B323865

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

ENDEAVOR OPERATING CO., LLC,
Plaintiff and Appellant,

v.

HDI GLOBAL INSURANCE CO., et al.,
Defendants and Respondents.

Appeal from the Superior Court of California, County of Los Angeles
Hon. Elaine Lu, Dept. 26 – Case No. 21STCV23693

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CERTIFICATES OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case No.:	B323865
Superior Court Case No.:	21STCV23693
Case Name: *Endeavor Operating Co., LLC v. HDI Global Ins. Co. et al.*	

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:

Names of Interested Entities and Nature of Interests
Defendant HDI Global Insurance Company is an Illinois corporation and wholly owned subsidiary of **HDI Global Network AG**, a German corporation, which, in turn, is a wholly owned subsidiary of **HDI Global SE**, a German corporation. HDI Global SE is a wholly owned subsidiary of **Talanx AG**, a German corporation which is publicly traded on the Frankfurt, Germany stock exchange.

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Court of Appeal Case No.:	B323865
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☒ Interested entities or parties required to be listed under California Rules of court, Rule 8.208 are as follows:

Names of Interested Entities and Nature of Interests
Defendant ACE American Insurance Company is a 100% wholly owned subsidiary of **INA Holdings Corporation**, a Delaware corporation. INA Holdings Corporation is a 100% wholly owned subsidiary of **INA Financial Corporation**, a Delaware corporation. INA Financial Corporation is a 100% wholly owned subsidiary of **INA Corporation,** a Pennsylvania corporation. INA Corporation is a 100% wholly owned subsidiary of **Chubb INA Holdings, Inc.**, a Delaware corporation. Chubb INA Holdings, Inc. is 80% owned by **Chubb Group Holdings, Inc.**, a Delaware corporation, and 20% owned directly by **Chubb Limited**. Chubb Group Holdings, Inc. is a 100% wholly owned subsidiary of Chubb Limited. Chubb Limited is publicly traded on the New York Stock Exchange. No publicly held corporation owns 10% or more of Chubb Limited's stock.

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Party Represented: Defendant and Respondent
ACE American Insurance Company

Court of Appeal Case No.:	B323865
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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:

Names of Interested Entities and Nature of Interest
Defendant AIG Specialty Insurance Company is a direct, wholly-owned (100%) subsidiary of **AIG Property Casualty U.S., Inc.**, which is a wholly-owned (100%) subsidiary of **AIG Property Casualty Inc.**, which is a wholly-owned (100%) subsidiary of **American International Group, Inc.**, which is a publicly-held corporation. No parent entity or publicly held entity owns 10% or more of the stock of American International Group, Inc.

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Court of Appeal Case No.:	B323865
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Case Name: *Endeavor Operating Co., LLC v. HDI Global Ins. Co. et al.*	

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
Defendant Interstate Fire & Casualty Company is a wholly owned subsidiary of **Fireman's Fund Insurance Company**, which is a wholly owned subsidiary of **Allianz Global Risks US Insurance Company** ("AGR US"); **Allianz of America, Inc**. is the parent of AGR US and owns 80% of AGR US voting stock; **AGCS International Holding B.V.** owns 20% of AGR US voting stock; and **Allianz S.E** indirectly owns 10% of AGR US voting stock.	

/s/ Kathryn C. Ashton

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INTRODUCTION

The COVID-19 pandemic and accompanying governmental shutdown orders caused economic havoc worldwide. They led to widespread cancellation and modification of live events and in-person entertainment, and they caused potential customers to stay home. Endeavor, a massive entertainment company, lost income.

Endeavor sought coverage of those losses under its property insurance, but Endeavor's insurance carriers denied coverage because the losses did not result from "direct physical loss or damage" to property—a coverage requirement. Then Endeavor sued. Its complaint, however, was long on generalizations and conclusions and short on specifics; for instance, Endeavor did not identify a single property that actually experienced direct physical loss or damage. The trial court accordingly sustained the insurers' demurrer without leave to amend and entered judgment against Endeavor.

This Court should affirm for three independent reasons.

First, Endeavor alleged in the abstract that the virus that causes COVID-19 was present on its property. But Endeavor did not specify any property where the virus was present—nor did it allege that this viral presence resulted in any distinct, demonstrable, physical alteration to property, which is what California law requires to plead "direct physical loss or damage" for a commercial property insurance claim.

Second, even if the presence of COVID-19 could constitute direct physical loss or damage to property, no such loss or damage caused Endeavor's alleged losses. Instead, events were cancelled or modified and potential customers stayed home because of the general risk of person-to-person transmission of COVID-19. Endeavor would have experienced the same losses regardless of whether virus was ever actually present at any specific place and time.

Third, even if the presence of COVID-19 could constitute direct physical loss or damage to property, and even if Endeavor had adequately pleaded that such loss or damage caused its losses, its property insurance also has a Contaminants or Pollutants exclusion. This exclusion expressly bars losses caused by the "dispersal" of "virus"—the very source of all Endeavor's alleged losses.

To try to get around these arguments, on appeal, Endeavor also argues that its property insurance covers *some* losses triggered by non-physical "events" even in the absence of any "physical loss or damage" to any property. But this argument misconstrues the policy language. Coverage always requires direct physical loss or damage to property, and Endeavor failed to plead it.

On any of these independent grounds, the Court should affirm the judgment below.

STATEMENT OF FACTS

Endeavor is a holding company whose revenue derives from sports, live events, and other entertainment activities. (AA-12, ¶ 1 [complaint].) Endeavor purchased commercial property insurance from the Insurers (HDI Global Insurance Company, ACE American Insurance Company, AIG Specialty Insurance Company, and Interstate Fire & Casualty Company). (AA-19–20, ¶¶ 31–39.)

The Insurers informed Endeavor that its property insurance would not cover its economic losses arising from the COVID-19 pandemic. (AA-15, ¶ 15.) Endeavor sued the Insurers claiming that its losses were covered. (AA-11 et seq.) The trial court sustained the Insurers' demurrer and dismissed the suit with prejudice. (AA-192.)

1. The policy language.

A. The hypothetical policy language, assumed on this demurrer record.

This case involves two successive policies for commercial property insurance: "Policy A," issued by HDI Global only, which expired before the pandemic; and "Policy B," issued by all four Insurers and in force during the pandemic.

As detailed below, despite the timeline connecting pandemic-related losses to Policy B, in ruling on the demurrer, the trial court accepted certain purely speculative allegations by

Endeavor, and on that basis assumed that Endeavor was entitled to rely on "the most favorable of the two policies" on a given issue (AA-266, fn. 1), which Endeavor generally contends is Policy A (see AOB 23–24).

