Case No. 21-35916

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HT-SEATTLE OWNER, LLC,

Plaintiff and Appellant,

v.

AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY,

Defendant and Appellee.

On Appeal from the United States District Court
for the Western District of Washington
No. 2:21-cv-00048-BJR / Hon. Barbara J. Rothstein

APPELLEE'S ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Appellee AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY is wholly owned by Zurich American Insurance Company, which is wholly owned by Zurich Holding Company of America, Inc., which in turn is wholly owned by Zurich Insurance Company Ltd, a Swiss corporation. Zurich Insurance Company Ltd is owned by Zurich Insurance Group Ltd, a Swiss corporation and the only publicly traded parent company, with a listing on the Swiss stock exchange, and a further trading of American Depositary Receipts.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

Federal Rules and Statute

State Statute

Other Authorities

JURISDICTIONAL STATEMENT

American Guarantee and Liability Insurance Company (AGLIC) agrees with HT-Seattle's statement of jurisdiction. Appellants' Opening Brief (AOB) 1. *See* C.R. 28-2.2.

ISSUES PRESENTED

1. HT-Seattle seeks insurance coverage for economic losses allegedly related to the presence of Covid-19 virus particles on its property.

    a. HT-Seattle admits that the virus particles are no longer infectious after nine days or less, and are completely undetectable within 28 days—even with no intervention. Did these virus particles cause "direct physical loss of or damage to" HT-Seattle's property under its commercial property insurance policy?

    b. The insurance policy excludes "[a]ny condition of property due to the actual presence of . . . virus." Does this exclusion bar coverage?

2. After entry of judgment dismissing the case, HT-Seattle moved to reopen the judgment based on "previously unavailable evidence" (most of which predated the original complaint and all of which predated the judgment) and proposed an amended complaint. The district court denied the motion, finding that the evidence was not actually new and that the proposed amendment merely reiterated allegations from the operative complaint. Was this an abuse of discretion?

3. This case shares one issue with a pending Washington Supreme Court case called *Hill and Stout*. But HT-Seattle has abandoned this issue on appeal, and moreover, the issue is a simple question of contract interpretation. Should this appeal be stayed to wait for a decision in *Hill and Stout*?

STATEMENT OF THE CASE

HT-Seattle Owner, LLC, owns the Hyatt Regency Seattle, "the largest business and convention hotel in the Pacific Northwest." 5-ER-677, ¶ 1. HT-Seattle purchased commercial property insurance

for the Hyatt from American Guarantee and Liability Insurance Company (AGLIC), a subsidiary of Zurich Insurance Group. 5-ER-677–79, 677 n.1, 684, ¶¶ 2–4, 31.

The district court concluded that HT-Seattle's alleged losses from the Covid-19 pandemic were not covered by the insurance policy and dismissed HT-Seattle's operative complaint for failure to state a claim without leave to amend. Several months later, the district court denied HT-Seattle's motion to alter or amend the judgment under Fed. R. Civ. P. 59(e). HT-Seattle appeals from both the judgment of dismissal and the denial of the Rule 59(e) motion. 5-ER-880 (notice of appeal).

A. Stating the case accurately.

When reviewing a judgment or order below, this Court considers only the record that was before the trial court at the time it reached the challenged decision. *See LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1136 (9th Cir. 2009); *United States v. $22,474.00 in U.S. Currency*, 246 F.3d 1212, 1218 (9th Cir. 2001). Accordingly:

- Whether HT-Seattle stated a claim requiring reversal of the judgment depends on the allegations of the operative

complaint at that time. This review is de novo. *See Autotel v. Nev. Bell Tel. Co.*, 697 F.3d 846, 850 (9th Cir. 2012).

- The amended complaint that HT-Seattle proposed two weeks *after* judgment, with its Rule 59(e) motion, is not part of that record. This Court considers the proposed amended complaint only on its review of the order denying Rule 59(e) relief—and HT-Seattle must show that *that* order was an abuse of discretion. *See Turner v. Burlington N. Santa Fe R.R. Co.*, 338 F.3d 1058, 1063 (9th Cir. 2003).

HT-Seattle's opening brief, however, commingles allegations from the two complaints. AOB 8–14. It seeks to justify this by arguing that the "expert reports" on which the proposed amended complaint relied are subject to "judicial notice" by this Court. AOB 8 n.2. But judicial notice on appeal offers no path around the law set forth above. Proper review requires segregating the two pleadings—even if both ultimately fail as a matter of law.

Therefore, except when addressing the Rule 59(e) order (Arg. § III., *post*), this brief discusses only the allegations of HT-Seattle's operative complaint at the time the district court entered judgment.

B. The property insurance policy.

HT-Seattle seeks coverage under a commercial property insurance policy in effect from November 19, 2019, to November 19, 2020. 5-ER-684, ¶ 31.

1. The coverages at issue require direct physical loss of or damage to property.

HT-Seattle sought two forms of coverage. 5-ER-695–97, ¶¶ 87–101. Both require "direct physical loss of or damage" to property.

- "Property Damage" coverage requires "direct physical loss of or damage caused by a **Covered Cause of Loss**" to HT-Seattle's property. 5-ER-716, 722, §§ 1.01, 3.01 (bold font denotes defined terms); *see also* 5-ER-695–96, ¶¶ 87–93.
- "Time Element" coverage, including for "Extra Expense," requires a "**Suspension**" of HT-Seattle's business "due to direct physical loss of or damage to Property (of the type insurable under this Policy . . .) caused by a **Covered Cause of Loss** . . . ." 5-ER-726, 728, §§ 4.01.01, 4.02.03; *see also* 5-ER-696–97, ¶¶ 94–101.

"**Covered Cause of Loss**" is defined as "[a]ll risks of direct physical loss of or damage from any cause unless excluded." 5-ER-760, § 7.11.

2. The policy excludes losses due to the presence of virus.

The policy excludes "**Contamination**, and any cost due to **Contamination** including the inability to use or occupy property." 5-ER-723, § 3.03.01 and sub-§ .01. "**Contamination"** means "[a]ny condition of property due to the actual presence of any foreign substance, . . . virus, disease causing or illness causing agent, **Fungus**, mold or mildew." 5-ER-760, § 7.09.

C. HT-Seattle's alleged economic losses.

HT-Seattle alleged that Covid-19 is highly contagious through both surface contact and the air. 5-ER-686–89, ¶¶ 53–60. This contagion, HT-Seattle alleged, created a "virtually guaranteed risk of significant harm and damage to persons and property," including "great risk to HT Seattle of direct physical loss of or damage to covered property[.]" 5-ER-689–90, ¶ 61; *see also* 5-ER-692–93, ¶¶ 77, 82 (referring to this continuing risk). "[I]t became necessary to close or strictly limit the use of indoor business spaces" at the Hyatt, and

at times, HT-Seattle closed the Hyatt altogether. 5-ER-689–90, ¶ 61. The lost business revenue from these suspensions and closures constitutes HT-Seattle's claimed loss. 5-ER-692–93, ¶¶ 75–78.

1. Some alleged losses relate to the presence of SARS-CoV-2 and Covid-19 at the Hyatt.

HT-Seattle alleged that "[r]espiratory droplets expelled from" people with Covid-19 "adhere to surfaces and objects. In doing so, they physically change the property," and "contact with those previously safe, inert surfaces (*e.g.*, walls, tables, countertops) has been made unsafe." 5-ER-688, ¶ 59. "'[C]oronavirus particles can remain suspended in the air for up to three hours'"; at the outer limit, HT-Seattle alleged that "droplets containing Coronavirus can land and remain infectious on surfaces" for "up to nine days," and virus can remain detectable in them for "up to 28 days." 5-ER-688–90, 699, ¶¶ 60–61, 116.

As for the Hyatt specifically, HT-Seattle alleged:

> The actual and/or threatened presence . . . at the Hyatt Regency Seattle of individuals infected with Coronavirus, or carrying Coronavirus particles on their body . . ., has rendered and/or created the risk of the premises and the physical property located there unusable, damaged and unsafe. These

> circumstances have caused and continue to cause and/or create the risk of direct physical loss of and damage to the covered premises and property.

5-ER-690, ¶ 63. The complaint never alleged the confirmed presence of virus particles at the Hyatt. Nor did it allege any connection between HT-Seattle's losses and any virus particles at the Hyatt.

2. Other alleged losses relate to government closure orders.

From March 13, 2020, to the present, the governments of Washington, King County, and Seattle have issued various orders limiting gatherings, closing businesses, and requiring people to stay at home. 5-ER-691–93, ¶¶ 68–73, 81. HT-Seattle alleged that "in compliance with government guidance and orders, HT Seattle was required to immediately close its restaurants, bars, fitness center, and event meeting spaces," and it experienced "a significant loss of overnight customers" staying in hotel rooms. 5-ER-692, ¶ 75. For several months, HT-Seattle closed the Hyatt completely. 5-ER-692,

¶ 77.[1] Afterward, the Hyatt "continue[d] to suffer a suspension of its hotel operations[.]" 5-ER-692–93, ¶ 78.

D. HT-Seattle's lawsuit.

1. HT-Seattle sues AGLIC for denying coverage.

After AGLIC denied coverage, HT-Seattle sued AGLIC for breach of contract (Count I), violation of Washington's consumer protection statute (Count II), insurance bad faith (Count III), and declaratory judgment regarding coverage (Count IV). 5-ER-699–702.

