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B313518

**IN THE COURT OF APPEAL, STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SEVEN**

STARLIGHT CINEMAS, INC., ET AL.,
Plaintiffs and Appellants,

v.

MASSACHUSETTS BAY INSURANCE COMPANY,
Defendant and Respondent.

Appeal from the Superior Court of California, County of Los Angeles
Hon. Mark A. Young, Dept. M – Case No. 20SMCV01181

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Court of Appeal
State of California
Second Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case No.:	B313518
Superior Court Case No.:	20SMCV01181
Case Name: *Starlight Cinemas, Inc., et al. v. Massachusetts Bay Insurance Company*	

Please check the applicable box:

☐ There are no interested entities or parties that must be listed in this Certificate under California Rules of Court, Rule 8.208.

☒ Interested entities or parties required to be listed under California Rules of court, Rule 8.208 are as follows:

Name of Interested Entity	Nature of Interest
The Hanover Insurance Group, Inc.	Whole owner of Respondent Massachusetts Bay Insurance Company (and intermediate companies). No person or entity owns 10% or more of The Hanover Insurance Group, Inc.

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TABLE OF CONTENTS

	Page
RESPONDENT'S BRIEF	1
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS	2
TABLE OF AUTHORITIES	5
INTRODUCTION	12
STATEMENT OF THE CASE	13
A. The policy provision at issue covers only claims based on direct physical loss of or damage to property.	13
B. The policy excludes losses caused by any virus and losses caused by any ordinance or law.	14
C. Starlight alleges economic losses resulting from government orders issued in response to the Covid-19 pandemic.	15
D. Starlight's suit against MBIC is dismissed.	16
ARGUMENT	17
I. Governing law.	17
A. Standard of review.	17
B. Insurance coverage.	18
II. Starlight's alleged losses did not fall within the scope of coverage because the government orders did not cause "physical loss of" Starlight's property.	20
A. "Physical loss" must involve some material or tangible effect on property.	21
1. "Physical loss" in the policy.	21
2. "Physical loss" under California law.	25
3. Starlight's interpretative errors.	28

TABLE OF CONTENTS

			Page
	B.	The government orders did not cause physical loss.	34
	C.	All Court of Appeal decisions addressing the issue agree that government orders do not cause physical loss or damage.	37
	D.	Starlight's contrary cases are unpersuasive.	42
III.	Coverage is also barred by the virus exclusion and the ordinance and law exclusion.		45
	A.	By its plain terms, the virus exclusion applies to all of Starlight's alleged losses.	46
	B.	By its plain terms, the ordinance and law exclusion also applies to all of Starlight's alleged losses.	48
	C.	Regardless of the ordinance and law exclusion, the efficient proximate cause rule bars coverage under the virus exclusion alone.	51
		1. A loss that arises from multiple causes is excluded if the loss's efficient proximate cause is excluded.	52
		2. Virus was the efficient proximate cause of Starlight's losses.	57
IV.	Starlight's newly proposed amendment to its complaint would be futile.		60
V.	Starlight failed to state a claim for insurance bad faith.		62
CONCLUSION			63
CERTIFICATE OF COMPLIANCE			64
PROOF OF SERVICE			65

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Berry v. Commercial Union Ins. Co.
(9th Cir. 1996) 87 F.3d 387 53

Bradley Hotel Corp. v. Aspen Specialty Ins. Co.
(7th Cir. 2021) 19 F.4th 1002 49

Hair Studio 1208, LLC v. Hartford Underwriters Ins. Co.
(E.D.Pa. 2021) 539 F.Supp.3d 409 42

Kingray, Inc. v. Farmers Group Inc.
(C.D.Cal. 2021) 523 F.Supp.3d 1163 42–43

Mudpie, Inc. v. Travelers Casualty Ins. Co. of America
(9th Cir. 2021) 15 F.4th 885 23, 58

Norwich Union Fire Ins. Soc. v. Board of Com'rs of Port of New Orleans
(5th Cir. 1944) 141 F.2d 600 54

Oral Surgeons, PC v. Cincinnati Ins. Co.
(8th Cir. 2021) 2 F.4th 1141 44

Pacific Marine Center, Inc. v. Philadelphia Indemnity Ins. Co.
(E.D.Cal. 2017) 248 F.Supp.3d 984 26

Plan Check Downtown III, LLC v. AmGuard Ins. Co.
(2020) 485 F.Supp.3d 1225 31, 36

Princess Garment Co. v. Fireman's Fund Ins. Co. of San Francisco
(6th Cir. 1940) 115 F.2d 380 56

Sandy Point Dental, P.C. v. Cincinnati Ins. Co.
(7th Cir. 2021) 20 F.4th 327 29

TABLE OF AUTHORITIES

Page(s)

Santo's Italian Café LLC v. Acuity Ins. Co. (6th Cir. 2021) 15 F.4th 398 — 30

Seifert v. IMT Ins. Co. (D.Minn. 2021) 542 F.Supp.3d 874 — 30–31, 43–44

Southeast Mental Health Center, Inc. v. Pacific Ins. Co. (W.D.Tenn. 2006) 439 F.Supp.2d 831 — 33

Susan Spath Hegedus, Inc. v. ACE Fire Underwriters Ins. Co. (E.D.Pa. 2021) 538 F.Supp.3d 457 — 42

Tento Intern., Inc. v. State Farm Fire and Cas. Co. (9th Cir. 2000) 222 F.3d 660 — 54–55, 57–58

State Cases

AC Ocean Walk, LLC v. American Guarantee and Liability Ins. Co. (N.J.Super.Ct.App.Div. June 23, 2022) 2022 WL 2254864 — 33

Advanced Network, Inc. v. Peerless Ins. Co. (2010) 190 Cal.App.4th 1054 — 32

Align Technology, Inc. v. Tran (2009) 179 Cal.App.4th 949 — 18

American Alternative Ins. Corp. v. Superior Court (2006) 135 Cal.App.4th 1239 — 26

Apple Annie, LLC v. Oregon Mutual Ins. Co. (2022) 82 Cal.App.5th 919 — 29, 37–41

Aydin Corp. v. First State Ins. Co. (1998) 18 Cal.4th 1183 — 19, 44

TABLE OF AUTHORITIES

Page(s)

Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.
(1993) 5 Cal.4th 854 — 31

Board of Educ. of City of Chicago v. A, C and S, Inc.
(Ill. 1989) 546 N.E.2d 580 — 34

Brodkin v. State Farm Fire & Casualty Co.
(1989) 217 Cal.App.3d 210 — 47

Brooks v. Metropolitan Life Ins. Co.
(1945) 27 Cal.2d 305 — 56

Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.
(2016) 1 Cal.5th 994 — 18

Century Surety Co. v. Polisso
(2006) 139 Cal.App.4th 922 — 55

Consolidated Restaurant Operations, Inc. v. Westport Ins. Corp.
(App.Div. 2022) 167 N.Y.S.3d 15 — 43

Dey v. Continental Central Credit
(2008) 170 Cal.App.4th 721 — 60

Edgerton & Sons, Inc. v. Minneapolis Fire & Marine Ins. Co.
(Conn. 1955) 116 A.2d 514 — 54

Eisen v. Tavangarian
(2019) 36 Cal.App.5th 626 — 50–51

EOTT Energy Corp. v. Storebrand Internat. Ins. Co.
(1996) 45 Cal.App.4th 565 — 26

TABLE OF AUTHORITIES

Page(s)

Garvey v. State Farm Fire & Casualty Co.
(1989) 48 Cal.3d 395 — 52–53, 56, 58–60

Gillis v. Sun Ins. Office, Limited
(1965) 238 Cal.App.2d 408 — 53

Hanna v. Interstate Business Men's Acc. Ass'nf of Des Moines, Iowa
(1919) 41 Cal.App. 308 — 53

Haynes v. Farmers Ins. Exchange
(2004) 32 Cal. 4th 1198 — 24

Homeowners Choice Property & Casualty v. Miguel Maspons
(Fla.Dist.Ct.App. 2017) 211 So.3d 1067 — 33

Howell v. State Farm Fire & Casualty Co.
(1990) 218 Cal.App.3d 1446 — 56

Hughes v. Potomac Ins. Co.
(1962) 199 Cal.App.2d 239 — 27

Inns-by-the-Sea v. California Mutual Ins. Co.
(2021) 71 Cal.App.5th 688 — 38–39, 41

Jordan v. Allstate Ins. Co.
(2007) 148 Cal.App.4th 1062 — 62

Julian v. Hartford Underwriters Ins. Co.
(2005) 35 Cal.4th 747 — 52

Mac Property Group LLC & The Cake Boutique LLC v. Selective Fire and Casualty Ins. Co.
(N.J.Super.Ct.App.Div. 2022) 278 A.3d 272 — 33