This assumption was invalid, for reasons detailed below. That said, for the narrow purpose of this appeal, we explain why this Court should affirm dismissal *even if* this assumption were valid. For that reason, we refer generally to "the policy" and cite Policy A (which Endeavor contends governs), also citing Policy B where relevant.

B. All forms of coverage at issue require (1) direct physical loss or damage to property that (2) caused the claimed loss.

Endeavor claimed that its alleged losses fell under numerous different forms of coverage. (See AA-32–48, ¶¶ 70–127.) No matter the form of coverage, however, the policy covers only losses involving direct physical loss or damage to property. This requirement appears in Clause 5:

> **5. Loss or Damage Insured**
> This policy insures against all risk of direct physical loss or damage to property … except as hereinafter excluded.

(AA-70; cf. AA-117 [Policy B].)

The next clause lists numerous forms of excluded loss or damage, including the Contaminants or Pollutants exclusion important to this appeal:

> **6. Loss or Damage Excluded**
>
> This policy does not insure the following:
>
> …
>
> M. Against loss or damage caused by, resulting from, contributed to or made worse by actual, alleged or threatened release, discharge, escape or *dispersal* of CONTAMINANTS OR POLLUTANTS ….
>
> …
>
> Contaminants or Pollutants means any material which after its release can cause or threaten damage to human health or human welfare or threatens damage, deterioration, loss of value, marketability or loss of use to property insured hereunder, including, but not limited to, bacteria, fungi, *virus*, or hazardous substances.

(AA-70–71, italics added; cf. AA-130, 144 [Policy B].)

Clause 5 is the core of the policy, insuring against non-excluded risks of "direct physical loss or damage to property," and Clause 7 builds on that core: it lists the forms of property that the policy insures against those risks.

> **7. Coverage**
>
> This policy insures the interest of the Insured in the following:
>
> **A. Real and Personal Property**
>
> All real and personal property … which is owned, used, or intended for use by the Insured, or acquired by the Insured, and property of others in the Insured's care, custody or control …; including but not limited to the following:
>
> 1. Improvements and betterments ….

(AA-74; cf. AA-125 [Policy B].) The list goes on, describing other forms of real and personal property in which Endeavor's interest is insured.

In short, Clauses 5, 6, and 7.A. are the center of this property insurance policy, protecting Endeavor's interest in physical property that it owns or uses against non-excluded risks of physical loss or damage and establishing essential requirements for coverage.

The sub-clauses that follow Clause 7.A. list various adjunct coverages for certain additional losses "resulting from loss or damage insured herein," that is, resulting from direct physical loss or damage to property listed in Clause 7.A.:

> **[7.] B. Business Interruption Gross Earnings**
>
> 1. Loss due to the necessary

interruption of business conducted by the Insured, including all inter-dependencies between or among companies owned or operated by the Insured *resulting from loss or damage insured herein* and occurring during the term of this policy *to real and/or personal property described in Clause 7.A.*

…

C. Business Interruption – Loss of Profits

…

1. Loss of gross profit as hereinafter defined, resulting from interruption of or interference with the business, and *caused by loss or damage to real or personal property as described in Clause 7.A. of this policy* during the term of the policy.

…

D. Extra Expense

1. Extra Expense incurred by the Insured in order to continue as nearly as practicable the normal operation of the Insured's business following

> *loss or damage insured herein and occurring during the term of this policy to real and/or personal property as described in Clause 7.A.*

(AA-76–78, italics added; cf. AA-146–150 [Policy B].) There follow five more sub-clauses, 7.E. through 7.I., listing other adjunct coverages, all available only if Endeavor has also incurred "loss or damage insured herein," that is, direct physical loss or damage to property. (See AA-79–81 [including some other property beyond that in 7.A.]; cf. AA-150–152 [Policy B].)

The next clause extends Clause 7:

> **8. Extensions of Coverage**
> THIS CLAUSE EXTENDS THE COVERAGES DESCRIBED IN CLAUSES 7.B, 7.C, 7.D, 7.E, 7.F, 7.G, 7.H and 7.I.

(AA-81–82.) The express reference requires these "extensions" to be read in the context of Clause 7.

Clause 8.A., "Contingent Business Interruption/Contingent Extra Expense" coverage, extends the Clause 7 coverages to certain other property—such as certain customers' or suppliers' property, for example—when it sustains direct physical loss or damage that interferes with Endeavor's business. (AA-81–82; see AA-34–35, ¶¶ 78–83; cf. AA-152–155 [Policy B].)

Clauses 8.B. and 8.C. extend the Clause 7 coverages to certain losses due to limitations on access to property. They state:

> [8.] B. Interruption by Civil or Military Authority
> This policy is extended to insure loss sustained during the period of time when, *as a result of* loss, damage or an event not excluded in Clause 6. access to property is impaired by order or action of civil or military authority.
>
> C. Ingress/Egress
> This policy is extended to insure loss sustained during the period of time when, *as a result of* loss, damage or an event not excluded in Clause 6., ingress to or egress from real or personal property is impaired.

(AA-82, italics added; cf. AA-121, 153, 157 [equivalent coverages in Policy B].)

Several additional elements of these two coverage extensions are set forth in their respective Limits of Liability provisions, earlier in the policy in Clause 3:

> **3. Limits of Liability**
> …
> $25,000,000 per Occurrence for Ingress/Egress. Insured physical loss or damage *must occur* within one (10) [*sic*] statute mile from the Insured's premises

> in order for coverage to apply. Time limit of 60 Days.
>
> $25,000,000 per Occurrence for Interruption by Civil or Military Authority. Insured physical loss or damage *must occur* within one (10) [*sic*] statute mile from the Insured's premises in order for coverage to apply. Time limit is 60 Days.

(AA-65–66, italics added.)[1] These additional requirements reinforce the relationship between Clauses 5 and 7 and extensions 8.B. and 8.C.: these extensions apply *only* when "insured physical loss or damage," that is, direct physical loss or damage to property, occurs within one mile of Endeavor's premises.

For these policy provisions to operate in harmony, it must be that the phrase from Clause 3 "insured physical loss or damage" refers to the same concrete circumstance as the phrase from Clauses 8.B. and 8.C. "loss, damage or an event not excluded in Clause 6." As a result, there is coverage under these extensions only if Endeavor suffers loss due to *both* direct physical loss or damage to property ("insured physical loss or damage") within

[1] Endeavor also sought coverage of its "claim preparation costs"; this coverage depends on a predicate covered loss, so it rises or falls with the other claims. (AA-91–92; cf. AA-137 [Policy B: "resulting from insured loss payable under this Policy"].)

one mile of insured property (Clauses 3 and 5) *and* a resulting government order impairing access to insured property (Clause 8.B.) or resulting impairment of ingress or egress to insured property (Clause 8.C.).

