No. 21-15240
Oral Argument Requested

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEVIN BARRY FINE ART ASSOCIATES,

Plaintiff–Appellant,

v.

SENTINEL INSURANCE COMPANY,

Defendant–Appellee.

APPEAL FROM THE U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA
HON. SALLIE KIM NO. 3:20-CV-04783

APPELLANT'S OPENING BRIEF

HANSON BRIDGETT LLP
ALEXANDER J. BERLINE
JOSEPHINE K. PETRICK
SEAN G. HERMAN

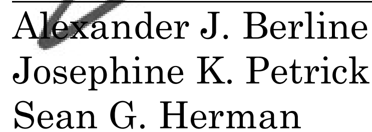
425 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105
(415) 777-3200
ABERLINE@HANSONBRIDGETT.COM
JPETRICK@HANSONBRIDGETT.COM
SHERMAN@HANSONBRIDGETT.COM

COUNSEL FOR APPELLANT
KEVIN BARRY FINE ART ASSOCIATES

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellant Kevin Barry Fine Art Associates states that it has nothing to report.

Dated: May 26, 2021 **HANSON BRIDGETT LLP**



By: ______________________

Alexander J. Berline
Josephine K. Petrick
Sean G. Herman

Counsel for Plaintiff-Appellant
KEVIN BARRY FINE ART ASSOCIATES

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HON. SALLIE KIM NO. 3:20-CV-04783

APPELLANT'S OPENING BRIEF

INTRODUCTION

This is among the first appellate cases in the country to address whether business interruption insurance is available to cover policyholders' economic losses incurred in connection with the COVID-19 pandemic. However, this case is different from many of the thousands of COVID-19-related business-interruption insurance cases making their way through the courts, due to one crucial difference: Plaintiff–Appellant Kevin Barry Fine Art Associates ("KBFA"), the insured here, purchased virus coverage.

While many insurers adopted an absolute virus exclusion proposed by the insurance industry's drafting arm (Insurance Services Office, Inc.), KBFA's insurer, Sentinel Insurance Co., d/b/a The Hartford ("Sentinel"), elected to sell "additional" "Limited Fungi, Bacteria or Virus Coverage." While certain virus-related risks are excluded, KBFA's policy with Sentinel provided: "*We will pay for loss or damage by 'fungi', wet rot, dry rot, bacteria and virus*." (3-ER-445 ¶ B.1.b)

When the COVID-19 pandemic hit San Francisco, Los Angeles, and Las Vegas, where KBFA operates its art galleries, the civil authorities ordered that nonessential businesses including KBFA close due to the presence or potential presence of the deadly Coronavirus. For example, hundreds of cases of COVID-19 were reported in the immediate vicinity of KBFA's San Francisco gallery. Consequently, KBFA was unable to access its galleries for their intended purpose: to show and sell art to the public. KBFA timely submitted a claim, but Sentinel denied coverage the very next day.

KBFA sued for breach of contract and bad faith, but the district court granted Sentinel's motion for judgment on the pleadings. The

district court ruled that KBFA must show that the presence of the Coronavirus caused either a permanent dispossession or a demonstrable physical alteration to the property—a question that has split trial courts across the country.

This Court should reverse. The plain text of the Policy provides that Sentinel "will pay for direct physical loss of or physical damage to Covered Property at the premises[.]" (3-ER-336 ¶ A; *accord* 3-ER-445 ¶ B.1.b [similar language in Virus Endorsement]) If Sentinel wished to limit coverage to "total and complete" or "unrecoverable" physical loss, or physical damage that "permanently changed the condition of the property," it could have done so.

But Sentinel did not do so. Instead, it sold coverage in the event of "direct physical loss" *or* "direct physical damage." Especially given that KBFA purchased Sentinel's optional virus coverage in addition to its standard business-interruption insurance, KBFA's reasonable expectation as an insured was that its business losses occasioned by the Coronavirus pandemic would be covered.

The district court's order here is inconsistent with the text of the policy, California insurance law, and the principle protecting the

reasonable expectations of policyholders. And though the district court did not reach the remaining requirements for coverage, they are all met here, under multiple independent policy provisions. KBFA respectfully requests that this Court certify to the California Supreme Court whether the Policy's direct physical loss or damage clause may encompass loss of the ability to access the covered premises for their intended purposes. And ultimately, KBFA respectfully requests that this Court reverse the judgment and remand for further proceedings.

JURISDICTION

The district court had diversity jurisdiction because the parties are citizens of different states and the amount in controversy exceeds $75,000. (3-ER-514–15 ¶¶ 9, 12-13) 28 U.S.C. § 1332.

The district court granted Sentinel's motion for judgment on the pleadings in an order dated January 13, 2021, and entered judgment the same day. (1-ER-2–3) On February 10, 2021, within 30 days of entry of judgment, KBFA timely filed its notice of appeal. (2-ER-16) *See* Fed. R. App. P. 4(a)(1)(A). This appeal is from a final judgment that disposes of all parties' claims. (1-ER 2–14) This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

1. For coverage to attach, KBFA's Policy requires direct physical loss or direct physical damage to covered property. One possible interpretation is that not being able to access property for its intended purpose is a type of "direct physical loss." Did the district court err in ruling that this provision tacitly requires a permanent dispossession or a physical alteration to the property? At a minimum, is the provision ambiguous, such that it must be read in favor of coverage?

2. The Virus Endorsement also requires that the "virus" in question be "the result of" a "specified cause of loss," which includes "aircraft or vehicles." Is the Policy reasonably susceptible to the interpretation that the Coronavirus pandemic in the United States—and KBFA's resulting business losses—were caused by travel by "aircraft or vehicles"?

3. Alternatively, would denying coverage here render the Virus Coverage provision illusory because, under Sentinel's interpretation, there is no scenario in which KBFA would be entitled to Virus Coverage?

4. Additionally and independently, did KBFA state a claim under the Policy's Civil Authority, Business Income, Extra Expense, and "sue and labor" provisions?

STATEMENT OF THE CASE

I. Statement of Facts

A. In July 2006, anticipating "the specter of pandemic," the insurance industry proposes new express virus exclusions, which Sentinel does not include in KBFA's policy.

The Insurance Services Office, Inc. ("ISO"), advises insurance companies nationwide on insurance products and services, and provides standard insurance forms for insurance companies. (2-ER-95–106; 3-ER-517 ¶ 25)

In July 2006, the ISO published a circular ("ISO Circular") recommending insurance companies to adopt express virus exclusions, and providing a proposed exclusion form, captioned "Exclusion of Loss Due to Virus or Bacteria." (2-ER-95, 102; 3-ER-517 ¶ 25) The ISO's virus exclusion provides: "We will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease."

(2-ER-102 & ¶ B) The ISO Circular recognized "the specter of pandemic" as necessitating such an exclusion. (2-ER-100)

As described herein, this case does not involve such a virus exclusion; rather, it includes virus coverage. (3-ER-444–46)

B. KBFA purchases insurance from Sentinel to protect its art gallery business.

KBFA has three retail locations at which it sold art to the public. (3-ER-513 ¶ 1, 515 ¶ 12, 301–12) KBFA purchased Policy No. 72 SBA IA0061 SC (the "Policy") from Sentinel for a policy period of March 1, 2020, to March 1, 2021. (3-ER-300, 336, 514–15 ¶¶ 3, 14) The "Covered Property" at issue in the Policy refers to KBFA's three retail locations in San Francisco, Los Angeles, and Las Vegas. (3-ER-301–12, 515 ¶ 14)

The Policy's Special Property Coverage Form includes Business Income, Civil Authority, Extra Expense, and "Sue and Labor" coverages. (3-ER-515 ¶ 15, 345–46 ¶¶ A.5.o-q, 355 ¶ 3) As detailed below, the Policy also includes "Limited Fungi, Bacteria or Virus Coverage." (3-ER-444–45, 516 ¶¶ 17-19)

The Special Property Coverage Form contains the following general coverage provisions:

A. COVERAGE

We will pay for direct physical loss of or physical damage to Covered Property at the premises described in the Declarations (also called "scheduled premises" in this policy) caused by or resulting from a Covered Cause of Loss.

(3-ER-336 ¶ A)

3. Covered Causes of Loss

RISKS OF DIRECT PHYSICAL LOSS unless the loss is:

a. Excluded in Section B., **EXCLUSIONS**; or

b. Limited in Paragraph **A.4.** Limitations; that follow.

(3-ER-337 ¶ A.3)

C. The Policy that Sentinel sold to KBFA includes "Limited Fungi, Bacteria or Virus Coverage."

In addition to its standard business coverages, Sentinel sold KBFA a "Limited Fungi, Bacteria or Virus Coverage" (hereinafter, "Virus Coverage" located in the "Virus Endorsement"). (3-ER-444–45) With certain exceptions detailed below, the Virus Endorsement states: "*We will pay for loss or damage by 'fungi', wet rot, dry rot, bacteria and virus.*" (3-ER-445 ¶ B.1.b [emphasis added])

The Policy provides a separate policy limit of $50,000 for the Virus Coverage for each covered property. (3-ER-302, 305, 308) The term "Limited" Virus Coverage refers to the fact that the Virus Coverage has a separate policy limit from the rest of the Policy. (*See* 3-ER-302, 305, 308, 445 ¶ B.1.c; *cf.* 3-ER-313–14 [general limits of insurance])

The Virus Coverage "only applies when the 'fungi', wet or dry rot, bacteria or virus is the result of" a "specified cause of loss" or equipment breakdown. (3-ER-445 ¶ B.1.a) The Policy defines "specified cause of loss" as follows:

19. "Specified Cause of Loss" means the following:

Fire; lightning; explosion, windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; water damage.

(3-ER-360 ¶ G.19)

The Policy also provides a more specific definition of "loss or damage" for purposes of the Virus Coverage:

b. We will pay for loss or damage by "fungi", wet rot, dry rot, bacteria and virus. As used in this Limited Coverage, the term loss or damage means:

(1) Direct physical loss or direct physical damage to Covered Property caused by "fungi", wet rot, dry rot, bacteria or virus, including the cost of removal of the "fungi", wet rot, dry rot, bacteria or virus;

(2) The cost to tear out and replace any part of the building or other property as needed to gain access to the "fungi", wet rot, dry rot, bacteria or virus; and

(3) The cost of testing performed after removal, repair, replacement or restoration of the damaged property is completed, provided there is a reason to believe that "fungi", wet rot, dry rot, bacteria or virus are present.

(3-ER-445 ¶ B.1.b)

The Virus Coverage form also contains language purporting to exclude certain risks associated with "'Fungi', Wet Rot, Dry Rot, Bacteria And Virus":

> **i. "Fungi", Wet Rot, Dry Rot, Bacteria And Virus**
>
> We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss:
>
> **(1)** Presence, growth, proliferation, spread or any activity of "fungi", wet rot, dry rot, bacteria or virus.
>
> **(2)** But if "fungi", wet rot, dry rot, bacteria or virus results in a "specified cause of loss" to Covered Property, we will pay for the loss or damage caused by that "specified cause of loss".

(3-ER-444 ¶ A.2.i)

However, the Policy expressly carves out the "Limited Coverage For 'Fungi', Wet Rot, Dry Rot, Bacteria and Virus" from the scope of the virus exclusion:

> This exclusion does not apply:
>
> **(1)** When "fungi", wet or dry rot, bacteria or virus results from fire or lightning; or
>
> **(2)** To the extent that coverage is provided in the Additional Coverage – Limited Coverage for "Fungi", Wet Rot, Dry Rot, Bacteria and Virus with respect to loss or damage by a cause of loss other than fire or lightning.
>
> This exclusion applies whether or not the loss event results in widespread damage or affects a substantial area.

(3-ER-444 ¶ A.2.i)

Thus, the "Fungi, Bacteria or Virus Exclusions" do not affect the "Limited Coverage for 'Fungi', Wet Rot, Dry Rot, Bacteria and Virus." (3-ER-444–45 ¶¶ A, B.1)

D. In January 2020, the first case of the Coronavirus is imported to the United States by overseas air travel.

On January 15, 2020, a traveler arrived by airplane from Wuhan, China, to Washington State, carrying the first case of the imported SARS-CoV-2 virus ("Coronavirus"), which causes the deadly COVID-19 disease. (2-ER-88)

Several travelers infected with Coronavirus entered the United States by airplane from Europe in February and March. (2-ER-88) Early on, COVID-19 cases were detected in the San Francisco Bay Area and beyond. (*E.g.*, 2-ER-88) The Coronavirus spread rapidly and has become a global pandemic, killing millions and infecting millions more. (*See* 3-ER-86–90)

E. Coronavirus spreads to the communities in which KBFA operates its businesses, causing civil authorities to issue extended shelter-in-place orders.

In March 2020, the California governor declared a state of emergency due to the Coronavirus pandemic and issued an executive order requiring all individuals to remain at home indefinitely. (3-ER-518–19 ¶¶ 31-32, 34–35) The Counties of San Francisco and Los Angeles also imposed shelter-in-place orders that prohibited non-

essential businesses from operating. (3-ER-518–19 ¶¶ 33, 36, 38, 40-41) Nevada followed with an order that all non-essential businesses close. (3-ER-519 ¶¶ 37, 39) (Collectively, the "Closure Orders.")