2. The district court dismisses all claims.

The district court granted AGLIC's motion to dismiss the suit for failure to state a claim. The court found that the provisions under which HT-Seattle sought coverage "all require direct physical loss or damage to covered property to trigger coverage." 1-ER-11. The court then referred to and reaffirmed its own previous holding, from a set of cases addressing the same issue, that "COVID-19 did not cause physical loss or damage." 1-ER-11–12. "Therefore, given the Court's

[1] None of the government orders detailed in the complaint required the full closure of the Hyatt. 5-ER-691–92, ¶¶ 66–71. This appears instead to have been a business or economic decision.

conclusion that COVID-19 does not cause physical loss or damage, these provisions fail to provide coverage." 1-ER-12.

This ruling disposed of HT-Seattle's claims for breach of contract and for declaratory judgment. 1-ER-13. The court dismissed the other claims *sua sponte*, as they could proceed only if HT-Seattle's losses were covered in the first place. *Id.*

HT-Seattle did not seek to file an amended complaint during the nearly four-month period between AGLIC's motion for dismissal and the district court's entry of judgment dismissing the case. 5-ER-886–89. The court dismissed with prejudice, finding that "any amendment would be futile based on the finding that COVID-19 does not cause a triggering loss." 1-ER-13.

3. The district court denies HT-Seattle's motion under Rule 59(e) to alter or amend the judgment.

Two weeks after the court entered judgment of dismissal, 1-ER-9, HT-Seattle moved under Fed. R. Civ. P. 59(e) to alter or amend the judgment on the basis of "previously unavailable evidence." SER-6–7. HT-Seattle asked the court to reopen the judgment and amend the dismissal to be without prejudice, thereby

allowing it to propose an amended complaint. 1-ER-3–4. HT-Seattle attached a proposed amended complaint. 2-ER-17.

None of the newly cited evidence dated from after the judgment. The motion gave no reason why HT-Seattle could not have offered the revised allegations before judgment. *See* SER-7–12.

The district court determined that HT-Seattle's Rule 59(e) motion "hinge[s] on there being newly discovered evidence capable of altering the Court's original judgment." 1-ER-5. The court concluded that HT-Seattle had offered no such evidence. Instead, HT-Seattle's proposed amended complaint "merely reframes, clarifies, and expands upon facts and scientific data that were present in the original complaint." 1-ER-6. The court therefore denied the motion.

SUMMARY OF THE ARGUMENT

1. The Court should affirm dismissal of HT-Seattle's complaint because HT-Seattle's policy contract with AGLIC does not cover its claims.

A. On appeal, HT-Seattle's only argument for coverage is that its losses involve direct physical loss or damage caused by the

presence of virus particles at the Hyatt. However, the operative complaint did not allege that virus particles were present at the Hyatt; it did not allege any losses of which the presence of virus particles was the cause; and even if it had alleged losses caused by virus particles' presence at the Hyatt, virus particles' presence does not cause loss or damage that is physical, as coverage requires.

HT-Seattle also argues for coverage related to the mere risk that virus particles would enter the Hyatt. But the policy provisions under which HT-Seattle claims coverage require actual loss or damage, not the mere risk thereof.

B. As an alternative basis for affirmance, HT-Seattle's alleged losses are barred by the policy's contamination exclusion. This exclusion applies to "[a]ny condition of property due to the actual presence of any foreign substance," including a "virus" or a "disease causing or illness causing agent." On its face, this exclusion bars coverage for all losses allegedly arising from the presence of virus particles at the Hyatt. The policy's "Amendatory Endorsement – Louisiana" does not change this, because HT-Seattle's claim does not involve any Louisiana property.

2. The Court should also affirm the district court's denial of HT-Seattle's motion to alter or amend the judgment under Rule 59(e). As the district court determined, HT-Seattle's motion did not offer any previously unavailable evidence, as was required to reopen the judgment. And even if the new allegations attached to the motion had been based on previously unavailable evidence, these allegations did not meaningfully alter HT-Seattle's theory of coverage and therefore would not have affected the judgment of dismissal.

3. The Court should not stay this appeal to wait for the decision of the Washington Supreme Court in *Hill and Stout PLLC v. Mutual of Enumclaw Insurance Co.*, No. 100211-4 (Wash. argued June 28, 2022). HT-Seattle has abandoned on appeal the main issue that this case shared with *Hill and Stout*, making it a matter of speculation whether the decision in *Hill and Stout* will be relevant to this appeal. And even if HT-Seattle had not abandoned that main overlapping issue, the issue is a straightforward question of contract law which this Court can resolve without the guidance of the Washington Supreme Court. A stay would therefore be a waste of time.

ARGUMENT

I. The Court should affirm dismissal of Counts I and IV in the operative complaint because HT-Seattle alleged no losses covered by the policy.

Under Washington law, which governs here, "[t]he interpretation of insurance policies is a question of law . . . ." *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 874 P.2d 142, 145 (Wash. 1994); *see also Caliber One Indem. Co. v. Wade Cook Fin. Corp.*, 491 F.3d 1079, 1082 (9th Cir. 2007) (applying Washington law to Washington insurance action).

If "the language in an insurance policy is clear and unambiguous, the court must enforce it as written and cannot modify the contract or create ambiguity where none exists." *Allstate Ins. Co. v. Peasley*, 932 P.2d 1244, 1246 (Wash. 1997). "An ambiguity exists only 'if the *language on its face* is fairly susceptible to two different but reasonable interpretations.'" *Id.* (some quotation marks omitted).

Adjudication of insurance coverage proceeds in two steps. First, "an insured must show that a loss is within the scope of her coverage." *State Farm Fire & Cas. Co. v. Ham & Rye, L.L.C.*, 174 P.3d 1175, 1178–79 (Wash. Ct. App. 2007). Second, if the loss may

fall within the scope of coverage, "the insurer then bears the burden of showing that an exclusion applies." *Id*.

HT-Seattle's complaint fails as a matter of law at both steps: (1) HT-Seattle's losses do not fall within the scope of policy coverage in the first instance; and (2) HT-Seattle's losses fall within the policy's exclusion of losses caused by the presence of "virus."

A. HT-Seattle's alleged losses do not fall within the scope of policy coverage because they involve no "direct physical loss of or damage to" the Hyatt.

As noted, coverage under HT-Seattle's insurance policy requires "direct physical loss of or damage to" the Hyatt caused by a covered cause of loss. Stmt. § B.1., *ante*.

HT-Seattle argues that this requirement is satisfied by purely economic losses from "the actual or threatened presence of a dangerous physical substance which renders property unfit for its intended use." AOB 25.

HT-Seattle's argument fails both in its interpretation of the policy language and in its reading of the operative complaint.

1. The policy does not cover the mere risk that virus particles would be present at the Hyatt.

HT-Seattle incorrectly contends that the insurance policy covers economic losses from the mere risk of physical loss or damage. AOB 8 (claiming that the policy "insures against 'risks,' (*i.e.*, threats) to property"), 25 (referring to the "threatened presence of a dangerous physical substance"), 32, 41, 43–46.

As already described, the coverages at issue impose two requirements: First, the insuring clause of the policy requires "direct physical loss or damage" to HT-Seattle's property; second, the causation clause of the policy requires that the direct physical loss or damage be "caused by a **Covered Cause of Loss**." 5-ER-716, 726, §§ 1.01, 4.01.01. A "Covered Cause of Loss" is "[a]ll risks of direct physical loss of or damage from any cause unless excluded." 5-ER-760, § 7.11.

That certain property has experienced "direct physical loss or damage" and that this loss or damage was caused by a "covered cause of loss" are two independent requirements. The definition of a covered cause of loss does not *expand* coverage or relieve HT-Seattle from demonstrating that it satisfies the insuring clause, in other

words, that it experienced "direct physical loss of or damage to" property; it *limits* coverage by further requiring that the direct physical loss or damage arise from a non-excluded cause.

HT-Seattle's interpretation improperly imports the phrase "all risks of" from the second step of the inquiry—whether the loss resulted from a covered cause—into the threshold issue of whether HT-Seattle experienced physical loss or damage at all. Indeed, the policy's insuring clause does not insure against "covered causes of loss," or against "all loss or damage" (including purely economic loss or damage) if caused by a covered cause of loss. It insures against *actual*, physical loss or damage, and only if *caused* by a "covered cause of loss." There is nothing "incomprehensible" about this scope of coverage, despite HT-Seattle's contrary argument. AOB 24–25.

To support its interpretation, HT-Seattle refers to extrinsic evidence of the policy's drafting history. AOB 43–44. But extrinsic evidence on the meaning of an insurance policy is admissible only if the policy is "ambiguous," that is, only "if the language *on its face* is fairly susceptible to two different but reasonable interpretations." *Spratt v. Crusader Ins. Co.*, 37 P.3d 1269, 1272 (Wash. Ct. App. 2002)

(emphasis added). On its face, HT-Seattle's insurance policy covers only actual direct physical loss or damage, not the mere risk thereof. HT-Seattle may not bring in extrinsic evidence to try to alter this plain meaning.

