. Emps. Ins. Co.,
302 F.3d 1049 (9th Cir. 2002) 43, 65

Aydin Corp. v. First State Ins. Co.,
18 Cal.4th 1183 (1998) 40

Bank of the W. v. Superior Court,
2 Cal.4th 1254 (1992) 36, 67

Barroso v. Ocwen Loan Servicing, L.L.C.,
208 Cal.App.4th 1001 (2012) 18, 35, 43

Bay Cities Paving & Grading v. Laws. Mut. Ins. Co.,
5 Cal.4th 854 (1993) 35

Bischel v. Fire Ins. Exch.,
1 Cal.App.4th 1168 (1991) 77

Boxed Foods Co. v. Cal. Capital Ins. Co.,
No. 20-cv-04571-CRB, 2020 WL 6271021 (N.D. Cal. Oct. 26, 2020) 85, 86

Carlin v. Dairy Am., Inc.,
705 F.3d 856 (9th Cir. 2013) 33

Crane v. State Farm Fire & Cas. Co.,
5 Cal.3d 112 (1971) 35, 68, 76, 83

De Bruyn v. Superior Court,
158 Cal.App.4th 1213 (2008) 86

De Witt v. W.P.R. Co.,
719 F.2d 1448 (9th Cir. 1983) 34

Doe v. United States,
419 F.3d 1058 (9th Cir. 2005) 64

E.M.M.I. Inc. v. Zurich Am. Ins. Co.,
32 Cal.4th 465 (2004) 72

Emp'rs. Ins. of Wausau v. Granite State Ins. Co.,
330 F.3d 1214 (9th Cir. 2003) 55

Encompass Ins. Co. v. Berger,
No. CV 12-08294-MWF-PJWx, 2014 WL 4987978 (C.D. Cal. Oct. 7, 2014) 85

Eott Energy Corp. v. Storebrand Internat. Ins. Co.,
45 Cal.App.4th 565 (1996) 56

Erie R.R. v. Tompkins,
304 U.S. 64 (1938) 34, 52, 71

Fireman's Fund Ins. Cos. v. Atl. Richfield Co.,
94 Cal.App.4th 842 (2001) 83

Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co.,
18 Cal.4th 857 (1998) 43, 47

Garvey v. State Farm Fire & Cas. Co.,
48 Cal.3d 395 (1989) 36, 86, 87

Haynes v. Farmers Ins. Exch.,
32 Cal.4th 1198 (2004) 36, 63, 79

Hendrickson v. Zurich Am. Ins. Co.,
72 Cal.App.4th 1084 (1999) 66

Howell v. State Farm Fire & Cas. Co.,
218 Cal.App.3d 1446 (1990) 85

Hughes v. Potomac Ins. Co.,
199 Cal.App.2d 239 (1962) 55, 61

Ind. Gas Co. v. Home Ins. Co.,
141 F.3d 314 (7th Cir. 1998) 21

The Inns by the Sea v. Cal. Mut. Ins. Co.,
2020 WL 5868739 (Cal. Super. Ct. Aug. 6, 2020) 71

Kean, Miller, Hawthorne, D'Armond McCowan & Jarman, L.L.P. v. Nat'l Fire Ins. Co.,
Civil Action No. 06-770-C, 2007 WL 2489711 (M.D. La. Aug. 29, 2007) 64

Kingray Inc. v. Farmers Grp. Inc.,
No. EDCV 20-963 JGB (SPx), 2021 WL 837622 (C.D. Cal. Mar. 4, 2021) 61, 71

Lewis v. Tel. Emps. Credit Union,
87 F.3d 1537 (9th Cir. 1996) 34

Lopez v. City of Needles,
95 F.3d 20 (9th Cir. 1996) 23

MacKinnon v. Truck Ins. Exch.,
31 Cal.4th 635 (2003) 36, 37, 78, 84

Mark's Engine Co. No. 28 Rest., L.L.C.,
2020 WL 5938689 (C.D. Cal. Oct. 2, 2020) 70

Martinez v. Allied Ins. Co. of Am.,
2020 WL 540218 (M.D. Fla. Sept. 2, 2020) 82

McMillin Homes Constr., Inc. v. Nat'l Fire & Marine Ins. Co.,
35 Cal.App.5th 1042 (2019) 57

Meyer Nat'l Foods, L.L.C. v. Liberty Mut. Fire Ins. Co.,
218 F.Supp.3d 1034 (D. Neb. 2016) 83

Minkler v. Safeco Ins. Co. of Am.,
49 Cal.4th 315 (2010) 72, 75

Mirpad, L.L.C. v. Cal. Ins. Guarantee Ass'n,
132 Cal.App.4th 1058 (2005) 42, 49, 76

MRI Healthcare Center of Glendale, Inc. v. State Farm Gen. Ins. Co.,
187 Cal.App.4th 766 (2010) .... *passim*

Murray v. BEJ Minerals, L.L.C.,
924 F.3d 1070 (9th Cir. 2019) 87

N. State Deli, L.L.C. v. The Cincinnati Ins. Co.,
2020 WL 6281507 (N.C. Super. Oct. 9, 2020) 59, 60

Palmer v. Truck Ins. Exch.,
21 Cal.4th 1109 (1999) 35, 51

Pappy's Barber Shops, Inc. v. Farmers Group, Inc.,
2020 WL 5500221, (S.D. Cal. Sept. 11, 2020) 71

Pfeifer v. Countrywide Home Loans, Inc.,
211 Cal.App.4th 1250 (2012) 81

Plan Check Downtown III, L.L.C. v. AmGuard Ins. Co.,
No. CV 20-6954-GW-SKx, 2020 WL 5742712 (C.D. Cal. Sept. 10, 2020) 69

Ponder v. Blue Cross of S. Cal.,
145 Cal.App.3d 709 (1983) 83

Romano v. Mercury Ins. Co.,
128 Cal.App.4th 1333 (2005) 50

Rosen v. State Farm Gen. Ins. Co.,
30 Cal.4th 1070 (2003) .... *passim*

Rose's 1, L.L.C. v. Erie Ins. Exch.,
2020 WL 4589206 (D.C. Super. Ct. Aug. 6, 2020) 70

Rsrv. Ins. Co. v. Pisciotta,
30 Cal.3d 800 (1982) 52, 82

Sabella v. Wisler,
59 Cal.2d 21 (1963) 55, 86

Safeco Ins. Co. v. Robert S.,
26 Cal.4th 758 (2001) 51, 62

Salve Regina Coll. v. Russell,
499 U.S. 225 (1991) 33

Shell Oil Co. v. Winterthur Swiss Ins. Co.,
12 Cal.App.4th 715 (1993) 40, 42

Sierra Pac. Power Co. v. Hartford Steam Boiler Inspection & Ins. Co.,
665 F.3d 1166 (9th Cir. 2012) 79

State Farm Fire & Cas. Co. v. Von Der Lieth,
54 Cal.3d 1123 (1991) 73, 85

Tento Int'l, Inc. v. State Farm Fire & Cas. Co.,
222 F.3d 660 (9th Cir. 2000) 86

Thee Sombrero, Inc. v. Scottsdale Ins. Co.,
28 Cal.App.5th 729 (2018) 53, 54, 63

Total Intermodal Servs., Inc. v. Travelers Prop. Cas. Co. of Am.,
2018 WL 3829767 (C.D. Cal. July 11, 2018) 66

Travelers Cas. & Sur. Co. v. Superior Court,
63 Cal.App.4th 1440 (1998) 25

Univ. Sav. Bank v. Bankers Std. Ins. Co.,
2004 WL 515952 (Cal. Ct. App. Mar. 17, 2004) 55

Valley Lodge Corp. v. Soc'y Ins. (*In re Soc'y Ins. Co. Covid-19 Bus. Interruption Prot. Ins. Litig*),
No. 20 C 02005, 2021 WL 679109 (N.D. Ill. Feb. 22, 2021) 60

Vandenberg v. Superior Court,
21 Cal.4th 815 (1999) 71

Vazquez v. Jan-Pro Franchising Int'l, Inc.,
939 F.3d 1045 (9th Cir. 2019) 88

Vict. Family L.L.L.P. v. Ohio Sec. Ins. Co.,
No. 19-CV-2159-CAB-WVG, 2020 WL 4430994 (S.D. Cal. July 31, 2020) 86

Young v. Aeroil Prods. Co.,
248 F.2d 185 (9th Cir. 1957) 34

STATUTES

28 U.S.C. § 1291 22

28 U.S.C. § 1332 21

Cal. Civ. Code § 1641 (Deering) 17, 44, 48

Cal. Civ. Code § 1858 (Deering) 50

INTRODUCTION AND SUMMARY OF ARGUMENT

Defendant-Appellee Beazley Underwriting Limited ("Beazley") issued a commercial property policy to Appellants Rialto Pockets, Inc., et al. (collectively, "Rialto") promising to pay its Time Element (i.e., business interruption) losses. This appeal primarily concerns the interpretation of Paragraph A of Beazley's Time Element coverage provision, pursuant to which Beazley must pay Rialto for Time Element losses directly resulting from "direct physical loss or physical damage . . . to Property Insured by this Policy." From a layperson's perspective, coverage under this provision is triggered by either direct "physical loss" *or* "physical damage" to Property Insured by the Policy.

Starting in March 2020, various state and local governments issued Covid-19 Governmental Orders, which prevented Rialto from using its insured buildings[1] to conduct their income-producing business operations. These Covid-19 Governmental Orders constitute "physical loss" under the Policy, as this term, in context, means a "loss of possession." Beazley's obligation to pay Time Element loss was triggered.

---

[1] There is no question that Rialto conducts its income-producing business operations in buildings qualifying as Property Insured by the Policy.

Rialto's interpretation is based on the plain meaning of the Policy language, giving each term its ordinary and popular meaning in the context of its usage in the Policy itself. Rialto's interpretation complies with California's rules of contract interpretation.

Beazley, by contrast, argues "physical damage" or "physical alteration" to property is required to trigger physical loss for purposes of its "direct physical loss or physical damage" language. This interpretation – which the district court adopted despite claiming not to do so – renders the term "physical loss" redundant and illusory. Crucially, however, Beazley admitted for the first time in its reply brief that "dispossession" (i.e., "loss of possession") could constitute "physical loss". But Beazley tried to qualify its admission by arguing that only permanent (not partial or temporary) dispossession of property constitutes "physical loss" under the Policy. While some district courts have recognized such a distinction based on policies in those cases, Beazley's Policy does not support Beazley's interpretation. Indeed, Beazley's Policy provides for recovery if Rialto is "wholly or partially prevented from . . . continuing business operations or services," and is devoid of any language that would alert Rialto that a temporary physical

loss of real property is not covered. As such, Beazley's concession that "loss of possession" could trigger Time Element coverage was fatal by itself to Beazley's motion to dismiss. The district court did not, however, address this issue (and others raised below).

Rialto now turns to these issues.

A. "Physical Loss" as Used in the Phrase "Physical Loss or Physical Damage" Refers to a "Loss of Possession"

Under California's rules of contract interpretation, "physical loss" (as used in a Policy provision promising coverage for "physical loss" *or* "physical damage") must have a meaning separate and distinct from "physical damage." Cal. Civ. Code § 1641; *AIU Ins. Co. v. Superior Court*, 51 Cal.3d 807, 826-27 (1990). The word "loss" – giving it a meaning that does not overlap with "damage" - refers to losing possession, or a deprivation,[2] such as one that deprives someone of the ability to fully use something.[3] The loss of possession here was Rialto's inability to use its insured buildings to run their

---

[2] *Loss*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/loss.
[3] *Deprivation*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/deprivation.

income-producing business operations as mandated by the Covid-19 Governmental Orders.