Marina Pacific Hotel and Suites, LLC v. Fireman's Fund Ins. Co.
(2022) 81 Cal.App.5th 96 — 19, 40–41, 46, 51

TABLE OF AUTHORITIES

Page(s)

Mission National Ins. Co. v. Coachella Valley Water Dist.
(1989) 210 Cal.App.3d 484 59

Mountain Air Enterprises, LLC v. Sundowner Towers, LLC
(2017) 3 Cal.5th 744 30

MRI Healthcare Center of Glendale, Inc. v. State Farm General Ins. Co.
(2010) 187 Cal.App.4th 766 16, 25–26, 40, 42

Musso & Frank Grill Co. v. Mitsui Sumitomo Ins. USA Inc.
(2022) 77 Cal.App.5th 753 38–39, 41, 46

People ex rel. Harris v. Pac Anchor Transportation, Inc.
(2014) 59 Cal.4th 772 17

Powerine Oil Co., Inc. v. Superior Court
(2005) 37 Cal.4th 377 17

Prudential Ins. Co. of America, Inc. v. Superior Court
(2002) 98 Cal.App.4th 585 32

Reid v. Google, Inc.
(2010) 50 Cal.4th 512 56

Sabella v. Wisler
(1963) 59 Cal.2d 21 52–54, 56, 58–59

Sauer v. General Ins. Co. of America
(1964) 225 Cal.App.2d 275 53, 57, 61

Scott v. Continental Ins. Co.
(1996) 44 Cal.App.4th 24 22

TABLE OF AUTHORITIES

Page(s)

Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.
(2000) 78 Cal.App.4th 847 28

State Farm Fire & Casualty Co. v. Von Der Lieth
(1991) 54 Cal.3d 1123 56

Strickland v. Federal Ins. Co.
(1988) 200 Cal.App.3d 792 27

Tellez v. Rich Voss Trucking, Inc.
(2015) 240 Cal.App.4th 1052 20

United Talent Agency v. Vigilant Ins. Co.
(2022) 77 Cal.App.5th 821 23, 38–39, 41

Vardanyan v. AMCO Ins. Co.
(2015) 243 Cal.App.4th 779 52

Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.
(N.J.Super.Ct.App.Div. 2009) 968 A.2d 724 32–33

Waller v. Truck Ins. Exchange, Inc.
(1995) 11 Cal.4th 1 18, 21, 23, 50, 62

Ward General Ins. Services, Inc. v. Employers Fire Ins. Co.
(2003) 114 Cal.App.4th 548 26

Ward v. Taggart
(1959) 51 Cal.2d 736 50

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State Statutes

Civil Code
Section 1641 — 23

Evidence Code
Section 452, subdivision (g) — 18

Other Authorities

Black's Law Dictionary
(11th ed. 2019) — 22, 49

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<https://www.merriam-webster.com/dictionary/
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Public Order Under City of Los Angeles Emergency
Authority: New City Measures to Address
COVID-19 (March 15, 2020)
<https://www.lamayor.org/COVID19Orders>
[as of Nov. 21, 2022] — 35

INTRODUCTION

Because of the Covid-19 pandemic, state and local governments ordered Starlight Cinemas to temporarily close its movie theaters. Starlight alleged that its property insurance policy covered its resulting business losses because the government orders caused "physical loss of" its property—as required under the relevant policy provision.

The trial court properly entered judgment on the pleadings against Starlight. Starlight lost some *use* of its property, but it did not, and could not, allege *physical loss of* any theater. California cases unanimously and correctly hold that loss of use due to the pandemic is not physical loss in the context of commercial property insurance.

Starlight's allegations failed as a matter of law for other reasons, too. Starlight's alleged losses were caused by (1) the virus that causes Covid-19 and (2) the ensuing government closure orders intended to limit the virus's spread. But its insurance policy excludes "loss or damage caused by or resulting from any virus . . . that induces or is capable of inducing . . . illness or disease." And it excludes "loss or damage caused directly or indirectly by . . . [t]he enforcement of or compliance with any ordinance or law . . . [r]egulating the . . . use . . . of any

property." Thus, both causes of Starlight's alleged losses are excluded from coverage.

This Court should therefore affirm the trial court's judgment against Starlight.

STATEMENT OF THE CASE

Starlight Cinemas owns and operates movie theaters across Southern California. (1AA/19 [complaint, ¶ 40].) Starlight purchased property insurance for its theaters from Massachusetts Bay Insurance Company (MBIC). (1AA/14–15 [¶ 24].) The trial court concluded that Starlight's alleged economic losses from the Covid-19 pandemic were not covered by the insurance policy and granted MBIC's motion for judgment on the pleadings. (2AA/749–760.) The court denied leave to amend because even if Starlight could allege some physical alteration to covered property, the virus exclusion would still bar coverage. (2AA/754.)

A. The policy provision at issue covers only claims based on direct physical loss of or damage to property.

Starlight sought coverage under a commercial property insurance policy in effect from August 19, 2019, to August 19,

2020. (1AA/15 [¶ 25].) The core property insurance provision covers “direct physical loss of or damage to Covered Property,” including covered buildings and personal property. (1AA/151; see also 1AA/151–166 [the core property insurance provision]; 1AA/43–46 [listing Starlight’s property-related coverages and premiums].)

Starlight claimed coverage under a provision of the insurance policy for “Business Income.” (1AA/15–17, 19, 21 [¶¶ 29–34, 46, 57–58].) This provision requires a “‘suspension’” of Starlight’s “‘operations’” that is “caused by direct physical loss of or damage to” Starlight’s insured property. (1AA/167.)[1]

B. The policy excludes losses caused by any virus and losses caused by any ordinance or law.

The policy excludes “loss or damage caused by or resulting from any virus, bacterium or other micro-organism that induces

[1] On appeal, Starlight makes no argument concerning Civil Authority coverage (1AA/17–18 [¶ 35])—nor could it, because its complaint fails to allege the distinct elements of that coverage and it did not argue that coverage in opposing judgment on the pleadings. (See 2AA/754 [trial court: “Plaintiffs also failed to address how they would be entitled to coverage under the Civil Authority provision”].) Starlight has thus forfeited any such contention.

or is capable of inducing physical distress, illness or disease." (1AA/178.)

The policy also excludes "loss or damage caused directly or indirectly by" "[t]he enforcement of or compliance with any ordinance or law: [¶] **(1)** Regulating the construction, *use* or repair of any property." (1AA/181, italics added.) This exclusion applies to any loss that "results from: [¶] **(a)** An ordinance or law that is enforced even if the property has not been damaged." (*Ibid.*)

C. Starlight alleges economic losses resulting from government orders issued in response to the Covid-19 pandemic.

According to Starlight, "The Coronavirus (COVID-19) originated in China," spread around the world, and led to a "pandemic." (1AA/11 [¶ 5].) "[I]n response" to the pandemic, the governments of Los Angeles County, Orange County, and Riverside County issued orders "closing all non-essential businesses, including theatres." (1AA/11 [¶ 6].) And the State of California issued an order "banning all public and private gatherings." (1AA/11–12 [¶ 6].)

These government orders “required” Starlight “to close [its] theaters and cease business operations.” (1AA/12 [¶ 7].) Starlight alleged that these closures “result[ed] in a covered loss under the Policy.” (1AA/19 [¶ 43].)

D. Starlight’s suit against MBIC is dismissed.

After MBIC denied coverage, Starlight sued for breach of contract and insurance bad faith. (1AA/21–24 [¶¶ 55–68].) The trial court granted MBIC’s motion for judgment on the pleadings without leave to amend.

The trial court ruled that under California law, the “direct physical loss” required for coverage occurs only when property undergoes a “‘distinct, demonstrable, physical alteration.’” (2AA/753–754, quoting *MRI Healthcare Center of Glendale, Inc. v. State Farm General Ins. Co.* (2010) 187 Cal.App.4th 766, 779 (*MRI Healthcare*).) Starlight alleged only “loss of the use of the movie theaters,” not any “physical alteration of the movie theaters or any other actual change.” (2AA/754.) The failure of this most basic requirement for commercial property insurance coverage—physical loss or damage to covered property—defeated Starlight’s claims for both breach of contract and insurance bad faith. (*Ibid.*)

Because of the virus exclusion, the trial court also denied Starlight's request for leave to amend its complaint. In its ruling, the court assumed for the sake of argument that Starlight had proposed to allege "physical alterations that would be covered" by the basic insuring agreement. (2AA/754.) This assumption gave Starlight the benefit of the doubt: Counsel at the motion hearing had proposed alleging that Starlight *itself* had physically altered its property to promote social distancing (RT/4)—a far cry from experiencing covered physical loss or damage. The court held that even if Starlight could allege "some degree of physical alteration" consistent with its existing allegations, "the Virus Exclusion provision" would bar coverage. (2AA/754; see also RT/11.)