While the Closure Orders were community-wide, the neighborhoods in which KBFA operates have been specifically impacted; for instance, as of December 4, 2020, hundreds of cases were reported in the immediate vicinity of KBFA's San Francisco gallery at 101 Henry Adams Street. (2-ER-82; *see* 3-ER-306, 519 ¶ 45)

F. KBFA incurs business losses as a result of the Coronavirus pandemic and Closure Orders.

KBFA was forced to close each of its retail locations in March 2020 due to the Closure Orders. (3-ER-513 ¶ 1) As a result, KBFA lost "business income" and incurred "extra expenses." (3-ER-520 ¶ 48; *see* 3-ER-345 ¶ A.5.o-p)

G. Sentinel denies KBFA's business-interruption insurance claim the day after it is submitted.

KBFA has performed all of its obligations under the Policy, including the payment of premiums. (3-ER-515 ¶ 14)

On April 2, 2020, KBFA submitted a claim of loss under the Policy to Sentinel. (3-ER-520 ¶ 49) Sentinel denied the claim the next day. (3-ER-520 ¶ 50)

H. The California Department of Insurance reminds insurers of their obligation to fairly investigate Coronavirus business-interruption claims.

When the pandemic hit, California Insurance Commissioner Ricardo Lara began receiving complaints that insurance representatives were attempting to dissuade policyholders from making business-interruption claims related to the COVID-19 pandemic; and that when policyholders made such claims, the insurers refused to investigate them. (2-ER-92; 3-ER-519–20 ¶ 46)

The California Department of Insurance issued a notice reminding insurance companies of their obligation to comply with their legal obligations to fairly investigate all business-interruption claims made in connection with the pandemic. (3-ER-519–20 ¶ 46; 2-ER-92) *See* Cal. Ins. Code § 790.03; 10 Cal. Code Regs. § 2695.7.

II. Procedural History

KBFA sued Sentinel for breach of contract, breach of the implied covenant of good faith and fair dealing, and declaratory relief. (3-ER-513–31)

Sentinel moved for judgment on the pleadings, which the district court granted in an order dated January 13, 2021. (1-ER-3–14) The district court entered final judgment the same day. (1-ER-2) This appeal ensued. (2-ER-16)

SUMMARY OF ARGUMENT

First, the presence or potential presence of the Coronavirus caused "direct physical loss" or "direct physical damage" by denying access to KBFA's Covered Properties for their intended purpose. (3-ER-336 ¶ A, 445 ¶ B.1.b)

While Sentinel argued that the Policy's direct physical loss or damage provision tacitly requires either a permanent dispossession or a distinct, demonstrable, physical alteration to the property, that is not the only possible interpretation. A reasonable alternative interpretation is that direct physical loss or damage occurs when covered property is rendered unusable for its intended purpose, because

not being able to use property for its intended purpose is a type of "direct physical loss." The Policy does not foreclose this alternative interpretation. Under California law, the provision is therefore ambiguous, and must be read in favor of coverage.

In its ruling, however, the district court erred by failing to consider whether the text of the Policy is reasonably susceptible to more than one interpretation, an analytical step required by California precedents; and erred by writing into the policy terms favorable to Sentinel that do not appear on the face of the Policy.

If there is any question as to whether the district court erred in its ruling regarding the direct physical loss or direct physical damage provision, this Court should certify the question to the California Supreme Court.

Second, though the district court did not reach the issue, the Coronavirus pandemic in the United States was caused by travel by "aircraft or vehicles"—a "specified cause of loss," satisfying the remaining condition for Virus Coverage to apply. (3-ER-445 ¶ B.1.a, 360 ¶ G.19)

Third and alternatively, adopting Sentinel's interpretation of the Virus Endorsement would render the Virus Coverage illusory. Sentinel argues that viruses could hypothetically damage certain business property, like livestock or perishable goods. But KBFA does not operate a farm or trade in perishable goods. KBFA operates art galleries—a business to which coverage would never apply under Sentinel's suggested interpretation. California law does not countenance such a pretense of coverage.

Fourth, though the district court did not reach the question, KBFA stated a claim under the Policy's Civil Authority, Business Income, Extra Expense, and "sue and labor" provisions.

This Court should reverse and remand.

STANDARD OF REVIEW

This Court reviews de novo an order granting a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c). *LeGras v. AETNA Life Ins.*, 786 F.3d 1233, 1236 (9th Cir. 2015). This Court accepts the factual allegations in the complaint as true and in a light most favorable to the plaintiff. *Id.* The court may also consider

matters subject to judicial notice. *Heliotrope Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 n.18 (9th Cir. 1999).

Because this is a diversity case arising in California on a California insurance policy (3-ER-300, 515 ¶ 12), California law applies, *see Muniz v. United Parcel Serv., Inc.*, 738 F.3d 214, 219 (9th Cir. 2013). This Court reviews "the district court's interpretation of state law in a diversity case de novo." *Id.* at 218.

ARGUMENT

I. The Virus Endorsement covers KBFA's business losses incurred in connection with the Coronavirus pandemic

A. The Policy that Sentinel sold KBFA contains Virus Coverage—not an absolute exclusion.

Unlike many other policies that courts are considering for COVID-19-related insurance coverage, KBFA's Policy with Sentinel contains Virus Coverage. (3-ER-444–45) This is by design—offering virus coverage distinguishes Sentinel from its competitors, many of whom use the ISO's "Exclusion of Loss Due to Virus or Bacteria." (3-ER-517 ¶ 25; 2-ER-102). *See, e.g.*, *Chattanooga Pro. Baseball LLC v. Nat'l Cas. Co.*, No. CV-20-01312, 2020 WL 6699480, at *2 (D. Ariz. Nov. 13, 2020), *appeal filed*, No. 20-17422 (9th Cir. Dec. 16, 2020) (policy providing:

"[W]e will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism.").

The Virus Endorsement does contain exclusionary language (3-ER-444 ¶ A.2.i), but by its own terms, that "exclusion does not apply" if the conditions for the "Limited Coverage For 'Fungi', Wet Rot, Dry Rot, Bacteria and Virus" are met (3-ER-444). Given that the Virus Endorsement expressly provides for virus coverage, describing this endorsement as merely a "virus exclusion" is misleading. More accurately, it is—as its title states—a "Virus" "Coverage" endorsement. (3-ER-444)

The terms of KBFA's Policy must be read "in context," including how it explicitly provides Virus Coverage. *Marquez Knolls Prop. Owners Assn. v. Exec. Risk Indem.*, 153 Cal.App.4th 228, 234–35 (2007). This Court should decline Sentinel's invitation to conflate KBFA's Virus Coverage with virus-related exclusions.

B. The presence or potential presence of the Coronavirus caused "direct physical loss" by denying access to KBFA's Covered Properties for their intended purpose.

The Policy's general Coverage Clause provides that Sentinel "will pay for direct physical loss of or physical damage to Covered Property . . . caused by or resulting from a Covered Cause of Loss." (3-ER-336 ¶ A; *accord* 3-ER-445 ¶ B.1.b [Virus Endorsement providing "that Sentinel "will pay for loss or damage by . . . virus," including "[d]irect physical loss or direct physical damage to Covered Property caused by . . . virus"])[1]

Since the pandemic, courts across the country have split over whether government closure orders during the pandemic, and the presence or potential presence of Coronavirus, may satisfy the physical loss or damage requirements of many business-interruption policies.[2]

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[1] While the Coverage Clause and the Virus Endorsement have slightly different wording (3-ER-336 ¶ A, 445 ¶ B.1.b), the district court correctly began its analysis with the Coverage clause (1-ER-7–13), as it "establishes scope of coverage by identifying the kinds of losses covered by the Policy[,]" *Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, No. CV 17-04908, 2018 WL 3829767, at *3 (C.D. Cal. July 11, 2018).

[2] *See* https://cclt.law.upenn.edu/judicial-rulings/ and herein.

For the reasons that follow, this Court should answer this question in the affirmative, looking to the text of the Policy, applying California insurance law principles, and following the lead of persuasive authorities concluding that similar direct physical loss or damage provisions include the insured's inability to access the covered premises for their intended purpose.

1. The district court erred by failing to ground its analysis in the text of the Policy, which is broadly worded, encompassing business losses caused by KBFA's inability to use and access its Covered Properties for their intended purpose.

Determining coverage begins with the language of the Policy itself. *Waller v. Truck Ins. Exch., Inc.*, 11 Cal.4th 1, 18 (1995); *Amadeo v. Principal Mut. Life Ins.*, 290 F.3d 1152, 1162 (9th Cir. 2002). Language in a policy must be interpreted in light of the policy as a whole, and in light of the circumstances of the case. *TRB Invs., Inc. v. Fireman's Fund Ins.*, 40 Cal.4th 19, 27 (2006) (cleaned up). Courts must "look first to the language of the contract . . . to ascertain its plain meaning or the meaning a layperson would ordinarily attach to it." *Waller*, 11 Cal.4th at 18 (cleaned up).

"Moreover, insurance coverage is interpreted broadly so as to afford the greatest possible protection to the insured, whereas exclusionary clauses are interpreted narrowly against the insurer." *TRB Invs.*, 40 Cal.4th at 27 (cleaned up). Exceptions to coverage are also construed narrowly. *Id.* Exclusions and exceptions to coverage must be "conspicuous, plain and clear[,]" and it is the insurer's burden to prove their applicability. *Haynes v. Farmers Ins. Exch.*, 32 Cal.4th 1198, 1204 (2004); *see MacKinnon v. Truck Ins. Exch.*, 31 Cal.4th 635, 652 (2003) (insurer's burden).

Courts must resolve any ambiguities in an insurance policy in favor of coverage to protect the reasonable expectations of the insured. *AIU Ins. v. Superior Ct.*, 51 Cal.3d 807, 823 (1990). "A policy provision will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable." *TRB Invs.*, 40 Cal.4th at 27–28 (cleaned up).

Here, the district court erred by failing to begin its analysis with the text of the Policy itself, and by failing to conduct the requisite ambiguity analysis—i.e., to analyze whether the policy language in question is fairly susceptible to more than one reasonable

interpretation. (1-ER-7–12) *See Waller*, 11 Cal.4th at 18; *TRB Invs.*, 40 Cal.4th at 27–28.

The "direct physical loss" or "direct physical damage" clause (3-ER-336 ¶ A; *see* 3-ER-445 ¶ B.1.b) is susceptible to two interpretations:

1. That such "direct physical loss" occurs when covered property is rendered unusable for its intended purpose, as KBFA submits, because not being able to use or access property for its intended purpose is a type of "direct physical loss," and the Policy does not exclude or limit such an interpretation; or,

2. That "direct physical loss" or "direct physical damage" tacitly requires either a permanent dispossession or a demonstrable physical alteration to the property, as insurers like Sentinel contend and as the district court ruled here, even though such limiting language does not appear on the face of the Policy.

See, e.g., *Boardwalk Ventures CA, LLC v. Century-Nat'l Ins.*, No. 20STCV27359, 2021 WL 1215892, at *4–6 (Cal. Super. Mar. 18, 2021) (finding direct physical loss or damage provision ambiguous and deferring to policyholder's interpretation); *P.F. Chang's China Bistro, Inc. v. Certain Underwriters at Lloyd's of London*, No. 20STCV17169,

2021 WL 818659, at *7–9 (Cal. Super. Feb. 4, 2021); *Goodwill Indus. of Orange Cty. v. Phila. Indem. Ins.*, No. 30-2020-01169032, 2021 WL 476268, at *2–3 (Cal. Super. Jan. 28, 2021) (ruling that policyholder adequately pleaded direct physical loss or damage to covered property based on similar definition); *Susan Spath Hegedus, Inc. v. Ace Fire Underwriters Ins.*, No. 20-2832, 2021 WL 1837479, at *2–3, *8–9 (E.D. Pa. May 7, 2021) (ruling same language is ambiguous under California law); *Cherokee Nation v. Lexington Ins.*, No. CV-20-150, 2021 WL 506271, at *3 (Okla. Dist. Jan. 28, 2021) (explaining that policy with substantially similar language is susceptible to both of the foregoing interpretations); *Elegant Massage, LLC v. State Farm Mut. Auto. Ins.*, No. 2:20-CV-265, 2020 WL 7249624, at *8 (E.D. Va. Dec. 9, 2020) (same); *Scott Craven DDS PC v. Cameron Mut. Ins.*, No. 20CY-CV06381, 2021 WL 1115247, at *2 (Mo. Cir. Mar. 9, 2021) (same); *Serendipitous, LLC/Melt v. Cincinnati Ins.*, No. 2:20-CV-00873, 2021 WL 1816960, at *5 (N.D. Ala. May 6, 2021) (same).[3]

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[3] Though California Superior Court decisions are not binding precedent, unpublished decisions and other sources may serve as persuasive authority. *See Emps. Ins. of Wausau v. Granite State Ins.*, 330 F.3d 1214, 1220 n.8 (9th Cir. 2003); *Nunez ex rel. Nunez v. City of*

KBFA's proffered interpretation is reasonable for multiple reasons. First, KBFA's interpretation is consistent with California law regarding the interpretation of insurance policies. Coverage provisions must be construed broadly in favor of the insured. *TRB Invs.*, 40 Cal.4th at 27–28. And KBFA's interpretation gives meaning to each term in the clause, as required by California law. *See* Cal. Civ. Code § 1641 (rule against surplusage); *Lyons v. Fire Ins. Exch.*, 161 Cal.App.4th 880, 886 (2008) (same); *Farmers Ins. Exch. v. Knopp*, 50 Cal.App.4th 1415, 1421 (1996) ("*Knopp*") (same); *Barboza v. Cal. Ass'n of Pro. Firefighters*, 651 F.3d 1073, 1078–79 (9th Cir. 2011) (same).