Moreover, HT-Seattle's extrinsic evidence is not of a kind permitted by Washington law. Admissible extrinsic evidence must "go[ ] no further than to show the situation of the parties and the circumstances under which [a written] instrument was executed." *Berg v. Hudesman*, 801 P.2d 222, 230 (Wash. 1990). Evidence of "[u]nilateral or subjective purposes and intentions" is not admissible. *Lynott v. Nat'l Union Fire Ins. Co.*, 871 P.2d 146, 149 (Wash. 1994). Because "it is unusual for the terms of [an insurance] policy to be negotiated," extrinsic evidence has no role in policy interpretation except "where there are actual negotiations . . . ." *Id.*; *accord Spratt*, 37 P.3d at 1272–73; *see also Cont'l Ins. Co. v. PACCAR, Inc.*, 634 P.2d 291, 292–93 (Wash. 1981) (admitting extrinsic evidence of parties' conduct subsequent to executing policy) (cited in AOB 54–55).

HT-Seattle's extrinsic evidence concerns only AGLIC's unilateral statements and actions, in other contexts and other cases

not involving HT-Seattle. AOB 43–44. We do not burden the Court here with a full explanation of these other contexts; the inadmissibility of such evidence under Washington law makes plain how utterly irrelevant the evidence is to interpreting HT-Seattle and AGLIC's own policy. HT-Seattle has no evidence on "the circumstances under which" it executed the policy *at issue here*. HT-Seattle must support its interpretation by the policy language alone. As explained, it cannot.

The cases HT-Seattle cites that involve the phrase "risk of" do not otherwise resemble this case. AOB 45–46. First, *Assurance Co. of America v. Wall & Associates LLC of Olympia*, 379 F.3d 557 (9th Cir. 2004), involves different facts and policy language. There, a large building experienced chronic leaks over a nearly ten-year period, causing the building's sides to "turn[ ] to mush" and "creat[ing] a serious risk" that the building's exterior sheeting would "completely fall[ ] off the building." *Id.* at 558–59. In other words, *Assurance* involved a severely deteriorated building, whereas the Hyatt experienced no physical alteration whatsoever.

Moreover, the property insurance policy in *Assurance* did not require direct physical loss of or damage to property from a covered cause of loss; instead, it covered "loss or damage caused by or resulting from risks of direct physical loss involving collapse of a building or any part of a building" caused by water damage. *Id.* at 559. The court held that "collapse" in this clause included "imminent collapse" and remanded for the district court to determine whether the building's condition fit the coverage provision, so interpreted. *Id.* at 563. In other words, the *Assurance* court did not hold that this language covered the mere risk of damage (as HT-Seattle argues for here), but rather that it covered actual "loss or damage" that resulted from "risks of" a specific, severe form of physical damage, namely, a state of "imminent collapse."

Second, the trial court order in *US Airways, Inc. v. Commonwealth Insurance Co.*, 2004 WL 1637139 (Va. Cir. Ct. July 23, 2004), also involved policy language significantly different from HT-Seattle's policy, aside from the single phrase "risk of." The policy covered losses when a "civil or military authority" prohibits access to insured property "as a direct result of" "all risk of direct physical loss

or damage to property." *Id.* at *2. HT-Seattle does not claim civil or military authority coverage, and anyway, the similar provision of HT-Seattle's policy requires the claimed loss to "result from a civil authority's response to *direct physical loss of or damage*" to property. 5-ER-732, § 5.02.03 (emphasis added).

HT-Seattle cites no case in which the phrase "risks of" expands coverage in the way it proposes, that is, expands a clause covering "direct physical loss or damage" to cover purely economic loss resulting from risk alone.

Given that the policy requires actual physical loss or damage for coverage, Washington law is clear that mere risk—even if severe—does not establish a covered loss. *See Villella v. Pub. Emps. Mut. Ins. Co.*, 725 P.2d 957, 961 (Wash. 1986) (holding that risk of physical damage from destabilized foundation did not cause physical loss of a house); *Fujii v. State Farm Fire & Cas. Co.*, 857 P.2d 1051, 1052 (Wash. Ct. App. 1993) (holding that heightened risk of landslide is not a physical loss to a house). Therefore, HT-Seattle's economic losses that arise from a mere risk of physical loss or damage are not covered.

2. HT-Seattle did not allege "direct physical loss of or damage to" the Hyatt caused by the actual presence of virus particles.

Having shown that the risk of virus particles' presence at the Hyatt cannot establish a covered loss, we now address whether the operative complaint established a covered loss from virus particles' actual presence. It did not—for several interrelated reasons.

a. HT-Seattle did not allege that virus particles were present at the Hyatt.

The operative complaint made many general allegations about Covid-19 and the way it spreads. But when it came to the Hyatt itself, the complaint equivocated: It alleged only that "[t]he actual and/or threatened presence" of Covid-19 at the Hyatt "rendered and/or created the risk" that the Hyatt would become "unusable, damaged and unsafe." 5-ER-690, ¶ 63. It further asserted that this circumstance either "caused . . . direct physical loss of and damage to" the Hyatt or "create[d] the risk of direct physical loss of and damage to" the Hyatt. *Id.* This hedging language avoided saying whether virus particles were actually present at the Hyatt—perhaps to avoid the contamination exclusion (discussed in § I.B., *infra*), but regardless, it could not have been inadvertent.

Because the operative complaint did not allege that virus particles were present at the Hyatt, the theory that HT-Seattle's losses arose from these particles' presence rests on speculation beyond the face of the complaint. *Cf. Dakota Girls, LLC v. Phila. Indem. Ins. Co.*, 17 F.4th 645, 647–48 (6th Cir. 2021) (party did not adequately allege presence of the virus where it merely "theorized that COVID-19 was itself 'damaging surfaces' within the preschools' properties," but "could not confirm that a COVID-positive individual was ever at the preschools"). The theory thus fails to support HT-Seattle's claim. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (a complaint must state a claim that is "plausible on its face").

b. HT-Seattle did not allege that its losses were caused by the presence of virus particles.

Aside from failing to allege that virus particles were present at the Hyatt, the operative complaint also failed to connect HT-Seattle's losses to virus particles' presence—as the policy requires. The complaint attributed the suspension and closure of the Hyatt only to government orders. 5-ER-691–92, ¶¶ 66–77. In contrast, the

complaint did not refer to any suspension or closure that resulted from the discovery of virus particles on the insured property.

To be sure, the operative complaint stated the bare conclusion that the physical presence of virus particles at the Hyatt caused HT-Seattle's losses. 5-ER-690, ¶ 63. But this conclusory allegation is "not entitled to be assumed true," *Iqbal*, 556 U.S. at 681, especially when it is contradicted by the more specific factual allegations. *See*, *e.g.*, *Brown Jug, Inc. v. Cincinnati Ins. Co.*, 27 F.4th 398, 403 (6th Cir. 2022) ("[A] threadbare recital[ ] of the contract's language combined with conclusory statements saying that the coronavirus impaired some unidentified property in some unidentified manner is not sufficient to survive a motion to dismiss.") (quotation marks omitted).

According to HT-Seattle, it would have experienced exactly the same losses even if no virus particles were ever present at the Hyatt, because the government closure orders would have had the same effect (the government orders applied regardless of whether there were virus particles at a location), and the broader decline in travel due to the pandemic would have occurred just the same. 5-ER-691–93, ¶¶ 66–81. If HT-Seattle's losses would have been the same

whether virus particles were present or not, then the presence of virus particles did not cause the losses. *See Inns-by-the-Sea v. Cal. Mut. Ins. Co.*, 286 Cal. Rptr. 3d 576, 589 (Ct. App. 2021) ("Inns cannot reasonably allege that the presence of the COVID-19 virus on its premises is what *caused* the premises to be uninhabitable or unsuitable for their intended purpose."); *accord Rialto Pockets, Inc. v. Beazley Underwriting Ltd.*, 2022 WL 1172134, at *1–2 (9th Cir. Apr. 20, 2022); *Torgerson Props. v. Cont'l Cas. Co.*, 38 F.4th 4, 6 (8th Cir. 2022) ("The contamination did not cause TPI's business interruption; the shutdown orders did. TPI would have been subject to the exact same restrictions even if its premises weren't contaminated.").

The failure to plead causation further dooms HT-Seattle's complaint.

c. Virus particles do not cause "direct physical loss of or damage to" property.

Even if the operative complaint had alleged that virus particles were present at the Hyatt and that they caused HT-Seattle's losses, these losses would still not be covered. This is because the presence of virus particles does not cause "direct physical loss of or damage to" property in the way coverage requires.

HT-Seattle alleged that Covid-19 "is present in viral fluid particles in the air, as well as on surfaces[,]" and "easily transmitted from person to person or from surface to person." 5-ER-686, ¶ 54. The "[r]espiratory droplets" of infected people "adhere to surfaces and objects." 5-ER-688, ¶ 59. These droplets cause "contact with those previously safe, inert surfaces" to become "unsafe." *Id*. They "remain infectious" for "up to nine days" and detectable for "up to 28 days." 5-ER-688–90, ¶¶ 60–61.

Thus, according to HT-Seattle, even if the Hyatt had been exposed to virus particles, within days, the particles would no longer have posed any threat—without any intervention or repair whatsoever. And after sitting on surfaces or drifting through the air, the particles would soon have degraded to the point that they are undetectable and benign. Moreover, even during the brief period that the particles would have been detectable, HT-Seattle has not alleged that the property on which they lay experienced any tangible or material change.

Based on these allegations, virus particles' presence—a self-correcting, intangible condition—does not cause "physical loss or damage" under the insurance policy.