ARGUMENT

I. Governing law.

A. Standard of review.

On review of judgment on the pleadings, the Court independently reviews questions of law, including the interpretation of language in an insurance policy. (*People ex rel. Harris v. Pac Anchor Transportation, Inc.* (2014) 59 Cal.4th 772, 777 [grant of judgment on the pleadings reviewed de novo]; *Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377,

389–390 [insurance policy language subject to independent review].)

The Court accepts "all material facts properly pleaded" in the complaint, "but not contentions, deductions or conclusions of fact or law." (*Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.* (2016) 1 Cal.5th 994, 1010.) The Court "give[s] the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Ibid.*) The Court "also consider[s] matters which may be judicially noticed" (*ibid.*), including "[f]acts and propositions that are of such common knowledge within the territorial jurisdiction of the court that they cannot reasonably be the subject of dispute" (Evid. Code, § 452, subd. (g)).

The Court should affirm the judgment if the complaint read in this way fails to state a cause of action. (See *Align Technology, Inc. v. Tran* (2009) 179 Cal.App.4th 949, 958.)

B. Insurance coverage.

As noted, the "interpretation of an insurance policy is a question of law." (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18 (*Waller*).) The "'goal in construing insurance contracts, as with contracts generally, is to give effect to the

parties' mutual intentions. If contractual language is clear and explicit, it governs.'" (*Marina Pacific Hotel and Suites, LLC v. Fireman's Fund Ins. Co.* (2022) 81 Cal.App.5th 96, 105 (*Marina Pacific*) [quoting *Montrose Chemical Corporation v. Superior Court of Los Angeles* (2020) 9 Cal.5th 215, 230].)

"The burden is on an insured to establish that the occurrence forming the basis of its claim is within the basic scope of insurance coverage." (*Aydin Corp. v. First State Ins. Co.* (1998) 18 Cal.4th 1183, 1188 (*Aydin Corp.*).) If the occurrence may be covered, "the burden is on the insurer to prove the claim is specifically excluded." (*Ibid.*)

Applying this framework, the Court should affirm the judgment against Starlight on any or all of several independent grounds: (1) The alleged losses did not fall within the scope of coverage; and (2) the alleged losses *did* fall within the virus exclusion, and within the ordinance and law exclusion. And the new allegation Starlight now proposes to add would not solve these problems.

II. Starlight's alleged losses did not fall within the scope of coverage because the government orders did not cause "physical loss of" Starlight's property.

The coverage at issue requires "direct physical loss of or damage to" property. (Stmt. § A., *above*.) On appeal, Starlight argues that the government orders caused only direct physical *loss*. (AOB 14 ["While 'damage to' property may require some type of physical alteration, the 'loss of' that property does not"]; 41 [similar]; 30 ["The Government Orders therefore caused a 'direct physical loss of' the property"].)

In making this argument, and in omitting any assertion of physical *damage* to its property, Starlight forfeits any "physical damage" contention and narrows the coverage question for this appeal. (See *Tellez v. Rich Voss Trucking, Inc.* (2015) 240 Cal.App.4th 1052, 1066.) Starlight also effectively concedes that its property did not undergo any physical or material alteration.

Instead, Starlight stakes coverage on its assertion that "physical loss" does not need to be "material." (AOB 43–44 [stating it is "incorrect" to conclude that "physical loss" "must have *material existence*"].) According to Starlight, physical damage entails "physical alteration" of property, but physical loss

does not. (AOB 31 ["'physical loss of' in the insuring clause cannot be read to require the physical alteration or transformation of the insured property"]; see also AOB 41, 50 [reiterating this distinction].)

However, every Court of Appeal decision to address this issue has held that pandemic-related government closure orders do not cause "physical loss of or damage to" property. Starlight's contrary assertion neuters the word "physical" and must be rejected.

A. "Physical loss" must involve some material or tangible effect on property.

The notion that commercial property insurance turns on *physical loss of the covered property* is not surprising or arcane. It is a familiar concept to any reasonable layperson, and surely to a corporate insured like Starlight.

1. "Physical loss" in the policy.

To interpret the policy term "physical," the first step is to "ascertain its plain meaning or the meaning a layperson would ordinarily attach to it." (*Waller*, *supra*, 11 Cal.4th at p. 18.) As a starting place, "courts in insurance cases regularly turn to

general dictionaries." (*Scott v. Continental Ins. Co.* (1996) 44 Cal.App.4th 24, 29.)

Merriam-Webster's dictionary relevantly defines "physical" as "having material existence: perceptible especially through the senses and subject to the laws of nature," and "of or relating to material things." (Merriam-Webster Online Dict., <https://www.merriam-webster.com/dictionary/physical> [as of Nov. 21, 2022].) Black's Law Dictionary likewise defines "physical" as "[o]f, relating to, or involving material things; pertaining to real, tangible objects." (Black's Law Dict. (11th ed. 2019).)

Another policy provision governing "Business Income" coverage reinforces this interpretation of "physical." Business Income coverage covers only losses incurred "during the 'period of restoration,'" which is the period beginning "72 hours after the time of *direct physical loss or damage*" and ending "on the earlier of: [¶] **(1)** The date when the property at the described premises should be *repaired, rebuilt or replaced* with reasonable speed and similar quality; or [¶] **(2)** The date when business is resumed at a *new permanent location*." (1AA/167, 175, italics added.)

The policy's definition of the "period of restoration" compels the conclusion that a covered "physical loss" triggering Business

Income coverage must be remediable through repair, rebuilding, or replacement. If this were not so, it would be impossible to determine when Business Income coverage should end. (Accord *United Talent Agency v. Vigilant Ins. Co.* (2022) 77 Cal.App.5th 821, 833–834 (*United Talent*) [explaining why analogous "'period of restoration' language in the policies demonstrates that coverage requires a physical loss requiring repair or replacement, not simply loss of use"]; *Mudpie, Inc. v. Travelers Casualty Ins. Co. of America* (9th Cir. 2021) 15 F.4th 885, 892 (*Mudpie*) (applying California law) ["That this coverage extends only until covered property is repaired, rebuilt, or replaced, or the business moves to a new permanent location suggests the Policy contemplates providing coverage only if there are physical alterations to the property"].)

Starlight tries to minimize this provision's importance to interpreting "physical loss." (AOB 51–53.) But this Court must use the definition of "period of restoration" to construe the phrase "physical loss," because the "period of restoration" is a key parameter of the Business Income coverage Starlight seeks. (See Civ. Code, § 1641 ["The whole of a contract is to be taken together, . . . each clause helping to interpret the other"]; *Waller*, *supra*, 11 Cal.4th at p. 18.)

The "period of restoration" provision, moreover, is a *definition*—not an exclusion or limitation on coverage governed by the rule Starlight quotes from *Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198, 1204. (AOB 53.) And anyway, the definition of "period of restoration" is made "conspicuous, plain and clear" in three easy steps:

1. The top lines of the Business Income coverage form say, "[W]ords and phrases that appear in quotation marks have special meaning. Refer to Section **F.** Definitions" (1AA/167);

2. On that same page, as promised, the coverage clause places certain words and phrases in quotation marks:

   > We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration" (*ibid.*);

3. And a few pages later, section "**F. Definitions**," duly defines "period of restoration" (1AA/175).

In the context of a commercial property insurance policy for a group of companies that "operate movie theaters across Southern California" (1AA/19 [¶ 40]; 1AA/37), this language is sufficiently clear, and it serves as a useful aid to interpreting "physical loss."

———

Dictionary definitions and other provisions of the policy thus establish that a "physical loss" must involve a material, tangible change to property.

2. "Physical loss" under California law.

Pre-pandemic California case law confirms that "physical" loss must be material. The fullest discussion appears in *MRI Healthcare*, *supra*: For a loss to be "physical," *MRI Healthcare* held, "some *external force* must have acted upon the insured property to cause a *physical change* in the condition of the property." (187 Cal.App.4th at p. 780.)

According to Starlight, this holding ignored the distinctions between "loss" and "damage" and between "loss of" property and "loss to" property. (AOB 42.) But it was undisputed in *MRI Healthcare* that "direct physical loss" included physical damage; the policyholder even argued that "damage" from ramping down the insured MRI machine should qualify as "direct physical loss." (187 Cal.App.4th at p. 778.) The court's analysis therefore centered on the word "physical." (*Id.* at pp. 778–780.)