2. Endeavor's claim.

A. The complaint.

Endeavor sued the Insurers for declaratory relief and breach of contract, asserting that the policy covered its pandemic-related business losses. (AA-15, 49–52, ¶¶ 15–16, 128–140.)

i. Allegations regarding COVID-19.

Endeavor alleged that COVID-19, "a dangerous and potentially fatal communicable disease," "can be transmitted by human-to-human contact, airborne viral particles in ambient air, and contact with affected indoor and outdoor air, surfaces and/or objects." (AA-26, ¶ 49.) People infected with COVID-19 expel virus-containing droplets that "can attach to surfaces" in various ways, Endeavor alleged. (AA-29–30, ¶¶ 55–59.)

"An effective way" to remove virus particles from surfaces, Endeavor alleged, "is to wash the surface with water containing detergents (*e.g.*, soapy water) or organic solvents, such as alcohol (ethanol)." (AA-30, ¶ 60.) "[S]ome disinfectants, such as aqueous detergents, can both inactivate the virus and remove it from

surfaces," while "others, like fumigants and ultraviolet light, only inactivate." (*Ibid.*)

Endeavor alleged that even without any cleaning, however, the virus "remain[s] viable" on surfaces for at most "seven days," and it could remain detectable for "up to approximately a month." (AA-30, ¶ 61.)

Endeavor alleged that because of the presence of COVID-19 virus, property is (temporarily) "transformed from safe for occupancy and commercial activity to property that is uninhabitable, unfit for its intended purpose, dangerous and, indeed, potentially deadly." (AA-31, ¶ 64.) Borrowing the language of its insurance policy, Endeavor contended, "[i]n short, the property is physically altered and physically damaged." (*Ibid.*)

ii. Allegations regarding Endeavor's losses.

Endeavor alleged that because of the COVID-19 pandemic, it "incurred substantial loss" both "as a result of the presence of [COVID-19 virus] at various of its facilities and resulting adverse physical alteration of indoor and outdoor air and other physical property" and, even when COVID-19 virus was not present, "due to COVID-19 outbreaks in the area." (AA-32, ¶¶ 67–68.)

Endeavor generally alleged that in response to the COVID-19 pandemic, governments have implemented orders (1) "restricting or prohibiting travel"; (2) "closing or limiting

business facilities"—both facilities that "have experienced the actual presence" of COVID-19 virus and facilities "without the confirmed or suspected presence of" COVID-19; and (3) "quarantin[ing] … individuals infected by or potentially exposed to" COVID-19. (AA-25, ¶ 48.a.) And businesses, including Endeavor, have allegedly (1) "remediat[ed] or replac[ed] physical property adversely altered by" the physical presence of COVID-19 virus; (2) "shut down the [business] facility and undertake[n] remedial efforts" based on "disease outbreaks at a facility" or "a suspicion that [COVID-19] virus is present"; (3) implemented "[s]uspension of business activities due to business premises … being altered or threatened by attachment of the [COVID-19 virus]; (4) and "[u]ndertak[en] out-of-the-ordinary activities and expenses, such as testing" and "protective equipment" based on both the actual and the suspected presence of COVID-19 virus. (AA-25–26, ¶ 48.b.)

However, Endeavor's complaint did not name a single specific property where COVID-19 virus had been found, or allege a single instance in which the identification of COVID-19 virus at a property led to a closure, suspension, cancellation, or other loss.

Instead, Endeavor alleged only as a general matter that during the pandemic, "stadiums and concert venues closed, games and performances were cancelled, and fans were prevented from attending in-person events." (AA-12, ¶ 3.) "As

cancellations caused by COVID-19 outbreaks mounted, revenues from ticket sales and media sponsorship rights plummeted. … [Endeavor's] business has suffered across nearly all segments because of COVID-19 outbreaks. As marquee events like the Wimbledon tennis tournament, New York Fashion Week, and Ultimate Fighting Championship matches were cancelled or postponed, Endeavor's revenue from ticket sales and media distribution rights declined"; Endeavor also lost money from diminished concession and merchandise sales; and "commissions from Endeavor's representation business dropped" because its "clients were unable to hold performances or other in-person events" (AA-12–13, 33, 35, ¶¶ 5, 75, 81.)

Endeavor also alleged that it "was forced to pause in-person instruction at its IMG Sports Academy to avoid the potential spread of SARS-CoV-2 among students. These unforeseen—and unforeseeable—circumstances have caused Endeavor to suffer substantial losses," such as "reduced attendance and enrollment" at classes. (AA-13, 33, ¶¶ 5, 75.)

iii. Allegations regarding the insurance policies.

Endeavor's alleged losses, of course, post-date January 2020. According to the complaint, it was on January 23, 2020 that the government of China first issued orders restricting travel and business in response to the COVID-19 pandemic (AA-24, ¶ 46); and "since January 2020," the virus has "spread to many

locations across the globe," leading to the wave of government orders and other consequences—a wave that reached the United States in March 2020 (AA-25, 37–38, ¶¶ 47, 89).

These dates bring the alleged losses squarely within "Policy B":

- **Policy A:** Endeavor was insured under Policy A, issued by HDI Global, from December 31, 2018 to December 31, 2019. (AA-13, ¶ 8.)
- **Interim:** For the first month of 2020—while Endeavor was negotiating the terms of Policy B "with the assistance of its broker"—the terms of Policy A remained in effect, aside from a lower per-occurrence limit of liability. (AA-14, 19, ¶¶ 10, 33–35; see also AA-13–14, ¶¶ 7–9.)
- **Policy B:** Beginning on January 31, 2020, Endeavor was insured under Policy B, issued by all four Insurers. (AA-14, 20, ¶¶ 10, 37–38.)

Based on these dates, Endeavor's COVID-19-related losses occurred while it was insured under Policy B.

However, Endeavor alleged that the Insurers "did not issue a new policy form" showing the terms of Policy B until "late March 2020." (AA-14, ¶ 11.) Endeavor alleged that "[i]t is therefore possible (and may be disclosed in discovery) that one or more Insurers adjusted the as-issued terms of Policy B to reflect

coverage less favorable to Endeavor than was originally agreed, and that the as-issued provisions reflected an effort by one or more Insurers to limit their exposure to COVID-19 losses that developed in the seven weeks between Policy B becoming effective and the as-issued Policy B being provided to Endeavor." (AA-14–15, ¶¶ 11–12.) Endeavor thus contended that it "is entitled to the benefit of the most favorable terms as between" Policy A and Policy B. (AA-20, ¶ 39.)

The Insurers explained to the trial court that "this argument is based solely on speculation." (RA-126.) The Insurers noted that Endeavor alleged the bare "'possibility'" of chicanery, but not a single actual fact—general or specific, concrete or abstract—to support it. (*Ibid.*) The court, the Insurers argued, should not accept this mere "'unsupported speculation'" as true. (*Ibid.*, quoting *Doe v. Roman Catholic Archbishop of Los Angeles* (2016) 247 Cal.App.4th 953, 960.)