Consistent with the ordinary understanding of "physical," dictionary definitions of "physical" suggest that physical loss or damage must be essentially material and tangible. Merriam-Webster's Dictionary relevantly defines "physical" as "having material existence: perceptible especially through the senses," and "of or relating to material things." *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary (last reviewed August 18, 2022). Black's Law Dictionary similarly defines "physical" as "[o]f, relating to, or involving material things; pertaining to real, tangible objects." *Black's Law Dictionary* (11th ed. 2019); *see also Kut Suen Lui v. Essex Ins. Co.*, 375 P.3d 596, 601 (Wash. 2016) (courts "give undefined terms in an insurance policy their popular and ordinary meaning in accord with the understanding of the average purchaser of insurance, which we may determine by reference to dictionary definitions").

This interpretation receives support from another provision of the policy that uses the phrase "physical loss or damage." *Cf. Peasley*, 932 P.2d at 1246 (to interpret any individual provision, "[t]he insurance contract must be viewed in its entirety"). That other provision—essential to the Time Element coverage HT-Seattle seeks—allows payment for a period that begins "from the time of physical loss or damage of the type insured against," and ends when "with due diligence and dispatch the building and equipment could be *repaired or replaced* . . . ." 5-ER-730 § 4.03.01.01 (emphasis added). Based on this provision, "physical loss or damage of the type insured against" must be remediable through repair or replacement. Otherwise, it would be impossible to determine the end of the payment period for Time Element coverage. *See Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885, 892 (9th Cir. 2021) ("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.").

Many Courts of Appeals have held that similar provisions demonstrate "direct physical loss or damage" requires a tangible alteration. *See, e.g.*, *Uncork & Create LLC v. Cincinnati Ins. Co.*, 27 F.4th 926, 932 (4th Cir. 2022) (holding "[t]he need to repair, rebuild, replace, or expend time securing a new, permanent property" would be "render[ed] meaningless" if the policy did not require "material alteration"); *Santo's Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398, 403 (6th Cir. 2021) ("Baked into th[e period of restoration] provision is the understanding that any covered 'direct physical loss of or damage to' property could be remedied by repairing, rebuilding, or replacing the property or relocating the business."). The policy also excludes "[l]oss or damage" caused by "loss of use," further textual evidence that it does not cover economic loss absent a physical alteration to insured property. 5-ER-723 § 3.03.02.01.

Although no decision of the Washington Court of Appeals is directly on point, closely analogous is *Herr v. Forghani*, 161 Wash. App. 1037, 2011 WL 1833829 (Wash. Ct. App. May 16, 2011)

(unpub.).[2] A property owner argued that a neighbor's increased use of an easement on the owner's property caused a covered "physical loss" by diminishing the property's value. *Id.* at *7. The court disagreed, finding that a covered "physical loss" must affect "tangible property" rather than cause only a loss in value. *Id.* at *8.

Strictly speaking, increased traffic is a physical phenomenon: Vehicles physically traverse the property (temporarily), and each one wears down the road surface (permanently). But the *Herr* plaintiff's loss arose only from *the economic effect* of the increased traffic, independent of the negligible physical effect. It was therefore not a "physical loss."

Much like the increased use of an easement, even if virus particles' presence is technically a physical phenomenon, the particles are gone within a matter of hours or days, and the property on which they rested is unchanged. Any loss to HT-Seattle that arises from

[2] As an unpublished decision, *Herr* is not binding precedent in Washington, but this Court may consider it for its persuasive value. *See Powell v. Lambert*, 357 F.3d 871, 877–79 (9th Cir. 2004) (considering unpublished decisions of Washington Court of Appeals to determine a point of law).

virus particles' presence, including any resulting danger to human health, is not physical loss or damage to property, but is rather "purely economic." AOB 32.

HT-Seattle's discussion of Covid-infected crowds continuously circulating through the Hyatt, AOB 36–37, ends up undermining its position. That the risk from virus particles inside the Hyatt depends on a flow of people from outside only underscores the ephemeral, intangible nature of the virus particles' effect on the property. The threat of infection inheres not in property but in people.

The Seventh Circuit reached the same conclusion in *Sandy Point Dental, P.C. v. Cincinnati Insurance Co.*, 20 F.4th 327 (7th Cir. 2021), applying Illinois law that did not relevantly differ from Washington's. *See id.* at 331–32 (summarizing rule that physical loss or damage is "material"). According to the court, the fact that "COVID-19 physically attaches itself to the physical premises" does not establish physical loss or damage. *Id.* at 335. The plaintiff "does not allege that the virus *altered* the physical structures to which it attached, and there is no reason to think that it could [plausibly] have done so," because the virus "disintegrates on its own in a matter of

days." *Id.*; *see also Colectivo Coffee Roasters, Inc. v. Soc'y Ins.*, 974 N.W.2d 442, 448 (Wis. 2022) ("[T]he danger of the virus is to 'people in close proximity to one another,' not to the real property itself."). Similarly, although HT-Seattle does allege that virus particles "physically change . . . property," 5-ER-688, ¶ 59, HT-Seattle's other allegations undermine this conclusory statement. *See also Ascent Hosp. Mgmt. Co. v. Emp'rs Ins. Co. of Wausau*, 2022 WL 130722, at *3 (11th Cir. Jan. 14, 2022) (per curiam) (applying New York law and holding that no physical loss or damage resulted from virus particles being "physically present in—and attached to—the subject property").

HT-Seattle's fine distinction between "loss" and "damage" also misses the point. AOB 27–28. Regardless of whether virus particles are understood as causing "loss of" or "damage to" property, their effect, being self-correcting and intangible, is not "physical" and therefore not covered. Their presence is equivalent to fog on a mirror. The fog, a literally physical phenomenon, may limit the mirror's utility for its intended purpose—temporarily—but in no sense does it constitute direct physical loss of or damage to the mirror.

If instead, as HT-Seattle argues, the temporary presence of virus particles *does* amount to physical loss or damage covered by property insurance, absurd conclusions follow. For example, a person infected with Covid-19 who isolates at home can claim physical loss or damage under her homeowners' policy. This holding would upend Washington insurance law and drain the word "physical" of nearly all meaning. *Cf. Plan Check Downtown III, LLC v. AmGuard Ins. Co.*, 485 F. Supp. 3d 1225, 1231–32 (C.D. Cal. 2020) (rejecting an insured's interpretation of "physical" because it would cause "a sweeping expansion of insurance coverage without any manageable bounds"); *Iqbal*, 556 U.S. at 663–64 ("[D]etermining whether a complaint states a plausible claim is context specific, requiring the reviewing court to draw on its experience and common sense.").

Virus particles' presence does not cause direct physical loss of or damage to property. The operative complaint fails on this third ground as well.

d. HT-Seattle's authorities do not help it.

HT-Seattle attempts to analogize the presence of virus particles to various other conditions of property. But in all the cases HT-

Seattle cites, the condition actually caused the claimed loss, and the condition would not have corrected itself without intervention. *See*, *e.g.*, *Port Auth. of N.Y. & N.J. v. Aff'ed FM Ins. Co.*, 311 F.3d 226 (3d Cir. 2002) (asbestos contamination); *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823 (3d Cir. 2005) (unpub.) (e-coli in the water supply); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co.*, 2014 WL 6675934 (D.N.J. Nov. 25, 2014) (ammonia contamination) (cited in AOB 33–34); *see also* AOB 26–27 (radioactive contamination). Numerous pandemic-related coverage cases have therefore rejected this analogy. *See*, *e.g.*, *Sandy Point Dental, P.C.*, 20 F.4th at 333–34 (distinguishing these cases based on nature of condition); *Inns-by-the-Sea*, 286 Cal. Rptr. 3d at 589 (distinguishing these cases based on causation); *First & Stewart Hotel Owner, LLC v. Fireman's Fund Ins. Co.*, 2021 WL 3109724, at *4 (W.D. Wash. July 22, 2021) (distinguishing these cases based on nature of condition). And none of the cases cited by HT-Seattle applies Washington law.

HT-Seattle also cites several decisions of Washington superior courts. AOB 38–40. But those cases involved losses caused by government orders only, not the presence of virus particles. So even

if this Court were inclined to consider trial court orders, the cited orders do not apply to this appeal. HT-Seattle nowhere explains how they do. *See* AOB 40 (arguing only that "Coronavirus (a *physical* substance) invaded the air and surfaces at the insured premises").

Moreover, as trial court decisions, these cases would not be binding even if they were on point. And their persuasive weight is negligible. Indeed, in one of them, although the court held for the plaintiff on a motion to dismiss, *Hill and Stout PLLC v. Mut. of Enumclaw Ins. Co.*, 2020 WL 6784271 (Wash. Super. Ct. Nov. 13, 2020), it later granted summary judgment to the defendant, *Hill and Stout PLLC v. Mut. of Enumclaw Ins. Co.*, 2021 WL 4189778, at *3 (Wash. Super. Ct. Sept. 9, 2021) (physical loss or damage requires "physical effect(s) on the properties"). In another, although the trial court granted partial summary judgment to the plaintiff, *Snoqualmie Entm't Auth. v. Aff'ed FM Ins. Co.*, 2021 WL 4098938 (Wash. Super. Ct. Sept. 3, 2021), the Court of Appeals later granted interlocutory review, determining that in light of Washington precedent, the trial

court committed "obvious error."[3] Incorrect trial court decisions cannot establish that HT-Seattle's position is "reasonable." AOB 28–29, 40.