The court wrote, "That the loss needs to be 'physical,' given the ordinary meaning of the term, is 'widely held to exclude

alleged losses that are intangible or incorporeal . . . .'" (*MRI Healthcare*, *supra*, 187 Cal.App.4th at p. 779; see also *Ward General Ins. Services, Inc. v. Employers Fire Ins. Co.* (2003) 114 Cal.App.4th 548, 556 [holding that "direct physical loss of or damage to" property must involve a "material" or "tangible" effect].) And this was not mere "dictum." (AOB 43.) Instead, *MRI Healthcare* truly held that the loss at issue was not "physical," separately holding that it was also not "accidental." (187 Cal.App.4th at pp. 780, 782.)

Starlight's authorities confirm that under California law, a "physical" loss must involve a material effect on property. For example, in Starlight's lead authority, *American Alternative Ins. Corp. v. Superior Court* (2006) 135 Cal.App.4th 1239, an insured airplane was seized by the sheriff. (*Id.* at pp. 1242–1243.) The court held that "physical loss" "could reasonably extend to a governmental seizure or confiscation." (*Id.* at p. 1246.)

"Governmental seizure or confiscation" is not an intangible phenomenon without material effect. It involves physical appropriation of property: The property is literally moved from one place to another. The same goes for theft, a form of physical loss in some of Starlight's other cases. (See *EOTT Energy Corp. v. Storebrand Internat. Ins. Co.* (1996) 45 Cal.App.4th 565; *Pacific*

Marine Center, Inc. v. Philadelphia Indemnity Ins. Co. (E.D.Cal. 2017) 248 F.Supp.3d 984, cited in AOB 31, fn. 2.)

In another case cited by Starlight (AOB 45–46), *Hughes v. Potomac Ins. Co.* (1962) 199 Cal.App.2d 239 (*Hughes*), "the earth to the rear of and partially underlying plaintiffs' house slid into the creek, leaving their home standing on the edge of and partially overhanging a newly formed 30-foot cliff." (*Id.* at p. 243.) The court held that this constituted "physical loss of and damage to" the plaintiffs' "dwelling building." (*Id.* at pp. 242, 248–249.)

Starlight argues that in this and a similar case, because "the homes themselves were not physically altered," there was no "physical alteration of the property." (AOB 31, fn. 2.) But Starlight is wrong that these cases expanded the phrase "physical loss" to the realm of the non-material—for what could be more material than a landslide that undermines a house?

Instead of "physical loss," these cases expanded the phrase "dwelling building": Because a "dwelling building" is "a safe place in which to dwell or live," it "suffered real and severe damage when the soil beneath it slid away and left it overhanging a 30-foot cliff." (*Hughes*, *supra*, 199 Cal.App.2d at pp. 248–249.) The underlying soil necessary to the stability of a dwelling is a part of the dwelling (*Strickland v. Federal Ins. Co.* (1988) 200

Cal.App.3d 792, 800–802), so instability of the underlying soil—a material phenomenon—can constitute a physical loss to it. (See also *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 866 ["the presence of wood splinters in the diced roasted almonds," a material, tangible phenomenon, "caused property damage to the nut clusters"]; contra, AOB 31, fn. 2 [asserting that in *Shade Foods*, "the goods themselves"—although contaminated with splinters—"were not physically altered"].)

The principle is therefore firmly established under California law that "physical loss" must involve material, tangible alteration to property.

3. Starlight's interpretative errors.

In opposing this conclusion, Starlight commits a series of interpretative errors.

"Physical loss" versus "physical damage." Starlight argues that interpreting "physical loss" to require a material effect on property improperly "collapse[s] the definition of 'loss of' into 'damage to.'" (AOB 50; see also AOB 48–53.) This argument commits an error of logic.

It is true that “physical loss” and “physical damage” do not mean precisely “the same thing” (AOB 14)—that is, they are not co-extensive and thus not redundant. But Starlight errs in proceeding from this premise to the conclusion that they must therefore mean *entirely* different things: that because “physical damage” needs to involve a material effect on property, “physical loss” does not. (See AOB 47, 49–50.) Starlight’s error here is twofold.

First, even though “physical loss” and “physical damage” each involve a material effect on property, “physical loss” encompasses some claims that “physical damage” does not, so the phrases are not redundant. Property undergoes physical loss without physical damage in many cases of seizure or theft. As another example, complete destruction of property is often described—in a phrase commonly understood by reasonable policyholders—as a total “loss” rather than just “damage.” (*See Apple Annie, LLC v. Oregon Mutual Ins. Co.* (2022) 82 Cal.App.5th 919, 929, fn. 10 (*Apple Annie*), quoting *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.* (7th Cir. 2021) 20 F.4th 327, 332 [“the word ‘loss’ may refer to complete destruction while ‘damage’ connotes lesser harm that may be repaired”])

Second, partial overlap between adjacent contractual terms is commonplace. (See, e.g., *Mountain Air Enterprises, LLC v. Sundowner Towers, LLC* (2017) 3 Cal.5th 744, 752–753 [construing the phrases "action" and "proceeding" as partially overlapping]; *Santo's Italian Café LLC v. Acuity Ins. Co.* (6th Cir. 2021) 15 F.4th 398, 405–406 [rejecting the argument raised by Starlight: "it would not be an insurance contract if it did not come with some surplusage"].) Even if some instances of "physical damage" could also be described as "physical loss," that would not make either term superfluous.

"Loss of" versus "loss to" property. Starlight makes a big deal of the distinction between "loss of" property and "loss to" property, discussed in *Seifert v. IMT Ins. Co.* (D.Minn. 2021) 542 F.Supp.3d 874 (*Seifert*). (AOB 32, 42.) But this point proves ineffectual.

First, even *Seifert* interprets "loss of" property to require an "immediate and *materially perceptible*" effect. (*Seifert*, *supra*, 542 F.Supp.3d at p. 879, italics added.) This contradicts Starlight's position. Second, the distinction between "loss of" and "loss to" didn't end up mattering to *Seifert*'s reasoning: "Minnesota courts would extend the same reasoning when interpreting 'direct physical loss of'" as they have when interpreting "direct physical

loss to." (*Id.* at p. 880.) And most importantly, whatever the preposition that follows "loss," both "physical loss of" and "physical loss to" require that the loss be *physical*: material and tangible. (Accord *Plan Check Downtown III, LLC v. AmGuard Ins. Co.* (2020) 485 F.Supp.3d 1225, 1231 (*Plan Check*) ["sometimes the distinction between prepositions is important, but [the Court] finds that this case is not one of them"].)

Ambiguity. Finally, Starlight argues that the phrase "direct physical loss of or damage to property" is ambiguous and "reasonably subject" to its interpretation that a "physical loss" need not entail any physical alteration to property. (AOB 54–55.)

Ambiguity means the policy is '"capable of two or more constructions both of which are *reasonable*"'; '"a strained or absurd interpretation"' cannot '"create an ambiguity where none exists."' (*Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, 867.)

But Starlight's interpretation of "physical loss" is not reasonable. This is because Starlight accords to the word "physical" no meaning whatsoever. Indeed, Starlight's opening brief offers definitions of "loss" and "damage," but not "physical." (AOB 26–28.) Starlight's concept of a "physical loss" that involves no material or tangible effect is in all meaningful respects

identical to a “loss.” This is a mistake. (See *Advanced Network, Inc. v. Peerless Ins. Co.* (2010) 190 Cal.App.4th 1054, 1063 [“‘We must give significance to every word of a[n insurance] contract, when possible”].)

Because the policy language cannot reasonably accommodate Starlight’s interpretation, the policy language is not ambiguous. And because the policy language is not ambiguous, Starlight’s expectation of coverage (AOB 36) is irrelevant. (*Prudential Ins. Co. of America, Inc. v. Superior Court* (2002) 98 Cal.App.4th 585, 599 [“an insured’s reasonable expectations are not considered except where the policy provisions are ambiguous”].)

Starlight proclaims that “courts across the country have instead concluded for over sixty years that the phrase [physical loss or damage] is ambiguous.” (AOB 44.) This is not true. Of the dozen cases Starlight cites in support of this proclamation (AOB 44–45, fn. 9), only *one* determined that the phrase “physical loss or damage” is ambiguous. (*Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.* (N.J.Super.Ct.App.Div. 2009) 968 A.2d 724,

734–35.)[2] Another one stated to the contrary that this phrase is "plain and unambiguous." (*Southeast Mental Health Center, Inc. v. Pacific Ins. Co.* (W.D.Tenn. 2006) 439 F.Supp.2d 831, 837 ["the power outage therefore does not constitute 'direct physical loss of or damage to' Plaintiff's property"]; contra, AOB 44, fn. 9 [incorrectly stating that this case held the "power outage a 'direct physical loss'"].) The other ten cases do not say the phrase is ambiguous and offer no support to Starlight. (See, e.g., *Homeowners Choice Property & Casualty v. Miguel Maspons* (Fla.Dist.Ct.App. 2017) 211 So.3d 1067, 1069 [determining the "ordinary meaning" of "direct physical loss" from the dictionary and then applying "the plain language of the insurance policy" to the facts].)