Disregarding this, the trial court, for the narrow purpose of "ruling on the demurrer," "applied the most favorable of the two policies" on any given issue. (AA-266, fn. 1.) As a practical matter, this meant the trial court ruled on Endeavor's pandemic-related coverage claim based on policy language that expired at the end of January 2020—before the wave of pandemic-related closures or cancellations alleged in the complaint reached the United States and most other countries.

Insurers maintain that Policy B governs Endeavor's claim. But whether under Policy A or Policy B, there is no coverage for Endeavor's pandemic-related losses.

B. The trial court's dismissal.

On April 4, 2022, the trial court sustained the Insurers' demurrer without leave to amend. (AA-195–215.) The court ruled that under "any reasonable interpretation" of the Contaminants or Pollutants exclusion, it "clearly and precisely" applied to losses arising from the COVID-19 virus, and it therefore barred Endeavor's claims. (AA-214.)

Later that month, before the trial court entered judgment on Endeavor's complaint, the Second District Court of Appeal decided two property insurance coverage cases related to the COVID-19 pandemic: *Musso & Frank Grill Co., Inc. v. Mitsui Sumitomo Ins. USA Inc.* (Apr. 21, 2022) 77 Cal.App.5th 753 (*Musso & Frank*) (Div. 1) and *United Talent Agency v. Vigilant Ins. Co.* (Apr. 22, 2022) 77 Cal.App.5th 821 (*United Talent*) (Div. 4). This new on-point authority led the trial court to reconsider its order *sua sponte* and issue a revised order again sustaining the Insurers' demurrer on August 2, 2022. (AA-247–273.)

The revised order reaffirmed that the Contaminants or Pollutants exclusion bars Endeavor's claims. (AA-264.) The revised order also held that Endeavor's complaint failed on an

"additional ground": Endeavor failed to allege "physical loss or damage" to property, as coverage required. (AA-263.) The court found Endeavor's allegations "nearly identical to the claims in *United Talent Agency*": like United Talent (another entertainment conglomerate), Endeavor "generally alleges physical damage that COVID-19 can potentially inflict without specifically identifying physical damage that has been caused by the actual presence of COVID-19 at the insured property." (AA-263; see *United Talent*, *supra*, 77 Cal.App.5th at p. 838 ["we agree with the majority of the cases finding that the presence or potential presence of the virus does not constitute direct physical damage or loss" to property].)

ARGUMENT

1. Governing law.

A. Standard of review.

On review of a sustained demurrer, 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 [sustained demurrer reviewed de novo]; *Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377, 389–390 (*Powerine*) [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 (*Centinela*).)

The Court should affirm the judgment on the demurrer 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. Interpretation of insurance contracts.

The "goal in construing insurance contracts, as with contracts generally, is to give effect to the parties' mutual intentions. [Citations.] 'If contractual language is clear and explicit, it governs.'" (*Montrose Chemical Corporation v. Superior Court* (2020) 9 Cal.5th 215, 230.)

"'[L]anguage in a contract must be construed in the context of that instrument as a whole, and in the circumstances of that case ….'" (*Powerine*, *supra*, 37 Cal.4th at p. 391.) "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.)

"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," including that its claim involved, for example, "direct physical loss" to property, if the policy requires that. (*Aydin Corp. v. First State Ins. Co.* (1998) 18 Cal.4th 1183, 1188 (*Aydin Corp.*); *MRI Healthcare Center of Glendale, Inc. v.*

State Farm General Ins. Co. (2010) 187 Cal.App.4th 766, 777–778 (*MRI Healthcare*).) If the insured meets that burden, then "the burden is on the insurer to prove the claim is specifically excluded." (*Aydin Corp.*, at p. 1188.) If the insured fails to bring its claim within the basic scope of coverage, it is not covered, and the burden never shifts to the insurer to prove an applicable exclusion. (See *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 16 (*Waller*) ["Before 'even considering exclusions, a court must examine the coverage provisions to determine whether a claim falls within [the policy terms],'" brackets in original].)

Applying this framework, the Court should affirm the judgment against Endeavor on any of three independent grounds: The alleged losses did not fall within the scope of coverage (1) because Endeavor did not plead "direct physical loss or damage to property" and (2) because Endeavor did not plead that any such loss or damage caused its losses; and at any rate, (3) all alleged losses are excluded by the Contaminants or Pollutants exclusion.

2. Endeavor failed to plead direct physical loss or damage to property.

Endeavor concedes that most of the coverage provisions it invokes require direct physical loss or damage to property. (Stmt. § 1.A., *ante*; see AOB 36–53.) Accordingly, we begin by explaining

how Endeavor failed to plead such loss or damage, which makes all those coverages unavailable.

A. To plead direct physical loss or damage, Endeavor needed to allege distinct, demonstrable, physical alteration to property.

i. "Direct physical loss or damage" under California law.

If a policy insures against "direct physical loss or damage to property," coverage requires the property to undergo "'a distinct, demonstrable, physical alteration.'" (*MRI Healthcare*, *supra*, 187 Cal.App.4th at p. 779.) This can include physical dispossession, as in theft of undamaged property—but something demonstrably physical must happen to property to qualify as "direct physical loss or damage."

Many California precedents addressing whether property insurance covers pandemic-related business losses have expressly adopted this rule of law.[2] And this rule is the premise of even

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[2] See *Inns-by-the-Sea v. California Mutual Ins. Co.* (2021) 71 Cal.App.5th 688, 705–706 (calling this a "generally recognized principle"); *Best Rest Motel, Inc. v. Sequoia Ins. Co.* (2023) 88 Cal.App.5th 696, 703–704 (quoting and adopting reasoning of *Inns*); *United Talent*, *supra*, 77 Cal.App.5th at pp. 830–833 ("We therefore decline [plaintiff's] invitation to depart from" this rule); *Apple Annie, LLC v. Oregon Mutual Ins. Co.* (2022) 82 Cal.App.5th 919, 935–936 (joining a "wall of precedent" for this view); *Starlight Cinemas, Inc. v Massachusetts Bay Ins. Co.* (2023) 91 Cal.App.5th 24, 42–43.

that handful of decisions permitting policyholders' lawsuits to proceed beyond the pleading stage.[3] Thus, Endeavor's modest concession that "[c]ertain California decisions" have followed this definition of "direct physical loss or damage" (AOB 40) was a gross understatement; Endeavor ought to have said *every* decision regarding property insurance coverage of pandemic-related business losses has adopted this definition.