"[T]o interpret 'physical loss of' as requiring 'damage to' would render meaningless the 'or damage to' portion of the same clause, thereby violating a black-letter canon of contract interpretation—that every word be given a meaning." *Total Intermodal*, 2018 WL 3829767, at *3; *accord Susan Spath*, 2021 WL 1837479, at *9 (ruling under California law that the Coronavirus may constitute direct physical loss or damage to property); *In re Soc'y Ins. COVID-19 Bus. Interruption*

San Diego, 114 F.3d 935, 943 n.4 (9th Cir. 1997); *Ingenco Holdings, LLC v. ACE Am. Ins.*, 921 F.3d 803, 815 (9th Cir. 2019).

Prot. Ins. Litig., MDL No. 2964, 2021 WL 679109, at *8 (N.D. Ill. Feb. 22, 2021) (reaching same result); *Studio 417, Inc. v. Cincinnati Ins.*, 478 F.Supp.3d 794, 800–01 (W.D. Mo. 2020) (same); *Blue Springs Dental Care, LLC v. Owners Ins.*, 488 F.Supp.3d 867, 873–74 (W.D. Mo. 2020) (same); *Serendipitous*, 2021 WL 1816960, at *5 (same); *see also Boardwalk Ventures*, 2021 WL 1215892, at *4–6; *P.F. Chang's*, 2021 WL 818659, at *7–9; *Goodwill Indus.*, 2021 WL 476268, at *2–3.

Second, KBFA's interpretation is consistent with California authorities holding that a policyholder suffers direct physical loss or damage to covered property when the policyholder cannot access it for its intended purpose. *See Hughes v. Potomac Ins. of D.C.*, 199 Cal.App.2d 239 (1962), *abrogated on other grounds as stated in Sabella v. Wisler*, 59 Cal.2d 21, 34 (1963); *Am. Alt. Ins. v. Superior Ct.*, 135 Cal.App.4th 1239, 1246 (2006); *Strickland v. Fed. Ins.*, 200 Cal.App.3d 792, 799 (1988); *see also Susan Spath*, 2021 WL 1837479, at *9 (holding that California law recognizes that direct physical loss includes loss of the ability to physically operate business at insured premises); *accord, e.g.*, *N. State Deli, LLC v. Cincinnati Ins.*, No. 20-CVS-02569, 2020 WL 6281507, at *3 (N.C. Super. Oct. 9, 2020) ("[T]he ordinary meaning of

the phrase 'direct physical loss' . . . describes the scenario where businessowners and their employees, customers, vendors, suppliers, and others lose the full range of rights and advantages of using or accessing their business property."); *Studio 417*, 478 F.Supp.3d at 801 ("[E]ven absent a physical alteration, a physical loss may occur when the property is uninhabitable or unusable for its intended purpose." (collecting authorities)).

In *Hughes*, a landslide swept away the ground support of a house, making it unstable though the structure was intact. 199 Cal.App.2d at 248–49. The California Court of Appeal ruled that this risk was covered because the policy did not limit coverage to "tangible injury to the physical structure itself." *Id.* It was enough that the property was unfit for its intended purpose: "a safe place in which to dwell or live." *Id.* at 249; *see also Strickland*, 200 Cal.App.3d at 799 (following *Hughes* where home was still habitable but faced future risk of instability); *Am. Alt. Ins.*, 135 Cal.App.4th at 1246 (holding that policy covering "direct and accidental physical loss" included coverage for costs due to government's seizure of airplane, though the government eventually returned it).

Here, the intended use of KBFA's properties was to sell fine art directly to customers. (3-ER-513 ¶ 1) But for the presence of COVID-19 and the Closure Orders, KBFA would not have had to close its business to those customers and thus would not have incurred business losses. (3-ER-520 ¶ 48) As in *Hughes*, *Strickland*, and *American Alternative Insurance*, KBFA's three buildings could scarcely be considered "retail locations" after they were forced to close in the sense that no customer was lawfully allowed to access the store. (3-ER-519 ¶¶ 44–45)

Because the Policy does not explicitly require permanent dispossession, this Court, applying California law, must not write such a requirement into the phrase "direct physical loss." (3-ER-336, 445) *See Hughes*, 199 Cal.App.2d at 248–49; *Strickland*, 200 Cal.App.3d at 799; *Am. Alt. Ins.*, 135 Cal.App.4th at 1246; *see also Boardwalk Ventures*, 2021 WL 1215892, at *4–6; *P.F. Chang's*, 2021 WL 818659, at *7–9; *Goodwill Indus.*, 2021 WL 476268, at *2–3; *Best Rest Motel Inc. v. Sequoia Ins.*, No. 37-2020-00015679, 2020 WL 7229856, at *1 (Cal. Super. Sept. 20, 2020).

Third, many courts interpreting the same or similar phrases have held that it does not require physical alteration and thus includes loss

of use or access to property occasioned by the Coronavirus pandemic. *Boardwalk Ventures*, 2021 WL 1215892, at *4–6; *P.F. Chang's*, 2021 WL 818659, at *7–9; *Susan Spath*, 2021 WL 1837479, at *8–9; *In re Soc'y Ins.*, 2021 WL 679109, at *8; *N. State Deli*, 2020 WL 6281507, at *3; *Studio 417*, 478 F.Supp.3d at 800–01; *Blue Springs*, 488 F.Supp.3d at 873–74; *Cherokee Nation*, 2021 WL 506271, at *3; *Elegant Massage*, 2020 WL 7249624, at *8; *Serendipitous*, 2021 WL 1816960, at *5; *see also, e.g.*, *Henderson Rd. Rest. Sys., Inc. v. Zurich Am. Ins.*, No. 1:20-CV-1239, 2021 WL 168422, at *12 (N.D. Ohio Jan. 19, 2021) (recognizing that direct physical loss or damage clauses must be construed in favor of policyholders seeking to recover COVID-19-related business losses, applying the same interpretive principles as those applicable in California); *Derek Scott Williams PLLC v. Cincinnati Ins.*, No. 20-C-2806, 2021 WL 767617 (N.D. Ill. Feb. 28, 2021) (same); *NeCo, Inc. v. Owners Ins.*, No. 20-CV-04211, 2021 WL 601501 (W.D. Mo. Feb. 16, 2021) (same); *Urogynecology Specialist of Fla. LLC v. Sentinel Ins.*, 489 F.Supp.3d 1297 (M.D. Fla. 2020) (same); *S. Dental Birmingham LLC v. Cincinnati Ins.*, No. 2:20-cv-681, 2021 WL 1217327, at *6 (N.D.

Ala. Mar. 19, 2021) (same); *Scott Craven DDS*, 2021 WL 1115247, at *2 (same).

While Sentinel will point out that district courts have split on this issue (*see infra* Argument § I.B.3), this Court is not bound by these district court opinions; the Court reviews the issue independently and must apply California law as it determines the California Supreme Court would apply it. *See Muniz*, 738 F.3d at 218. Further, multiple California courts have declined to follow the insurers' cited federal authorities. *Boardwalk Ventures*, 2021 WL 1215892, at *5; *P.F. Chang's*, 2021 WL 818659, at *9; *Goodwill Indus.*, 2021 WL 476268, at *3; *Best Rest Motel*, 2020 WL 7229856, at *1.

Fourth, a ruling in favor of coverage here would be consistent with the long line of authorities recognizing that, in the insurance context, direct physical loss or damage includes the presence or threatened presence of material hazardous to human health, even if it is microscopic.[4]

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[4] *See, e.g.*, *Am. All. Ins. v. Keleket X-Ray Corp.*, 248 F.2d 920, 925 (6th Cir. 1957) (radioactive dust and radon gas); *Motorists Mut. Ins. v. Hardinger*, 131 F.App'x 823, 824, 826–27 (3d Cir. 2005) (E. coli); *Gregory Packaging, Inc. v. Travelers Prop. Cas.*, No. 2:12-cv-04418, 2014

In sum, KBFA's interpretation of the direct physical loss or damage provision is a reasonable one. Because the direct physical loss or damage provision is fairly susceptible to the parties' competing interpretations, and KBFA's interpretation is reasonable, the provision is ambiguous. *See TRB Invs.*, 40 Cal.4th at 27–28.

Given that the Policy is ambiguous and KBFA's interpretation is reasonable, this Court need not decide which interpretation it prefers. Applying California insurance law principles, this ambiguous provision must be construed in favor of the policyholder and in favor of coverage. *See AIU Ins.*, 51 Cal.3d at 822.

WL 6675934, at *6 (D.N.J. Nov. 25, 2014) (ammonia discharge); *Murray v. State Farm Fire & Cas.*, 509 S.E.2d 1, 17 (W. Va. 1998) (boulders poised above homes); *Farmers Ins. v. Trutanich*, 858 P.2d 1332, 1336 (Or. App. 1993) (methamphetamine fumes); *Matzner v. Seaco Ins.*, No. 96-0498-B, 1998 WL 566658, at *4 (Mass. Super. Ct. Aug. 12, 1998) (carbon monoxide); *W. Fire Ins. v. First Presbyterian Church*, 437 P.2d 52, 54 (Colo. 1968) (gasoline vapors); *Pillsbury Co. v. Underwriters at Lloyd's, London*, 705 F.Supp. 1396, 1399 (D. Minn. 1989) (health-threatening organisms); *Azalea, Ltd. v. Am. States Ins.*, 656 So.2d 600, 601 (Fla. Ct. App. 1995) (unknown pollutant); *Yale Univ. v. Cigna Ins.*, 224 F.Supp.2d 402, 413–14 (D. Conn. 2002) (asbestos and lead); *Graff v. Allstate Ins.*, 54 P.3d 1266, 1269 (Wash. Ct. App. 2002) (methamphetamine vapors).

Accordingly, this Court should construe the Policy in KBFA's favor and hold that "direct physical loss" or "direct physical damage" occurs when covered property is rendered unusable for its intended purposes.

Further, though KBFA need only demonstrate that the clause is ambiguous, *see, e.g.*, *AIU Ins.*, 51 Cal.3d at 822, KBFA's proffered interpretation is also the better one.

Sentinel's interpretation would read into the Policy terms that simply are not there. The Policy contains no language limiting the direct physical loss or damage provision to permanent dispossession or a distinct, demonstrable, physical alteration to the property. (3-ER-336, 444) Sentinel's interpretation is not based on the text of the Policy, and in effect seeks to rewrite the Policy to include terms more favorable to the insurer than what Sentinel itself elected to include in the Policy. *See* Cal. Civ. Proc. Code § 1858 (courts construing contracts may not "insert what has been omitted, or . . . omit what has been inserted); *Safeco Ins. Co. of Am. v. Robert S.*, 26 Cal.4th 758, 763 (2001) (same, insurance policies)*; Aerojet-Gen. Corp. v. Transp. Indem.*, 17 Cal.4th 38, 75–76 (1997) ("[Insurance] policies provide what they provide. . . . We may not rewrite what [the insurer and insureds] themselves wrote.");

Studio 417, 478 F.Supp.3d at 801 (COVID-19 case holding nothing in the policy would lead a reasonable insured to believe that actual physical damage is required for coverage); *Susan Spath*, 2021 WL 1837479, at *2–3, *8–9 (same, applying California law).

If Sentinel wished to limit coverage to "total and complete" or "unrecoverable" physical loss, or physical damage that "permanently changed the condition of the property," it could have done so. *See* Cal. Civ. Proc. Code § 1858; *Safeco Ins.,* 26 Cal.4th at 763; *Aerojet-Gen.*, 17 Cal.4th at 75–76; *Susan Spath*, 2021 WL 1837479, at *8–9; *Cherokee Nation*, 2021 WL 506271, at *3–4. Or like its competitors, Sentinel could have incorporated the absolute virus exclusion language proposed in the ISO Circular. (2-ER-102) *See, e.g.*, *Chattanooga Pro. Baseball*, 2020 WL 6699480, at *2. Indeed, Sentinel, like the insurance industry at large, would have been on notice that courts have long treated the presence of substances dangerous to human health as physical loss of or damage to that property. (*See supra* n.4)

Instead, Sentinel continued selling coverage containing the "direct physical loss" or "direct physical damage" clauses without further qualification. (3-ER-336, 444–45) Especially in view of the fact that

KBFA specifically purchased Sentinel's optional "virus coverage" in addition to its standard business-interruption insurance, KBFA's reasonable expectation as an insured was that its business losses occasioned by the pandemic would be covered. *See AIU*, 51 Cal.3d at 822.