Beazley *initially* rejected Rialto's interpretation of "physical loss." In its moving brief, Beazley asserted there can be no "physical loss" absent "physical damage" or "physical alteration" (effectively a synonym for physical damage) to property.[4] This interpretation, which the court adopted, renders Beazley's promise of coverage for "physical loss" of the insured buildings superfluous and illusory. Thus, it violates California's rules of policy interpretation as a matter of law and is unreasonable. *Barroso v. Ocwen Loan Serv., LLC*, 208 Cal.App.4th 1001, 1012 (2012).

---

[4] The term "direct physical loss" could have a different meaning in a policy if it is not juxtaposed (as here) against the term "physical damage." The California Court of Appeal interpreted such a standalone "direct physical loss" provision in *MRI Healthcare Center of Glendale, Inc. v. State Far Gen. Ins. Co.*, 187 Cal.App.4th 766 (2010) (*MRI*). Many California federal district court decisions (including the one at issue here) have erroneously extended *MRI* to insuring agreements containing "physical loss or physical damage" language. The California Supreme Court would not adopt such an expansive reading of *MRI* to such different policy language, and in a different factual context, especially where its application violates California's rules of contract interpretation. *See* Section II.C.5, *infra*.

B. Beazley Admits "Physical Loss" Can Be Interpreted as Meaning a "Loss of Possession"

Rialto's position that the "physical loss" policy language of the Beazley Policy means a loss of possession, i.e., dispossession, was confirmed by Beazley's admission in its reply brief that the term "physical loss" is susceptible to this interpretation. While Beazley claims only the permanent dispossession of property can constitute "physical loss," Beazley's argument is contradicted by the Policy itself.

C. Beazley's "Physical Loss" Permanent/Temporary Distinction is Devoid of Merit

Beazley's assertion that a dispossession must be permanent to trigger its Time Element coverage is not supported by any policy language. The Policy contains no words stating "physical loss" must be permanent for coverage to exist. For example, the Gross Earnings section of the Policy's Time Element coverage includes the Insureds' recovery of their loss to the extent they are "wholly or partially prevented from producing goods or continuing business operations or services". 6-ER-1428. The Policy is also devoid of any language that would alert Rialto that a temporary

physical loss of real property is not covered. Beazley's interpretation reads these provisions out of the Policy and requires the insertion of the term "permanent," which is something this Court cannot do for any purpose. *Rosen v. State Farm Gen. Ins. Co.*, 30 Cal.4th 1070, 1078 (2003). No reasonable layperson interpreting Beazley's Policy language in context would discern that Time Element coverage for "physical loss" exists only if there is a "direct [***permanent***] physical loss" or understand why the Policy's promise to pay for the "partial" cessation of business operations does not exist when the interruption of business operations is occasioned by "physical loss."

D. Both of Beazley's No-Coverage Positions Are Contrary to California's Rules of Policy Interpretation

On the one hand, Beazley asks the Court to interpret "physical loss" as used in the phrase "direct physical loss or physical damage" in such a manner that "physical loss" has the same or an overlapping meaning with "physical damage". Beazley is effectively asking this Court to read "physical loss" out of the Policy, which this Court cannot do. *AIU Ins. Co.,* 51 Cal.3d at 827. On the other hand, Beazley's admission in its reply brief that "physical loss" refers to a dispossession, i.e.,

loss of possession, is asking this Court to add a non-existence "permanent" requirement into the Policy for coverage to exist. Again, this Court cannot do so. *Rosen,* 30 Cal.4th at 1078.

Rialto instead asks this Court to apply California's rules of contract interpretation to the "direct physical loss or physical damage" language, giving each word its plain meaning, in context, which a layperson would give them. When these rules are applied, Rialto believes the Court will conclude it has alleged a plausible claim for Time Element Coverage under the Beazley Policy.

JURISDICTIONAL STATEMENT

The issue whether the district court had original jurisdiction over this action pursuant to 28 U.S.C. § 1332 (diversity of citizenship) involved several issues for which there is no Ninth Circuit authority. The court ultimately agreed that complete diversity exists between Rialto and Beazley. *See* Excerpts of Record (hereinafter, "ER"), 6-ER-1217-1218.

Relying on *Indiana Gas Co. v. Home Ins. Co.*, 141 F.3d 314 (7th Cir. 1998), the court issued an OSC re Dismissal for Lack of Subject Matter Jurisdiction because, *inter alia*,

Rialto had failed to plead the citizenship of the underwriters of the two Lloyd's Syndicates (2623 and 623) named as defendants in the Complaint. 6-ER-1469. Beazley subsequently acknowledged it is the sole member of Syndicate 2623 (and, thus, an insurer under the Policy) and an English citizen for diversity purposes. 6-ER-1286; 6-ER-1290 ¶¶4-5.

Rialto filed its FAC and added Beazley as a new defendant. 6-ER-1347-1468. It also filed a response to the OSC. 6-ER-1271-1283. The court eventually discharged the OSC, finding Rialto is diverse from the sole member of Syndicate 2623 (i.e., Beazley). The district court implicitly found Syndicate 623 is not an indispensable party and ordered it dismissed without prejudice. 6-ER-1217-1218. The court implicitly found the amount in controversy was satisfied. Rialto dismissed without prejudice all of the remaining defendants except for Beazley. 6-ER-1213-1214.

Appellate jurisdiction is based on FRAP 4(a) and 28 U.S.C. § 1291. This appeal is from a final judgment following an order granting Beazley's motion to dismiss Rialto's FAC. 1-ER-2. The district court's order granting Beazley's motion to dismiss without prejudice was entered on January 7, 2021. 1-ER-5-7. Although the court gave Rialto an

opportunity to file a SAC, Rialto elected to stand on the dismissed FAC. 1-ER-3-4. *See Lopez v. City of Needles*, 95 F.3d 20, 22 (9th Cir. 1996) (order dismissing complaint without prejudice is appealable if plaintiff stands on dismissed complaint). The court entered judgment on February 1, 2021. 1-ER-2. Rialto timely appealed on February 26, 2021. FRAP 4(a)(1)(A). 7-ER-1590-1591.

STATEMENT OF AUTHORITY

Pursuant to Circuit Rule 28-2.7, all applicable statutes, etc., are contained in the brief or Addendum filed by Rialto.

STATEMENT OF ISSUES

1. Would a reasonable layperson construing the term "physical loss" contained in the phrase "direct physical loss or physical damage . . . to Property Insured by the Policy" interpret "physical loss" as meaning a "loss of possession," such as when an insured is prohibited from using its insured building(s), to conduct its income-generating business operations in?

2. If "physical loss" is reasonably interpreted as a "loss of possession" of property, is it properly interpreted as applying only to a "permanent" loss of possession?

3. Should this Court certify either or both prior questions of state law to the California Supreme Court?

4. Whether the Covid-19 Governmental Orders are a covered cause of loss under the Policy?

5. Whether the Policy's "Civil Authority" provision excludes or otherwise limits coverage for the Covid-19 Governmental Orders?

6. Whether the Policy's "Law or Ordinance" Exclusion (Exclusion A.6) can be unambiguously interpreted as applying to and excluding coverage for the Covid-19 Governmental Orders?

7. Whether the Policy's Mold Exclusion (Exclusion D) can be unambiguously interpreted as applying to "viruses"?

8. If the Mold Exclusion and the Covid-19 Governmental Order are both contributing causes to Rialto's Time Element losses, is it a factual question to determine which of them is the "efficient proximate cause" (i.e., the "predominant" or "most important cause") of their losses?

STATEMENT OF THE CASE

A. Beazley "All Risk" Commercial Property Policy

Rialto operates 23 gentlemen's clubs, 14 of which are located in California. 6-ER-1349 ¶2. Rialto purchased the Beazley Policy with a Policy Period of January 1, 2021 to January 1, 2022, and aggregate limits of liability of $10 million per occurrence. 6-ER-1397-1461. Rialto timely paid all premiums for, and performed all duties required of it under, the Policy. 6-ER-1392 ¶136.

The Policy is an "all risk" property insurance policy – a policy covering all risks of physical loss or physical damage except those specifically excluded. 2-ER-257 & fn.1; 6-ER-1380-1381; 6-ER-1397-1461. Unlike "enumerated perils" policies, which cover only certain causes of loss, "all risk" property insurance policies provide broad coverage for unanticipated risks of loss. *See, e.g., Travelers Cas. & Sur. Co. v. Superior Court*, 63 Cal.App.4th 1440, 1454 (1998).

The Policy's insuring agreement coverage provision for its "Time Element" section (Section D) of the Policy states: "This Policy insures Time Element loss, as set forth in the Time Element Coverages, directly resulting from direct physical loss or physical damage insured by this Policy

occurring during the Period of Insurance to Property Insured by this Policy." 6-ER-1428. The term "Property Insured," in turn, is defined as: "A. Real Property at an Insured Location, in which the Insured has an insurable interest. B. Personal Property . . . ." 6-ER-1418. The term "Insured Location" means, *inter alia*, buildings. 6-ER-1418. The Policy does not define several key terms in the insuring agreement, including "direct," "physical," loss," and "damage."

The Policy promises to pay its Insureds "Time Element loss," which includes the Insureds' recovery of their loss, to the extent the Insureds are: (i) wholly or partially prevented from producing goods or continuing business operations or services; . . . (iii) unable to continue such operations or services; . . . (iv) able to demonstrate a loss of sales for the operations, services or production prevented. 6-ER-1428-1429.

The Policy includes a Mold Exclusion (Exclusion D), which excludes coverage for "any loss, damage, claim, cost, expense or other sum directly or indirectly arising out of or relating to: mold, mildew, fungus, spores or other microorganism of any type . . . ." 6-ER-1417. It also includes a "law or ordinance" exclusion (General Exclusion A. 6), which applies to "loss from enforcement of any law or

ordinance: a) regulating the construction, repair, replacement, use or removal, including debris removal, of any property; and/or b) requiring the demolition of any property, including the cost in removing its debris." 6-ER-1415.

B. The Pandemic and Covid-19 Governmental Orders

The first instances of Covid-19 were reported in or around December 2019. 6-ER-1367 ¶57. By March 2020, Covid-19 was labeled a global pandemic, and health officials issued guidance advising the public to adopt social distancing measures. 6-ER-1368 ¶¶62-64. Around the same time, state and local governments issued "state of emergency" orders, which included the cancellation of large non-essential gatherings. 6-ER-1368-1369 ¶¶66-68.

On March 19, 2020, California Governor Gavin Newsom issued an order requiring residents to stay in their homes, except as needed in 16 critical infrastructure sectors. 6-ER-1369 ¶70. Rialto's gentlemen's clubs did not fall within any of these essential sectors, and therefore it had to remain closed. 6-ER-1369 ¶¶69-70. Other states around the country have implemented similar orders, which forced Rialto's nightclubs to close its doors. 6-ER-1369 ¶73. These Covid-19 Governmental Orders are neither laws nor ordinances. 6-ER-

1369 ¶74. Rialto did not have the ability or right to ignore them, and doing so would have exposed it, *inter alia*, to fines and sanctions. 6-ER-1369 ¶75. Rialto's losses far exceed $10 million. 6-ER-1371 ¶81.