There is no ambiguity about whether a self-correcting, intangible phenomenon can cause "physical loss or damage." It cannot. *See Peasley*, 932 P.2d at 1246 (unambiguous policy language must be enforced as written rather than "creat[ing] ambiguity where none exists").

3. HT-Seattle has abandoned any argument that losses caused by government-ordered closures are covered.

"[O]n appeal, arguments not raised by a party in its opening brief are deemed waived." *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999). To preserve an argument, the appellant must raise it "specifically and distinctly," that is, within "(1) a statement of the issues presented for review; (2) a summary of the argument; and (3) the argument section itself." *Christian Legal Soc'y Ch. of Univ. of*

[3] The Washington Court of Appeals reported its decision to grant review in a letter to counsel. We request that the Court take judicial notice of this letter in a concurrently filed request for judicial notice.

Cal. v. Wu, 626 F.3d 483, 485 (9th Cir. 2010) (quotation marks omitted).

In the operative complaint, HT-Seattle attributed its alleged losses in part to government orders limiting or shutting down the Hyatt's operations. 5-ER-691–92, ¶¶ 66–77 (Hyatt closed for part of 2020 due to both "government public health guidance and orders" and to "the risks associated with the Coronavirus pandemic, including direct physical loss of or damage to covered property"). HT-Seattle's opening brief, however, does not mention government orders. Nowhere does it even suggest—let alone contend "specifically and distinctly"—that its losses were covered because they were caused by government-ordered suspension of operations.

This theory's absence from the opening brief, compared with the operative complaint, signals that HT-Seattle has decided to abandon the contention that losses caused by government orders are covered. But whether abandoned or forfeited, HT-Seattle has not made this

argument and therefore may not raise it in reply. *See Barnes v. Fed. Aviation Admin.*, 865 F.3d 1266, 1271 n.3 (9th Cir. 2017).[4]

B. HT-Seattle's alleged losses are barred by the contamination exclusion.

As shown, HT-Seattle failed to plead any losses falling within its policy's insuring clause, the first step in determining insurance coverage. *See Ham & Rye, L.L.C.*, 174 P.3d at 1178–79 (outlining the two steps). HT-Seattle's losses are also excluded from coverage at the second step by the policy's contamination exclusion. Affirmance can rest on either or both of these independent grounds.

1. The plain language of the contamination exclusion applies to losses allegedly caused by the presence of virus particles at the Hyatt.

The policy's contamination exclusion bars from coverage "[a]ny condition of property due to the actual presence of any foreign substance, . . . virus, disease causing or illness causing agent, **Fungus**, mold or mildew." 5-ER-723, 760, §§ 3.03.01.01, 7.09. The

[4] Should HT-Seattle attempt to resurrect this point, AGLIC will seek leave to file a short sur-reply debunking this moribund theory based on both Washington law and similar law from other jurisdictions that at least nine Circuit Courts, including this one, have applied to reject this argument.

exclusion applies not only to physical loss and damage due to "**Contamination**," that is, such a "condition of property" itself, but also to "any cost due to **Contamination** including the inability to use or occupy property." 5-ER-723, 760, § 3.03.01 and sub-§ .01, § 7.09.

HT-Seattle alleged that "[t]he actual and/or threatened presence of Coronavirus particles at the Hyatt . . . have caused and can continue to cause and/or create the risk of direct physical loss of and damage to the covered premises and property." 5-ER-690, ¶ 63. On its face, this allegation refers to the presence of "Coronavirus particles" and squarely fits the exclusion's listing of a "virus" or "disease causing or illness causing agent."

The contamination exclusion applies "unless [the contamination] *results from* direct physical loss or damage not excluded by this Policy." 5-ER-723, §§ 3.03, 3.03.01 (emphasis added). HT-Seattle nowhere alleged that viral contamination of its property *resulted from* covered physical loss or damage. As stated, HT-Seattle asserted the opposite: that the viral contamination of its property *itself* caused physical loss or damage to the property.

Under the plain language of the contamination exclusion, therefore, this "condition of property" is not covered. Nor is any cost that might be due to HT-Seattle's resulting "inability to use or occupy" its property. *See Palomar Health v. Am. Guar. & Liab. Ins. Co.*, 2022 WL 3006356, at *1 (9th Cir. July 28, 2022) ("To the extent that Plaintiff's claims rely on the presence of 'Coronavirus and COVID-19 particles' on its property, those claims are barred by the policies' contamination exclusions."); *Carilion Clinic v. Am. Guar. & Liab. Ins. Co.*, 2022 WL 347617, at *17 (W.D. Va. Feb. 4, 2022) ("[T]he virus provision in the Contamination Exclusion [identical to the one here] applies to bar [plaintiff's] losses attributable to the COVID-19 pandemic . . . .").

2. The contamination exclusion is not ambiguous.

HT-Seattle observes that even though the definition of "contamination" includes "virus," the definition of "contaminant" does not. 5-ER-760, § 7.10. This does not, however, make the contamination exclusion "ambiguous" as HT-Seattle claims. AOB 50.

"Contaminant" and "contamination" are defined and used differently in the policy. The contamination exclusion does not refer

to "contaminant," so the definition of "contaminant" does not affect the exclusion's scope. 5-ER-723, § 3.03.01.01. The contamination exclusion uses only one bolded and defined term: "**Contamination**." 5-ER-723, § 3.03.01.01. That term encompasses "virus" contamination. 5-ER-760, § 7.09.

HT-Seattle argues that as used in the definition of "contamination," the word "virus" refers only to virus "in a traditional pollution context," for example, leeching from medical waste, rather than virus "in the context of a Pandemic." AOB 51. Nothing in the definition supports that view; it excludes "[a]ny condition of property due to the actual presence of" virus, no matter how that presence came about. 5-ER-760, § 7.09. The sole exception, explained above, is contamination that "*results from* direct physical loss or damage not excluded," such as an explosion that distributes a disease-causing agent. 5-ER-723, §§ 3.03, 3.03.01 (emphasis added). Nor can the word "virus" itself bear HT-Seattle's attempted distinction; that word always refers to any infectious agent of a certain type, without regard for how the agent ends up in one place or another. *See* virus, *Merriam-Webster Online Dictionary*, https://www.merriam-

webster.com/dictionary (last reviewed August 18, 2022) ("any of a large group of submicroscopic infectious agents").

Kent Farms, Inc. v. Zurich Ins. Co., 998 P.2d 292 (Wash. 2000), does not support HT-Seattle's strained reading of "virus." AOB 52. In *Kent Farms*, a driver delivering diesel fuel to a farm was injured when a faulty valve caused the diesel to spray on him. *Id.* at 293. The court held that a "pollution exclusion" in the farm's commercial liability policy—which would have excluded, for instance, liability for injuries to third parties caused by diesel seeping onto the soil—did not apply to the driver's injuries. *Id.* at 295–96. "Most importantly," the court said, "the fuel was not acting as a 'pollutant' when it struck" the driver. *Id.* at 295. In other words, the driver was not injured due to the polluting nature of the diesel, and therefore the pollution exclusion did not apply.

In contrast, here—even granting the analogy between the contamination exclusion in HT-Seattle's policy and the pollution exclusion in *Kent Farms*—if HT-Seattle experienced any loss from virus particles, it arose from the nature of the virus particles themselves. That is, unlike the spray of fuel in *Kent Farms*, HT-

Seattle alleged exactly the sort of loss or damage that the contamination exclusion is meant to exclude. But the analogy itself is also faulty. The contamination exclusion in HT-Seattle's commercial property insurance policy serves a different purpose from, and bears little resemblance to, the pollution exclusion in the commercial liability policy at issue in *Kent Farms*. *See Kent Farms*, 998 P.2d at 294 (policy excludes "'[b]odily injury' and 'property damage' arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants").

In a last effort to show ambiguity, HT-Seattle refers to AGLIC's prior statements about the contamination exclusion, and to the policy's drafting history. AOB 53–54. But this evidence may not be considered for this purpose.

As discussed in section I.A.1., *ante*, extrinsic evidence of the meaning of an insurance policy is admissible only if the policy is "ambiguous." *Spratt*, 37 P.3d at 1272. On its face, the contamination exclusion cannot bear HT-Seattle's interpretation. It is not ambiguous, so HT-Seattle's extrinsic evidence of its meaning has no proper role here.

And even if the language of the contamination exclusion were ambiguous in the way HT-Seattle suggests, again, HT-Seattle's extrinsic evidence all concerns AGLIC's unilateral statements and actions. As already explained, purported evidence of AGLIC's "subjective purposes and intentions" is not relevant or admissible. *Lynott*, 871 P.2d at 149.[5]

3. Applying the policy's plain language, the "Amendatory Endorsement – Louisiana" does not apply here.

The policy includes "amendatory endorsements" for 31 states and two endorsements of general application. 5-ER-710–11. The "Amendatory Endorsement – Louisiana" is several pages in length and addresses myriad changes to the policy that are required to comply with Louisiana law, including a change to the definition of "Contamination" to "[a]ny condition of property due to the actual presence of any **Contaminant(s)**," defining "Contaminant(s)" as

> [a]ny solid, liquid, gaseous, thermal or other irritant, including but not limited to smoke, vapor, soot, fumes, acids, alkalis, chemicals, waste (including

[5] HT-Seattle has filed a motion to take judicial notice of this evidence. Dkt. 19. Because this evidence is irrelevant and inadmissible under Washington law, this motion should be denied.

> materials to be recycled, reconditioned or reclaimed), other hazardous substances, **Fungus** or **Spores**.