In sum, Sentinel's interpretation is contrary to the text of the Policy and inconsistent with California principles of insurance policy interpretation. This Court at a minimum should rule that the provision is ambiguous and must be construed in KBFA's favor.

2. California law does not require the direct physical loss or damage provision to be given a technical or special meaning that does not appear on the face of the Policy.

Sentinel may contend that the direct physical loss or damage provision should be given a technical or special meaning, requiring either a permanent dispossession or a distinct, demonstrable, physical alteration to the property, and that such a technical or special meaning should supersede the foregoing textual analysis. *Cf. MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins.*, 187 Cal.App.4th 766

(2010) (holding that the phrase "accidental direct physical loss to" personal business property requires a physical change in the property).

However, the California Supreme Court has made clear that purported technical or special meanings to which the insured did not specifically agree, and which are not memorialized on the face of the Policy, are not given any weight in the court's textual analysis of the policy. *AIU Ins.*, 51 Cal.3d at 823. As the Supreme Court in *AIU* explained: "In the absence of evidence that the parties, at the time they entered into the policies, intended the provisions at issue . . . to carry technical meanings *and implemented this intention by specially crafting policy language*," courts will construe policy language "in the broad sense understood by laypersons (as opposed to a narrower technical sense)[.]" *Id.* (emphasis added). Here, there is nothing in the Policy terms to support Sentinel's proffered technical or special meaning of the direct physical loss or damage provision. (*See* 3-ER-336, 444–45; Argument § I.B.1)

Sentinel is mistaken that *MRI*, 187 Cal.App.4th 766, compels the opposite result. *See Boardwalk Ventures*, 2021 WL 1215892, at *6 (distinguishing *MRI* and rejecting insurer's argument that *MRI*

precludes policyholders' COVID-19-related business losses, and declining to follow various unpublished federal district court cases applying *MRI* in the context of COVID-19 business-interruption insurance); *Susan Spath*, 2021 WL 1837479, at *7–9 (same).

In *MRI*, a healthcare provider, "MHC," demagnetized its MRI machine during building repairs. 187 Cal.App.4th at 769–70. The machine then failed to "ramp back up," which was an "'inherent risk'" of an MRI machine. *Id.* at 770–75 & n.2. MHC had insurance for "accidental direct physical loss to" MHC's property. *Id.* at 770–71. State Farm denied MHC's claim for the repair costs and income loss it sustained while the machine was inoperable. *Id.*

The Court of Appeal affirmed summary judgment for the insurer. *Id.* at 778. It reasoned that the phrase "direct physical loss"—when it comes to *personal property insurance policies*—generally "contemplates an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so." *Id.* at 779 (cleaned up). The Court

of Appeal also ruled that deliberately ramping down the machine was not "accidental." *Id.* at 778–80.

The Court of Appeal's opinion in *MRI* is not controlling here for several reasons.

First, the factual context of *MRI* is not analogous to the context here. *Cf. Lockheed Martin Corp. v. Cont'l Ins.*, 134 Cal.App.4th 187, 197–98 (2005) ("Prior judicial construction of a term in a standard form policy will be helpful only so long as the term appears in a context analogous to its context in the policy before us."), *disapproved on other grounds by California v. Allstate Ins.*, 45 Cal.4th 1008, 1036 & n.11 (2009).

As a California Superior Court recently explained, *MRI* dealt with inherent mechanical problems in machinery, making it not controlling in the context of insured business losses due to COVID-19. *Boardwalk Ventures*, 2021 WL 1215892, at *6. In *MRI*, unlike here, the machine failed to ramp up because of the inherent nature of the machine—not because of any physical damage and not because of any "external force" acting on the machine. *Id.* (citing *MRI*, 187 Cal.App.4th at 780). By contrast, the Coronavirus is such an "external force," making *MRI*

distinguishable. *See id.*; *see also Susan Spath*, 2021 WL 1837479, at *8–9 (distinguishing *MRI* from the COVID-19 business-interruption insurance context).

The type of loss the policy insured in *MRI*—personal business property, 187 Cal.App.4th at 770—is also distinguishable from real property used to operate a business. As a leading insurance law treatise explains, the "physical loss or damage" requirement that "triggers" property insurance coverage "*is generally unique to the particular type of loss insured.*" Steven Plitt *et al.*, 10A Couch on Ins. § 148:46 (3d Ed. & Supp. Dec. 2020) (emphasis added); *see Total Intermodal*, 2018 WL 3829767, at *4 n.4 (observing that "the same phrase in a different kind of insurance contract could mean something else"); *Henderson*, 2021 WL 168422, at *10 (COVID-19 business-interruption case making similar distinction under Ohio law); *Studio 417*, 478 F.Supp.3d at 802 (same, Missouri).

There is a significant difference between powering down a large machine, *see MRI*, 187 Cal.App.4th at 770, and having to shut down one's entire business due to the presence or potential presence of a *lethal pathogen* like the Coronavirus. *See, e.g., Urogynecology*, 489

F.Supp.3d at 1302–03 ("Importantly, none of the cases dealt with the unique circumstances of the effect COVID-19 has had on our society—a distinction this Court considers significant."). And, as discussed, courts have long held that the threat or actual presence of disease-causing agents on property constituted physical loss of or damage to that property. (*Supra* n.4)

Couch on Insurance—the authority on which the *MRI* court relied—further illustrates this point. *See MRI*, 187 Cal.App.4th at 778 (citing Couch § 148:46). Far from articulating a bright-line rule requiring a physical change to any and all property, Couch observes that the analysis will vary depending on the type of property insured, and cites a line of authorities "allowing coverage based on physical damage despite the lack of physical alteration of the property." Couch § 148:46. Couch, rather than unequivocally stating the proposition for which it was cited, "[i]n reality . . . merely notes a split in authority on the . . . issue." *Aydin Corp. v. First State Ins.*, 18 Cal.4th 1183, 1191 n.2 (1998) (discussing applicability of Couch in a similar context).

Couch offers the example of physical damage to a dwelling when gasoline vapors infiltrate the property, rendering it uninhabitable.

Couch § 148:46 (citing *W. Fire Ins.*, 437 P.2d 52). As discussed, this is consistent with California law. *See Hughes*, 199 Cal.App.2d at 248–49; *Strickland*, 200 Cal.App.3d at 799; *Am. Alt. Ins.*, 135 Cal.App.4th at 1246; *Boardwalk Ventures*, 2021 WL 1215892, at *4–6; *P.F. Chang's*, 2021 WL 818659, at *7–9; *Goodwill Indus.* 2021 WL 476268, at *2–3; *Best Rest Motel*, 2020 WL 7229856, at *1.

Second, *MRI* is also distinguishable because the court there did not perform the interpretative analysis that California requires for insurance contracts. *See MRI*, 187 Cal.App.4th at 778–79. That is, the court did not look to the text of the policy and consider whether the phrase "accidental direct physical loss to" business property is ambiguous, *i.e.*, fairly susceptible to two reasonable interpretations. *See id.*; *cf. TRB Invs.*, 40 Cal.4th at 27–28; *Waller*, 11 Cal.4th at 18. Because *MRI* does not speak to this precept at the heart of insurance contract interpretation, it cannot be considered precedential as to that issue. *See Ginns v. Savage*, 61 Cal.2d 520, 524 n.2 (1964) ("Language used in any opinion is of course to be understood in the light of the facts and the issue then before the court[.]"); *accord United States v. Corrales–Vazquez*, 931 F.3d 944, 954 (9th Cir. 2019); *see also In re K F*

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Dairies, Inc., 224 F.3d 922, 924–25 (9th Cir. 2000) (declining to follow California Court of Appeal opinions inconsistent with California Supreme Court precedent regarding the proper method of interpreting insurance contracts).

Indeed, in the decade since *MRI* issued, not a single published California appellate opinion has cited or followed *MRI*'s ruling that the phrase "accidental direct physical loss to" business property requires a change in the structure or composition of that property. *MRI* is not controlling precedent in this Court and would not be controlling in other California appellate courts. *See In re K F Dairies*, 224 F.3d at 924–25; *In re Marriage of Shaban*, 88 Cal.App.4th 398, 409 (2001).

And even where a California Court of Appeal case has been followed in unpublished California Court of Appeal opinions, this Court will not apply it if there is good reason to believe that the California Supreme Court would decide the issue differently. *See, e.g.*, *Beeman v. Anthem Prescription Mgmt., LLC*, 689 F.3d 1002, 1008–10 & n.2 (9th Cir. 2012) (certifying question to California Supreme Court despite existence of California Court of Appeal opinion that had been followed by two unpublished Court of Appeal cases), *certified question answered*,

58 Cal.4th 329 (2013) (disapproving the Court of Appeal opinions in question).

For the reasons outlined above making *MRI* distinguishable, there is good reason to believe that the California Supreme Court would not apply *MRI* to this case and, moreover, would decide the issue differently than the district court did here. *See Beeman*, 689 F.3d at 1008–10; *see also Boardwalk Ventures*, 2021 WL 1215892, at *4–6 (distinguishing *MRI* and denying insurer's motion for judgment on the pleadings in COVID-19 business-interruption insurance case); *P.F. Chang's*, 2021 WL 818659, at *7–9 (same); *Goodwill Indus.*, 2021 WL 476268, at *2–3 (Cal. Super. Ct.) (overruling insurer's demurrer in COVID-19 business-interruption insurance case); *Best Rest Motel*, 2020 WL 7229856, at *1; *Susan Spath*, 2021 WL 1837479, at *7–9 (distinguishing *MRI*).

To the extent that the Court is inclined to rule that the direct physical loss or damage issue cannot be resolved by looking to the plain text of the Policy and by applying the California interpretive principles, this Court is respectfully requested to certify the question to the California Supreme Court because there is no controlling California precedent on this issue, the issue is of acute public interest in the wake

of the Coronavirus pandemic, and it could determine the outcome of this case. *See* Cal. R. Ct. 8.548; Appellant's Certification Request, filed herewith.

3. The district court's ruling here does violence to the language of the Policy and misapplies California law.

In contrast to the foregoing authorities and reasoning, the district court, like certain other courts, ruled that "direct physical loss or damage" provisions do not cover COVID-19-related business losses. These decisions all rely on one or more of three basic arguments, none of which applies to KBFA's claim.

First, the district court reasoned that the term "direct physical loss of . . . property" requires either a physical change in the condition of the property or a permanent dispossession. (1-ER-8 (citing *Mudpie, Inc. v. Travelers Cas. Ins. of Am.*, No. 20-CV-03213, 2020 WL 5525171, at *4 (N.D. Cal. Sept. 14, 2020), *appeal filed*, No. 20-16858 (9th Cir. Sept. 24, 2020).) The district court reasoned that KBFA, like Mudpie, did not suffer permanent physical loss of storefront or inventory. (1-ER-8–9 (citing *Mudpie*, 2020 WL 5525171, at *4).) However, this begs the question presented, which is whether KBFA has offered a viable

alternative interpretation such that the phrase is ambiguous, and must be construed in KBFA's favor, *i.e.*, in favor of coverage, under California law. (Argument § I.B.1) Here, the Policy does not require "permanent loss" or "unrecoverable" property. As in the leading MDL regarding COVID-19 business interruption insurance, "the operative text is 'direct physical loss of *or* damage to covered property.'" *In re Soc'y Ins.*, 2021 WL 679109, at *8 (emphasis added). (3-ER-336; *see* 3-ER-444–45) The Court should not rewrite what Sentinel itself wrote—and chose not to write—into the Policy. *See* Cal. Civ. Proc. Code § 1858; *Safeco Ins.,* 26 Cal.4th at 763; *Aerojet-Gen.*, 17 Cal.4th at 75–76; Argument § I.B.1.

Indeed, the Policy's coverage during the "period of restoration" suggests that the property need not be permanently lost or otherwise unrecoverable. (3-ER-345, 359–60) The district court here drew a different inference—one in the insurer's favor—from the "period of restoration," concluding that because no repairs or replacements are needed, there is no physical loss. (1-ER-11–12 (citing *Mudpie*, 2020 WL 5525171, at *4).)

But a reasonable insured in KBFA's position would read the "period of restoration" to include the period between the date of the

"direct physical loss" and the date on which the premises were accessible again for their intended purpose—here, to sell art to the public. (*See* 3-ER-359 ¶ G.12; Argument § I.B.1) While the Policy refers to the property being "repaired, rebuilt or replaced" or "resum[ing] at a new, permanent location" (3-ER-359 ¶ G.12), Sentinel's gloss on these terms focuses unduly on the "direct physical *damage*" clause of the Policy and ignores the term itself: "*restoration*." "Restoration" is commonly understood as "restitution of something taken away or lost."[5] When property is lost, access to the property and the property itself may be "restor[ed]." (*See* 3-ER-345, 359 ¶ G.12) A reasonable insured purchasing the Policy would think, as KBFA did, that the "period of restoration" suggests that the property need not be permanently lost or otherwise unrecoverable. *See AIU*, 51 Cal.3d at 822.