C. Rialto's Insurance Claim and Beazley's Denial

Rialto gave notice of its claim for Time Element losses arising from the Covid-19 Governmental Orders. 6-ER-1352 ¶ 7. Beazley denied coverage under the Time Element section of the Policy, asserting coverage was not triggered because no "'direct physical loss or physical damage' to the property occurred at the Insured's business premises." Focusing on the motives behind the closure orders, rather than the prohibitions these orders placed on Rialto's ability to conduct business within the physical space of buildings wherein the clubs operated, Beazley added: "[The clubs'] closure was ordered to prevent the spread of an infectious disease transmitted by human interaction, and not due to any physical damage to property." 6-ER-1352 ¶8. Thus, Beazley stated (at least initially) that "physical damage to property" is essential to trigger coverage.

D. The District Court Litigation

Rialto filed the instant action on August 24, 2020. 7-ER-1513. After the court discharged the above-described OSC, Beazley filed a Rule 12(b)(6) motion. Beazley argued Rialto's breach of contract claim is not plausible because the Policy's promise of coverage for "direct physical loss or physical damage" is triggered solely by "physical damage" or "physical alteration" to property. 5-ER-923-925. Alternatively, Beazley argued Rialto's claim is barred under various Policy provisions, including the Mold Exclusion (Exclusion D) and the "Law or Ordinance" Exclusion (Exclusion A.6). 5-ER-931. On reply, Beazley conceded for the first time that the permanent dispossession of property could constitute "direct physical loss." 2-ER-226-227. It also argued for the first time that California's "efficient proximate cause" doctrine applies only where two or more perils "occurred independently of the other and caused damage." 2-ER-234-235. The court permitted Rialto to file a sur-reply to address Beazley's new arguments. 1-ER-5; 2-ER-191-212.

Without hearing, the court entered an order dismissing Rialto's breach of contract claim. 1-ER-5-7. The court held there cannot be "physical loss" unless there is a "physical

alteration of the property" or an external force caused a "physical change in the condition of the property, i.e., it must have been 'damaged' within the common understanding of that term." 1-ER-6-7. The court did not address any exclusions Beazley raised in its motion, the admission made by Beazley in its reply that "physical loss" can be interpreted as a "dispossession" (i.e., a loss of possession of property), or any of the points made in Rialto's sur-reply about the implications of Beazley's admission. 2-ER-201-206. The court entered judgment on February 1, 2021. 1-ER-5-7. Rialto timely appealed on February 26, 2021. 7-ER-1590-1591.

ARGUMENT

The district court erred as a matter of law in its interpretation of Beazley's broad "physical loss or physical damage" Time Element loss language. It did so by: (i) interpreting "physical loss" as used in the "physical loss or physical damage" language in a manner that makes "physical loss" redundant with "physical damage" and therefore illusory, in violation of California's rules of

contract interpretation;[5] (ii) ignoring Rialto's interpretation of "physical loss" (i.e., "physical loss" refers to a "loss of possession," a meaning that is separate and distinct from the meaning of "physical damage"), which is reasonable and complies with California's rules of contract interpretation; and (iii) ignoring Beazley's admission that "physical loss" is reasonably interpreted as a dispossession, i.e., a "loss of possession," which is consistent with Rialto's interpretation.[6]

The district court's interpretation rewrites Beazley's promise to pay Rialto's Time Element losses to read ". . . direct physical damage . . . to Property Insured by the Policy", when the language actually provides for ". . . direct *physical loss or* physical damage . . . to Property Insured by the Policy". Courts cannot rewrite contracts. *Rosen,* 30 Cal.4th at 1078 (court may not rewrite any provision of a policy "for any purpose"). The district court allowed Beazley

---

[5] The district court also failed to account for how a reasonable layperson would read the relevant policy language. 1-ER-5-7.

[6] Rialto vehemently disagrees with Beazley's assertion that "physical loss" encompasses only a "permanent" dispossession of property. As discussed in Section II.C.9, Beazley's interpretation regarding the permanency of any dispossession is not supported by policy language and violates California's rules of contract interpretation.

to change the benefit of the bargain provided by the Policy, as discerned from the plain meaning of the words used.

The California Supreme Court would never adopt the district court's "physical damage" trigger interpretation for both "direct physical loss or physical damage", as it violates California's rules of contract interpretation on a variety of different grounds, primarily rendering the promise of coverage for "direct physical loss" illusory. The California Supreme Court would also agree with Rialto's interpretation that "physical loss" means "loss of possession", as it is a reasonable interpretation that complies with California's rules of contract interpretation by, *inter alia*, giving meaning from a layperson's perspective to *all* of the policy language. The reasonableness of Rialto's interpretation of "physical loss" as meaning a "loss of possession" is further reinforced by Beazley's admission that "physical loss" refers to a dispossession, i.e., a loss of possession of property. This Court should reverse.

Rialto's interpretation of "physical loss" as meaning a "loss of possession" complies with California's rules of contract interpretation. Since Beazley also agreed in its reply with this interpretation, there really is no dispute as to the meaning of "physical loss". Even if there were a dispute,

the district court's interpretation is unreasonable as it violates California's rules of contract interpretation, including the rule against interpretations that render terms redundant and illusory. Because none of Appellee's other no-coverage arguments – including whether the loss of possession must be "permanent" – withstand scrutiny, this matter must be reversed.[7]

I. STANDARD OF REVIEW

This Court reviews the district court's grant of a motion to dismiss *de novo*. *Carlin v. Dairy Am., Inc.*, 705 F.3d 856, 866 (9th Cir. 2013). This Court reviews *de novo* the district court's interpretation of state law. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1991).

[7] Those other issues include whether: (i) the Policy contains any exclusions that make the Covid-19 Governmental Orders a non-covered cause of loss; (ii) the Policy's Mold Exclusion (Exclusion D) can be reasonably interpreted as applying to viruses, such as the coronavirus; and (iii) the Mold Exclusion, assuming it is determined to apply to viruses, bars coverage for Rialto's Time Element losses as a matter of law.

II. THE DISTRICT COURT ERRED IN GRANTING BEAZLEY'S MOTION TO DISMISS RIALTO'S FAC

A. The *Erie* Doctrine

The *Erie* doctrine requires federal courts exercising diversity jurisdiction over state-law claims apply state substantive law. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). To ascertain state law, federal courts look to statutes and decisions from the state's highest court. *Id.* at 78. Where (as here) the issues involved are ones upon which the state's highest court has not yet ruled, federal courts must predict how that court would rule on an issue. In doing so, they may look to state supreme court dicta, the opinions of lower state courts, decisions from other jurisdictions, statutes, treatises, and restatements as guidance. *Lewis v. Tel. Employees Credit Union*, 87 F.3d 1537, 1545 (9th Cir. 1996); *Young v. Aeriol Prods. Co.*, 248 F.2d 185, 188 (9th Cir. 1957) (*Erie* analysis entails examination of analogous state court decisions). Where intermediate appellate courts split on an issue, the court must attempt to predict which position the state's highest court will likely adopt. *See De Witt v. W. Pac. R. Co.*, 719 F.2d 1448, 1453 (9th Cir. 1983).

B. California's Rules of Policy Interpretation

The California Supreme Court interprets insurance policies like any other contract. *Palmer v. Truck Ins. Exch.*, 21 Cal.4th 1109, 1115 (1999). Courts must construe words in their ordinary and popular sense, and they generally resort to common dictionaries to do so. *AIU Ins. Co.,* 51 Cal.3d at 826-27. Policy language must be construed to give effect to *every* term, and courts must avoid rendering terms redundant, meaningless, or surplusage. *Id.* at 827. The terms in an insurance policy must be read in context and in reference to the policy as a whole, with each clause helping to interpret the other. *Bay Cities Pav. & Grading, Inc. v. Lawyers' Mut. Ins. Co.*, 5 Cal.4th 854, 867 (1993). The policy must be read as a layperson would read it, not as an attorney or expert would do so. *Crane v. State Farm Fire & Cas. Co.*, 5 Cal.3d 112, 115 (1971).

A court may not use public policy as an interpretive aid. *AIU Ins. Co.,* 51 Cal.3d at 818. Nor may it rewrite policy terms or substitute its own concepts of fairness. *Rosen,* 30 Cal.4th at 1073. An interpretation that violates the rules of policy interpretation is unreasonable and cannot be adopted. *Barroso,* 208 Cal.App.4th at 1012.

If a policy's terms are ambiguous or uncertain (*i.e.*, susceptible to more than one reasonable interpretation), they are interpreted to protect "the objectively reasonable expectations of the insured." *Bank of the West v. Superior Court,* 2 Cal.4th 1254, 1265 (1992). Any remaining ambiguity must be resolved against the insurer. *Id*. To ensure coverage conforms to the objectively reasonable expectations of the insured, courts interpret coverage provisions broadly in favor of policyholders, but interpret exclusions narrowly against the insurer. *MacKinnon v. Truck Ins. Exch.*, 31 Cal.4th 635, 648 (2003). If any reasonable interpretation of the policy would result in coverage, a court must find coverage even if other reasonable interpretations would preclude coverage. *Id.* at 655.

If an insured shows a claim falls within the insuring clause, the insurer must prove the claim is specifically excluded. *Garvey v. State Farm Fire & Cas. Co.,* 48 Cal.3d 295, 406 (1989). To be enforceable, an exclusion or "any provision that takes away or limits coverage reasonably expected by an insured must be 'conspicuous, plain and clear.'" *Haynes v. Farmers Ins. Exch.*, 32 Cal.4th 1198, 1204 (2004). An exclusion must "be placed and printed so that it will attract the reader's attention," and "stated precisely and understandably, in words that are part of the working vocabulary of the average

layperson." *Id*. This rule applies with "particular force" to policies like Beazley's, which lead an insured "to reasonably expect" coverage for all loses not clearly excluded. *MacKinnon*, 31 Cal.4th at 648.

C. "Physical Loss" as Used in the Term "Direct Physical Loss or Physical Damage" Means a Loss of Possession of Tangible Property

Rialto's interpretation that "physical loss" means a loss of possession of tangible property is reasonable and comports with California's rules of contract interpretation because it gives separate meanings to each of the words – "physical loss or physical damage" – in question. Moreover, Beazley admitted "physical loss" could be interpreted to mean a dispossession, i.e., a "loss of possession" (2-ER-226-227), the same meaning Rialto has always asserted applies. Additional support for Rialto's position that "physical loss" refers to the loss of possession of tangible property (such as the insured buildings here that Rialto was prevented from fully using by the Covid-19 Governmental Orders) is found in (a) the other terms of Beazley's Time Element loss provisions, (b) applicable California appellate case law, and (c) trial court decisions from various jurisdictions that give "physical loss" and "physical damage" separate meanings.

1. The "Plain Meaning" of the Words Used in an Insurance Policy, Interpreted in Context, Here Favor Coverage

Rialto's FAC contains detailed allegations regarding why its claim triggered coverage under the "Time Element – Section D" provision of the Policy. 6-ER-1379-1382; see also 2-ER-256-257. The Time Element insuring agreement (Paragraph A) provides "[t]his Policy insures Time Element loss, as set forth in the Time Element Coverages, directly resulting from direct physical loss or physical damage insured by this Policy occurring during the Period of Insurance to Property Insured by this Policy." 6-ER-1428. In addition to "physical loss or physical damage" being separately stated terms, the terms are separated by the disjunctive "or", which further reinforces that "physical loss" and "physical damage" are separate concepts, either of which triggers Time Element coverage, subject to the policy's exclusions and compliance with the other requirements of the policy's insuring agreement.