This definition makes sense. "[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*." (*Inns-by-the-Sea v. California Mutual Ins. Co.* (2021) 71 Cal.App.5th 688, 706 (*Inns*), italics added.) Instead, "'there must be some *physicality* to the loss … of property—*e.g.*, a physical alteration, physical contamination, or physical destruction.'" (*Id.* at p. 707, italics and ellipsis in original.) Even if the word "loss" on its own "could

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[3] See *Marina Pacific Hotel and Suites, LLC v. Fireman's Fund Ins. Co.* (2022) 81 Cal.App.5th 96, 109 ("the insureds have unquestionably pleaded direct physical loss or damage to covered property within" this definition); *Shusha, Inc. v. Century-National Ins. Co.* (2022) 87 Cal.App.5th 250, 263–264, review granted Apr. 19, 2023, S278614 ("assuming [plaintiff] was required to allege a distinct, demonstrable physical alteration of the property to show coverage"); *John's Grill, Inc. v. The Hartford Financial Services Group, Inc.* (2022) 86 Cal.App.5th 1195, 1209, review granted March 29, 2023, S278481 (noting that every case on this issue "accepts (or at least assumes)" this premise).

encompass the mere loss of use of property," "'[t]he requirement that *the loss be "physical,"* given the ordinary definition of that term,'" means "'direct physical loss of' property cannot reasonably be interpreted to have that meaning." (*Id.* at pp. 705–706, fn. 18, italics added.)

Another provision of Endeavor's policy reinforces this interpretation. The business interruption coverages claimed by Endeavor apply only during the "period of recovery," which "shall not exceed the length of time as would be required with the exercise of due diligence and dispatch to rebuild, repair, or replace the property that has been destroyed or damaged" plus a certain additional length of time. (AA-82–83.)

This definition compels the conclusion that covered "physical loss or damage" must be of a form remediable through rebuilding, repair, or replacement. If this were not so, it would be impossible to determine the period of recovery. (Accord, *United Talent*, *supra*, 77 Cal.App.5th at pp. 833–834 [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"]; *Inns*, *supra*, 71 Cal.App.5th at p. 708 [same]; *Mudpie, Inc. v. Travelers Cas. Ins. Co. of America* (9th Cir. 2021) 15 F.4th 885, 892 (*Mudpie*) [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"].)

ii. *Coast Restaurant*, *Starlight Cinemas*, and *Hughes*.

Since Endeavor filed its brief, two further decisions have addressed this rule of law. The first of these ended up affirming dismissal of a pandemic-related coverage lawsuit based on two policy exclusions—exclusions which applied regardless of whether the policyholder pleaded "direct physical loss or damage." (*Coast Restaurant Group, Inc. v. AmGuard Ins. Co.* (2023) 90 Cal.App.5th 332, 343–345 (*Coast Restaurant*).) This disposition did not depend at all on the scope of "direct physical loss or damage," making the latter issue irrelevant and the discussion of it therefore non-precedential. (See *Western Landscape Construction v. Bank of America* (1997) 58 Cal.App.4th 57, 61 ["Only statements necessary to the decision are binding precedents; explanatory observations are not binding precedent"].) The court nevertheless chose to offer its minority view "that 'a direct physical loss' can include loss of use, even if the subject property is not physically altered or damaged." (*Coast Restaurant*, at p. 342.)

Less than a month after *Coast Restaurant*, however, in *Starlight Cinemas, Inc. v Massachusetts Bay Ins. Co.* (2023) 91 Cal.App.5th 24 (*Starlight Cinemas*), Division Seven of this Court

rejected *Coast Restaurant*'s minority view and joined the "wall of precedent" holding that "temporary deprivation of an insured's right to use covered property" does not qualify as "direct physical loss or damage to property" for property insurance coverage purposes. (*Id.* at p. 43; see fn. 2, *ante*.)

Coast Restaurant had drawn an analogy to *American Alternative Ins. Corp. v. Superior Court* (2006) 135 Cal.App.4th 1239 (*American Alternative*), in which a court interpreted "physical loss" to include government seizure and confiscation of an airplane. (*Id.* at pp. 1248–1249.) *Coast Restaurant* had opined that "even if appellant's deprivation here is less than the insured's deprivation in *American Alternative*, there is still a 'loss' under the policy, although the amount of the loss would be different." (90 Cal.App.5th at p. 342.)

But *Starlight Cinemas* correctly pointed out that government orders do not cause *less* loss than seizure; they cause a crucially *different* loss—an intangible, purely legal loss as opposed to a physical one. The seizure of an airplane involves the owners "losing their physical possession of the property." (*Starlight Cinemas*, *supra*, 91 Cal.App.5th at p. 43.) In contrast, pandemic-related government closure orders legally "prohibited the insureds from operating—that is, *using*—their property for a business purpose," but "'posed no physical impediment'" to anything. (*Id.* at p. 43, italics in original.)

Coast Restaurant also erred in several other ways. For example, it concluded that the loss "of *important property rights* in the covered property"—self-evidently an intangible, abstract loss—qualified as a "*physical* loss." (90 Cal.App.5th at p. 340, italics added.) It reasoned that if "physical damage" involves a material alteration to property, to avoid redundancy, "physical loss" need not do so. (*Id.* at p. 343.) But these phrases are not redundant just because both require a material effect on property: the phrase "physical loss" includes, for example, seizure, theft, or complete destruction, none of which fits an ordinary understanding of "physical damage." (See *Musso & Frank*, *supra*, 77 Cal.App.5th at pp. 757–759 [rejecting the argument accepted in *Coast Restaurant*]; *Santo's Italian Café LLC v. Acuity Ins. Co.* (6th Cir. 2021) 15 F.4th 398, 405–406 [same].) And *Coast Restaurant* did not even mention, let alone confront, the four contrary, on-point prior decisions. *Coast Restaurant*'s dicta regarding "direct physical loss" has no persuasive force.

Endeavor's opening brief tries to draw support from an earlier decision, *Hughes v. Potomac Ins. Co. of District of Columbia* (1962) 199 Cal.App.2d 239 (*Hughes*). In *Hughes*, "the earth … 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.)

In doing so, the court did not, as Endeavor suggests, reject the premise that "physical loss or damage to property" means "tangible injury." (AOB 40.) Instead, the court ruled that "when the soil beneath [the house] slid away," this removal of the physical support for the home constituted direct physical loss or damage. (*Hughes*, *supra*, 199 Cal.App.2d at pp. 248–249; accord, *Ward General Ins. Services, Inc. v. Employers Fire Ins. Co.* (2003) 114 Cal.App.4th 548, 558 ["Quite clearly, the loss of the backyard [in *Hughes*] *was* a physical loss of tangible property," italics in original].)