Relatedly, the district court also reasoned that KBFA could still access its properties, even though its customers could not. (1-ER-9)

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[5] https://www.dictionary.com/browse/restoration ¶ 4 (last visited May 25, 2021); *accord, e.g.*, https://www.lexico.com/en/definition/restoration ¶ 1 (last visited May 25, 2021) ("The action of returning something to a former owner, place, or condition.").

But it remains that the covered properties were rendered unusable for their intended purpose: carrying on KBFA's art-gallery business and making sales. (3-ER-519 ¶ 45; Argument § I.B.1–2) And further, as the Complaint alleges, the shelter-in-place orders applied to everyone (which would include KBFA's owner), and the Closure Orders prohibited access to KBFA's galleries and the immediately surrounding areas. (3-ER-518–19 ¶¶ 35, 45)

Second, the district court reasoned that the Coronavirus affects people, not property. (1-ER-11–12) This reasoning, too, begs the question. The presence or potential presence of a deadly virus on or in property renders it unfit for human use and inaccessible for its intended purpose—thereby affecting property. (Argument § I.B.1–2; *supra* n.4) As the ISO recognized, "[d]isease-causing agents may . . . enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property. When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property[,] . . . cost of decontamination (for example, interior building surfaces), *and business interruption (time element) losses*." (2-ER-99 [emphasis added]; 3-ER-517 ¶ 25) *See Boardwalk Ventures*, 2021 WL

1215892, at *6; *P.F. Chang's*, 2021 WL 818659, at *4; *Goodwill Indus.*, 2021 WL 476268, at *3.

Similar to carbon monoxide, ammonia, or methamphetamine vapors, if Coronavirus is present in or on a property, it may be deadly. *See Gregory Packaging*, 2014 WL 6675934, at *6 (ammonia); *Trutanich*, 858 P.2d at 1336 (methamphetamine fumes); *Matzner*, 1998 WL 566658, at *4 (carbon monoxide).

Third, the district court echoed concerns that finding coverage here would constitute a "'sweeping expansion of insurance coverage without any manageable bounds.'" (1-ER-9 (quoting *Plan Check Downtown III, LLC v. AmGuard Ins.*, 485 F.Supp.3d 1225, 1232 (C.D. Cal. 2020), *appeal filed*, No. 20-56020 (9th Cir. Oct. 2, 2020), and citing *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Conn.*, 492 F.Supp.3d 1051, 1056 (C.D. Cal. 2020), *appeal filed*, No. 20-56031 (9th Cir. Oct. 6, 2020).)

The district court provided three hypotheticals to illustrate the concern regarding manageability: (1) a city changes its maximum occupancy codes, so that a restaurant may not seat as many customers at once; (2) a city amends an ordinance requiring restaurants to refrain

from operating between certain hours; and (3) a civil authority issues a mandatory evacuation order because of a nearby wildfire. (1-ER-9 (citing *Plan Check*, 485 F.Supp.3d at 1232).)

These hypotheticals appear to trouble the district court because of their indefinite nature and ergo exposure. But this concern is misplaced: Nearly all insurers limit business-interruption coverage by starting coverage only after 72 hours of the loss, and by applying a monetary sub-limit, a temporal limit, or both. (*See, e.g.*, 3-ER-346 ¶ A.5.q.2) So, for example, an evacuation order for wildfire could cause a long shutdown, but Sentinel would only provide coverage for up to 30 days. (3-ER-302–13, 346 ¶ A.5.q.2)

Moreover, a wildfire that causes a "covered loss" nearby is a type of civil authority claim that *is* frequently covered by insurance policies.[6]

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[6] *See, e.g.*, California FAIR Plan Property Insurance, CFP 00 01 Coverage D, *available at* https://www.cfpnet.com (on file with counsel) ("If a civil authority prohibits you from use of the Described Location as a result of direct damage to a neighboring location by a Peril Insured Against [including "Fire or Lightning"] in this policy, we cover the Fair Rental Value loss for no more than two weeks."); Douglas Berry, *COVID-19—When Civil Authorities Take over, Are You Covered?*, International Risk Management Institute, March 2020, *available at* https://www.irmi.com/articles/expert-commentary/when-civil-authorities-take-over-are-you-covered (last visited May 21, 2021).

And if an insurer does not wish to cover fire-related losses, it is free to decline to issue coverage or exclude it.[7] The wildfire hypothetical is far from an unmanageable expansion of insurance coverage.

The same is true of the court's two city-ordinance hypotheticals. (1-ER-9) A city changing the hours of operation or occupancy rates for policy reasons would first have to be tethered to a covered cause of loss, which would depend on the terms of the particular policy. (*See* 3-ER-336–37; Argument § I.C) And, like KBFA's policy, even if it were tethered to a covered cause of loss, the insurer's exposure would be limited by (1) the limits of insurance, and (2) the temporal limits in the policy (for example, a 30-day limit for closures).

An insurer has the power to define the limits of coverage. If an insurer truly believes that the *Plan Check* scenarios would be unmanageable, it can easily exclude them. Courts do not step in to write better policies for the insurers than "what they themselves wrote." *Aerojet-Gen.*, 17 Cal.4th at 75–76; *see* Cal. Civ. Proc. Code § 1858; *Safeco Ins.,* 26 Cal.4th at 763.

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[7] *See, e.g.*, *Pieper v. Com. Underwriters Ins.*, 59 Cal.App.4th 1008, 1011 (1997) (brush fire exclusion).

Similarly, here, if insurers do not like the result of policy language that they sell, they are free to amend it going forward—*e.g.*, to include the language "complete and unrecoverable physical loss" or "visible physical damage that permanently alters covered property." *See* Cal. Civ. Proc. Code § 1858; *Safeco Ins.,* 26 Cal.4th at 763; *Aerojet-Gen.*, 17 Cal.4th at 75–76; *Cherokee Nation*, 2021 WL 506271, at *3–4. Or, they may simply adopt an absolute virus exclusion, as other insurers have done. *See, e.g.*, *Chattanooga Pro. Baseball*, 2020 WL 6699480, at *2; 2-ER-102.

Perhaps the broader "manageability" concern is for exposing insurance companies to widespread liability following black-swan events like the COVID-19 pandemic. But such a concern is greatly exaggerated, given the temporal and monetary limits most policies—like Sentinel's—impose. (*See, e.g.*, 3-ER-302, 305, 308, 311, 345 ¶ A.5.o) Further, insurance companies are in the business of assuming their insureds' risks, in exchange for a premium, on a large scale. The occasional payout obligation is the very risk that insurance companies bargain for—the inherent downside to their extremely profitable business model. Especially where, as here, the insurer deliberately

marketed and sold its insured "Virus Coverage" stating: "*We will pay for loss or damage by 'fungi', wet rot, dry rot, bacteria and virus*" (3-ER-445 ¶ B.1.b [emphasis added]), insurers like Sentinel should be held to their end of the bargain.

This Court should reverse and hold that the phrase "direct physical loss of or damage to" Covered Property in KBFA's California Policy includes a situation when covered property is rendered inaccessible for its intended purpose.

C. The Coronavirus pandemic in the United States was caused by travel by "aircraft or vehicles"—a "specified cause of loss," satisfying the remaining condition to trigger Virus Coverage.

Though the district court did not reach the issue, the remaining condition for applying the Virus Coverage here is satisfied—namely, the COVID-19 virus is the "result of" a "specified cause of loss." (3-ER-360 ¶ G.19, 445 ¶ B.1.a)

In California, in considering an exception or exclusion in an insurance policy, "where there is a concurrence of different causes, the efficient cause—the one that sets others in motion—is the cause to which the loss is to be attributed, though the other causes may follow it,

and operate more immediately in producing the disaster." *Garvey v. State Farm Fire & Cas. Co.*, 48 Cal.3d 395, 402 (1989) (cleaned up).

Here, the Policy's Virus Coverage applies "when the 'fungi', wet or dry rot, bacteria or virus is the result of" a "specified cause of loss" (other than fire or lightning) that occurs during the policy period. (3-ER-445 ¶ B.1.a)[8] A "specified cause of loss" includes "aircraft or vehicles." (3-ER-360 ¶ G.19)

That is precisely how the Coronavirus entered the United States: by aircraft and other vehicles. (3-ER-88)[9]

Though Sentinel may contend that the Policy implicitly requires an airplane or vehicle to make "actual physical contact" with the covered property and thereby cause damage, such limiting language does not appear on the face of the Policy. (3-ER-360 ¶ G.19, 445

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[8] The Policy also requires that the insured take reasonable means to save the property from further damage. (3-ER-445 ¶ B.1.a) Sentinel has not contended that this condition was not met here.

[9] The district court correctly granted judicial notice of the U.S. Department of Health and Human Services/Centers for Disease Control and Prevention report reflecting that the Coronavirus arrived in the United States by air travel and spread throughout the West Coast and country via transit. (1-ER-3–4; *see* 2-ER-86, 108 ¶ 2) *See Heliotrope*, 189 F.3d at 981 n.18.

¶ B.1.a) And, unlike some "aircraft or vehicle" policies, KBFA's Policy does not limit coverage to "'direct loss resulting from actual physical contact of . . . a vehicle with the property covered.'" 11 Couch on Ins. § 155:98. Sentinel could have, but elected not to, include such an express limitation. (*See* 3-ER-360 ¶ G.19, 444–45) This Court should decline Sentinel's invitation to rewrite the Policy to include terms more favorable to the insurer than those that Sentinel itself elected to include in the Policy. *See* Cal. Civ. Proc. Code § 1858; *Safeco Ins.,* 26 Cal.4th at 763; *Aerojet-Gen.*, 17 Cal.4th at 75–76.

Thus, KBFA's Virus Coverage applies when a "virus is the result of," inter alia, "an aircraft or vehicle" (3-ER-445 ¶ B.1.a, 360 ¶ G.19), regardless of whether the aircraft or vehicle makes actual physical contact with the covered property.

Sentinel may also contend that travel by "aircraft or vehicles" is too attenuated from KBFA's loss. But as a coverage provision, the phrase must be construed broadly in favor of the insured. *TRB Invs.*, 40 Cal.4th at 27–28. For the reasons that follow, Sentinel's argument runs contrary to the text of the Policy—which must be broadly construed in

KBFA's favor—and contrary to California and other decisions finding causation under analogous circumstances.

To begin with, the Policy does not define the phrase "result of." (*See* 3-ER-445 ¶ B.1.a) Thus, the "ordinary and popular" meaning of the term will apply. *TRB Invs.*, 40 Cal.4th at 27; *accord Waller*, 11 Cal.4th at 18.

"Result" as a noun is commonly defined as "[a] consequence, effect, or conclusion." *E.g.*, Bryan A. Garner, ed., Black's Law Dictionary, result (n.), sense 1 (11th ed. 2019). California courts give a "consistently broad interpretation" to such phrases. *St. Paul Fire & Marine Ins. v. Am. Dynasty Surplus Lines Ins.*, 101 Cal.App.4th 1038, 1050 (2002) (Croskey, J.). Thus, the Virus Coverage applies if the virus is the "result of"—i.e., a "consequence" or "effect" of—"aircraft or vehicles." (3-ER-445 ¶ B.1.a, 360 ¶ G.19) *See* Black's Law Dictionary, result (n.), sense 1. This provision is expansive enough to include a deadly pathogen entering the United States, including San Francisco, Los Angeles, and Las Vegas, from China and Europe by means of aircraft and other vehicles. (3-ER-88) *See TRB Invs.*, 40 Cal.4th at 27–28; *Waller*, 11 Cal.4th at 18; *Garvey*, 48 Cal.3d at 402.

This interpretation is consistent with other courts' rulings that a "vehicle" qualifies as a "specified cause" of an insured's loss when activity by the vehicle sets off a chain of events that eventually leads to contamination that renders premises unsafe. *See, e.g.*, *Cincinnati Ins. v. German St. Vincent Orphan Ass'n*, 54 S.W.3d 661, 666–67 (Mo. Ct. App. 2001) ("*German St. Vincent*"). In *German St. Vincent*, the policyholder removed vinyl flooring from its premises using a propane-powered floor stripper, which generated clouds of asbestos powder, requiring the building to temporarily close. *Id.* at 663. The policy excluded coverage for asbestos-related losses except to the extent caused by a "specified cause of loss," which included "vehicles." *Id.* at 664.

Though the insurer objected that the asbestos powder did not physically alter the property and that the floor scraper did not collide with the building, the Court of Appeals construed the policy in favor of the policyholder and held that the asbestos was caused by the floor scraper—a "vehicle" and therefore a "specified cause of loss." *Id.* at 666–67.