The FAC identifies the relevant defined terms in the Policy. For example, "Property Insured" includes "A. Real Property at an Insured Location, in which the Insured has an insurable interest. B. Personal Property". 6-ER-1355-

1356. The "Insured Locations" are listed in the Schedule and include each of the buildings the in which the clubs at issue conduct their income-producing activities. 6-ER-1373 ¶¶96-97. The FAC provides plain ordinary definitions for the relevant undefined terms in the Policy. Among other things, the FAC explains the term "direct" means "without interruption or diversion" or "without any intervening agency or step"[8]; the term "physical" means "[o]f pertaining to material nature" and having a "material existence"[9]; and the term "loss" means "the act of losing possession" or "detriment, disadvantage, or deprivation from failure to keep, have, or get".[10] *See also* 6-ER-1380 ¶¶112-117.

Giving those definitions the plain meaning a layperson would in context, "physical loss" means losing or being deprived of the ability to use something that has material existence that one possesses, such as the buildings in which

---

[8] *Direct*, Webster's Third New Int'l Dictionary 640 (1986).
[9] *Physical*, 3 Oxford English Dictionary 346-347 (1933).
[10] *Loss*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/loss. Deprivation, in turn, means "being kept from possessing, enjoying, or using something." Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/deprivation.

the clubs conduct their business operations. This is a meaning separate and distinct from "physical damage". 6-ER-1380 ¶118(d). By contrast, the term "damage", when modified by the term "physical" (as opposed to standing alone), means "[p]hysical harm that impairs the value, usefulness, or normal function of something" that has material existence. *Damage*, Oxford English Dictionary (2013); 2-ER-259; 6-ER-1380.

In an analogous situation, the California Supreme Court has given separate meanings to the words "sudden and accidental", which supports Rialto's interpretation. *Aydin Corp. v. First State Ins. Co.*, 18 Cal.4th 1183, 1191 (1998) (citing *Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 12 Cal.App.4th 715, 753 (1993)). Thus, the Policy provides Time Element coverage because Rialto's losses directly resulted from the Covid-19 Governmental Orders, and such orders prohibited (*i.e.*, prevented) Rialto from using its insured buildings to conduct the income generating aspects of its business operations.

2. The District Court's Unreasonable Interpretation of "Direct Physical Loss or Physical Damage"

Notwithstanding its misquotation of the insuring clause,[11] the district court did consider whether the terms "physical loss" and "physical damage" are synonymous. Although the court stated it agrees with Rialto that these two terms are not synonyms, the court proceeded to conflate these terms in the next sentence of its order. 1-ER-6. Specifically, relying on the California Court of Appeal

[11] The district court's order repeatedly misquotes Beazley's insuring clause as "physical loss or damage" rather than the actual Policy language of "direct physical loss or physical damage." 1-ER-5-7. Notably, the insuring agreements in all three decisions cited in footnote 2 of the court's order (1-ER-6 fn. 2) provide coverage for "physical loss or damage." Regardless, the court's error on such a critical provision does raise a legitimate question about whether the court closely considered the whole Policy, or if it simply followed other decisions in the district because those policies appear to contain similar wording. If the latter, then the court erred. *See American Cyanamid Co. v. American Home Assurance Co.*, 30 Cal.App.4th 969, 978 (1994) (trial court erred by assuming substantially similar policy language in another matter was controlling in the case before it). Put another way, close is not good enough when interpreting an insurance policy under California law.

decision in *MRI*, 187 Cal.App.4th at 779, the court held there is no coverage unless there is (1) a "physical alteration of the property" or, (2) an external force caused a "physical change in the condition of the property, i.e., it must have been 'damaged' within the common understanding of that term." 1-ER-6-7. And even though Beazley admitted a certain form of "dispossession" of property, i.e., a loss of possession, can constitute "direct physical loss," the court failed to discuss this admission.

The district court's interpretation of "physical loss" and "physical damage" as being triggered only by physical damage to property renders the term "physical loss" illusory and without legal effect, in that "physical loss" and "physical damage" mean the same thing. This result is contrary to one of the basic tenets of California's rules of contract interpretation requiring that all the words or phrases used in a contract are given separate and distinct meanings. *See, e.g., Mirpad, LLC v. Cal. Ins. Guar. Assn.*, 132 Cal.App.4th 1058, 1070-73 (2005) (where policy referred to "person" and "organization" separately and distinctly, the words must be given their separate and distinct meaning to avoid creating ambiguity and redundancy); *Shell Oil Co.,* 12 Cal.App.4th at 754-55 (the terms "sudden" and "accidental" must have

different meanings); *Anthem Elecs., Inc. v. Pac. Emplrs. Ins. Co.*, 302 F.3d 1049, 1059-60 (9th Cir. 2002) ("sudden and accidental" exception to an "Impaired Property" exclusion required both sudden and accidental physical damage to circuit boards).[12]

The district court's interpretation violates the rule of construction prohibiting an interpretation that effectively rewrites the policy language. *Rosen,* 30 Cal.4th at 1073. As interpreted by the district court, the words ". . . direct physical loss or physical damage . . . to Property Insured by the Policy" is effectively rewritten as ". . . direct physical damage . . . to Property Insured by the Policy." The court's interpretation therefore is unreasonable and cannot be adopted under California law. *Barroso,* 208 Cal.App.4th at 1012 (interpretation that violates rules of policy interpretation is unreasonable and cannot be adopted).

---

[12] Other examples of California Supreme Court decisions that interpret policy provisions to give the words used separate and distinct meanings include, but are not limited to: *AIU*, 51 Cal.3d at 827 (declining to apply a definition of "damages" which would render redundant the phrase "legally obligated to pay"); *Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co.*, 18 Cal.4th 857, 879 (1998) (interpreting insuring agreement of commercial general liability in context to give terms "claim" and "suit" distinct meaning).

3. Other Provisions of the Policy Support Rialto's Interpretation

The reasonableness of Rialto's interpretation of "direct physical loss or physical damage" is supported by other Time Element Policy provisions, none of which were considered by the district court.

a) Exclusions A. 2) and 3)

Neither Beazley nor the district court discussed Time Element Exclusions A. 2) and 3).[13] Under these provisions, the Policy does not insure against any loss due to a "planned or rescheduled shutdown" or "strikes or other work stoppage". 6-ER-1433; *see also* 2-ER-259-260. Shutdowns and strikes do not involve physical damage. These exclusions corroborate Rialto's position that "direct physical loss" is distinct from "physical damage"; otherwise, there would be no need for these exclusions. *See* Cal. Civ. Code § 1641 (every contractual provision presumably has meaning and must not be treated as superfluous); *AIU*, 51 Cal.3d at 826-27 (same);

[13] Likewise, Beazley and the district court failed to address several other issues raised by Rialto, including the Policy's "Property Insured by this Policy" provision, the "Gross Earnings" provision, and the Policy's different treatment of "physical loss" and "physical damage." *See infra.*

Am. Alt. Ins. Corp. v. Superior Court, 135 Cal.App.4th 1239, 1247 n.2 (2006) (exclusions are part of the overall contextual analysis when interpreting policy provisions).

b) The "Property Insured by this Policy" Provision

Beazley Policy's Time Element Coverage applies "to Property Insured by this Policy." 6-ER-1428. "Property Insured" as defined includes: "A. Real Property at an Insured location, in which the Insured has an insurable interest. B. Personal Property . . . ." 6-ER-1418. The insuring agreement of the Time Element coverage expressly promises, in pertinent part, to pay for either "direct physical loss" or "direct . . . physical damage" to Property Insured. 6-ER-1428. This provision does not differentiate between real property and personal property. As such, a reasonable layperson would conclude that coverage for "direct physical loss" applies to situations where an Insured loses its ability to possess, use, or control "Property Insured by this Policy," which includes the building(s) – the real property – in which an Insured conducts its business income generating operations. One must conclude California's high court would not adopt Beazley's "physical damage" trigger as applying to both "direct physical loss" or "direct . . . physical damage" to

Property Insured. *See* 2-ER-260. Beazley's interpretation effectively reads out of the Policy its promise of physical loss ever applying to real property.

c) The "Gross Earnings" Provision

The Gross Earnings section of the Policy's Time Element coverage provides – without limiting itself to only "physical damage" situations – that Time Element coverage exists if an insured is prevented, in whole or part, from continuing business operations or services. 6-ER-1428. Moreover, the "Measurement of [Time Element] Loss" provision is not limited to only "physical damage" situations. 6-ER-1428-1429. A reasonable insured reading the Gross Earning and Measure of Loss provisions would conclude the Policy's Time Element coverage includes "direct physical loss" occurring at an insured location that temporarily and/or partially prevents the insured from conducting its business operations or performing services. *See* 2-ER-260-261.

d) The Policy Does Not Treat the Terms "Physical Loss" and "Physical Damage" Interchangeably

When an insurance policy treats two different words separately, it indicates the insurer's "differing rights and obligations . . . were deliberately and intentionally articulated". *Foster-Gardner, Inc.*, 18 Cal.4th at 880. Here, the Policy treats the terms "physical loss" and "physical damage" separately in several ways, including in the "Period of Liability" provision upon which Beazley heavily relied. This provision uses the term "physical damage" without including "physical loss" (compare Period of Liability A. 1) a) ("starting from the time of direct physical loss or physical damage") with A. 3) b) ("to replace physically damaged mercantile stock" and A. 6) ("[f]or physically damaged exposed films")). 6-ER-1433-1434. These distinctions show the parties *deliberately distinguished* the term "physical damage" from "physical loss or physical damage". 2-ER-261.

e) The Time Element "Period of Liability" Provisions are Susceptible to an Interpretation that Give "Physical Loss" and "Physical Damage" Distinct Meanings

Beazley's motion relied heavily on a very restrictive interpretation of certain words contained in the "Period of Liability" provisions – such as "repair," "replace," and "made ready for operations" – to support an interpretation of "direct physical loss or physical damage" that ultimately renders "physical loss" illusory. 5-ER-930-931. If adopted, that interpretation fails to give effect to other policy language, which is disfavored and contrary to California law. Cal. Civ. Code § 1641.

However, the same words and phrases (i.e., "repair," "replace" and "made ready for operations") found in the "Period of Liability" provisions are reasonably susceptible to broader interpretations that give separate meaning to "physical loss" and "physical damage." Paragraph A. 1) a) of the "Period of Liability" provisions provide that the "Period of Liability" for "building and equipment" start "from the time of direct physical loss or physical damage" and ends

when the building and equipment could be "(i) repaired or replaced; and (ii) made ready for operations". 6-ER-1433-1434. The plain meaning of the undefined term "repair" means not only to fix what is broken, but also "to restore to a sound or healthy state." *Repair*, Merriam-Webster (Online ed. 2020). Likewise, the undefined term "replace" means "to restore to a former place or position." *Replace*, Merriam-Webster Dict. (Online ed. 2020). Thus, the "Period of Liability" can be reasonably interpreted as starting from the time of "physical loss" (*i.e.*, when Rialto lost the ability to use its buildings to conduct income producing business operations) and ends when their functionality or condition is restored. This interpretation is consistent with the other phrase, "made ready for operations", which in no way suggests or even implies "physical loss" cannot exist absent "physical damage". *See* 2-ER-261.

Paragraph A. 1) a)'s concluding sentence – "under the same or equivalent physical and operating conditions that existed prior to the *damage*" – does not change this outcome. The Policy's use of "damage" instead of "physical damage" (especially in the same paragraph) means the parties intended these terms to have different meanings. *See Mirpad,* 132 Cal.App.4th at 1062 ("plain meaning of

insurance policy language may be established by considering such language in the context of the entire policy, even though, in other contexts, it might have a different meaning."); *cf. Romano v. Mercury Ins. Co.*, 128 Cal.App.4th 1333, 1343 (2005) ("When one part of a statute contains a term or provision, the omission of that term or provision from another part of the statute indicates the Legislature intended to convey a different meaning."). A court may not rewrite a contract by inserting what has been omitted. Cal. Civ. Code § 1858. Here, the plain ordinary meaning of the undefined term "damage", read in context, includes "unwelcome and detrimental effects". *Damage*, Oxford Online Dict. (Lexico 2020). A reasonable layperson reading the "Period of Liability" provisions would conclude Beazley's liability ends when the functionality or condition of its buildings is restored and made ready for operations. 2-ER-261-262.