5-ER-814. Under this definition, then, "contamination" does not include viruses or disease-causing agents.

The Hyatt is in Washington, not Louisiana, so the Louisiana endorsement does not apply to HT-Seattle's claim. *See Palomar Health*, 2022 WL 3006356, at *1 ("Although each policy contains an amendatory endorsement that removes the word 'virus' from the exclusion, those special endorsements apply only to property in Louisiana. Because Palomar does not allege any loss or harm to property in Louisiana, the contamination exclusion applies.")

HT-Seattle argues to the contrary that every state-specific endorsement applies in every state, except when the endorsement expressly says otherwise. AOB 56. In keeping with this theory, HT-Seattle even calls the Louisiana endorsement the "'Virus-Deletion Endorsement.'" AOB 55. (HT-Seattle fails to explain that the phrase "Virus Deletion Endorsement" does not appear anywhere in the policy—let alone capitalized and serving as a title.) HT-Seattle argues that the Louisiana endorsement applies to the Hyatt and

therefore that the contamination exclusion of its policy does not exclude physical loss or damage allegedly caused by a virus.

HT-Seattle's position is not reasonable. It renders the policy incoherent, and it violates other rules of policy interpretation.

If state-specific endorsements applied everywhere, the policy would be incoherent. The idea that state-specific endorsements generally apply in every state, rather than just the state referenced at the top of each, leads to insoluble contradictions and renders the policy incoherent.

Consider the provision for appraisal of property in case of disagreement over its value. The basic policy provides for an appraisal procedure initiated "on the written demand of either" the insured or the insurer. 5-ER-753–54, ¶ 6.13.04. But according to the Nebraska endorsement, this procedure is initiated only "upon mutual agreement" of the parties. 5-ER-833. The West Virginia endorsement, on the other hand, abridges the description of the procedure: For example, unlike the basic policy, the endorsement doesn't specify that each appraiser must be with "no direct or indirect financial interest in the claim," nor that the insured must have "fully

complied with all provisions of this Policy" before initiating the procedure. 5-ER-857. Finally, the Louisiana endorsement states that the appraisal provision "is deleted in its entirety." 5-ER-813.

If these endorsements applied in every state, the resulting conflicts among them would make the policy impossible to apply in practice. An insurance policy should not be interpreted in a way "that leads to an absurd conclusion, or that renders the policy nonsensical or ineffective." *Quadrant Corp. v. Am. States Ins. Co.*, 76 P.3d 773, 775 (Wash. Ct. App. 2003). Yet that is the result of HT-Seattle's reading.

HT-Seattle's interpretation also breaks other rules of contract interpretation. "[C]ourts should read" language in an insurance contract "as the average person purchasing insurance would" and "construe the entire contract together for the purpose of giving force and effect to each clause." *Robbins v. Mason Cty. Title Ins. Co.*, 425 P.3d 885, 890 (Wash. Ct. App. 2018). Intuitively, in the context of the policy as a whole, the intended effect of 31 amendatory endorsements that bear specific state names is to reference the area or state in which the endorsement applies.

The policy's "titles" provision does not change this analysis, contrary to HT-Seattle's contention. AOB 56. The provision directs, "The titles of the various paragraphs and endorsements are solely for reference and shall not in any way affect the provisions to which they relate." 5-ER-756, § 6.20. Thirty-one endorsements begin: "Amendatory Endorsement – [State]." The state listed on each is an essential "reference" or geographic identifier; while it does not affect the substance of the provisions that immediately follow, it does affect where they apply.

HT-Seattle's view of the "titles" provision makes the state names mean nothing whatsoever. AOB 57–58. They become surplusage—and confusing surplusage, at that. By ignoring the state references, HT-Seattle's argument fails to "giv[e] force and effect to each clause": It creates conflicts rather than reconciling the policy terms.

HT-Seattle also reads the Louisiana endorsement in isolation, ignoring the implications of its placement among 31 state-specific endorsements, ignoring their mutual contradictions, and ignoring the contrast between their state-specific nature and the policy's

endorsements of general application, which lack any geographic identifiers. 5-ER-861–62. The only reasonable reading, by contrast, takes these contextual cues into account and concludes that each state-specific endorsement must apply only in its identified state.

Further support for this interpretation comes from the context in which the state-specific endorsements arise. Under the McCarran-Ferguson Act, the federal government cedes to the individual states the power to regulate within their territory "[t]he business of insurance, and every person engaged therein." 15 U.S.C. § 1012. Different states regulate insurance contracts in different ways. *See, e.g.*, La. Stat. Ann. § 22:1311 (2011) (setting requirements for fire insurance policies "on any property *in this state*") (emphasis added). No state has the power to regulate conduct outside its borders. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571–72 (1996).

Both the policy and the broader legal context show that HT-Seattle's reading is not reasonable. Because the policy language cannot accommodate HT-Seattle's reading, extrinsic evidence is not admissible to support it (*contra* AOB 57).

The only reasonable reading of each state-specific endorsement is that it applies only within the state that approved it. The Louisiana endorsement does not apply to HT-Seattle's claims. *See Palomar Health*, 2022 WL 3006356, at *1; *Carilion Clinic*, 2022 WL 347617, at *17 ("[T]he only plausible way to harmonize the various provisions of the [policy] is to read the Amendatory Endorsement – Louisiana as applying solely to property in Louisiana."); *Boscov's Dep't Store, Inc. v. Am. Guar. & Liab. Ins. Co.*, 546 F. Supp. 3d 354, 369 (E.D. Pa. 2021); *Firebirds Int'l, LLC v. Zurich Am. Ins. Co.*, 2022 WL 1604438, at *4 (Ill. Ct. App. May 20, 2022) (agreeing that this is "the only reasonable interpretation").

II. The Court should affirm dismissal of Counts II and III of the operative complaint because they depend on pleading a covered loss in the first place.

Counts I and IV of HT-Seattle's operative complaint required its losses to be covered under the policy. 5-ER-699–702. Having found that HT-Seattle failed to allege any covered losses, the district court also dismissed Counts II and III, for violation of Washington's consumer protection law and for insurance bad faith, because these

claims required the threshold showing that AGLIC incorrectly denied coverage. 1-ER-13.

HT-Seattle does not dispute that if its losses are not covered, the district court correctly dismissed Counts II and III. AOB 58. Accordingly, if this Court affirms that HT-Seattle has not pleaded a covered loss, it should also affirm dismissal of these other claims.

III. The Court should affirm the denial of HT-Seattle's motion to alter or amend the judgment under Rule 59(e).

A. HT-Seattle has waived any challenge to the denial of its Rule 59(e) motion.

As discussed above, "arguments not raised by a party in its opening brief are deemed waived." *Smith*, 194 F.3d at 1052. The opening brief states no challenge to the district court's denial of HT-Seattle's motion to alter or amend the judgment under Rule 59(e)—not in the statement of issues, AOB 4–5, or in the summary of argument, AOB 17–19, or in the argument itself, AOB 20–59.

To be sure, in its conclusion, HT-Seattle duly asks the Court to reverse the order "denying HT-Seattle leave to alter the judgment [*sic*] and amend its Complaint . . . ." AOB 58. But nowhere in the preceding 57 pages does HT-Seattle ever state that this order was in

error, let alone present a "coherently developed" argument to that effect. *United States v. Kimble*, 107 F.3d 712, 715 n.2 (9th Cir. 1997) (deeming an argument "abandoned" when "not coherently developed in [party's] briefs on appeal"). At a minimum, such an argument would need to explain why the order was an abuse of discretion, based on the standard of law governing Rule 59(e) motions (explained in the next section).

Not only does the opening brief fail to muster any argument on this issue, its factual presentation also impedes review of the denial order. As noted, the brief commingles allegations from the operative complaint and the proposed amended complaint on which the Rule 59(e) motion was based. Stmt. § A. But the district court's denial of the motion depended on comparing the two complaints and concluding that the proposed amended complaint "merely reframes, clarifies, and expands upon facts and scientific data that were present in the original complaint." 1-ER-6. Reviewing the order thus requires analyzing the differences between the two complaints—differences that HT-Seattle has decided to obscure. *See* AOB 8 n.2

(explaining the decision to commingle allegations from the operative complaint and the proposed amended complaint).

HT-Seattle does not raise a coherent challenge to the order denying its Rule 59(e) motion. It also distorts the underlying record. HT-Seattle has therefore waived this issue and may not argue it in reply. *See Barnes*, 865 F.3d at 1271 n.3.

B. The district court did not abuse its discretion in denying the Rule 59(e) motion.

Even if HT-Seattle had not waived its challenge to the denial of its Rule 59(e) motion, it would lose this issue on the merits.

HT-Seattle styled its motion as a request both (a) to alter or amend the judgment under Rule 59(e) and (b) to grant leave to amend the complaint under Rule 15(a). AOB 16. However, "[o]nce judgment has been entered in a case, a motion to amend the complaint can only be entertained if the judgment is *first* reopened under a motion brought under Rule 59 or 60." *Lindauer v. Rogers*, 91 F.3d 1355, 1357 (9th Cir. 1996) (emphasis added); *see also Weeks v. Bayer*, 246 F.3d 1231, 1235–36 (9th Cir. 2001) ("It is clear in the first instance that the judgment would have to be reopened, under Federal Rule of Civil

Procedure 59(e), before the district court could entertain [a] motion to amend. This requirement is a high hurdle for [plaintiff] to meet.") (citation omitted).