Similarly, courts have recognized that the "specified cause of loss" requirement may be satisfied if a "specified cause of loss" appears anywhere in the causal chain leading to the insured's loss. *See, e.g., id.*; *Gemini Ins. v. W. Marine Ins. Servs. Corp.*, No. 2:10-cv-03172, 2016 WL 3418413, at *6, *14 (E.D. Cal. June 22, 2016) (windstorm that damaged docks, which the insured repaired with plywood, which in turn caused rotting); *Allied Prop. & Cas. Ins. v. Zenith Aviation, Inc.*, 336 F.Supp.3d 607 (E.D. Va. 2018) (indoor wet saw that released dust into the air, which settled onto aircraft parts, thereby damaging them, because "specified cause of loss" included the term "smoke," which the court interpreted as including any visible suspension of particles in gas).

Sentinel's own cited case also supports this interpretation. *See Curtis O. Griess & Sons, Inc. v. Farm Bureau Ins. of Neb.*, 528 N.W.2d 329, 332 (Neb. 1995). In *Curtis O. Griess*, a farmer suffered losses when a windstorm swept a pseudorabies virus to the farm, infecting the farmer's pigs. *Id.* at 331. The court held that the loss was covered, reasoning: "The wind need not pick up and throw the swine to the earth to constitute a direct cause of the loss." *Id.* at 333. Because "[t]he windstorm had carried the virus to [the insured's] farm," the court

determined that there would be no loss "[a]bsent the windstorm." *Id.* The court explained: "[W]here a virus has been *transmitted by means of* a covered peril, the covered peril has been held to be the proximate cause of the loss." *Id.* (emphasis added).

Here, as in *Curtis* and *German St. Vincent*, a "specified cause of loss" like "aircraft or vehicles" carrying virus-infected passengers need not crash into KBFA's stores to trigger its Virus Coverage. It is enough that an "airplane or vehicle" carried the virus to KBFA's communities, which caused KBFA's losses. (3-ER-88) *See Curtis O. Griess*, 528 N.W.2d at 333; *German St. Vincent*, 54 S.W.3d at 666–67; *see also Gemini Ins.*, 2016 WL 3418413, at *6, *14; *Allied Prop.*, 336 F.Supp.3d 607. Absent "aircraft or vehicles," the virus would not have been present in KBFA's communities. *See Curtis O. Griess*, 528 N.W.2d at 333; *Garvey*, 48 Cal.3d at 402.

In sum, "aircraft or vehicles" was an "efficient cause" of KBFA's damage because travel by air and other vehicles was a necessary part in the causal chain by which the Coronavirus arrived in the United States and spread to California and Nevada. (2-ER-88) *See Garvey*, 48 Cal.3d at 402. Though Sentinel may contend that other factors (e.g., the

presence of virus-infected human beings) may have contributed "more immediately" in producing KBFA's business losses, airplanes and vehicles nevertheless set the Coronavirus pandemic "in motion." *Id.* Aircraft and other vehicles are therefore "the cause to which the loss is to be attributed" under California law. *Id.* (cleaned up).

To KBFA's knowledge, Sentinel's best authority in opposition would be an unpublished case applying Illinois law, *Firenze Ventures LLC v. Twin City Fire Ins.*, No. 20-C-4226, 2021 WL 1208991 (N.D. Ill. Mar. 31, 2021), in which the court ruled that the Coronavirus is not a "specified cause of loss" though it was brought to the country as a result of travel by "aircraft or vehicle," calling the theory "unrealistically broad," *id.* at *4.[10]

[10] Other COVID-19 insurance cases have mentioned this issue without resolving it due to policyholders' waiver of the issue. *See Franklin EWC, Inc. v. Hartford Fin. Servs. Grp.*, No. 20-cv-04434, 2020 WL 7342687, at *4; *Wilson v. Hartford Cas.*, 492 F.Supp.3d 417 (E.D. Pa. Sept. 30, 2020); *Digital Age Mktg. Grp., Inc. v. Sentinel Ins.*, No. 20-61577-CIV, 2021 WL 80535, at *4 (S.D. Fla. Jan. 8, 2021); *Protege Rest. Partners LLC v. Sentinel Ins.*, No. 20-CV-03674, 2021 WL 428653, at *8 (N.D. Cal. Feb. 8, 2021); *Westside Head & Neck v. The Hartford Fin. Servs. Grp.*, No. 2:20-cv-06132, 2021 WL 1060230, at *5 (C.D. Cal. Mar. 19, 2021). Because the courts there did not address the "specified cause of loss" issue, they are not precedent on that point. *See Ginns*, 61 Cal.2d at 524 n.2; *Corrales–Vazquez*, 931 F.3d at 954.

But *Firenze* is not consistent with California insurance law. The court in *Firenze* did not apply the principle that a cause of loss includes a concurrent cause "that sets others in motion"—even if "other causes may follow it, and operate more immediately in producing the disaster.'" *Garvey*, 48 Cal.3d at 402; *see Firenze*, 2021 WL 1208991 at *4.

Further, the *Firenze* court's characterization of the argument as "unrealistically broad" appeared to be the result of plaintiff's concession that virus "*will virtually always* be 'the result of' 'aircraft or vehicles.'" *Firenze*, 2021 WL 1208991, at *4 (emphasis added). But such a concession is unnecessary. Coverage requires a case-by-case analysis. While in this case the Coronavirus arrived in the U.S., including California and Nevada, by way of aircraft (2-ER-88), that will not always be the case. For example, had a technician at a nearby lab negligently poured a pathogen in the trash bin, causing an outbreak just in that neighborhood, that outbreak would not be "the result of" an aircraft or vehicle. Nor would it likely be the result of any other "specified cause of loss."

Thus, unlike in *Firenze*, KBFA offers a cognizable limiting principle—namely, that air travel or other vehicular travel must

actually be a moving cause of a viral transmission—as it was here (2-ER-88)—to trigger the "specified cause of loss" requirement at issue here. *See Curtis O. Griess*, 528 N.W.2d at 333; *German St. Vincent*, 54 S.W.3d at 666–67; *Garvey*, 48 Cal.3d at 402.

At the least, the "aircraft or vehicle" provision as applied to the facts of this case is reasonably susceptible to two interpretations: (1) Sentinel's argument that the airplane or vehicle must actually make contact with the property, thereby damaging it, and (2) KBFA's interpretation that the airplane or vehicle qualifies as a specified cause of loss when it is a necessary component of the causal chain in leading to the insured's pandemic-related losses. As such, the provision is ambiguous and must be construed in KBFA's favor. *See TRB Invs.*, 40 Cal.4th at 27; *AIU Ins.*, 51 Cal.3d at 822.

Consequently, the "Virus Coverage" endorsement applies here.

D. Sentinel's interpretation of the Virus Endorsement would exclude all business losses that KBFA could conceivably incur in connection with a virus, rendering the coverage illusory.

In California, insurance policies may not provide illusory coverage. *See Md. Cas. Co. v. Reeder*, 221 Cal.App.3d 961, 977 (1990)

("*Reeder*") (lead case); *Julian v. Hartford Underwriters Ins.*, 35 Cal.4th 747, 756 (2005). California courts will construe insurance policies so as to avoid rendering the policy's coverage illusory. *See, e.g.*, *Reeder*, 221 Cal.App.3d at 978; *Downey Venture v. LMI Ins.*, 66 Cal.App.4th 478, 487 (1998). "Even plain language may not be enforced if doing so would render the promised coverage illusory. Instead, the language will be construed in a manner that the insured reasonably would expect." Hon. H. Walter Croskey (Ret.) *et al.*, California Practice Guide: Insurance Litigation ¶ 4:29 (Rutter 2020) ("Rutter") (collecting authorities).

Under California law, whether an insurance policy provision provides illusory coverage is a fact-laden inquiry specific to the policyholder and the circumstances surrounding the policy. *See, e.g.*, *Marquez Knolls*, 153 Cal.App.4th at 233; *Oliver Mach. Co. v. U.S. Fid. & Guar. Co.*, 187 Cal.App.3d 1510, 1514–15 (1986); *see also Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins.*, 5 Cal.4th 854, 868 (1993) ("The proper question is whether the word is ambiguous in the context of *this* policy and the circumstances of *this* case."); Rutter ¶ 4:175 (courts must consider "disputed policy language in the context of the

policy as a whole, . . . the circumstances of the case in which the claim arises[,] and common sense" (cleaned up)).

As the Court of Appeal in *Marquez Knolls* explained, a coverage determination must "necessarily refer[ ] to *the insured's*" activities sought to be covered—"not someone else's. Any other interpretation . . . would be contrary to principles of contract interpretation requiring language to be construed in the context of the policy as a whole and the circumstances of the case; would result in a policy that is almost entirely illusory; has no support in the [case law][;] . . . and would defy common sense." 153 Cal.App.4th at 233; *see, e.g.*, *Oliver Mach.*, 187 Cal.App.3d at 1514–15 (holding policy provided illusory coverage based on the specific circumstances of the insured and its business relationships); *Nautilus Ins. v. Onebeacon Ins. Grp., Ltd*, No. CV 12-08399, 2014 WL 1794405, at *5 (C.D. Cal. May 6, 2014) (construing policy to avoid illusory coverage, analyzing "the facts known to the parties when the . . . endorsement was signed" and "the surrounding circumstances"); *Villalpando v. Transguard Ins. of Am.*, 17 F.Supp.3d 969 (N.D. Cal. 2014) (holding worker sufficiently alleged that disability insurance policy was illusory because insurer must have known worker

was ineligible for Social Security, a prerequisite for receiving disability benefits).

Thus, a trial court errs by ignoring the factual circumstances of the insured when it determines the scope of coverage and any exclusions. *See Marquez Knolls*, 153 Cal.App.4th at 234 ("The fundamental error in the trial court's analysis of the policy language is that it omits the requirement of a connection between the risks the policy insures against—or excludes—and the insured.").

Here, if Sentinel were correct that the Virus Endorsement's direct physical loss or direct physical damage and "specified cause of loss" requirements are not met here, then there is no scenario in which the Virus Coverage would apply to KBFA. This Court should avoid such an interpretation because it would render KBFA's Virus Coverage illusory.

Sentinel did not offer—and research did not reveal—a single instance in which a virus changed the composition or structure of a piece of artwork, nor any other nonliving or nonperishable business property. Similarly, Sentinel did not cite, and research did not reveal, any case (real or hypothetical) in which a *virus* could result from equipment breakdown, explosion, windstorm, riot or civil commotion,

vandalism, leakage from fire extinguishing equipment, sinkhole collapse, volcanic action, falling objects, weight of snow, ice or sleet, or water damage (3-ER-360 ¶ G.19, 445 ¶ B.1.a), in any respect that is meaningful to KBFA's insured art-gallery business. *See Marquez Knolls*, 153 Cal.App.4th at 233; *Oliver Mach.*, 187 Cal.App.3d at 1514–15; *Nautilus*, 2014 WL 1794405, at *5; *Villalpando*, 17 F.Supp.3d 969.

If the virus exclusionary language is as all-encompassing as Sentinel suggests, it nullifies the possibility of coverage under the endorsement. As discussed, KBFA had a reasonable expectation that the Policy would cover business losses resulting from viruses. (Argument § I.A) The Virus Endorsement professes to provide "Additional Coverage." (3-ER-444 ¶ B) While this endorsement also contains exclusionary language (3-ER-444 ¶ A), Sentinel's strict reading of its language would create an exclusion that swallows the entire endorsement and provide no possibility of coverage. (3-ER-444–45 ¶ B, 516 ¶ 22) Sentinel fails to meet its burden to demonstrate that its interpretation of the exclusion in the Virus Endorsement is "conspicuous, plain and clear[.]" *Haynes*, 32 Cal.4th at 1204; *see MacKinnon*, 31 Cal.4th at 652 (insurer's burden).

KBFA anticipates that Sentinel will cite a number of unpublished federal district court cases erroneously concluding that virus coverage provisions in similar circumstances are not illusory.[11] This Court should reject the reasoning of those authorities as inconsistent with California insurance law and inapplicable to the circumstances of KBFA's claim.

The cases concluding that virus coverage provisions are not illusory rely on one or two basic arguments. First, courts have pointed out that there is at least one, hypothetical scenario in which a virus could be caused by a "specified cause of loss": a tornado that carries pseudorabies to a pig farm, infecting the livestock, citing *Curtis O. Griess*, 528 N.W.2d 329. *See Ultimate Hearing*, 2021 WL 131556, at *9; *Firenze*, 2021 WL 1208991, at *4. (*See* 3-ER-360 ¶ G.19 ["windstorm" is a "specified cause of loss"]) Though Sentinel did not cite it, research revealed another case involving a perishable good—milk—infected by listeria, *Parker's Farm, Inc. v. Hartford Cas. Ins.*, No. 10-4904, 2012 WL

[11] *See, e.g.*, *Ultimate Hearing Sols. II, LLC v. Twin City Fire Ins.*, No. CV-20-2401, 2021 WL 131556, at *9 (E.D. Pa. Jan. 14, 2021); *Franklin EWC*, 2020 WL 7342687, at *4–5; *Westside Head & Neck*, 2021 WL 1060230, at *5; *Firenze*, 2021 WL 1208991, at *4.