By contrast, Beazley's interpretation of the Time Element "Period of Liability" language (5-ER-923; 5-ER-930) is restrictive, as it applies only when Property Insured is "physically damaged". 2-ER-262. It is therefore unreasonable under California law because it renders illusory the promise of Time Element coverage for "direct physical loss" to

Property Insured, as articulated in the Time Element insuring agreement. *Safeco Ins. Co. of Am. v. Robert S*, 26 Cal.4th 758, 764-65 (2001) (interpretations of exclusions that render promised coverage illusory, null, or meaningless are disfavored).

In contrast, Rialto's interpretation of the "Period of Liability" language – set forth above – results in the language applying to property that has sustained either "physical loss" or "physical damage". This interpretation gives meaning to all aspects of Beazley's Time Element coverage, including its promise to pay for both "direct physical loss" and "direct physical damage" and is a reasonable one giving force and effect to all aspects of the Time Element coverage promised by Beazley. *Palmer*, 21 Cal.4th at 1115 (court must construe policy language in context and give effect to every part with each clause helping to interpret the other).

Finally, even if Beazley's interpretation of the "Period of Liability" provision that only "physical damage" triggers "direct physical loss or physical damage" is deemed reasonable, Rialto's position that the same language supports separate meanings for "direct physical loss" and "direct physical damage" is also a reasonable interpretation.

The reasonable expectation of the insured in these circumstances is that the terms “physical loss” and “physical damage” have distinct and separate meanings. *AIU,* 51 Cal.3d at 822. The presence of competing reasonable constructions in such circumstances creates an ambiguity that must be construed in Rialto’s favor. *Reserve Ins. Co. v. Pisciotta,* 30 Cal.3d 800, 807-08 (1982). 2-ER-262-263.

4. The California Supreme Court Would Find Coverage Here

The California Supreme Court has set forth all of the interpretive rules necessary for this Court to conduct an *Erie* analysis to ascertain the meaning of the “direct physical loss or physical damage”. *See supra*, § II.B. Based on these rules, the California Supreme Court would conclude Rialto’s interpretation is a reasonable one, as it complies with the rules of contract interpretation. Conversely, it would never adopt the district court’s (or Beazley’s) “physical damage” as the sole trigger for both “direct physical loss or physical damage”, as it renders the promise of coverage for “physical loss” illusory. 2-ER-263.

5. California Court of Appeal Decisions Also Support Rialto's Interpretation

Although Covid-19 is a new disease, there is California precedent for finding property policies cover losses analogous to those at issue here, to wit: ones that do not require "physical damage". For example, in *American Alt. Ins. Corp. v. Superior Court*, 135 Cal.App.4th 1239, 1247 (2006), the policy at issue provided coverage for "accidental physical loss", and the California Court of Appeal held coverage applied for a governmental seizure order for the insured plane at issue. In so holding, the court noted the insured's interpretation was supported by the deletion (by an endorsement) of a policy exclusion for government seizure and forfeiture orders. *Id*. Likewise, here, the fact Beazley's Exclusions A. 2) and 3) concern shutdowns and strikes may be considered part of the general circumstances impacting an insured's objectively reasonable expectations as to the scope and extent of coverage under the Beazley Policy, to wit: that "physical loss" does not require "physical damage". *Id*. at 1247 n.2; *AIU*, 51 Cal.3d at 826-27 (declining to adopt interpretation that would render term illusory).

The more recent decision in *Thee Sombrero, Inc. v. Scottsdale Ins. Co.*, 28 Cal.App.5th 729, 734 (2018) also

supports Rialto's policy interpretation. There, a policyholder, sought coverage for the "loss of use" form of "property damage" when he was required to operate his nightclub only as a banquet hall, which followed a shooting at the premises that resulted in the revocation and replacement of the policyholder's permit to operate the nightclub. In rejecting the insurer's arguments, the court reasoned that the loss of functionality or loss of any significant use of the insured's tangible property constituted the loss of use form of property damage. *Id.* at 734-37. The court added, "the reasonable expectations of the insured would be that 'loss of use' means the loss of *any* significant use of the premises, not the total loss of all uses." *Id.* at 737. The court held the loss of the policyholder's ability to use the property as a nightclub, as it did prior to the shooting event, constituted property damage to property covered under the policy. *Id.* at 742. Though *Thee Sombrero* involved a commercial general liability policy, its reasoning involves "loss of use" language analogous to the commercial property policy language, "physical loss", whose plain meaning refers to a "loss of possession, at issue here. The reasonable interpretation of "physical loss" articulated here is consistent with the meaning of "loss of use" in *Thee Sombrero*, which in both instances involves the loss of a

significant use of the real property at issue, and in the case of Rialto, the complete shutdown of business operations.

Further, California courts are solicitous of finding coverage where there is danger to occupants situated within the four walls of an insured premises. *Hughes v. Potomac Ins. Co. of the Dist. of Col.*, 199 Cal.App.2d 239 (1962), disapproved on other grounds in *Sabella v. Wisler*, 59 Cal.2d 21, 34 (1963). This is analogous to the danger existing to employees, customers, and the general public because of Covid-19's easy transmission within the clubs, absent the Covid-19 Governmental Orders preventing the use of the insured buildings for the clubs' business operations. 6-ER-1349-1350 ¶2.

Rialto's position is further supported by the California Court of Appeal's unpublished decision in *Univ. Sav. Bank v. Bankers Std. Ins. Co.*, 2004 WL 515952 (Cal. Ct. App. Mar. 17, 2004), which this Court may consider as persuasive authority. *Emp'rs. Ins. of Wasau v. Granite St. Ins. Co.,* 330 F.3d 1214, 1220 n.8 (9th Cir. 2003). There, the policy covered personal property (which is treated indistinguishably from real property under the Beazley Policy here), and insured against "the risk of direct physical loss or damage". 2004 WL 515952, at *6. The court noted that the "plain meaning of

'direct physical loss' encompasses physical displacement or loss of physical possession," and held "[t]he ordinary meaning of 'direct physical loss' is not the same as that of 'direct physical damage'". *Id.* (citing, *inter alia*, *Eott Energy Corp. v. Storebrand Int'l Ins. Co.*, 45 Cal.App.4th 565, 569 (1996) (coverage against "'all risks of direct physical loss or damage'" included theft losses)).

Unfortunately, the district court (like Beazley) did not consider any of Rialto's case law. Instead, it relied heavily upon the readily distinguishable case of *MRI,* 187 Cal.App.4th 766. *MRI*, which was the only California appellate authority Beazley relied upon in its motion and did ***not*** involve "direct physical loss or physical damage" language. Rather, *MRI* considered whether the lost use of an MRI machine after it was deliberately powered off by the insured qualified as an "accidental direct physical loss." 187 Cal.App.4th at 778. Ruling for the insurer, the court found that, "[f]or there to be a 'loss' within the meaning of the policy, some external force must have acted upon the insured property to cause a physical change in the condition of the property, i.e., it must have been 'damaged' within the common understanding of that term." *Id*. at 780. *MRI* is readily distinguishable for several reasons. 2-ER-265-266.

First, *MRI* is neither binding nor persuasive because it analyzed materially different policy language. The policy in *MRI* required the insurer to pay only for "accidental direct physical loss to business personal property" and did not include the term "physical damage." *Id.* at 771. The absence of this term is absolutely critical because the *MRI* court analyzed a *standalone* "direct physical loss" provision and was not required (as here) to juxtapose "physical loss" *or* "physical damage" to ensure each word had a separate meaning to avoid redundancy. Since *MRI* is "only authority for those issues actually considered or decided," *Rosen*, 30 Cal.4th at 1076, it is neither binding nor persuasive authority for interpreting the key phrase here – "direct physical loss or physical damage" – which was not before it. Put another way, even if *MRI* correctly interpreted the standalone term "direct physical loss" before it, that court's analysis does not apply to the different policy language at issue here. *McMillin Homes Constr., Inc. v. Nat'l Fire & Marine Ins. Co.*, 35 Cal.App.5th 1042, 1052-53 (2019) (before incorporating another court's construction of a policy term, the court must proceed "with caution, first determining whether the context in which the construed term appears is analogous") (citations omitted).

Second, *MRI's* comments about the meaning of "direct physical loss" also constitute dicta because the court held "[t]he undisputed evidence conclusively established the ramping down of the MRI machine was not "accidental." *Id.* at 781. Once the court held the loss was not "accidental," there was no need to consider whether "direct physical loss" had occurred.

Third, *MRI* is also distinguishable because, unlike that insured, Rialto has sustained covered (Time Element) losses and is not seeking replacement of business property or machinery paid for by its insurers.

Fourth, Rialto has not caused its own losses as occurred in *MRI*. *Id.* Here, in contrast, an external force (the Covid-19 Governmental Orders) acted upon Rialto's businesses, required it to shut down its income-generating business operations and suffer substantial losses of business income as a direct result.

6. Authorities Interpreting the Phrase "Direct Physical Loss or Physical Damage" Support Coverage in This Case

Like Beazley, the district court failed to address the growing body of case law supporting Rialto's interpretation of the phrase "direct physical loss or physical damage." In one instructive case, *North State Deli, LLC v. The Cincinnati Ins. Co.*, 2020 WL 6281507 (N.C. Super. Oct. 9, 2020), the court granted summary judgment to a group of restaurants seeking insurance coverage for business interruption losses arising out of certain pandemic-related government orders. The court adopted the same argument Rialto is advancing here. Specifically, after consulting common dictionary definitions for the undefined terms in the insuring clause, the court held the "ordinary meaning of the phrase 'direct physical loss' includes the ability to utilize or possess something in the real, material, or bodily world, resulting from a given cause without the intervention of other conditions." *Id*. at *3. Thus, "'[d]irect physical loss' describes the scenario where businessowners . . . lose the full range of rights and advantages of using or accessing their business

property. This is precisely the loss caused by the Government Orders." *Id.*

In a recent multi-district case, the court in *In Re: Society Ins. Co. Covid-19 Business Interruption Protection Ins. Litig.*, 2021 WL 679109, at *9 (N.D. Ill Feb. 22, 2021) observed:

> [V]iewed in the light most favorable to the Plaintiffs, the pandemic-caused shutdown orders do impose a *physical* limit: the restaurants are limited from using much of their physical space. It is not as if the shutdown orders imposed a *financial* limit on the restaurants by, for example, capping the dollar-amount of daily sales that each restaurant could make. No, instead the Plaintiffs cannot use (or cannot fully use) the physical space. Indeed, the policy defines "covered property" to include buildings at the premises, not just personal property or movable items.

Like the government shutdown orders in *North State Deli, LLC* and *In re Soc'y Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, the Covid-19 Governmental Orders prohibited Rialto from using the physical space of its on-premises clubs to conduct its income-generating business

operations. As such, Rialto's "loss" of its buildings was undoubtedly "physical."