Because HT-Seattle's motion followed entry of judgment dismissing the case, it must be analyzed under Rule 59(e), not Rule 15(a).

This Court reviews for abuse of discretion the district court's denial of a Rule 59(e) motion. *Turner*, 338 F.3d at 1063. This Court should reverse only if "the reviewed decision lies beyond the pale of reasonable justification under the circumstances." *Boyd v. City & Cty. of S.F.*, 576 F.3d 938, 943 (9th Cir. 2009).

Review for abuse of discretion involves two steps. First, the Court determines de novo whether the district court applied "the correct legal rule" to HT-Seattle's motion. *United States v. Hinkson*, 585 F.3d 1247, 1261–62 (9th Cir. 2009). If it did, then the Court determines whether the district court's "application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn" from the complaint. *Id.* at 1262 (quotation marks omitted).

1. The district court applied the correct legal standard.

To guide its adjudication of HT-Seattle's Rule 59(e) motion, 1-ER-4, the district court looked to *Turner*, 338 F.3d 1058, for the reasons such a motion may be granted. These include "to correct manifest errors of law or fact upon which the judgment is based" and to accommodate the moving party's presentation of "newly discovered or previously unavailable evidence." *Id.* at 1063. The court also cited the rule that "[a] Rule 59(e) motion may *not* be used to raise arguments or present evidence for the first time when they could reasonably have been raised earlier in the litigation." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000); 1-ER-4. The court further noted, "A Rule 59(e) motion is an extraordinary remedy and 'should not be granted, absent highly unusual circumstances.'" 1-ER-4 (quoting *Orange St. Partners v. Arnold*, 179 F.3d 656, 665 (9th Cir. 1999)).

The cited authorities are good law. HT-Seattle offers no argument to the contrary.

2. The district court's application of the standard was not illogical, implausible, or without support.

HT-Seattle's Rule 59(e) motion gave two reasons to reopen the judgment. Even if HT-Seattle had reprised these arguments in its opening brief, neither would justify reversal now.

a. The judgment did not rest on manifest error.

First, HT-Seattle argued that the judgment should be altered because it rested on "manifest error," namely, the error of "preventing [HT-Seattle] from amending its complaint to add further information supporting its claims." 1-ER-5 (brackets in original). The purported manifest error, then, was simply the district court's decision to dismiss the complaint with prejudice.

But HT-Seattle never asked the district court to allow any proposed amendment at any point in the nearly four months between AGLIC's motion to dismiss and the court's dismissal order. 5-ER-886–89. HT-Seattle thus appeared unwilling or unable to refine its pleading to avert judgment against it. In deciding the Rule 59(e) motion, it was logical and reasonable for the district court to conclude that its earlier decision to dismiss with prejudice was not "manifest

error" as HT-Seattle claimed. District courts are not required to hold the door open indefinitely for plaintiffs to propose better allegations whenever they get around to it.

b. The motion did not raise "previously unavailable evidence" that warranted reopening the judgment.

HT-Seattle also argued that "previously unavailable evidence warrants altering the Court's judgment." 1-ER-5. For a Rule 59(e) motion to be granted on this basis, the moving party must show "that the evidence was discovered after the judgment, that the evidence could not be discovered earlier through due diligence, and that the newly discovered evidence is of such a magnitude that had the court known of it earlier, the outcome would likely have been different." *Dixon v. Wallowa County*, 336 F.3d 1013, 1022 (9th Cir. 2003).

HT-Seattle did not even attempt to argue to the district court that its new allegations were based on evidence "discovered after the judgment" that "could not be discovered earlier":

- None of the sources newly cited in the proposed amended complaint date from after the entry of judgment, that is, after June 1, 2021. Indeed, most date from before HT-

Seattle even filed its original complaint, that is, before December 15, 2020. *See* 4-ER-608–71 (redline of proposed amended complaint).

- Neither the proposed amended complaint nor HT-Seattle's motion ever states that any of the new evidence was discovered after entry of judgment, or that it could not have been discovered earlier through due diligence. Instead, HT-Seattle makes only vague and weak claims of novelty and links them only to the date of the original complaint. *See*, *e.g.*, SER-9 (referring to expert report "made publicly available since HT's original complaint"); SER-11 (referring to "information [HT-Seattle] has obtained since the filing of its original complaint"); 4-ER-645–46 (describing expert report dated November 6, 2020—before HT-Seattle filed even its original complaint—as "only recently obtained by HT-Seattle").

- Much of the purportedly new evidence almost certainly *was* available when HT-Seattle filed its original complaint, or could have been through due diligence. This includes

> HT-Seattle's new allegations that some of its "guests and associates had tested positive for COVID-19 while working or staying at the hotel" and that it implemented "remedial measures" at the Hyatt. 2-ER-46, 48, ¶¶ 131, 136. It also includes newly offered dictionary definitions of "risk" and "physical" and years-old evidence of drafting history of this and similar insurance policies. 2-ER-26–27, ¶¶ 41–48 (referring to events of 2012 and 2013), 2-ER-28–29, ¶¶ 62–68 (definitions). HT-Seattle offers nothing to rebut the commonsense inference that this evidence is not new. *See* SER-11–12.

HT-Seattle thus failed to offer any "previously unavailable evidence" as required under Rule 59(e).

And even if HT-Seattle had cleared this hurdle, its newly offered evidence was also not "of such a magnitude that had the court known of it earlier, the outcome would likely have been different." Instead, as the district court put it, the proposed amended complaint "merely reframes, clarifies, and expands upon facts and scientific data that were present in the original complaint." 1-ER-6.

The significant additions fall into a few categories.

Airborne transmission. The proposed amended complaint added numerous details regarding airborne transmission of Covid-19 infection. *See, e.g.*, 2-ER-33–39, ¶¶ 77–98. But this evidence did not meaningfully alter the theory already laid out in HT-Seattle's operative complaint.

The operative complaint alleged that "[p]eople 'catch' Coronavirus by being in the vicinity of a person who has Coronavirus and breathing in shed [respiratory] droplets," and that "Coronavirus has spread widely" through "airborne particles within premises." 5-ER-686–87, ¶¶ 55–56. It further alleged that according to the WHO, "airborne transmission of Coronavirus may be possible," so that the virus may "'be transmitted to others over distances greater than 1 [meter].'" 5-ER-687–88, ¶ 58. And "'coronavirus particles can remain suspended in the air for up to three hours.'" 5-ER-699, ¶ 116; see also 5-ER-686, ¶ 54 (Coronavirus "is present in viral fluid particles in the air"). The complaint also referred to court cases addressing "a hazardous substance at or on a property, including the *airspace* inside buildings . . . ." 5-ER-682, ¶ 21 (emphasis added).

Representative of the new allegations in the proposed amended complaint are the following: "The recent consensus among researchers, the CDC and WHO is that a predominant mode of transmission of Coronavirus and/or COVID-19 is through the air," 2-ER-35, ¶ 84; "the risk of disease transmission increases substantially in enclosed environments, compared to outdoor settings," due to airborne transmission, 2-ER-38, ¶ 93; and "[o]nce Coronavirus is in, on, or near property, it is easily spread by the air, people and objects, from one area to another," 2-ER-39, ¶ 98.

These and similar new allegations merely reiterate points raised in the operative complaint. Reiteration might help a party in a posture that requires weighing the evidence and assessing credibility. But on a motion to dismiss, the district court had already "accepted [the operative complaint's] allegations" regarding airborne transmission "as true . . . ." 1-ER-6. The proposed amended complaint's repetition of the same allegations, or attribution of those allegations to additional sources, would not affect the outcome.

Cleaning. The proposed amended complaint also discussed how virus particles must be cleaned. 2-ER-44–52, ¶¶ 122–53. But these

allegations did not change the allegation that most undermines HT-Seattle's position regarding physical loss or damage: that after only nine days, virus particles on surfaces no longer pose a risk of infection, even without any intervention or cleaning. 2-ER-40, ¶ 99(b).

Virus particles at the Hyatt. In dismissing the operative complaint, the district court had already ruled that "even when present, the virus does not cause physical loss or damage." 1-ER-13. So even though the proposed amended complaint decisively alleged that virus particles were actually present at the Hyatt, 2-ER-48, ¶ 136, this would have made no difference to the district court's judgment.

Other "new" allegations. HT-Seattle's newly alleged dictionary definitions, 2-ER-28–29, ¶¶ 62–68, would not have altered the outcome. The district court's decision was in keeping with any reasonable reading of "physical loss or damage." *See* § I.A.2.c., *ante*. Evidence of drafting history, 2-ER-26–27, ¶¶ 41–48, is equally irrelevant under Washington law. *See* § I.A.1., *ante*.

In sum, the district court acted well within its discretion in concluding that the proposed amended complaint did not offer previously unavailable evidence that warranted reopening the judgment. The district court's denial of HT-Seattle's Rule 59(e) motion should therefore be affirmed.

IV. The pending decision of the Washington Supreme Court in *Hill and Stout* does not justify staying this appeal.

"'Only in rare circumstances'" should an appeal be stayed pending the outcome of another case. *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109–10 (9th Cir. 2005) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 255 (1936)). Relevant factors include "the possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward, and the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." *Lockyer*, 398 F.3d at 1110.

It is unclear whether any issues in this appeal will be resolved by the Washington Supreme Court case of *Hill and Stout*. To delay this appeal while waiting for that decision would be a waste of time.