Endeavor also faults the prevailing interpretation of "direct physical loss or damage" because it relies on Couch on Insurance. (AOB 41–42.) Endeavor is wrong about this, but the point is also moot; as noted in *Apple Annie, LLC v. Oregon Mutual Ins. Co.* (2022) 82 Cal.App.5th 919, "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" analyzing and adopting this formulation to decide property insurance coverage of pandemic-related claims. (*Id.* at pp. 935–936; see also *Starlight Cinemas*, *supra*, 91 Cal.App.5th at p. 44 [same].)

This Court should therefore join the California precedents holding that the requirement of "direct physical loss or damage to

property" is satisfied only by distinct, demonstrable, physical alteration to property.

B. Endeavor failed to plead any distinct, demonstrable, physical alteration to property.

i. Endeavor alleged the presence of COVID-19 virus and a risk to people—but no material changes to property itself.

Endeavor's complaint was rife with legal argument and conclusory assertions of "physical loss or damage" (or "adverse alteration") to unspecified property. (See, e.g., AA-22–24, 32–48.) Disregarding all that, as the Court must (*Centinela*, *supra*, 1 Cal.5th at p. 1010), the remaining *factual* allegations do not add up to "direct physical loss or damage" to Endeavor's property.

Fatally, the complaint never identified *any* specific insured property that was physically lost or damaged in any way, or that needed to be repaired or replaced—which it surely would have, if Endeavor could truthfully do so.

Instead, without making anything but a superficial connection to Endeavor's experience, the complaint noted the widespread cancellations of gatherings experienced across the world (AA-12–13, 33, 35, ¶¶ 75, 81), declared what "various kinds of private businesses" did in response to the pandemic (AA-25–26), and delivered a lecture on public health and the ways that droplets temporarily cling to surfaces (AA-26–31). Having failed

to identify any property that was physically lost or damaged *at all*, Endeavor necessarily failed to allege *distinct, demonstrable, physical alteration to property*. Its coverage case fails.

Analyzing the complaint in more detail, we place the alleged losses into three categories. The first set of alleged losses arose from circumstances in which "COVID-19 was neither actually present nor suspected to be present" on property. (AA-25–26, ¶ 48(b)(iii) and (b)(v); see also AA-31–32, ¶¶ 65, 68.) As explained above (§ 2.A., *ante*), every Court of Appeal to address the issue (except for erroneous dicta in one) has held that such allegations do not plead physical loss or damage to property for property insurance purposes. These allegations should likewise be rejected here.

The second set of alleged losses—regarding changes to the very air—are just as easily rejected. (E.g., AA-25, ¶ 48(b)(ii) ["indoor and outdoor air and other physical property has been altered or threatened" by virus].) The policy insures Endeavor's interest in certain "real and personal property." (AA-74–76.) Circulating freely and eluding control or ownership, air is not real or personal property. The policy did not insure the air itself. (See, e.g, *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.* (7th Cir. 2021) 20 F.4th 327, 336; *Tapestry, Inc. v. Factory Mutual Ins. Co.* (Md. 2022) 286 A.3d 1044, 1059.)

All that remains are Endeavor's allegations that the presence of COVID-19 virus on (unspecified) property surfaces constituted physical loss or damage within the meaning of this property policy. These allegations likewise failed as a matter of law because they did not establish distinct, demonstrable, physical loss or damage.

Endeavor alleged in baroque detail the process by which "virus-containing droplets" can "settle" on property. (AA-28, ¶ 54): the droplets can be "adsorbed" (which involves a "weak chemical bond") or "merely deposited" (AA-29, ¶¶ 56–57); they can "form a noncovalent chemical bond with the surface" (AA-29, ¶ 55); they behave differently on "hydrophilic" and "hydrophobic" surfaces (AA-29–30, ¶ 58); and so on. But all this merely reiterates the simple allegation that virus-containing droplets were *physically present on property*, just as any other substance (like dirt or pollen) might be present on property. Endeavor alleged no distinct, demonstrable, physical change to the property itself—a change that brought the property from a satisfactory condition to one that required repair, rebuilding, or replacement in order for Endeavor to resume using it.

To the contrary: Endeavor alleged that viral presence is temporary, easily reversed, and even self-correcting. Washing surfaces with "soapy water" or "alcohol" will break the "bond between the viral particles and a surface they have adhered to";

"some disinfectants, such as aqueous detergents, can both inactivate the virus and remove it from surfaces," and "some others, like fumigants and ultraviolet light, only inactivate." (AA-30, ¶ 60.) And if simple cleaning weren't effective, nevertheless, even "*undisturbed*" virus particles remain "viable" on surfaces for only "as long as seven days" and "can be detected" only "for up to approximately a month." (AA-30, ¶ 61, italics added.) Then for all intents and purposes, they disappear, while the property on which they lay remains as it ever was. Again, the complaint nowhere alleged that any property suffered any actual harm, or that any property is any different today from how it was before the SARS-CoV-2 virus traversed the world.

"Where a pleading includes a general allegation, such as an allegation of an ultimate fact, as well as specific allegations that add details or explanatory facts," the "specific allegations in a complaint control over an inconsistent general allegation." (*Perez v. Golden Empire Transit Dist.* (2012) 209 Cal.App.4th 1228, 1235–1236 (*Perez*).) This means that sometimes, "specific allegations will render a complaint defective when the general allegations, standing alone, might have been sufficient." (*Id.* at p. 1236.)

Endeavor's general allegations—conclusory allegations—that the presence of COVID-19 constituted physical loss or damage (e.g., AA-31, ¶ 64) are contradicted by its specific

allegations that COVID-19 is easily cleaned and that even if left alone, it becomes harmless and undetectable in a matter of weeks. The latter allegations render its complaint defective on this issue.

Endeavor also alleged that property with virus particles on it poses a risk of infection. (AA-30, ¶ 62.) But this is a risk to humans, not property. In that respect, virus particles are no different from any other object that poses a risk to humans and that could come to rest on property. A thumbtack rests on a table. Its presence is a physical condition that could injure a person who handles it carelessly. But its presence does not constitute *physical loss or damage to the table*. Likewise, if a sick patron breathes on a bathroom mirror at one of Endeavor's venues, that surface may for a short time (if not cleaned) endanger others who touch it. In terms of its *physical condition*, the mirror has become fogged with germ-containing droplets. But the presence of those droplets is not *physical loss or damage to the mirror* within the meaning of property insurance.

The policy's definition of the "period of recovery," quoted above, reinforces this conclusion. By Endeavor's own allegations, the presence of COVID-19 on property is self-correcting; it required *no* "due diligence and dispatch to rebuild, repair, or replace the property" (AA-82–83). So Endeavor can plead no "period of recovery" based on these allegations.

In sum, even accepting Endeavor's factual allegations as true, its complaint failed to allege any distinct, demonstrable, physical alteration to its property from viral presence, and therefore failed to satisfy the coverage requirement of "direct physical loss or damage to property."

ii. This Court should follow *United Talent* instead of *Marina Pacific*.