13027973 (D. Minn. June 21, 2012), although listeria is a bacteria, not a virus (*e.g.*, 2-ER-99).

But KBFA is not in the business of farming, does not own livestock, and does not trade in perishable food or drink. (3-ER-301, 513, 515 ¶¶ 1, 12) KBFA is exclusively in the business of selling art to the public—as its Policy with Sentinel reflects and as Sentinel was thus well aware when it sold KBFA its policy. (3-ER-301, 513–15 ¶¶ 1, 12)

Considering the facts and circumstances surrounding KBFA's policy that were known to Sentinel, remote hypotheticals regarding pseudorabies-infected livestock or listeria-infected milk do not save KBFA's Virus Endorsement from being illusory. Livestock and milk have no relevance to KBFA's business.

In arguing otherwise, Sentinel fails to account for California law requiring courts to consider the insured's particular circumstances of which the insurer was aware. *See Marquez Knolls*, 153 Cal.App.4th at 233; *Oliver Mach.*, 187 Cal.App.3d at 1514–15; *Nautilus*, 2014 WL 1794405, at *5; *Villalpando*, 17 F.Supp.3d 969. Whether KBFA's Virus Endorsement is illusory must be determined with reference "to *the insured's*" activities sought to be covered—"not someone else's."

Marquez Knolls, 153 Cal.App.4th at 233; *see also Bay Cities Paving & Grading*, 5 Cal.4th at 868 (court must consider "the context of *this* policy and the circumstances of *this* case").

Thus, the Nebraska court's opinion in *Curtis O. Griess* and the milk hypothetical do not undermine the conclusion that the Virus Endorsement is illusory *as to KBFA*. *See Marquez Knolls*, 153 Cal.App.4th at 233; *Nautilus*, 2014 WL 1794405, at *5; *Villalpando*, 17 F.Supp.3d 969.

The insurers' second line of reasoning is that even though there is *admittedly no scenario* in which the virus coverage could ever apply, *see, e.g.*, *Ultimate Hearing*, 2021 WL 131556, at *9, the insured could still conceivably be entitled to coverage under the same endorsement in connection with damage by fungi, mold, or bacteria. For example, courts have found coverage where water damage caused fungi, mold, or bacteria. *Cooper v. Travelers Indem. Co. of Ill.*, No. C-01-2400, 2002 WL 32775680, at *5 (N.D. Cal. Nov. 4, 2002) (snowmelt which caused e-coli bacteria to proliferate in well); *WPB No. 1, LLC v. Valley Forge Ins.*, No. 05cv2027, 2007 WL 9702161, at *1 (S.D. Cal. Mar. 27, 2007) (hurricane which caused mold).

But the fact that KBFA's virus coverage is bundled with its fungi and bacteria coverage does not mean that Sentinel may interpret the Policy in such a way that the *virus* coverage is rendered surplusage. (3-ER-444–45) *See* Cal. Civ. Code § 1641; *Lyons*, 161 Cal.App.4th at 886; *Knopp*, 50 Cal.App.4th at 1421.

Further, the illusory analysis is specific to each coverage provision, not an insurance policy as a whole. *See, e.g.*, *Crum & Forster Specialty Ins. v. DVO, Inc.*, 939 F.3d 852, 854–55 (7th Cir. 2019) (holding policy exclusion for claims arising out of breach of contract rendered professional liability coverage provision illusory, in policy that also covered other risks that were not affected, such as commercial general liability and pollution coverages); *Rockhill Ins. v. Hoffman-Madison Waterfront, LLC*, 417 F.Supp.3d 50, 61, 65–66 (D.D.C. 2019) (same, "wrongful eviction" coverage where other coverages in the same "personal and advertising liability coverage" form were unaffected); *see also* Cal. Civ. Code § 1641; *Lyons*, 161 Cal.App.4th at 886; *Knopp*, 50 Cal.App.4th at 1421; *Marquez Knolls*, 153 Cal.App.4th at 233; *Oliver Mach.*, 187 Cal.App.3d at 1514–15; *Nautilus*, 2014 WL 1794405, at *5; *Villalpando*, 17 F.Supp.3d 969; *Urogynecology*, 489 F.Supp.3d at 1302

(considering virus coverage as distinct from fungi, mold, and bacteria coverage in policy apparently identical to KBFA's).[12]

Here, the purpose of the "Limited Fungi, Bacteria or Virus Coverage" Endorsement was to provide certain coverage for various risks to human health—*including viruses*. (3-ER-444–45; Argument § I.A) Sentinel's interpretation of the Policy would render KBFA's Virus Coverage a nullity. This Court should interpret the Virus Endorsement so as to avoid rendering that coverage illusory.

II. Additionally and independently, the Special Property Form coverages apply to KBFA's business losses

Though the district court did not reach the question, KBFA is also entitled to coverage under the Policy's Civil Authority, Business Income, Extra Expense, and "sue and labor" provisions.[13]

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[12] An interpretation resulting in *no* coverage for the insured is a sufficient, but not necessary, condition for finding coverage illusory. *See Oliver Mach.*, 187 Cal.App.3d at 1515.

[13] Sentinel has not contended that the exclusion in the Virus Endorsement would preclude coverage under the other provisions of the Special Property Coverage Form. (*Cf.* 1-ER-444) Sentinel raised such an argument in other recent cases, *see Wilson*, 2020 WL 5820800, at *8; *Moody v. Hartford Fin. Grp., Inc.*, No. 20-2856, 2021 WL 135897, at *8 (E.D. Pa. Jan. 14, 2021), suggesting that its decision not to advance such an argument in KBFA's case was deliberate. Indeed, courts have

A. The Policy's "Civil Authority" provision covers KBFA's business losses because the Closure Orders forced KBFA to close its stores to its customers.

A claim under the Civil Authority provision requires (1) actual loss of Business Income; and (2) access to a scheduled premises "specifically prohibited by order of a civil authority" that (3) arose as a direct result of a Covered Cause of Loss in the immediate area. (3-ER-346 ¶ A.5.q.1) KBFA has alleged facts that establish each element.

First, KBFA alleges that, as a result of the Coronavirus and the Closure Orders, KBFA lost business income. (3-ER-520 ¶ 48)

Second, KBFA alleges that the Closure Orders prohibited access to its premises. (3-ER-518–19 ¶¶ 31–45)

Third, KBFA alleges that the Closure Orders prohibited access to KBFA's properties "in response to dangerous physical conditions resulting from a Covered Cause of Loss." (3-ER-519 ¶ 45) As discussed, the presence of Coronavirus and the Closure Orders prohibited KBFA's employees, customers, vendors, suppliers, and others from accessing its

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cast doubt on the effectiveness of so-called "anti-concurrent causation" clauses. *See, e.g., Vardanyan v. AMCO Ins.*, 243 Cal.App.4th 779, 787 (2015); *Susan Spath*, 2021 WL 1837479, at *10–11. In any event, by failing to raise the issue in the district court, Sentinel has waived it on appeal. *See Gieg v. DDR, Inc.*, 407 F.3d 1038, 1047 (9th Cir. 2005).

stores for their intended purpose. (3-ER-519 ¶¶ 44–45) Such a loss is a "direct physical loss" qualifying as a Covered Cause of Loss. (Argument § I.B)

Fourth, KBFA alleges that the Closure Orders reacted to dangerous conditions resulting from a Covered Cause of Loss at the areas immediately surrounding KBFA's stores. (3-ER-519 ¶ 45) For instance, in the immediate vicinity of KBFA's San Francisco gallery, there were 215 cases of COVID-19 as of December 4, 2020. (2-ER-82, 108 ¶ 2) Further, KBFA's Complaint explicitly alleges that Coronavirus is in the immediate area of KBFA's locations. (3-ER-519 ¶ 45)

Unlike the cases on which Sentinel relied, KBFA does not concede that a civil order did not prohibit access to its property. (3-ER-519 ¶ 45) *Cf. Backroads Corp. v. Great N. Ins.*, No. C 03-4615, 2005 WL 1866397, at *6 (N.D. Cal. Aug. 1, 2005); *Derek Scott Williams PLLC*, 2021 WL 767617, at *5. Nor is this a case in which a city imposes a dusk-to-dawn curfew that still allowed a business to remain open during the day, if it wanted. *Cf. Syufy Enters. v. Home Ins. of Ind.*, No. 94-0756, 1995 WL 129229, at *2 (N.D. Cal. Mar. 21, 1995). Instead, this is a case in which Closure Orders forced KBFA to close its business. (3-ER-519 ¶ 45)

Closure Orders like the ones at issue in KBFA's case arising from the Coronavirus pandemic fit squarely within policyholders' Civil Authority Coverage. *See, e.g.*, *Studio 417*, 478 F.Supp.3d at 803–04; *Blue Springs*, 488 F.Supp.3d at 877–78; *Urogynecology*, 489 F.Supp.3d at 1300; *N. State Deli*, 2020 WL 6281507, at *4; *S. Dental Birmingham*, 2021 WL 1217327, at *6-7; *Scott Craven DDS*, 2021 WL 1115247, at *3–4; *see also Susan Spath*, 2021 WL 1837479, at *1, *7–9.

B. The Policy's "Business Income" provision also covers KBFA's losses.

Additionally and independently, there is coverage for KBFA's loss of business income. "Business Income" means the net income (or loss) before tax that KBFA would have earned if no physical loss or damage had occurred. (3-ER-345 ¶¶ A.5.o, 516 ¶ 23)

Sentinel agreed to pay for KBFA's actual loss of Business Income sustained due to the necessary suspension of its operations during the "period of restoration" that occurs within twelve consecutive months after the date of direct physical loss or damage. (3-ER-345 ¶ A.5.o)

As discussed, the requirement of direct physical loss or direct physical damage is met. (Argument § I.B) Further, KBFA alleges that

it experienced a net drop in income due to the presence or potential presence of Coronavirus. (3-ER-520 ¶ 48) Therefore, the prerequisites for business income coverage are met. *See, e.g.*, *Boardwalk Ventures*, 2021 WL 1215892, at *5–6; *Goodwill Indus.*, 2021 WL 476268, at *2–3; *Susan Spath*, 2021 WL 1837479, at *7–9; *In re Soc'y Ins.*, 2021 WL 679109, at *8; *Urogynecology*, 489 F.Supp.3d at 1300; *Henderson*, 2021 WL 168422, at *6–17; *Derek Scott Williams PLLC*, 2021 WL 767617, at *5; *NeCo*, 2021 WL 601501, at *5–7; *N. State Deli*, 2020 WL 6281507, at *4; *Blue Springs*, 488 F.Supp.3d at 874–77; *Cherokee Nation*, 2021 WL 506271, at *1–12; *Scott Craven DDS*, 2021 WL 1115247, at *4.

C. The Policy's "Extra Expense" provision also covers KBFA's losses.

Similarly, KBFA purchased "Extra Expense" coverage, which means expenses "to avoid or minimize the 'suspension' of business and to continue 'operations,'" and to repair or replace property. (3-ER-345 ¶¶ A.5.p, 517 ¶ 26) For the same reasons that KBFA's Business Income coverage applies here, the Extra Expense coverage applies, as well. (3-ER-520 ¶ 48; Argument § II.B) *See, e.g.*, *Boardwalk Ventures*, 2021 WL 1215892, at *5–6; *Goodwill Indus.*, 2021 WL 476268, at *2–3; *Susan*

Spath, 2021 WL 1837479, at *6; *Urogynecology*, 489 F.Supp.3d at 1300; *NeCo*, 2021 WL 601501, at *7; *N. State Deli*, 2020 WL 6281507, at *4; *Blue Springs*, 488 F.Supp.3d at 877; *Scott Craven DDS*, 2021 WL 1115247, at *3–4.

D. KBFA's "sue and labor" expenses are also recoverable.

Lastly, KBFA alleged that it is entitled to "sue and labor" coverage under the Policy. (3-ER-514–18 ¶¶ 7, 15, 29–30) In the event of loss or damage, the Policy requires KBFA to "[t]ake all reseasonable [*sic*] steps to protect the Covered Property from further damage by a Covered Cause of Loss." (3-ER-355 ¶ E.3.d) KBFA must also "keep a record of [its] expenses for emergency and temporary repairs, for consideration in the settlement of the claim." (3-ER-355 ¶ E.3.d)

This type of clause is commonly known as a "sue and labor" provision, and functions as additional coverage requiring the insurer to reimburse the insured for costs it incurs in the course of complying with the requirements in the clause. *See Young's Mkt. Co. v. Am. Home Assur. Co.*, 4 Cal.3d 309, 313 (1971).

Because KBFA alleged that it has incurred expenses in connection with taking reasonable steps to protect the Covered Property, it has

alleged a plausible claim under the Policy's Sue and Labor provisions. (3-ER-355 ¶ E.3.d, 514–18 ¶¶ 7, 15, 29–30) *See Young's Mkt.*, 4 Cal.3d at 313; *Studio 417*, 478 F.Supp.3d at 805; *Blue Springs*, 488 F.Supp.3d at 879–80; *Scott Craven DDS*, 2021 WL 1115247, at *4.