The district court reached a similar outcome in *Kingray Inc. v. Farmers Group Inc.*, 2021 WL 837622 (C.D. Cal. Mar. 4, 2021). In *Kingray*, the court interpreted the phrase "direct physical loss of or damage to property" in a policy issued to one of the plaintiffs (Nora's). The court considered whether Nora's loss – dispossession – constitutes a "direct physical loss." *Id.* at *7. The court concluded that Nora had "compellingly contend[ed] that under both California and New York law, physical alteration to property is not necessary to constitute physical loss." *Id.* (citing *Hughes,* 199 Cal.App.2d at 242). Further, the court concluded that if the term "loss" shared a meaning with "damage," it would violate California's rules of policy interpretation. *Id.* at *8 (citation omitted). Therefore, the *Kingray* court held that "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 Nora's to close." *Id.*

7. Beazley's Reliance on the "Period of Liability" Provision is Misplaced

Although not addressed by the district court, Beazley strenuously argued below that its interpretation of "direct physical loss or physical damage" is supported by the Policy's "Period of Liability" provision because it includes the terms "repair" and "replace". 5-ER-923; 5-ER-930. Yet, as explained above, this provision actually supports Rialto's interpretation of the phrase. However, even if it were reasonable to read the "Period of Liability" provision as applying only to "physical damage" (and it is not), such a broad interpretation of this limiting provision is directly at odds with the insuring agreement, which expressly provides there can be covered loss for "physical loss" and "physical damage". Put another way, Beazley's interpretation still renders the Policy's insuring agreement – as it applies to "physical loss" – meaningless and illusory, an interpretation that under California law cannot be applied. *See Safeco,* 26 Cal.4th at 764-65.

Relatedly, since Beazley attempts to use the "Period of Liability" provision in such a way that it functions as an exclusion or limitation, Beazley must demonstrate it is "conspicuous, plain and clear" so an average layperson could

understand it that Rialto's claim "is specifically excluded." *Haynes,* 32 Cal.4th at 1204. It cannot make this showing. The "Period of Liability" provision is not conspicuous, plain, and clear because, *inter alia*, it is located five pages below the promise of coverage, it is inconsistent with the insuring agreement, it is not found under an "exclusion" heading, and it would mean there is no durational limitation for "physical loss". Thus, the provision is not enforceable.

Beazley also argues the "FAC is devoid of any allegations that [Rialto] (or its [sic] employees) were prohibited from physically accessing the premises as a result of COVID-19 or any other government orders" 5-ER-920-921. Yet, there is no requirement anywhere in the Policy that there must be a complete prohibition of access to the Insured Property, and Beazley (not surprisingly) fails to cite to any.[14] Once again, Beazley tries to rewrite its Policy to include coverage limitations that are not present.

Rialto's interpretation the Covid-19 Governmental Orders resulted in "direct physical loss" because they prevented Rialto from using the physical premises of its

---

[14] *Thee Sombrero*, 28 Cal.App.5th at 737 (reasonable insured expects "loss of use" means the loss of *any* significant use of the premises, not the total loss of all uses).

insured locations for purposes of conducting its income-generating business operations is a reasonable one. *See, e.g., Kean, et al. v. Nat'l Fire Ins. Co. of Hartford*, 2007 WL 2489711, at *6 (M.D. La. Aug. 29, 2007) (access to insured premises is prohibited where order or action of civil authority requires insured's business premises to close). And even if Rialto is required to allege it and its employees were prohibited from physically accessing the premises as a result of the Covid-19 Governmental Orders, the district court erred by failing to construe the FAC in the light most favorable to Rialto, "taking all allegations as true and drawing all reasonable inferences" in Rialto's favor. *Doe v. U.S.*, 419 F.3d 1058, 1062 (9th Cir. 2005).

8. Beazley's "Loss of Use" is Not Physical Damage Interpretation is Unavailing

The district court failed to address Beazley's argument that the inability to use property for its intended purposes is *solely* an economic loss that does not constitute physical damage to bring it within coverage. 5-ER-928-929. According to Beazley, if coverage could be established through "loss of use", it would lead to unreasonable and absurd results." 5-ER-930.

Beazley's "loss of use" is not physical damage interpretation must be rejected for several reasons. Beazley's interpretation conflates "physical loss" and "physical damage" rendering the term "physical loss" redundant or illusory. Beazley's argument also renders its promise of economic loss recovery for both "physical loss" or "physical damage" under the Time Element coverage provision illusory. Beazley's interpretation also violates the rules of policy interpretation by asking the Court to use public policy as an interpretive aid. *AIU Ins. Co.,* 51 Cal.3d at 818. Beazley's argument also ignores numerous Policy provisions that restrict or exclude coverage. Among other things, the insuring clause contains limitations such as "direct" and "physical", and the Policy also contains numerous exclusions and other types of limitations, only some of which Beazley raised in its motion. Beazley failed to address how these provisions prevent such alleged "unreasonable and absurd" results in the parties' bargained-for contract. Further, in *Anthem*, this Court rejected the argument Beazley advances here. 302 F.3d 1049, 1057 (9th Cir. 2002) (allegations in underlying complaint that defective circuit boards failed after they were installed in scanners, causing customers loss

of use of the scanners, sufficiently asserted "loss of use" property damage within the meaning of CGL policy)[15].

9. Beazley's Argument that the Loss of Possession of Property Must Be Permanent to Be Covered is Without Merit

Beazley, relying heavily upon *Total Intermodal Servs., Inc. v. Travelers Prop. Cas. Co. of Am.*, 2018 WL 3829767 (C.D. Cal. July 11, 2018), argued for the first time on reply that permanent (but not temporary) dispossession of insured property could also trigger coverage. 2-ER-226-227. Although the district court allowed Rialto to file a sur-reply to address Beazley's admission and new no-coverage argument, and the court stated it considered it (1-ER-5), it failed to discuss this

[15] In *Hendrickson v. Zurich Am. Ins. Co.*, 72 Cal.App.4th 1084 (1999), the policy at issue insured the strawberry plant seller against damages it incurred to third parties for "loss of use" of tangible property. The court held the complaint against the insured could "reasonably be construed as alleging that . . . the growers suffered a loss of strawberry production, and thereby a loss of the use of their land," due to the supply of defective plants. *Id*. at 1091. The court explained "loss of use of tangible property" under the policy provision is distinct from physical injury to the property and is not limited to losses caused by or relating to some physical injury to the property. *Id*. at 1090.

issue in its order. See 2-ER-201-204 (explaining why Beazley's "permanent dispossession" argument is without merit). There are numerous reasons why Beazley's "permanent" dispossession argument is unpersuasive.

First, Beazley's Policy provides for recovery if the insured is "wholly or partially prevented from . . . continuing business operations or services," and is devoid of any language that would alert Rialto that a temporary physical loss of real property is not covered. 6-ER-1428-1429. Thus, Beazley's concession there is coverage for "dispossession" actually helps Rialto, as it: (i) agrees with its position "physical loss" means a "loss of possession" of property; and (ii) attempts to interpose a "permanent" requirement into the Policy that lacks contractual support.

Second, the parties' intent is to be discerned, if at all possible, "solely from the written provisions of the contract." *Bank of the West,* 2 Cal.4th at 1264. Here, Beazley does not look to the Policy language for the permanent versus temporary loss of possession distinction (or for its "physical damage"-is-the-sole-trigger argument).

Third, and relatedly, because there is no Policy language supporting Beazley's permanent/temporary loss of possession distinction, no layperson reading the actual

language of the insuring agreement would be able to make such a distinction. This distinction is one only an attorney or insurance expert could make and therefore ambiguity exists. *See, e.g.*, *Crane,* 5 Cal.3d at 115.

Fourth, to adopt Beazley's argument, this Court would have to rewrite the parties' contract or substitute its own concepts of fairness, which it may not do. *Rosen*, 30 Cal.4th at 1073.[16]

Fifth, Beazley's "permanent" physical loss argument eliminates "physical loss" coverage for real property. Beazley, for example, provided no explanation of how one could "permanently" physically lose a building, and Rialto cannot think of one. The Policy, however, expressly promises coverage for "physical loss" to "Property Insured", which is defined to include both personal and real property, including the buildings at issue here. 6-ER-1418.

Sixth, to the extent Beazley argued in its Reply that temporary loss of possession is an unreasonable expansion of

---

[16] For example, the Policy would have to be rewritten to include either an exclusion stating that "physical loss" only applies to ***permanen***t "physical loss", or the insuring agreement would have to read "direct physical loss, *but only if* ***permanent***, or physical damage".

coverage, this is an inappropriate interpretation and rewriting of the Policy because of a public policy ground. *AIU Ins. Co.,* 51 Cal.3d at 818 (court cannot use public policy as an interpretative aid). The reason coverage exists here is because Beazley could have (but did not) write into its Policy a Civil Authority exclusion applicable to governmental orders generally, or public health and safety orders in particular.

Finally, the case law upon which Beazley relies for its permanent loss of possession argument is readily distinguishable. In *10E, LLC v. Travelers Indem. Co. of Conn.*, 2020 WL 5359653 (C.D. Cal. Sept. 2, 2020), for example, there is no reference to or analysis of policy language similar to that found in Beazley's Policy, no analysis regarding the nature of the policy at issue, and most importantly, no analysis of the policy language from the perspective of a reasonable layperson. *10E* is also factually distinguishable because the restaurant was still open and operating at a limited capacity, while Rialto's clubs are totally shut down. In *Plan Check Downtown III, LLC v. AmGuard Ins. Co.*, 2020 WL 5742712 (C.D. Cal. Sept. 10, 2020), the court failed to interpret the policy language from the perspective of a reasonable layperson and instead

violated California's rules of policy interpretation by creating redundancy and relying on public policy. *Mark's Engine Co. No. 28 Rest., LLC*, 2020 WL 5938689 (C.D. Cal. Oct. 2, 2020), relies on *10E* and is therefore inapposite for the same reasons.

10. The California Supreme Court Will Not Follow the Cases Upon Which Beazley Relies

None of the authorities upon which Beazley relied upon below are persuasive because they all conflate "physical loss" and "physical damage" in violation of the California Supreme Court's interpretive rules.[17] *See, e.g., 10E, LLC v. Travelers Indem. Co. of Conn.*, 2020 WL 5359653, at *4 (C.D. Cal. Sept. 2, 2020) (relying on readily distinguishable *MRI* case for proposition that "[p]hysical loss or damage occurs only when property undergoes a 'distinct, demonstrable, physical

[17] Beazley also relied on numerous non-California authorities in its motion to dismiss. *See, e.g., Rose's 1, LLC v. Erie Ins. Exch.*, 2020 WL 4589206 (D.C. Super. Ct. Aug. 6, 2020). These authorities, however, are unpersuasive because they conflate "physical loss" with "physical damage" rendering "physical loss" illusory. 2-ER-271. The California Supreme Court would never find these authorities persuasive.

alteration); *Pappy's Barber Shops, Inc. v. Farmers Group, Inc.*, 2020 WL 5500221, at *5 (S.D. Cal. Sept. 11, 2020) (physical loss requires physical damage) (citing *10E* and *MRI*); *The Inns by the Sea v. Cal. Mut. Ins. Co.*, 2020 WL 5868739 (Cal. Super. Ct. Aug. 6, 2020) (order contains no analysis whatsoever and currently on appeal). California's high court will find these cases inapposite under California law. *See, e.g., Vandenberg v. Sup. Court*, 21 Cal.4th 815, 841 (1999) (overruling 20 years of intermediate California appellate cases for incorrectly interpreting phrase "legally obligated to pay as damages").[18] *See* 2-ER-270-271.