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[2] *Wakefern Food* has not been followed in cases like this one: The Superior Court of New Jersey, Appellate Division, has twice distinguished *Wakefern Food*'s interpretation of "physical loss or damage" and denied coverage. (See *Mac Property Group LLC & The Cake Boutique LLC v. Selective Fire and Casualty Ins. Co.* (N.J.Super.Ct.App.Div. 2022) 278 A.3d 272, 283–285, 295 [holding the phrase "direct physical loss of or damage to" property does not cover business losses from government closure orders]; *AC Ocean Walk, LLC v. American Guarantee and Liability Ins. Co.* (N.J.Super.Ct.App.Div. June 23, 2022) 2022 WL 2254864, at *12–13 [holding that "direct physical loss of or damage to" property does not include "the COVID-19 virus's presence in [property]'s air and on its surfaces" because virus "did not physically alter the property's physical structure"].)

Starlight also cites these dozen cases to support its claim that the phrase "physical loss or damage" "provides coverage when a physical substance renders the use of and access to a property dangerous or even just intolerable." (AOB 44.) But none of these cases purports to apply California law. And one of them isn't even an insurance case—it concerns a tort claim for property damage. (See *Board of Educ. of City of Chicago v. A, C and S, Inc.* (Ill. 1989) 546 N.E.2d 580, 585, 590.) They cannot override the consensus among California courts described above.

Starlight's interpretative attacks having failed, the conclusion stands: "Physical loss" must involve a tangible, material effect on property.

B. The government orders did not cause physical loss.

By their nature, the government orders here had no material effect on property. They "required" Starlight "to close [its] theaters and cease business operations." (1AA/12 [¶ 7].) But physically and materially, the orders left the theaters exactly as they were before.

What's more, the orders did not *physically* prevent Starlight from using its theaters, any more than mask or vaccine

mandates *physically* compel mask-wearing or vaccination. The orders merely altered Starlight's legal obligations with respect to using its theaters.

Illustrating this point, suppose that a theater manager had left personal property in her office just before a closure order took effect. Afterward, she could have entered the theater and retrieved it. If a projector had been left on, she could have turned it off. In short, she could have performed all the various physical acts associated with operating the theater. The orders would have posed no physical impediment to these activities, and probably not even a legal impediment. (See, e.g., Public Order Under City of Los Angeles Emergency Authority: New City Measures to Address COVID-19 (March 15, 2020) <https://www.lamayor.org/COVID19Orders> [decreeing "[a]ll movie theaters" "shall be closed *to the public*," italics added] [as of Nov. 21, 2022].)

Starlight argues that "'physical loss of' the insured property can reasonably be construed to apply to" the "closure of its theaters in response to the Government Orders." (AOB 36.) Starlight says "the physicality requirement" is satisfied when a business is "prevented . . . from *physically* using its property,"

that is, when the business loses "'the ability to *physically* operate its business.'" (AOB 33, 50, italics added.)

The problem, again, is that the government orders did not *physically* impede Starlight from operating its theaters. Apparently, Starlight would claim that it was "prevented from physically using property" by *any* impediment to its use of physical *property*. (See, e.g., AOB 30 ["The Government Orders made Starlight Cinemas' premises physically unavailable to host moviegoers"].) But coverage requires more than physical property; physical *loss* is also essential.

The government orders here resemble an ordinance that prohibits bars from opening until 11 a.m. on Sundays. Both regulations use intangible legal means rather than tangible physical means to restrict the use of physical property. Neither regulation, therefore, causes the physical loss of property. (See *Plan Check*, *supra*, 485 F.Supp.3d at pp. 1231–1232 [noting that under Starlight's argument, "physical" loss or damage would result from, for example, an ordinance limiting a business's occupancy or operating hours].)

C. All Court of Appeal decisions addressing the issue agree that government orders do not cause physical loss or damage.

As noted, California Courts of Appeal have uniformly held that government closure orders do not cause "physical loss of or damage to" property. All so concluded as a matter of law, affirming pleading-stage dismissals of insurance coverage lawsuits just like Starlight's suit against MBIC.

Most recently, in *Apple Annie*, *supra*, the First District affirmed demurrer dismissal of nearly the same allegations as Starlight made here. The policyholder operated a chain of restaurants. (82 Cal.App.5th at p. 924.) It alleged that pandemic-related government orders "'caused [it] to suspend business operations at all its locations,'" "'result[ing] in an immediate loss of business income,'" which constituted "direct physical loss of or damage to" its property under its property insurance policy. (*Id.* at pp. 924–925.)

The court disagreed. Based on a thorough review of California authorities, it held that under "the plain meaning rule," government orders are not a "'direct physical' cause" of loss

or damage. (*Apple Annie*, *supra*, 82 Cal.App.5th at pp. 926–930; see also *id.* at pp. 925–935 [surveying relevant California law].)

Apple Annie followed three Court of Appeal decisions that had reached the same conclusion. The first was *Inns-by-the-Sea v. California Mutual Ins. Co.* (2021) 71 Cal.App.5th 688 (*Inns*), in which the court concluded: "[T]he words 'direct' and 'physical' preclude the argument that coverage arises in a situation where the loss incurred by the policyholder stems solely from an inability to use the physical premises to generate income, without any other physical impact to the property." (*Id.* at p. 706.) Allegations of mere loss of use arising from government closure orders therefore failed to establish a covered loss. (See *id.* at pp. 692–693, 708.)

Next came *Musso & Frank Grill Co. v. Mitsui Sumitomo Ins. USA Inc.* (2022) 77 Cal.App.5th 753 (*Musso & Frank*). Relying on *Inns* and numerous federal appellate decisions, the court rejected the policyholder's argument that government closure orders caused "direct physical loss of or damage to" its property. (See *id.* at pp. 757–760.)

Finally, in *United Talent*, *supra*, 77 Cal.App.5th 821, the court ruled out coverage of similar losses on the same basis. Surveying case law across other jurisdictions in addition to

California, the court observed, "It is now widely established that temporary loss of *use* of a property due to pandemic-related closure orders, without more, does not constitute direct physical loss or damage." (*Id*. at pp. 830–832.) The court affirmed this point of law: "[Plaintiff]'s alleged loss 'was not a physical deprivation of property, but rather an interruption in business operations.'" (*Id.* at p. 833 [quoting trial court]; see also *id.* at p. 834 ["allegations of loss of use of insured premises" caused by "closure orders and other pandemic-related limitations are insufficient to establish 'direct physical loss or damage'"].)

Starlight criticizes *Inns*, *Musso & Frank*, and *United Talent* for their reliance on Couch on Insurance. (AOB 37–41.) But the principle that "physical loss" in a property insurance policy entails a tangible or material effect on property transcends Couch. (Arg. § II.A.2., *above*.) Moreover, as noted in *Apple Annie*, *supra*, "any analytical flaws in the Couch formulation" of physical loss or damage "have become largely academic in light of the now-existing wall of precedent" holding that government closure orders do not cause physical loss. (82 Cal.App.5th at p. 935.) It will no longer suffice merely to attack Couch; by doing so, Starlight avoids grappling with recent, on-point cases on their own terms. These cases have not just "uncritically accepted"

Couch. (AOB 41.) Instead, they show “careful and conscientious examination” “of the weighty issues before them.” (*Apple Annie*, at pp. 935–936.)

Starlight also criticizes these cases’ reliance on *MRI Healthcare*, *supra*. (AOB 41–43.) This proxy attack fails. Despite Starlight’s characterization, *MRI Healthcare* does interpret “physical” as it modifies “loss” or “damage.” (Arg. § II.A.2., *above*.) Moreover, as with Couch, *MRI Healthcare*’s interpretation of “physical” has been applied in several cases factually identical to Starlight’s. Why *those cases* shouldn’t carry the day here, Starlight cannot explain.

This Court has decided one other Covid-19-related coverage case: *Marina Pacific*, *supra*, 81 Cal.App.5th 96. But *Marina Pacific* does not address the issue here: whether government closure orders cause *physical loss* within the meaning of a commercial property policy. (See *id*. at p. 111, fn. 13 [noting that insureds did not argue “temporary loss of use of a property due to pandemic-related closure orders” constituted “direct physical loss or damage” sufficient “for a claim of coverage under commercial property insurance policies”].)

Instead, *Marina Pacific* concerned "a claim [that] the presence of the virus on the insured premises caused physical damage to covered property." (81 Cal.App.5th at p. 110.) *Marina Pacific* expressly distinguished this claim from claims like Starlight's that involve "allegations of loss of use of insured property as a result of government-ordered closures to limit the spread of COVID-19." (*Ibid.*) Unlike the *Marina Pacific* plaintiff, Starlight did not allege that virus was ever present on its property or caused physical loss or damage, nor has it argued this theory on appeal. (See 1AA/11–12, 19 [¶¶ 5–7, 42–44].)