This District has split over whether alleging the presence of COVID-19 virus suffices to plead direct physical loss or damage to property. On this issue, the Court should follow *United Talent*, *supra*, 77 Cal.App.5th 821 over *Marina Pacific Hotel and Suites, LLC v. Fireman's Fund Ins. Co.* (2022) 81 Cal.App.5th 96 (*Marina Pacific*) and the same Division's follow-up decision, *Shusha, Inc. v. Century-National Ins. Co.* (2022) 87 Cal.App.5th 250 (*Shusha*), review granted Apr. 19, 2023, S278614. The Court should follow *United Talent* because *Marina Pacific* and *Shusha* misapplied California pleading standards and because the allegations of Endeavor's complaint more closely match those in *United Talent*.[4]

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[4] While there was no direct review grant in *United Talent*, and none was sought in *Marina Pacific*, the California Supreme Court later agreed to resolve the conflict between them on a certified question from the Ninth Circuit Court of Appeals. (*Another Planet Entertainment, LLC v. Vigilant Ins. Co.* (9th Cir. 2022) 56 F.4th 730; see Cal. Supreme Court docket no. S277893,

a. *United Talent.*

In *United Talent*, a talent and entertainment agency (much like Endeavor) sought insurance coverage of business losses it experienced from the COVID-19 pandemic. (77 Cal.App.5th at pp. 824–826.) Coverage under the agency's policy required "direct physical loss or damage" to insured property. (*Id.* at pp. 824–825.) Foreshadowing Endeavor's allegations, United Talent alleged that the virus "'has been present in the vicinity of and on and in its [insured] properties'"; "when 'an infected person breathes, speaks, coughs, or sneezes,' the virus permeates the air" and "settles on surfaces"; and exhaled "'respiratory droplets … land on and adhere to surfaces and objects'" and "'physically change the property by becoming a part of its surface,'" a process which "'converts those surfaces and objects to active fomites, which constitutes physical loss and damage.'" (*Id.* at p. 826 [quoting the complaint], cf. Stmt. § 2.A., *ante*.)

The *United Talent* court rejected the agency's theory because it went against any ordinary reading of the phrase "physical loss or damage." (See *Waller*, *supra*, 11 Cal.4th at p. 18 [courts should interpret policy language based on "its plain meaning or the

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https://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=2458756&doc_no=S277893&request_token=NiIwLSEmLkw%2BWzBZSyM9VE5JUEw0UDxTJCMuJzNTQCAgCg%3D%3D, as of Jun. 22, 2023.) No argument has yet been scheduled. (*Id.*) This Court can of course decide the issue for itself.

meaning a layperson would ordinarily attach to it"].) The court noted that the virus "'disintegrates on its own in a matter of days'" (*United Talent*, *supra*, 77 Cal.App.5th at p. 835), a point Endeavor also conceded. The virus cannot "'alter or persistently contaminate property.'" (*Id.* at p. 836.) Drawing on a decision rejecting comparable coverage for restaurants, *United Talent* explained: "'If, for example, a sick person walked into one of Plaintiffs' restaurants and left behind COVID-19 [virus] particulates on a countertop, it would strain credulity to say that the countertop was damaged or physically altered as a result.'" (*Id.* at p. 835, quoting *Unmasked Management, Inc. v. Century-National Ins. Co.* (S.D.Cal. 2021) 514 F.Supp.3d 1217, 1226.)

This was not a ruling on the plaintiff's likelihood of establishing some fact. Instead, it was a legal holding that allegations of COVID-19 on property, without more, fail to trigger the contractual purpose of paying to repair or replace physically lost or damaged property (and for resulting business losses). (See also *Santa Ynez Band of Chumash Mission Indians v. Lexington Ins. Co.* (2023) 90 Cal.App.5th 1064, 1072 ["The ordinary meaning of the term 'physical damage to property' does not include a virus on the property"].)

The *United Talent* court also observed that "transmission may be reduced or rendered less harmful through practices unrelated to the property, such as social distancing, vaccination,

and the use of masks." (77 Cal.App.5th at p. 838.) The presence of COVID-19 "may affect how people interact with and within a particular space," but it does not "constitute direct physical damage or loss" to property. (*Ibid.*) Endeavor's similar allegations here failed to plead direct physical loss or damage to property, for the same reason.[5]

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[5] *United Talent* is in line with most other appellate court decisions, which hold that alleging the presence of COVID-19, without more, does not suffice to plead direct physical loss or damage to property. As of this writing, the list of decisions in agreement includes every decision of a Circuit Court of Appeals. (E.g., *Wilson v. USI Ins. Service LLC* (3d Cir. 2023) 57 F.4th 131, 145–146; *Wild Eggs Holdings, Inc. v. State Auto Prop. & Cas. Ins. Co.* (6th Cir. 2022) 48 F.4th 645, 652–653; *Circle Block Partners, LLC v. Fireman's Fund Ins. Co.* (7th Cir. 2022) 44 F.4th 1014, 1023; *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.* (7th Cir. 2021) 20 F.4th 327, 335–336; *Sagome, Inc. v. Cincinnati Ins. Co.* (10th Cir. 2023) 56 F.4th 931, 935–936; *Kim-Chee LLC v. Philadelphia Indem. Ins. Co.* (2d Cir. Jan. 28, 2022) 2022 WL 258569, at *2; *Ascent Hospitality Management Co. v. Employers Ins. Co. of Wausau* (11th Cir. Jan. 14, 2022) 2022 WL 130722, at *3.) And it includes decisions of at least seven state supreme courts. (*Connecticut Dermatology Group, PC v. Twin City Fire Ins. Co.* (Conn. 2023) 288 A.3d 187, 199–201; *Verveine v. Strathmore Ins. Co.* (Mass. 2022) 184 N.E.3d 1266, 1276–1277; *Tapestry, Inc. v. Factory Mutual Ins. Co.* (Md. 2022) 286 A.3d 1044, 1059–1060; *Neuro-Communication Services, Inc. v. Cincinnati Ins. Co.* (Ohio Dec. 12, 2022) — N.E.3d —, 2022 WL 17573883, at *6–7; *Sullivan Management, LLC v. Fireman's Fund Ins. Co.* (S.C. 2022) 879 S.E.2d 742, 743–746; *Colectivo Coffee Roasters, Inc. v. Society Ins.* (Wis. 2022) 974 N.W.2d 442, 447–448; see also *Cajun Conti LLC v. Certain Underwriters at Lloyd's, London* (La. 2023) 359 So.3d 922, 926–929 [summary judgment].)

b. *Marina Pacific*.