---

[18] Rialto acknowledges a number of recent California district court decisions continue to rely on *10E* and *MRI* (without any *Erie* analysis), and *Kingray* is in the minority among California federal cases. Beazley will, no doubt, cite many of these decisions in its response brief. Indeed, it employed a strategy of abusive string citations below in lieu of a detailed analysis of the actual language in its own Policy. However, repeated citation to these flawed and/or distinguishable cases does not make them more persuasive. As *Vandenberg* makes clear, the California Supreme Court will not be swayed by the quantity of court rulings, especially where those rulings were incorrectly decided.

11. Even if Beazley's Interpretation Were Reasonable, the Presence of Two Reasonable Interpretations Means there is an Ambiguity that Must Be Resolved Against Beazley

Finally, even if Beazley's no-coverage interpretations are found to be reasonable, there are countervailing reasonable interpretations of the same policy language. The existence of splits between different jurisdictions (or courts within a jurisdiction) if reasonably arrived at is per se evidence of the reasonableness of the interpretation finding coverage. *See, e.g., Minkler v. Safeco Ins. Co. of Am.*, 49 Cal.4th 315, 332 (2010) (jurisdictional split gives rise to ambiguity, which "must be resolved, if possible, in a way that preserves the objectively reasonable coverage expectations of the insured seeking coverage"); *E.M.M.I. v. Zurich Am. Ins. Co.*, 32 Cal.4th 465, 476 (2004) (based upon policy ambiguity, finding coverage despite majority of decisions denying coverage). Indeed, this principle is frequently cited by insurance companies when defending their own conduct in bad faith cases. *See, e.g., Aetna Cas. & Sur. Co. v. Superior Court*, 778 P.2d 1333, 1336 (Ariz. Ct. App. 1989). The California Supreme Court will likely find coverage here. *See* 2-ER-271.

III. THE COVID-19 GOVERNMENTAL ORDERS ARE A COVERED CAUSE OF LOSS & NO POLICY EXCLUSIONS APPLY TO PRECLUDE COVEARGE AS A MATTER OF LAW

Beazley's motion to dismiss also raised various arguments asserting that the Covid-19 Governmental Orders were not a covered cause of loss. It also asserted that its Policy's Mold Exclusion applied as a matter of law to bar coverage for Rialto's claims. None of these arguments were addressed by the district court in its ruling. Rialto respectfully requests this Court address these issues now, as they have been fully briefed and it would be more efficient to do so at this time.

A. The Covid-19 Governmental Orders Are a Covered Cause of Loss

Under an "all risk" policy, such as Beazley's here, coverage exists for all risks, sometimes referred to as perils, unless they are expressly excluded under the terms of the subject policy. *State Farm Fire & Cas. Co. v. Von Der Lieth*, 54 Cal.3d 1123, 1131 (1991). The only kind of governmental "order" expressly excluded in Beazley's Policy is found at Beazley's General Exclusion A.9.f, which by its terms applies

to "seizure or destruction under quarantine or custom regulation, or *confiscation by order* of any governmental or public authority." 2-ER-275-276 & fn.11; 6-ER-1371 ¶ 83; 6-ER-1414-1415 (emphasis added).

The Policy does not contain any exclusions that broadly apply to any orders of any kind or any nature issued by any governmental or public authority. Nor does it contain any exclusion that are more narrowly drafted to apply to any governmental or public authority orders based upon public health and safety considerations, such as the Covid-19 Governmental Orders. Nevertheless, Beazley made two different arguments in its motion to dismiss asserting that the Covid-19 Governmental Orders were not a covered cause of loss, each of which is addressed below.

1. Beazley's Reliance Upon its "Law or Ordinance" Exclusion (General Exclusion A.6.) Lacks Merit

Beazley asserts that Rialto's claims for coverage are barred because the "Policy excludes . . . 6) loss from enforcement of any law or ordinance . . . regulating the construction, repair, replacement, use or removal . . . of any property." 5-ER-931. Therefore, according to Beazley, "losses

stemming from laws like the relevant [Covid-19] government order[s] are excluded from coverage." *Id.*

Under California law, Beazley has the burden to prove its "Law or Ordinance" exclusion applies. *See, e.g., Minkler,* 49 Cal.4th at 322. It fails to do so.

First, Beazley admitted in its Denial Letter that General Exclusion A. 6 (as well as A. 2 and 3) does not apply if the Time Element coverage provided by the Policy is triggered because, in such circumstances, there is physical loss or physical damage to property. 6-ER-1467 ("Any claim that would potentially fall within the scope of exclusions A. 2, 3 and 6 would be excluded ***unless otherwise covered by the Time Element coverage afforded by the policy***.") (Emphasis added). Beazley's admission, which also constitutes a practical interpretation that General Exclusion A.6 (its "Law or Ordinance" exclusion) does not apply to covered Time Element coverage, cannot be reconciled with its argument that the exclusion applies to render the Covid-19 Governmental Orders a non-covered cause of loss for Time Element coverage.[19]

---

[19] Beazley failed to reconcile its admission that its "Law or Ordinance" Exclusion (General Exclusion A.6.) does not apply to covered Time Element loss and its subsequent

Second, a review of the "law and ordinance" exclusion (Exclusion A.6) reveals it does not contain the word "order". The Policy does use the term "order" separate and apart from the words "law" and "ordinance". 6-ER-1415. This means all three words – "order", "law", and "ordinance" – must be given separate and distinct meanings. *Mirpad, LLC*, 132 Cal. App. 4th at 1070-73. Thus, under California rules of contract interpretation for purposes of the Policy, an "order" can be neither a "law" nor an "ordinance." This belies Beazley's assertion that Covid-19 Governmental Orders are within the meaning of "ordinance," which is central to its position that the "law or ordinance" exclusion applies.[20] 5-ER-931. The Covid-19 Government Shutdown Orders do not qualify as a "law or ordinance", rendering Exclusion A. 6 inapplicable by its terms.

Further, even if the subject Covid-19 Government Shutdown Orders were interpreted as constituting a "law or

---

assertion that the same exclusion, for purposes of Covid-19 Governmental Orders, bars Time Element coverage.

[20] One would have to be an attorney to understand, as asserted by Beazley, that an "order" means an "ordinance". The legal knowledge and legal distinctions and nuances that would have to be made in these circumstances render the exclusion ambiguous. *See, e.g.*, *Crane,* 5 Cal.3d at 115.

ordinance", the exclusion by its express terms applies only to a "law or ordinance" that regulates construction, repair, replacement, removal and debris removal, none of which are at issue here. And while this exclusion also includes the term "use" in the phrase "use or removal", under the principle of *ejusdem generis*, this term must be construed as having a similar nature to the other listed terms such as construction, repair and replacement. *Pfeiffer v. Countrywide Home Loans, Inc.*, 211 Cal.App.4th 1250, 1275 (2012). Thus, the term "use", as used in Exclusion A. 6, applies to law or ordinances involving, *inter alia,* matters involving construction, repair, replacement and debris removal and does not apply to the public health and safety Covid-19 Governmental Orders at issue here. Case law interpreting this exclusion is in accord. *See, e.g.*, *Bischel v. Fire Ins. Exch.*, 1 Cal.App.4th 1168, 1173-74 (1991) (cost of construction upgrades required by ordinances or laws are borne by the property owner rather than insurer). Beazley, contrary to California law, takes out of context the single word "use" found in its "law or ordinance" exclusion and tries to broadly "spin" the word "use" so that the exclusion applies to a completely different peril, the health and safety based Covid-19 Governmental Orders issued here due to a viral pandemic. A broad

interpretation of an exclusion is not permissible under California law. *MacKinnon*, 31 Cal.4h at 648.

2. Beazley's Specious "Civil Authority" Argument Asserts an Extension of Coverage is Really an Exclusion

The Policy provides coverage for Time Element loss if the Property Insured, such as the buildings at Insured Locations sustain either "direct physical loss or physical damage". The Policy also provides additional Time Element coverage – beyond what is otherwise provided under the Policy – in certain situations where the insured location does not sustain any "direct physical loss or physical damage" but other property does, under the heading "Civil Or Military Authority" ("Civil Authority").

Specifically, the Civil Authority additional coverage provision applies if orders by civil or military authorities prohibit access to an Insured Location as the direct result of direct physical loss or direct physical damage ***to other property*** situated within one statute mile of the Insured Location. 6-ER-1436. This provision does not say it excludes or limits coverage otherwise provided by the Policy, and it is not located in the "Time Element Exclusions" section of the Policy. Instead, it is

found 8 pages below the insuring agreement for the Time Element coverage. *Id.*

The Civil Authority provision is a grant of additional coverage that does not limit coverage otherwise available. *Sierra Pac. Power Co. v. Hartford Steam Boiler Inspection & Ins. Co.*, 665 F.3d 1166, 1173 (9th Cir. 2012). Nevertheless, without citing to any supporting authority, Beazley treats the "Civil Authority" coverage as a policy limitation or exclusion, whose terms, if not satisfied, preclude coverage for the Covid-19 Governmental Orders as applied to an Insured Location. 5-ER-931. Incorrect. By its terms, the Civil Authority provision has nothing to do with the question of whether an insured location sustains "direct physical loss or physical damage" because of a covered cause of loss, such as the Covid-19 Governmental Orders. Conversely, if as Beazley asserts the Civil Authority provision is really a limitation or exclusion upon coverage, based upon its language and location in the Policy, the provision is not plain, clear, or conspicuous, and therefore it is not enforceable under California law. *Haynes,* 32 Cal.4th at 1204.

B. Beazley's "Mold Exclusion" Defense Lacks Merit

Rialto's FAC painstakingly analyzes the Mold Exclusion (Exclusion D) in Beazley's Policy. 6-ER-1386-1390

¶128(a)-(h). By its express terms, the Mold Exclusion applies to mold, mildew fungus, spores, and microorganisms. Conspicuously absent is the word virus(es). If Beazley wanted this exclusion (or one of its other exclusions) to apply to a virus(es), it could have expressly done so.

Beazley's motion not only failed to address these issues, it also failed to analyze the actual terms in its own Policy. Instead, Beazley sought to satisfy its heavy burden of establishing that its interpretation of the Mold Exclusion as applying to viruses is the *only* reasonable one by: (a) incorrectly interpreting the term "microorganism" in isolation, (b) relying on readily distinguishable case law, and (c) asking the district court to take judicial notice of inadmissible, disputed scientific sources, that do not constitute the plain meaning a layperson would give to the word microorganism as used here in context. Beazley's arguments are without merit.

1. Beazley's Interpretation of "Microorganism" is Unavailing

First, Rialto has suggested a reasonable interpretation of the Mold Exclusion and the term "microorganism" (*i.e.*, a living organism of microscopic or ultramicroscopic size). *See Microorganism*, Cambridge Online Dictionary; 6-ER-1387 ¶

128(b); 2-ER-272. Even if Beazley's interpretation were reasonable (and it is not), Beazley cannot satisfy its burden of establishing its interpretation of the Mold Exclusion is the *only* reasonable interpretation. None of the words preceding microorganism in the Mold Exclusion – giving them their plain meaning – remotely qualify as a virus. *Virus*, Dictionary.com ("Viruses are not technically considered living organisms because they are devoid of biological processes"). The plain every meaning of microorganism itself does not include "virus". 6-ER-1387 ¶ 128(b); 2-ER-272.

A reasonable layperson looking at the entire Mold Exclusion would not interpret it as applying to viruses. The word "microorganism", interpreted in context as it is used in the Mold Exclusion, refers to a living organism of microscopic or ultramicroscopic size of the same general nature of the proceeding items, e.g., molds, mildew, fungus, and spores. *Pfeifer*, 211 Cal.App.4th at 1275.