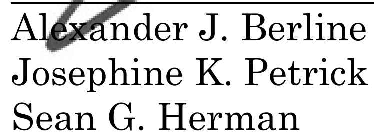
CONCLUSION

This Court is respectfully requested to (1) vacate the order granting judgment on the pleadings, (2) reverse with instructions to enter a new order denying the motion for judgment on the pleadings, (3) remand the case to the district court for further proceedings, and (4) award KBFA its costs.

In addition, this Court is respectfully requested to certify to the California Supreme Court the controlling question as to the proper interpretation of the direct physical loss or direct physical damage provision, as set forth in Appellant's Certification Request, filed herewith. *See* Cal. R. Ct. 8.548.

DATED: May 26, 2021

HANSON BRIDGETT LLP

By: 

Alexander J. Berline
Josephine K. Petrick
Sean G. Herman

Attorneys for Plaintiff-Appellant
KEVIN BARRY FINE ART ASSOCIATES

REQUEST FOR ORAL ARGUMENT

The Virus Endorsement in KBFA's Policy with Sentinel makes this a case of first impression in this Court, the California appellate courts, and, to KBFA's knowledge, in the U.S. Courts of Appeals generally. Trial courts across the country are split on questions relating to business-interruption insurance coverage in connection with the COVID-19 pandemic. The questions presented in this appeal are of vital public importance as small businesses like KBFA seek to rebuild after over a year of lockdowns and shelter-in-place orders occasioned by the pandemic. KBFA respectfully submits that oral argument would substantially assist the Court.

STATEMENT OF RELATED CASES

KBFA is not aware of any cases pending in this Court that arise out of the same or consolidated cases in the district court. 9th Cir. R. 28-2.6(a). KBFA identifies the following cases pending in this Court that raise the same or closely related issues, or involve the same transaction or event—namely, the COVID-19 pandemic as it bears on business-interruption insurance. *Id.* R. 28-2.6(b)-(c).

- *Mudpie, Inc. v. Travelers Cas. Ins. of Am.*, 9th Cir. No. 20-16858: appeal from order on motion to dismiss involving a policy containing an absolute virus exclusion, No. 20-cv-03213, 2020 WL 5525171 (N.D. Cal. Sept. 14, 2020)
- *Chattanooga Professional Baseball LLC v. Nat'l Cas. Co.*, 9th Cir. No. 20-17422: appeal from order granting motion to dismiss under Arizona law, which did not consider interpretive precepts akin to those under California law that construe ambiguous insurance policies in insureds' favor, involving a policy with an absolute virus exclusion, No. CV-20-01312, 2020 WL 6699480 (D. Ariz. Nov. 13, 2020)

- *Plan Check Downtown III, LLC v. AmGuard Ins.*, 9th Cir. No. 20-56020: appeal from order on motion to dismiss involving a policy containing an absolute virus exclusion, No. 2:20-cv-06954, 485 F.Supp.3d 1225 (C.D. Cal. Sept. 10, 2020)
- *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Conn.*, 9th Cir. No. 20-56031: appeal from order on motion to dismiss, which did not consider interpretive precepts under California law that construe ambiguous insurance policies in insureds' favor, involving a policy with an absolute virus exclusion, No. 2:20-cv-04423, 492 F.Supp.3d 1051 (C.D. Cal. Oct. 2, 2020)
- *10E, LLC v. Travelers Indem. Co. of Conn.*, 9th Cir. No. 20-56206: appeal from order on motion to dismiss that did not consider interpretive precepts under California law that construe ambiguous insurance policies in insureds' favor, involving a policy with an absolute virus exclusion, No. 2:20-cv-04418, 483 F.Supp.3d 828 (C.D. Cal. Sept. 2, 2020)
- *Robert W. Fountain, Inc. v. Citizens Ins. of Am.*, 9th Cir. No. 21-15053: appeal from order on motion for judgment on pleadings

involving a policy with absolute virus exclusion, No. 3:20-cv-05441, 2020 WL 7247207 (N.D. Cal. Dec. 9, 2020)

- *HealthNOW Med. Ctr., Inc. v. State Farm Gen. Ins.*, 9th Cir. No. 21-15054: appeal from order on motion to dismiss involving a policy containing absolute virus exclusion, No. 4:20-cv-04340, 2020 WL 7260055 (N.D. Cal. Dec. 10, 2020)
- *Karen Trinh DDS v. State Farm Gen. Ins.*, 9th Cir. No. 21-15147: appeal from order on motion to dismiss involving a policy covering "accidental direct physical loss" and containing an absolute virus exclusion, No. 5:20-cv-04265, 2020 WL 7696080 (N.D. Cal. Dec. 28, 2020)
- *O'Brien Sales & Mktg., Inc. v. Transp. Ins.*, No. 9th Cir. 21-15241: appeal from order on motion to dismiss that did not consider interpretive precepts under California law that construe ambiguous insurance policies in insureds' favor, involving a policy that does not contain a virus endorsement, No. 3:20-cv-02951, 2021 WL 105772 (N.D. Cal. Jan. 12, 2021)
- *Palmdale Estates, Inc. v. Blackboard Ins.*, 9th Cir. No. 21-15258: appeal from order on motion to dismiss that does not consider

interpretive precepts under California law that construe ambiguous insurance policies in insureds' favor, involving a policy with an absolute virus exclusion, No. 3:20-cv-06158, 2021 WL 25048 (N.D. Cal. Jan. 4, 2021)

- *Colgan v. Sentinel Ins.*, 9th Cir. No. 21-15332: appeal from order on motion for judgment on pleadings that does not consider interpretive precepts under California law that construe ambiguous insurance policies in insureds' favor, and construing the insured's additional virus endorsement as a virus exclusion, No. 20-cv-04780, 2021 WL 472964 (N.D. Cal. Jan. 26, 2021)
- *Water Sports Kauai, Inc. v. Fireman's Fund Ins.*, 9th Cir. No. 21-15366: appeal from order on motion to dismiss that does not consider interpretive precepts akin to those under California law that construe ambiguous insurance policies in insureds' favor, involving a policy that does not contain a virus endorsement, No. 20-cv-03750, 2020 WL 6562332 (N.D. Cal. Nov. 9, 2020)
- *Circus Circus LV, LP v. AIG Specialty Ins.*, 9th Cir. No. 21-15367: appeal from order granting motion to dismiss based on direct

physical loss issue under Nevada law, No. 2:20-CV-01240, 2021 WL 769660 (D. Nev. Feb. 26, 2021)

- *Founder Inst., Inc. v. Hartford Fire Ins.*, 9th Cir. No. 21-15404: appeal from order on motion to dismiss that does not consider interpretive precepts under California law that construe ambiguous insurance policies in insureds' favor, and instead construes the additional virus endorsement as a virus exclusion, No. 20-cv-04466, 497 F.Supp.3d 678 (N.D. Cal. Oct. 22, 2020)
- *Fink v. Hanover Ins. Grp., Inc.*, 9th Cir. No. 21-15421: appeal from order granting motion to dismiss where court adopted analysis of the district court in *Mudpie*, No. 20-CV-03907, 2021 WL 647374 (N.D. Cal. Jan. 25, 2021)
- *Egg & I, LLC v. U.S. Specialty Ins.*, 9th Cir. No. 21-15545: appeal from order on motion to dismiss that does not consider interpretive precepts akin to those under California law that construe ambiguous insurance policies in insureds' favor, involving a policy covering accidental contamination, malicious tampering, product extortion, and adverse publicity, and does not

contain a virus endorsement, No. 2:20-cv-00747, 2021 WL 769658 (D. Nev. Feb. 25, 2021)

- *Out W. Rest. Grp. Inc. v. Affiliated FM Ins.*, 9th Cir. No. 21-15585: appeal from order on motion for judgment on pleadings involving a policy that does not contain a virus endorsement, No. 20-CV-06786, 2021 WL 1056627 (N.D. Cal. Mar. 19, 2021)
- *Baker v. Or. Mut. Ins.*, 9th Cir. No. 21-15716: appeal from order granting motion to dismiss based on the direct physical damage issue, No. 20-CV-05467, 2021 WL 1145882 (N.D. Cal. Mar. 25, 2021)
- *Unmasked Mgmt., Inc. v. Century-Nat'l Ins.*, 9th Cir. No. 21-55090: appeal from order on motion to dismiss involving an insured that continued operating business and involving a policy that does not contain a virus endorsement, No. 3:20-cv-01129, 2021 WL 242979 (S.D. Cal. Jan. 22, 2021)
- *Pez Seafood DTLA, LLC v. Travelers Indem.*, 9th Cir. No. 21-55100: appeal from order on motion to dismiss involving a policy containing an absolute virus exclusion, No. CV 20-4699, 2021 WL 234355 (C.D. Cal. Jan. 20, 2021)

- *BA LAX, LLC v. Hartford Fire Ins.*, 9th Cir. No. 21-55109: appeal from order motion for summary judgment that does not consider interpretive precepts under California law that construe ambiguous insurance policies in insureds' favor, and instead construes the additional virus endorsement as a virus exclusion, No. 2:20-cv-06344, 2021 WL 144248 (C.D. Cal. Jan. 12, 2021)
- *Selane Prods. Inc. v. Cont'l Cas.*, 9th Cir. No. 21-55123: appeal from order on motion to dismiss that does not consider interpretive precepts under California law that construe ambiguous insurance policies in insureds' favor, and involving a policy that does not contain a virus endorsement, No. 2:20-cv-07834, 2020 WL 7253378 (C.D. Cal. Nov. 24, 2020)
- *Rialto Pockets, Inc. v. Certain Underwriters at Lloyds London*, 9th Cir. No. 21-55196: appeal from order on motion to dismiss that does not consider interpretive precepts under California law that construe ambiguous insurance policies in insureds' favor, and involving a policy that covers "physical loss or damage" to property and does not contain a virus endorsement, No. 2:20-cv-07709, 2021 WL 267850 (C.D. Cal. Jan. 7, 2021)

- *Gym Mgmt. Servs., Inc. v. Vantapro Specialty Ins.*, 9th Cir. No. 21-55231: appeal from order on motion for judgment on pleadings involving a policy that does not contain a virus endorsement, No. 2:20-cv-09541, 2021 WL 647528 (C.D. Cal. Feb. 1, 2021)
- *Daneli Shoe Co. v. Valley Forge Ins.*, 9th Cir. No. 21-55374: appeal from order granting motion to dismiss based on, inter alia, direct physical damage issue, No. 20-CV-1195, 2021 WL 1112710 (S.D. Cal. Mar. 17, 2021)
- *Caribe Rest. & Nightclub, Inc. v. Topa Ins.*, 9th Cir. No. 21-55405, appeal from order granting motion to dismiss based on the direct physical damage issue, No. 2:20-CV-03570, 2021 WL 1338439 (C.D. Cal. Apr. 9, 2021)
- *Islands Rests., LP v. Affiliated FM Ins.*, 9th Cir. No. 21-55409: appeal from order granting judgment on the pleadings based on the direct physical damage issue, No. 3:20-CV-02013, 2021 WL 1238872 (S.D. Cal. Apr. 2, 2021)
- *Motiv Grp., Inc. v. Cont'l Cas.*, 9th Cir. No. 21-55415: order granting motion to dismiss based on the direct physical damage

issue, No. 2:20-CV-09368, 2021 WL 1240779 (C.D. Cal. Apr. 1, 2021)

- *L.A. Cty. Museum of Nat. Hist. Found. v. Travelers Indem. Co. of Conn.*, 9th Cir. No. 21-55497: appeal from order granting motion to dismiss in case involving absolute virus exclusion, No. 2:21-CV-01497, 2021 WL 1851028 (C.D. Cal. Apr. 15, 2021)

Similar issues are also pending in:

- *Inns by the Sea v. Cal. Mut. Ins.*, No. H048443 (Cal. Ct. App. 6th Dist.): appeal from order sustaining demurrer to Plaintiff's entire complaint without leave to amend, No. 20CV001274, 2020 WL 5868739 (Monterey Cty. Super. Ct. Aug. 6, 2020)

DATED: May 26, 2021

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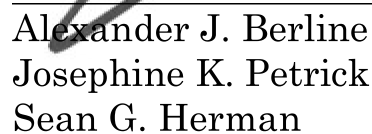
By: 

Alexander J. Berline
Josephine K. Petrick
Sean G. Herman

Attorneys for Plaintiff-Appellant
KEVIN BARRY FINE ART ASSOCIATES

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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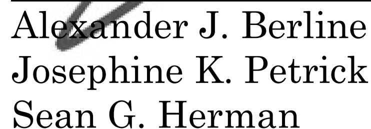
By: 

Alexander J. Berline
Josephine K. Petrick
Sean G. Herman

Attorneys for Plaintiff-Appellant
KEVIN BARRY FINE ART ASSOCIATES