Furthermore, the policy terms in *Marina Pacific* differed significantly from those here. (Compare 81 Cal.App.5th at pp. 100, 112 [employing a unique "communicable disease event" provision as an aid to interpreting the main property coverage] with Arg. § II.A.1., *above*.) *Marina Pacific* is irrelevant to Starlight's claim.

There is no good reason to depart from the rule of *Apple Annie*, *Inns*, *Musso & Frank*, and *United Talent* that government closure orders do not cause physical loss of or damage to property. This Court should affirm the trial court's dismissal.

D. Starlight's contrary cases are unpersuasive.

With decisions of the California Court of Appeal united against it, Starlight relies on a handful of trial court decisions from non-California courts. None should carry any weight here.

Only one of these cases even tried to apply California law: *Susan Spath Hegedus, Inc. v. ACE Fire Underwriters Ins. Co.* (E.D.Pa. 2021) 538 F.Supp.3d 457 (*Hegedus*). But *Hegedus* read *MRI Healthcare* as though *MRI Healthcare* had understood "direct physical loss" to be "synonymous" with "damage." (*Id.* at p. 468.) As explained above, this misses the point; the parties in *MRI Healthcare* disputed whether the plaintiff's loss qualified as "physical," not whether "loss" could include the concept of "damage." (Arg. § II.A.2., *above*.) *Hegedus* also concluded that the phrase "direct physical loss of or damage to property" is "ambiguous." (*Hegedus*, at pp. 468–469.) But it took only a week for another judge on the same court to disagree. (See *Hair Studio 1208, LLC v. Hartford Underwriters Ins. Co.* (E.D.Pa. 2021) 539 F.Supp.3d 409, 418, fn. 4.) Like Starlight, *Hegedus* ultimately fails to give an intelligible meaning to "physical."

New York law governed the relevant portion of the decision in *Kingray, Inc. v. Farmers Group Inc.* (C.D.Cal. 2021) 523

F.Supp.3d 1163 (*Kingray*). (*Id.* at p. 1171 ["New York substantive law applies to the claims asserted by Nora's"]; contra, AOB 33 ["Applying California law, the district court in *Kingray* . . ."].) The court committed the same faulty reading of "physical loss" outlined above. (*Kingray*, at p. 1173 ["Defendant's interpretation of the contract requires 'loss' to share a meaning with 'damage'"].) New York courts have since rejected that reading. (See *Consolidated Restaurant Operations, Inc. v. Westport Ins. Corp.* (App.Div. 2022) 167 N.Y.S.3d 15, 18 [finding no "direct physical loss or damage" based on "the policy holder's inability to fully use its premises as intended because of COVID-19, without any actual, discernable, quantifiable change constituting 'physical' difference to the property"]).

Finally, the district court applied Minnesota law in *Seifert*, *supra*, 542 F.Supp.3d 874. But this decision contradicted itself. At first, it read "direct physical loss" to require "an immediate and materially perceptible inability to occupy and control property as intended." (*Id.* at p. 879.) This should exclude government closure orders, whose effects are not "materially perceptible": A person observing Starlight's theaters at the moment the orders took effect would perceive no change; indeed, the theaters would look no different from how they looked on any pre-pandemic morning.

But two paragraphs later, without any explanation, the *Seifert* court decided that actually, "direct physical loss" "only require[s] *some* injury to an owner's ability to occupy and control property as intended." (*Id.* at p. 880, italics added.) With its slipshod reasoning, *Seifert* has since been contradicted by the Eighth Circuit, which concluded to the contrary that under Minnesota law, government closure orders do not cause direct physical loss. (See *Oral Surgeons, PC v. Cincinnati Ins. Co.* (8th Cir. 2021) 2 F.4th 1141, 1145.)

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In sum, Starlight failed to plead any losses falling within its policy's coverage requirements, the first step in determining insurance coverage. (*Aydin Corp.*, *supra*, 18 Cal.4th at p. 1188.) The Court can and should affirm on that ground; it need not reach further.

Independently, however, the alleged losses are also excluded at the second step by the policy's virus exclusion *and* its ordinance and law exclusion. Affirmance can rest on either or both grounds.

III. Coverage is also barred by the virus exclusion and the ordinance and law exclusion.

Starlight's alleged losses came about like this: First, the virus responsible for Covid-19 infection spread across the world. (1AA/11 [¶ 5].) Then, "in response to the COVID-19 pandemic," state and local governments issued orders closing businesses. (1AA/11–12 [¶ 6].) "As a result," Starlight was "required to close their theaters and cease business operations," causing its losses. (1AA/12 [¶ 7]; see also 1AA/19 [¶¶ 42–43] ["the Government Orders were issued in response to the COVID-19 pandemic" and they "required Plaintiffs to shut their theaters," "resulting in a covered loss"].)

Starlight thus posits two causes of its alleged losses: the virus that causes Covid-19 and the government closure orders intended to stop the virus's spread. *Each* cause is barred by an exclusion in Starlight's policy. Starlight's claim therefore fails for reasons independent of whether Starlight could ever establish direct physical loss of property in the first place.

A. By its plain terms, the virus exclusion applies to all of Starlight's alleged losses.

The virus exclusion bars claims based on "loss or damage caused by or resulting from any virus, bacterium or other micro-organism that induces or is capable of inducing physical distress, illness or disease." (1AA/178.) This exclusion occupies its own page in Starlight's commercial property policy, with the bold heading "**EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA**." (*Ibid.*; see also *Marina Pacific*, *supra*, 81 Cal.App.5th at p. 113, quoting *Musso & Frank*, *supra*, 77 Cal.App.5th at p. 761 ["'even assuming Musso & Frank could bring itself within the insuring clause, the virus exclusion [matching the one in Starlight's policy] would bar coverage'"]).

This virus exclusion applies to the Business Income coverage Starlight seeks: It applies "under all forms and endorsements that comprise this Coverage Part or Policy, including but not limited to forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority." (1AA/178.)

The plain terms of the virus exclusion bar coverage. Who could deny that Starlight's alleged losses were among the incalculable business losses "caused by or resulting from" a disease-inducing "virus" in 2020? Not even Starlight denies it directly.

Instead, Starlight's only argument for not applying the virus exclusion is that the virus responsible for Covid-19 infection was not the "efficient proximate cause" of its losses; government closure orders were. (AOB 56–67.) This argument is both irrelevant and incorrect.

Starlight's "efficient proximate cause" argument is irrelevant because government orders—the other cause of Starlight's losses—are also an excluded cause of loss under Starlight's policy, by operation of the ordinance and law exclusion. We explain this in section B just below. Because both virus and government orders are excluded causes of loss, it doesn't matter which one was the efficient proximate cause. (See *Brodkin v. State Farm Fire & Casualty Co.* (1989) 217 Cal.App.3d 210, 217 [even when proximate causation is in dispute, "summary judgment [for the insurer] is still proper if all of the alleged causes of the loss are excluded under the policy"].)

Starlight's "efficient proximate cause" argument is incorrect because, as we explain in section C below, the virus was the efficient proximate cause of Starlight's losses, not the government orders.

Irrelevance and incorrectness are alternative reasons for rejecting Starlight's "efficient proximate cause" argument. The Court need not reach both; either one leads to the conclusion that Starlight's claim is excluded.

B. By its plain terms, the ordinance and law exclusion also applies to all of Starlight's alleged losses.

The ordinance and law exclusion bars claims based on "loss or damage caused directly or indirectly by . . . [¶] [t]he enforcement of or compliance with any ordinance or law . . . [¶] [r]egulating the construction, use or repair of any property." (1AA/181.) It applies to Starlight's Business Income coverage. (See 1AA/168 [applicable "**Exclusions and Limitations**" are found in the "Causes Of Loss form as shown in the Declarations"]; 1AA/46 [the Declarations identify "Cause of Loss – Special Form"]; 1AA/181 ["Causes of Loss – Special Form" contains the ordinance and law exclusion]; see also 1AA/185

[same form removes the ordinance and law exclusion for *certain* coverages (¶¶ b.–c.)—but not for the Business Income coverage Starlight seeks (¶ a.)].)

Starlight alleged its losses were caused by state and local government orders that "close[ed] all non-essential businesses, including theatres" and "bann[ed] all public and private gatherings." (1AA/11–12 [¶ 6].) These orders were "ordinances" or "laws." (See Black's Law Dict. (11th ed. 2019) [defining "ordinance" as "[a]n authoritative law or decree; specif., a municipal regulation, esp. one that forbids or restricts an activity"]; Merriam-Webster Online Dict., <https://www.merriam-webster.com/dictionary/law> (as of Nov. 17, 2022) [defining "law" as "a rule of conduct or action prescribed . . . or formally recognized as binding or enforced by a controlling authority"]; see also *Bradley Hotel Corp. v. Aspen Specialty Ins. Co.* (7th Cir. 2021) 19 F.4th 1002, 1008–1009 [concluding that closure orders issued by the Illinois governor are "ordinance or law" under an identical exclusion].)