Beazley failed to cite any authority involving the same or similar language wherein a court, let alone a California appellate court, interpreted a mold exclusion as applying to

viruses. 2-ER-273.[21] Rialto's interpretation that the Mold Exclusion does not apply to viruses is reasonable. Rialto would also have the reasonable expectation that a policy, like Beazley's, which does not contain any exclusion stating it applies to viruses, does not exclude "direct physical loss or physical damage" caused by viruses. Further, even if Beazley's interpretation were reasonable, the resulting ambiguity is construed against Beazley. *Reserve Ins. Co.,* 30 Cal.3d at 807-08.

Second, Beazley is asking for a court to rewrite the Mold Exclusion so it includes the term "virus," which is not a living thing. This would require a court to: (i) add the word "virus" to the specific list of enumerated items so it reads "mold, mildew, fungus, spores, ***[viruses]*** or microorganisms of any type"; or (ii) specially define microorganism to include, *inter alia*, "viruses". This Court cannot rewrite the Policy. *Rosen,* 30 Cal.4th at 1077.

Third, if Beazley had intended to exclude viruses, it could have done so. Virus exclusions for first-party property policies were available in the marketplace at the time the

---

[21] *See, e.g.*, *Martinez v. Allied Ins. Co. of Am.,* 2020 WL 540218, at *2 (M.D. Fla. Sept. 2, 2020) (policy expressly excluded "viruses," unlike Beazley Policy).

policy was written. 6-ER-1388-1389 ¶ 128(d). *See, e.g., Meyer Nat. Foods, LLC v. Liberty Mut. Fire Ins. Co.*, 218 F.Supp.3d 1034, 1037-38 (D. Neb. 2016). Beazley's failure to use available exclusionary language gives rise to the inference the parties intended not to so limit coverage. *Fireman's Fund Ins. Co. v. Atl. Richfield Co.*, 94 Cal.App.4th 842, 852 (2001).

Fourth, Beazley's reliance on secondary scientific sources that purportedly support its argument that SARS-CoV-2 is a microorganism excluded under the Mold Exclusion is misplaced. Among other things, the Court must interpret the Beazley Policy as an ordinary layperson would read it, not as a scientific expert would do so. *Crane,* 5 Cal.3d at 115. If the Mold Exclusion requires an Insured to have scientific expertise to interpret its terms, it is uncertain and ambiguous, not conspicuous, plain and clear. *AIU Ins. Co.,* 51 Cal.3d at 825 (unreasonable to conclude that phrase "legally obligated to pay" unambiguously incorporated sophisticated legal distinction); *Ponder v. Blue Cross of So. Cal.*, 145 Cal.App.3d 709, 724 (1983) (exclusion not plain and clear where it has meaning primarily for health professionals). There is no reasonable basis for interpreting the subject Mold Exclusion as unambiguously applying to

viruses, such as the coronavirus. Once again, Beazley is trying to assert an exceedingly broad interpretation of an exclusion, contrary to California law. *MacKinnon*, 31 Cal.4th at 648.

2. Determining the "Efficient Proximate Cause" of Rialto's Losses Is a Jury Question

Rialto asserts that the Covid-19 Governmental Orders (an insured cause of loss) caused "direct physical loss" to their insured buildings, thereby triggering Beazley's obligation to pay them the Time Element losses they sustained. Beazley, as discussed in the proceeding section, also asserts that the coronavirus, which pursuant to its interpretation of its Mold Exclusion is an excluded risk, also caused Rialto's Time Element losses. Assuming arguendo this Court determines that the Mold Exclusion applies to viruses, we are presented with the situation where both a covered risk (Covid-19 Governmental Orders) and an excluded risk (the coronavirus) both caused or contributed to the Time Element losses.

In such situations, it is a factual question for a jury to determine whether the assumed excluded risk (the coronavirus) or the Covid-19 Governmental Orders

mandating the shutdown of Rialto's Insured Locations are the "efficient proximate cause" (i.e., the "predominating" or "most important cause") of Rialto's Time Element losses. As such, Rialto's losses are covered if the jury determines the Covid-19 Governmental Orders are the predominant or most important cause of Rialto's losses. *Von Der Lieth*, 54 Cal.3d at 1131 ("the question of what caused the loss is generally a question of fact."); *Encompass Ins. Co. v. Berger*, 2014 WL 4987978, at *24 (C.D. Cal. Oct. 7, 2014) (citing, *inter alia*, *Howell v. State Farm Fire & Cas. Co.*, 218 Cal.App.3d 1446, 1459 (1990); California Civil Jury Instruction 2306).

Beazley asserted in its motion that the court, as a matter of law, can determine that Rialto's Time Element losses are not covered because they were caused by the presumed excluded risk of viruses. 2-ER-235. Beazley's reliance on *Boxed Foods Co., LLC v. Cal. Cap. Ins. Co.*, 2020 WL 6271021 (N.D. Cal. Oct. 27, 2020) to support to support this proposition is sorely misplaced. In *Boxed Foods*, the court found Covid-19, not the Civil Authority Orders, was "the efficient proximate cause of Plaintiffs' losses" because "[t]he Civil Authority Orders would not exist absent the presence of Covid-19." *Id.* at *4. This conclusion is at odds with California's *current* efficient proximate cause doctrine.

While the California Supreme Court *initially* characterized the efficient proximate cause as "the one that sets others in motion", *Sabella*, 59 Cal.2d at 31, it later moved away from this formulation and held the efficient proximate cause is "the predominating" or "most important cause of the loss." *Tento Int'l, Inc. v. State Farm Fire & Cas. Co.*, 222 F.3d 660, 663 (9th Cir. 2000) (quoting *Garvey*, 48 Cal.3d at 406).

Boxed Foods is not persuasive authority to support Beazley's position, especially where its ruling runs directly counter to the law of California as determined by the California Supreme Court. If this Court were to rule the Mold Exclusion applies to the coronavirus, then it is a factual question for a jury to determine whether the Covid-19 Governmental Orders or the Mold (Virus) Exclusion is the predominant or most important cause of Rialto's Time Element losses.[22]

---

[22] Beazley's reliance on *Victoria Family LLP v. Ohio Sec. Ins. Co.*, 2020 WL 4430994, at *8 (S.D. Cal. July 31, 2020) for the proposition that the efficient proximate cause doctrine applies only where two or more perils "occurred independently of the other and caused damage" is equally unavailing. While *Victoria Family* relied on *De Bruyn v. Superior Court*, 158 Cal.App.4th 1213, 1223 (2008) for this proposition, *De Bruyn* actually states: "But it is not necessary that those two or more perils did in fact occur

IV. IN THE ALTERNATIVE, THIS COURT SHOULD CERTIFY RIALTO'S PROPOSED QUESTIONS TO THE CALIFORNIA SUPREME COURT

Upon request to the Ninth Circuit, the California Supreme Court may decide a question of California law if: (1) the decision could determine the outcome of a matter pending in the requesting court; and (2) there is no controlling precedent. Cal. R. Ct. 8.548(a). In deciding whether to exercise its discretion to certify a question, the Ninth Circuit considers: (1) whether the question presents important public policy ramifications yet unresolved by the state court; (2) whether the issue is new, substantial, and of broad application; (3) the state court's caseload; and (4) the spirit of comity and federalism. *Murray v. BEJ Minerals, LLC*, 924 F.3d 1070, 1072 (9th Cir. 2019) (en banc). If the questions presented by the appeal are unsettled and the answers are likely to affect a large number of businesses, then "'[c]omity and federalism counsel that the California Supreme Court, rather than this court, should answer' the certified question."

---

independently to cause the loss for which coverage is sought." 158 Cal.App.4th at 1223 (quoting *Garvey*). *See* 2-ER-205-206.

Vazquez v. Jan-Pro Franchising Int'l, Inc., 939 F.3d 1045, 1049 (9th Cir. 2019).

There is no controlling precedent because the questions presented by this appeal have not been decided by the California Supreme Court or any California Court of Appeal. The California Supreme Court's answers to these questions would determine this appeal, and there is no reason to believe that the Court's caseload would preclude it from doing so. As evidenced by the multitude of COVID-19 insurance cases that has been filed in the state and federal courts located in California, there are thousands of businesses that will be affected by the answers to the questions presented by this appeal. Because thousands of businesses may be on the brink of financial collapse in COVID-19's wake, because uncertainty and delay exacerbate their plight, and because only the California Supreme Court can provide certainty, the questions presented by this appeal should be certified. Based on comity and federalism, the California Supreme Court, rather the Ninth Circuit, should answer these unsettled questions. *See Vazquez*, 939 F.3d at 1049. Rialto asks the Court to certify the first two questions posed in its Statement of Issues, *supra*.

V. CONCLUSION

Rialto asks the Court to reverse the district court's order and judgment dismissing its FAC, and that the case be remanded to the district court. Alternatively, Rialto asks the Court to certify the first two questions presented by this appeal to the California Supreme Court.

Date:June 7, 2021

FORTIS LLP

/s/ Stanley H. Shure
Stanley H. Shure
Peter E. Garrell
Salvatore Picariello
FORTIS LLP
650 Town Center Dr., Ste 1530
Costa Mesa, CA 92626
Tel. (714) 839-3800
Attorneys for Appellants

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Instructions for this form: http://www.ca9.uscourts.gov/forms/form17instructions.pdf

9th Cir. Case Number(s) ____21-55196________________________________

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.

[X] 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:

(1) Mudpie, Inc. v. Travelers Cas. Ins., Case No. 20-16858
(2) Selane Prods., Inc. v. Continental Cas. Co., Case No. 21-55123
(3) Plan Check Downtown III, LLC v. AmGuard Ins. Co., Case No. 20-56020
(4) Kevin Barry Fine Art Assocs. v. Sentinel Ins. Co., Case No. 21-15240
(5) 10E, LLC v. Travelers Indem. Co., Case No. 20-56206
(6) Unmasked Mgmt., Inc. et al. v. Century Nat'l Ins. Co., Case No. 21-55090
(7) Marks Engine Co. No. 28 Re v. Travelers Property Cas. Co., Case No. 20-56031
(8) Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co., Case No. 21-15366

The above actions appear to be appeals concerning business interruption insurance coverage for losses relating to Covid-19 Governmental Orders.

Signature _s/*Stanley H. Shure*________________ **Date** __6/7/2021____________
(use "s/[typed name]" *to sign electronically-filed documents)*

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 21-55196

I am the attorney or self-represented party.

This brief contains 13990 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)*:

[X] 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;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] 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/*Stanley H. Shure*_________________ **Date** __6/7/2021___________
(use "s/[typed name]" *to sign electronically-filed documents)*

ADDENDUM

TABLE OF CONTENTS

28 U.S.C. § 1291 94
28 U.S.C. § 1332 94
Cal. Civ. Code § 1636 (Deering) 92
Cal. Civ. Code § 1641 (Deering) 93
Cal. Rules of Court 8.548 93
Fed. R. App. P. 4 95
Fed. R. Civ. P. 12 95

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 § 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.

Cal. R. Ct. 8.548(a):

On request of the United States Supreme Court, a United States Court of Appeals, or the court of last resort of any state, territory, or commonwealth, the Supreme Court may decide a question of California law if:

(1) The decision could determine the outcome of a matter pending in the requesting court; and

(2) There is no controlling precedent.

28 U.S.C. § 1291:

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1332(a):

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state, except that the district courts shall not have original jurisdiction under this subsection of an action between citizens of a State and citizens or subjects of a foreign state who are lawfully admitted

for permanent residence in the United States and are domiciled in the same State;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

Fed. R. App. P. 4(a)(1)(A):

In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

Fed. R. Civ. P. 12(b)(6):

Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(6) failure to state a claim upon which relief can be granted . . . .