A. HT-Seattle has abandoned the main issue that this case shared with *Hill and Stout*.

Before the opening brief, this case shared with *Hill and Stout* this question: Is a government-ordered suspension of a business's operations a "direct physical loss of or damage to" property? *Hill and Stout PLLC v. Mut. of Enumclaw Ins. Co.*, 2020 WL 6784271, at *1 (Wash. Super. Ct. Nov. 13, 2020).

However, HT-Seattle has abandoned the argument it made below that the policy covers losses caused by government orders. *See* § I.A.3., *ante*. It now argues that its losses were covered only because they were caused by the actual or threatened presence of virus particles at the Hyatt. In contrast, the *Hill and Stout* plaintiff conceded that "[n]o COVID-19 virus has been detected on [its] business premises." *Hill and Stout*, 2020 WL 6784271, at *1.

Moreover, regardless of *Hill and Stout*'s determination of that issue (waived here), this Court would still need to address AGLIC's argument that HT-Seattle's losses fell within the policy's "contamination exclusion," which independently justifies affirmance. § I.B., *ante*. *Hill and Stout* involves a somewhat different virus exclusion, *see Hill and Stout PLLC v. Mut. of Enumclaw Ins. Co.*,

2021 WL 4189778, at *1 (Wash. Super. Ct. Sept. 9, 2021), and there is no way to predict whether the Washington Supreme Court will even reach that point.

The opening brief does not even specify any question of law relevant to this appeal that *Hill and Stout* might settle. AOB 20–21. A stay must rest on more than mere speculation that *Hill and Stout* might resolve some issue of this appeal.

B. This Court does not need the guidance of the Washington Supreme Court to decide that issue.

What is more, even if HT-Seattle hadn't abandoned its argument that government orders caused a covered loss, this Court would have no need to wait for *Hill and Stout* to decide this question. It is straightforward. Appellate courts throughout the country—including this Court, at least eight other circuit courts, four states' highest courts, and nine states' intermediate appellate courts—have answered it "no."[6]

[6] *See 10012 Holdings, Inc. v. Sentinel Ins. Co.*, 21 F.4th 216, 222 (2d Cir. 2021); *Uncork & Create LLC*, 27 F.4th at 933 (4th Cir.); *Terry Black's Barbecue, L.L.C. v. State Auto. Mut. Ins. Co.*, 22 F.4th 450, 456 (5th Cir. 2022); *Santo's Italian Café LLC v. Acuity Ins. Co.*, 15 F.4th 398, 402 (6th Cir. 2021); *Sandy Point Dental, P.C.*, 20 F.4th at

[*Footnote Continues On Next Page*]

That is because this question turns on fundamental rules of contract interpretation that are essentially uniform across the country. The plain and unambiguous meaning of the phrase "direct physical loss of or damage to" property requires some tangible or material change to the property; the mere loss of use of property resulting from a government order in the absence of any physical change whatsoever does not satisfy this requirement.

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335 (7th Cir.); *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141, 1145 (8th Cir. 2021); *Mudpie, Inc.*, 15 F.4th at 893 (9th Cir.); *Goodwill Indus. of Cent. Okla., Inc. v. Phila. Indem. Ins. Co.*, 21 F.4th 704, 710 (10th Cir. 2021); *SA Palm Beach, LLC v. Certain Underwriters at Lloyd's London*, 32 F.4th 1347, 1358 (11th Cir. 2022); *Wakonda Club v. Selective Ins. Co. of Am.*, 973 N.W.2d 545, 555 (Iowa 2022); *Verveine Corp. v. Strathmore Ins. Co.*, 184 N.E.3d 1266, 1276 (Mass. 2022); *Sullivan Mgmt. v. Fireman's Fund Ins. Co.*, 2022 WL 3221920, at *2 (S.C. Aug. 10, 2022); *Colectivo*, 974 N.W.2d at 448 (Wis.); *Inns-by-the-Sea*, 286 Cal. Rptr. 3d at 593; *Commodore, Inc. v. Certain Underwriters at Lloyd's London*, 2022 WL 1481776, at *6 (Fla. Dist. Ct. App. May 11, 2022); *Sweet Berry Café, Inc. v. Soc'y Ins., Inc.*, 2022 WL 780847, *9, ¶ 45 (Ill. Ct. App. 2022); *Ind. Repertory Theatre v. Cincinnati Cas. Co.*, 180 N.E.3d 403, 410 (Ind. Ct. App. 2022); *GPL Enter., LLC v. Certain Underwriters at Lloyd's*, 276 A.3d 75, 84–85 (Md. App. 2022); *Gavrilides Mgmt. Co., LLC v. Mich. Ins. Co.*, 2022 WL 301555, at *6 (Mich. Ct. App. Feb. 1, 2022); *AC Ocean Walk, LLC v. Am. Guar. & Liab. Ins. Co.*, 2022 WL 2254864, at *11 (N.J. Super. Ct. App. Div. June 23, 2022); *N. State Deli v. Cincinnati Ins. Co.*, 2022 WL 2432157, at *2 (N.C. Ct. App. July 5, 2022); *Sanzo Enters., LLC v. Erie Ins. Exch.*, 182 N.E.3d 393, 405, ¶ 55 (Ohio Ct. App. 2021).

The Washington Supreme Court has repeatedly held that courts must give undefined policy terms their ordinary meaning. *See, e.g.*, *Xia v. ProBuilders Specialty Ins. Co.*, 400 P.3d 1234, 1240 (Wash. 2017); *Farmers Ins. Co. of Wash. v. Miller*, 549 P.2d 9, 11 (Wash. 1976). There is no reason to believe that it will interpret "direct physical loss or damage" any differently from the myriad other courts that have decided that government-ordered loss of use is not direct physical loss or damage, under the policy interpretation law of numerous states.

Federal courts bear a "responsibility for determining and applying state laws in all cases within their jurisdiction in which federal law does not govern"; they need not "hesitate[ ] to decide questions of state law when necessary for the disposition of a case brought to [them] for decision[.]" *Meredith v. City of Winter Haven*, 320 U.S. 228, 237 (1943). This Court should not hesitate to decide this point.

C. A stay would not promote judicial economy, and HT-Seattle cites no hardship from proceeding with the appeal.

HT-Seattle points to no "hardship or inequity" that would result from requiring it to proceed with this appeal. *Lockyer*, 398 F.3d at 1110. Indeed, HT-Seattle has already filed its opening brief and supporting materials, so most of its work in prosecuting this appeal is done. AGLIC wishes to resolve the present appeal quickly so that both parties can move on from the distraction and expense of litigation. Staying this appeal would not promote judicial economy.

A better path is for this Court to take briefing and hear argument as scheduled. If *Hill and Stout* is decided quickly, the Court can order supplemental briefing before argument. If *Hill and Stout* is not decided by the time of argument, the Court can then consider whether awaiting that decision would be useful.

* * *

Because a stay of this appeal would harm AGLIC without promoting judicial economy, and because this Court may rule without difficulty on the main question this case shares with *Hill and Stout*,

the Court should not stay this appeal to wait for a decision in *Hill and Stout*.

CONCLUSION

For the foregoing reasons, the Court should affirm the dismissal of HT-Seattle's complaint for failure to state a claim. The Court should also affirm the denial of HT-Seattle's motion to alter or amend the judgment under Rule 59(e).

Date: August 22, 2022

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,532 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in Microsoft Word using 14-point Century Schoolbook, a proportionally spaced typeface.

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STATEMENT OF RELATED CASES

Many appeals pending in this Court arise from the Western District of Washington's May 28, 2021 order dismissing complaints that sought insurance coverage for pandemic-related losses. This appeal arises from that court's June 1, 2021 order adopting its earlier conclusions as applicable to this case. 1-ER-11. Although the policies involved were not issued by affiliates of AGLIC, the following appeals raise some of the same or closely related issues:

- *Seattle Symphony Orchestra v. Hartford Fire Ins. Co.*, Nos. 21-35487, 21-35508.
- **La Cocina de Oaxaca, LLC v. Tri-State Ins. Co.*, No. 21-35493.
- *B & F Enters. Nw. v. AMCO Ins. Co.*, No. 21-35501.
- *Seven LLC v. Ace Prop. & Cas. Ins. Co.*, No. 21-35588.
- *Neighborhood Grills Mgmt. v. Nat'l Surety Corp.*, No. 21-35753.
- *Hot Yoga, Inc. v. Phila. Indem. Ins. Co.*, No. 21-35806.
- *Shokofeh Tabaraie DDS, PLLC v. Aspen Am. Ins. Co.*, Nos. 21-35477, 21-35492.
- *Mark Germack v. The Dentists Ins. Co.*, No. 21-35491.
- **Nguyen v. Travelers Cas. Ins.*, No. 21-35496.

- *Pac. Endodontics, PS v. Ohio Cas. Ins. Co.*, No. 21-35500.
- *Glacial Cryotherapy, LLC v. Evanston Ins. Co.*, No. 21-35505.
- *Caballero v. Mass. Bay Ins. Co.*, No. 21-35510.
- **Kara McCulloch, DMD, MSD, PLLC v. Valley Forge Ins. Co.*, No. 21-35520.

On August 12, 2022, the Court heard oral argument in the three cases marked *. All the cases listed here are currently stayed.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **APPELLEE'S ANSWERING BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 22, 2022.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Pauletta L. Herndon

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