And these orders regulated the "use" of property, placing them squarely within the exclusion. (1AA/181.) They "required" Starlight "to close [its] theaters and cease business operations" (1AA/12 [¶ 7]), causing "the loss of beneficial *use of*" the theaters

(AOB 14, italics added). Accordingly, to the extent Starlight attributes its losses to the government orders, the ordinance and law exclusion forecloses coverage.

MBIC did not raise the ordinance and law exclusion to the trial court. But under "settled law," this Court can address the issue because it "involves a question of law based on undisputed facts." (*Waller*, *supra*, 11 Cal.4th at p. 24; see also *Eisen v. Tavangarian* (2019) 36 Cal.App.5th 626, 637–638 (*Eisen*) [citing this principle and considering the merits of a new argument on the meaning of a CC&R provision].) Whether the ordinance and law exclusion applies to Starlight's claim is a pure question of law on undisputed facts; as noted, this Court accepts all material facts properly pleaded in the complaint. For the same reason, raising this issue now does not prejudice Starlight by limiting its opportunity to develop the factual record. (See *Ward v. Taggart* (1959) 51 Cal.2d 736, 742 [considering new theory because it "does not contemplate any factual situation different from that established by the evidence in the trial court"].)

Finally, invoking this exclusion is not novel or surprising. This Court may fairly consider an additional provision of the parties' own insurance contract, just as this Court considered an additional provision of the parties' CC&R contract in *Eisen*,

supra. Both "'are interpreted according to the usual rules of interpretation of contracts generally, with a view toward enforcing the reasonable intent of the parties.'" (*Eisen*, 36 Cal.App.5th at p. 635 [CC&Rs]; see also *Marina Pacific*, *supra*, 81 Cal.App.5th at p. 105 [insurance policies].)

With both causes of Starlight's loss excluded, Starlight's argument about efficient proximate causation is moot. The Court can and should affirm without reaching that argument. But if the Court does reach it, the Court should reject it.

C. Regardless of the ordinance and law exclusion, the efficient proximate cause rule bars coverage under the virus exclusion alone.

Starlight's argument about efficient proximate causation (AOB 56–67) is incorrect. Virus is the efficient proximate cause of Starlight's losses, not government orders. So even if the Court decides not to reach the ordinance and law exclusion, it should affirm because coverage for Starlight's losses is barred in any case.

1. A loss that arises from multiple causes is excluded if the loss's efficient proximate cause is excluded.

An insured's loss sometimes has more than one cause—one excluded and one non-excluded. In that situation, whether the policy excludes the loss depends on the loss's "efficient proximate cause"—its "predominating" cause or "most important" cause. (*Garvey v. State Farm Fire & Casualty Co.* (1989) 48 Cal.3d 395, 403 (*Garvey*); *Julian v. Hartford Underwriters Ins. Co.* (2005) 35 Cal.4th 747, 754.) If the efficient proximate cause is excluded, then the loss is. (See *Garvey*, at pp. 402–403 [interpreting Ins. Code, § 532].) If the efficient proximate cause is not excluded, then the loss is not (assuming it falls within the coverage grant in the first place). (See *Sabella v. Wisler* (1963) 59 Cal.2d 21, 31–32 (*Sabella*); *Vardanyan v. AMCO Ins. Co.* (2015) 243 Cal.App.4th 779, 786–787.)

The cases developing this doctrine fall into two categories.

Genuine chain of causation. In some cases, the first-in-time cause produces the second-in-time cause, and the second-in-time cause immediately produces the loss. The first-in-time cause is then the efficient proximate cause.

A good example is *Sauer v. General Ins. Co. of America* (1964) 225 Cal.App.2d 275 (*Sauer*), cited with approval in *Garvey*, *supra*, 48 Cal.3d at p. 404. In *Sauer*, a leak from an underground pipe caused the ground to subside beneath an insured house, and the subsidence caused damage to the house. (*Sauer*, at pp. 276–277.) The leak was the efficient proximate cause. (*Id.* at p. 278.) In an immediate sense, the damage to the house arose from the subsidence alone—the house experienced no water damage as such. But a clear and direct chain of causation led from the leak to the subsidence to the damage, making the leak the efficient proximate cause.[3]

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[3] For more examples of this category, see *Berry v. Commercial Union Ins. Co.* (9th Cir. 1996) 87 F.3d 387, 388, 390–391 (lack of warning label caused policyholder to flush chemical through insured pipe, causing deterioration that damaged the pipe; lack of warning label was efficient proximate cause); *Sabella*, *supra*, 59 Cal.2d at pp. 26–27, 32–34 (leak from broken sewer line caused subsidence, which damaged the insured home; broken sewer line was efficient proximate cause); *Gillis v. Sun Ins. Office, Limited* (1965) 238 Cal.App.2d 408, 410–411, 423–424 (windstorm caused gangway to push insured docking facility into water, causing water to damage the facility; windstorm was efficient proximate cause), cited with approval in *Garvey*, *supra*, 48 Cal.3d at p. 404; *Hanna v. Interstate Business Men's Acc. Ass'n of Des Moines, Iowa* (1919) 41 Cal.App. 308, 309–311 (accidental blow to chest caused hernia, causing man's death; blow to chest was efficient proximate cause of death), cited with approval in *Sabella*, *supra*,

[*Footnote Continued On Next Page*]

Multiple spontaneous causes. In other cases, two or more causes contribute to a loss, but the causes arise independently and spontaneously rather than forming a genuine chain of causation. The efficient proximate cause in such cases depends on the specific facts.

One such case is *Tento Intern., Inc. v. State Farm Fire and Cas. Co.* (9th Cir. 2000) 222 F.3d 660 (*Tento*) (discussed in AOB 60–61). The two causes contributing to the property damage in *Tento* were (a) a contractor's negligence in failing to install a temporary covering on a roof under repair, and (b) rain. (*Tento*, at p. 661.) Following the contractor's negligent omission, rainwater entered the structure and damaged insured property—an excluded cause of loss. (*Ibid.*)

The contractor's negligence preceded the rain but did not cause it. This distinguishes *Tento* from the cases involving a

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59 Cal.2d at p. 32; *Edgerton & Sons, Inc. v. Minneapolis Fire & Marine Ins. Co.* (Conn. 1955) 116 A.2d 514, 516–517 (truck's driving up onto culvert caused its tall insured cargo to strike underside of bridge, causing damage to cargo; driving up onto culvert was efficient proximate cause), cited with approval in *Sabella*, *supra*, 59 Cal.2d at p. 33; *Norwich Union Fire Ins. Soc. v. Board of Com'rs of Port of New Orleans* (5th Cir. 1944) 141 F.2d 600, 601–602 (fire caused equipment to break, causing insured corn to deteriorate; fire was efficient proximate cause), cited with approval in *Sabella*, *supra*, 59 Cal.2d at pp. 32–33.

genuine chain of causation, in which the first cause produces the second cause. Nevertheless, it so happened that the *Tento* court concluded the first-in-time cause (the contractor's negligence) was also the efficient proximate cause. (*Tento*, *supra*, 222 F.3d at p. 663.)

A contrasting example is *Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922 (*Century*). In *Century*, rainwater flooded into a "viewing chamber," causing paints and chemicals to spill and leaving a film on the window glass when the water receded. (*Id.* at pp. 931–932.) Then a contractor attempting to remove the film negligently scratched the glass. (*Id.* at p. 932.)

Inverting *Tento*, the rain in *Century* preceded the contractor's negligence but did not cause it. (*Century*, *supra*, 139 Cal.App.4th at p. 955 ["'acts by third parties actually caused the glass damage even if flooding may have precipitated the need for those acts'"].) The *Century* court concluded that the contractor's negligence—positioned second-in-time—was the efficient proximate cause. (*Ibid.*)

Tento and *Century* illustrate that in cases involving multiple spontaneous causes, the efficient proximate cause could be the earlier or the later cause of a loss. It depends on each

cause's precise role.[4] The court in *Garvey*, *supra*, had these cases in mind when it observed that the phrase "efficient proximate cause" is not *always* a synonym for "moving cause" or "triggering cause." (48 Cal.3d at p. 403, quoted in AOB 64–65.)

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[4] For more examples of this category, see *State Farm Fire & Casualty Co. v. Von Der Lieth* (1991) 54 Cal.3d 1123, 1127–1128, 1132 (natural conditions, water seepage, and third-party negligence combined to cause landslide and destabilize ground beneath insured home; jury was permitted to find that third-party negligence was efficient proximate cause); *Garvey*, *supra*, 48 Cal.3d at pp. 400–401, 412–413 (some combination of earth movement and builder negligence caused damage to home; determination of efficient proximate cause was for jury); *Brooks v. Metropolitan Life Ins. Co.* (1945) 27 Cal.2d 305, 307–310 (effects of cancer hindered man's ability to escape from fire, leading to his death; evidence could support conclusion that fire, not cancer, was efficient proximate cause of death), cited with approval in *Sabella*, *supra*, 59 Cal. 2d at p. 32; *Howell v. State Farm Fire & Casualty Co.* (1990) 218 Cal.App.3d 1446, 1449, 1459 (fire destroyed vegetation on hillside; heavy rain then caused landslide, to which lack of vegetation contributed; landslide damaged insured home; triable issue whether fire was efficient proximate cause), disapproved on another ground in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512; *Princess Garment Co. v. Fireman's Fund Ins. Co. of San Francisco* (6th Cir. 1940) 115 F.2d 380, 381–383 (evacuation of building due to nearby fire prevented employees from moving insured merchandise away from flooding basement, leading to damage from flood; determination of efficient proximate cause was for jury), cited with approval in *Sabella*, *supra*, 59 Cal.2d at p. 33.

2. Virus was the efficient proximate cause of Starlight's losses.

The causes contributing to Starlight's alleged losses form a genuine chain of causation. First, the virus responsible for Covid-19 infection spread across the world. (1AA/11 [¶ 5].) Then, "in response to the COVID-19 pandemic," state and local governments issued orders closing businesses. (1AA/11–12 [¶ 6].) "As a result," Starlight was "required to close their theaters and cease business operations," causing its losses. (1AA/12 [¶ 7]; see also 1AA/19 [¶¶ 42–43] ["the Government Orders were issued in response to the COVID-19 pandemic" and they "required Plaintiffs to shut their theaters," "resulting in a covered loss"].)

As in *Sauer*, an initial cause (virus) led directly to a second cause (government orders) which led directly to the loss. The broken pipe caused the subsidence in *Sauer*; the virus caused the government orders here. The subsidence was the immediate cause of damage in *Sauer*; the government orders were the immediate cause of Starlight's alleged loss. Nevertheless, the broken pipe that *caused* the subsidence was the efficient proximate cause in *Sauer*; and here, the virus that *caused* the government orders is the efficient proximate cause. This genuine chain of causation distinguishes Starlight's case from *Tento*, in

which the rain would have occurred regardless of the contractor's negligence, and from all other cases involving *multiple spontaneous causes*.

Starlight's error in clinging to *Tento* is to focus on only one of the two causes there. Starlight writes, "Absent the negligence in *Tento*, the rain would not have produced the loss. Likewise, absent the Government Orders here, the virus would not have produced the loss." (AOB 61.) But this says only that the negligence was a but-for cause of the loss. *The rain was also a but-for cause*: Absent the rain in *Tento*, the negligence also would not have produced the loss. To identify one but-for cause does not determine the efficient proximate cause.

Here, it may be true that the government orders were a but-for cause of Starlight's loss—but so was the virus. Absent the virus, there indisputably would have been no government orders. Starlight so alleges and argues.

And because there would be no government orders without the virus, Starlight would have no loss without the virus. Thus, the virus is "the efficient proximate (meaning predominant) cause of the loss." (*Garvey*, *supra*, 48 Cal.3d at p. 403; *see*, *e.g.*, *Mudpie*, *supra*, 15 F.4th at p. 894 [applying *Garvey* and *Sabella* to reject the same argument Starlight presents; policyholder did not and

could not “dispute that the Stay at Home Orders that impacted [its] business were issued in response to the COVID-19 pandemic].)

Indeed, we could find no case under California law in which a first-in-time cause (here, virus) produced a second-in-time cause (here, government orders) that immediately produced the loss, and the *second*-in-time cause was held to be the efficient proximate cause. And Starlight cites none.

Starlight also argues that a jury should decide the efficient proximate cause of its loss. (AOB 61–62, 64, 66.) But when the relevant facts are “not in dispute, the determination of proximate cause,” including efficient proximate cause, “becomes a question of law.” (*Sabella*, *supra*, 59 Cal.2d at p. 32; accord, *Mission National Ins. Co. v. Coachella Valley Water Dist*. (1989) 210 Cal.App.3d 484, 492.) There are no disputed facts on review of this judgment on the pleadings; the factual allegations in Starlight’s complaint must be credited—and the trial court was right that they fail to establish coverage as a matter of law.

On this procedural issue, *Garvey* (cited in AOB 66) is not on point. *Garvey* concerned damage to an insured home that arose from some combination of negligent construction and earth movement. (48 Cal.3d at pp. 400–401.) The parties offered

conflicting expert testimony concerning the cause of the damage. (*Id.* at p. 412.) The court held only that, "*bearing in mind the facts here*, we conclude the question of causation is for the jury to decide." (*Ibid.*, italics added.) The court did not hold that efficient proximate causation is always a jury question.

The parties here do not dispute that a disease-inducing virus that spread across the world caused the government orders, which in turn caused Starlight's economic loss. Given this chain of causation, the virus is the efficient proximate cause.

IV. Starlight's newly proposed amendment to its complaint would be futile.

To show an abuse of discretion, Starlight must show how the complaint could be amended in a way consistent with its existing theory of the case to state a cause of action. (See, e.g., *Dey v. Continental Central Credit* (2008) 170 Cal.App.4th 721, 731.)

Starlight asks for leave to amend its complaint "to clarify that it never would have chosen to close its theaters during the pandemic had the various government authorities not mandated their closure." (AOB 67–68.) Set aside Starlight's asserted willingness to gather unvaccinated patrons in windowless

theaters, never mind a then-raging pandemic; Starlight's proposed amendment also offers no viable path to coverage.

The proposed allegation merely reiterates something we already know: that the government orders were a but-for cause of Starlight's alleged losses. Similarly, in *Sauer*, the house would never have been damaged if the ground had not subsided. But subsidence was not the only but-for cause; the house would never have been damaged without the broken pipe either. The broken pipe—not the subsidence it caused—was the efficient proximate cause of the insured's loss. (*Sauer*, *supra*, 225 Cal.App.2d at pp. 278–279.) Likewise here, even if Starlight would not have closed its theaters absent the government orders, it also would not have closed its theaters absent the virus. The virus—not the orders it caused—was the efficient proximate cause of Starlight's loss. The virus exclusion still applies.

Moreover, even if this additional allegation could bring Starlight's losses outside the virus exclusion, it would bring them even more squarely within the ordinance and law exclusion. The proposed amendment amounts to an insistence that the losses were caused by an ordinance or law regulating the use of property.

And regardless of the exclusions, Starlight would still not have established any physical loss of or damage to property in the first place. Thus, Starlight's claims would still fall outside the basic scope of coverage. (See Arg. § II.B., *above*.)

Because Starlight's proposed amended complaint would still fail to state a claim, this Court should deny Starlight's request for leave to amend.

V. Starlight failed to state a claim for insurance bad faith.

"[B]ecause a contractual obligation is the underpinning of a bad faith claim, such a claim cannot be maintained unless policy benefits are due under the contract." (*Waller*, *supra*, 11 Cal.4th at p. 35.) As shown, no policy benefits are due to Starlight under its insurance contract with MBIC. Starlight therefore cannot maintain any bad faith claim.

It is irrelevant whether "an insurer can act in bad faith even before it determines coverage." (AOB 69.) A "claim of bad faith" that rests on "[a]n insurer's failure to investigate" "is not separately actionable if there is no coverage." (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1078, italics omitted.) There is no coverage here, so no possible bad faith.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment.

DATED: November 22, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **RESPONDENT'S BRIEF** contains 9,867 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

DATED: November 22, 2022

/s/ *Stefan C. Love*
Stefan C. Love

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036, my email address is pherndon@gmsr.com.

On November 22, 2022, I hereby certify that I electronically served the foregoing **RESPONDENT'S BRIEF** through the Court's electronic filing system operated by ImageSoft TrueFiling. I certify that all participants in the case are registered TrueFiling users and appear on its electronic service list and will be served pursuant to California Rules of Court, rule 8.70. The filing of this document through e-Filing will also satisfy the requirements for service on the Supreme Court under rule 8.212(c)(2):

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Executed on November 22, 2022, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Pauletta L. Herndon

Pauletta L. Herndon

Starlight Cinemas, Inc., et al. v. Massachusetts Bay Insurance Company
Court of Appeal Case No. B313518
Los Angeles County Superior Court Case No. 20SMCV01181

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