Taking the opposite view, in *Marina Pacific* and *Shusha*, *supra*, Division Seven held that policyholders alleging the presence of COVID-19 on insured property adequately pleaded "direct physical loss or damage." But these decisions mistakenly accepted as true the policyholders' mere "conclusions of fact or law" (*Centinela*, *supra*, 1 Cal.5th at p. 1010), and lost sight of the contractual context.

The court in *Marina Pacific* stated that California pleading standards required it to "deem as true, 'however improbable,' facts alleged in a pleading." (81 Cal.App.5th at p. 110.) But the court believed that one of the allegations it had to accept was the assertion "that the COVID-19 virus *alters ordinary physical surfaces* transforming them into fomites through physicochemical processes." (*Ibid.*, italics added.) This was a mistake on two levels. First, "fomite" just means an inanimate surface temporarily acting as a disease vector (see *id.* at p. 101); a threat to *people* falls entirely outside the purpose of an insurance contract covering "physical loss or damage" to insured *property*. And second, the quoted assertion was a mere conclusion, fatally undermined (as in Endeavor's complaint) by (1) specific factual allegations, such as that this virus survives on surfaces only for "up to 28 days," and (2) the absence of any alleged *change to the property*, beyond the temporary condition of viral presence in

itself—an absence papered over with scientific vocabulary: "'physico-chemical reactions involving, *inter alia*, cells and surface proteins.'" (*Id.* at pp. 101, 103–104.)

The complaint in *Shusha* had the same fatal flaws as the one in *Marina Pacific* (87 Cal.App.5th at pp. 255, 264 [virus "'may remain viable for hours to days"']])—and the court made the same mistakes. The court stated, "the policyholder is not required to provide *authority* at the pleading stage to support its position that contamination with the COVID-19 virus caused damage to the surfaces in its premises." (87 Cal.App.5th at pp. 264–265, italics added.) Perhaps not "authority"—but the policyholder *is* required to make factual allegations supporting that conclusion, and the policyholders in these cases did not.

Because *Marina Pacific* and *Shusha* relied on faulty reasoning, this Court should follow *United Talent* (and the slew of decisions in accord; see fn. 4, *ante*) and hold that Endeavor's complaint did not plead direct physical loss or damage to property.

3. Endeavor also failed to plead that its losses were *caused* by direct physical loss or damage to property—an independent coverage requirement.

Endeavor agrees with the Insurers that the coverage provisions it invokes require that direct physical loss or damage to property *caused* the claimed losses—an independent

requirement. (See AA-34, ¶ 79 ["resulting from or caused by loss or damage insured herein"]; AA-36, 39, ¶¶ 85, 94 ["as a result of loss, damage or an event"]; AA-41, ¶ 100 ["following loss or damage insured herein"]; AA-43, 45–46, ¶¶ 112, 118 ["caused by loss or damage insured herein"]; AA-76 ["resulting from loss or damage insured herein"].) Endeavor failed to plead this required causation—an independent reason that these provisions do not cover Endeavor's losses.

Every specific allegation concerning Endeavor's losses referred to event cancellations, venue closures, or reduced customer attendance: "stadiums and concert venues closed, games and performances were cancelled," such as Wimbledon; "in-person instruction at [Endeavor's] IMG Sports Academy" was "pause[d]"; certain "in-person exhibitions and events" were suspended; "commissions from Endeavor's representation business dropped"; and so on. (AA-12–13, 33, 35, ¶¶ 3, 5, 75, 81; see Stmt. § 2.A.ii., *ante*.)

What's missing? Any allegation causally connecting these losses to the presence of COVID-19 virus on affected property. Was Wimbledon cancelled because someone discovered virus particles on the referee chairs? (AA-13, ¶ 5.) No, Wimbledon was cancelled "to avoid the *potential* spread of SARS-CoV-2" at a large gathering—the same reason that Endeavor suspended in-person instruction at its sports academy, or that Fashion Week

underwent "modifications … that reduced ticket sales revenue." (AA-13, 33, ¶¶ 5, 75, italics added.) Events were cancelled and customers stayed home because governments, venues, and individuals made decisions aimed to reduce the risk of person-to-person COVID-19 transmission.

Even if the Wimbledon venue or another affected property had been physically free of COVID-19 the day before an event, the event would still have been cancelled (or potential attendees would have stayed home) and Endeavor would have incurred the same loss of revenue. Therefore, the presence of COVID-19 did not cause the alleged losses. Indeed, it's hard to imagine how revenues from advance-ticketed events even *could* be sensitive to the specific presence of COVID-19, such that whether or not an event proceeds as planned turns on whether or not COVID-19 was actually present at that venue at the time. And the complaint made no allegation bridging this gap.

An analogous case is *Inns*, *supra*, 71 Cal.App.5th 688. The case concerned a hotel's claim for property insurance coverage of pandemic-related business losses caused by government closure orders. (*Id.* at pp. 698–699.) The *Inns* court observed that even "if Inns had thoroughly sterilized its premises to remove any trace of the virus after the [closure] Orders were issued," "Inns would *still* have continued to incur a suspension of operations" and the resulting business losses "because the Orders would *still* have

been in effect and the normal functioning of society *still* would have been curtailed." (*Id.* at p. 704, italics in original.) On this basis the court affirmed dismissal of the hotel's complaint. (*Id.* at p. 692.) A recent decision followed identical reasoning to affirm summary judgment against a hotel that had asserted similar claims. (See *Best Rest Motel, Inc. v. Sequoia Ins. Co.* (2023) 88 Cal.App.5th 696, 708–709 [noting that even the closure of infected guests' rooms for cleaning purposes did not *cause* losses, "because the hotel had plenty of other vacant rooms"].)

Endeavor's complaint did make a conclusory allegation of causation: "Endeavor has incurred substantial loss … as a result of the presence of SARS-CoV-2 and/or COVID-19 at various of its facilities …." (AA-32, ¶ 66.) And the complaint presented a generic list of "actions" taken by "[g]overnmental authorities and private companies (including Endeavor)" in response to the pandemic, some of which involve alleged actual viral presence (without specifying where or when). (AA-25, ¶ 48.)

But as above with direct physical loss or damage (§ 2.B.1., *ante*), so too here, the complaint's general allegations regarding causation are controlled by, and undermined by, its specific allegations. (See *Perez*, *supra*, 209 Cal.App.4th at pp. 1235–1236.) Endeavor's losses depended on event cancellations, venue closures, reduced ticket sales, and other circumstances that are

by nature sensitive to the *risk* of infection but insensitive to whether COVID-19 virus was actually present.

The *Inns* plaintiff also offered general allegations of causation: "'[T]he Inns were forced to cease operations based on the COVID-19 coronavirus *and* [the Orders]. These orders *and/or* the virus itself … prohibited [Inns] from selling any rooms to the public.'" (71 Cal.App.5th at p. 698, fn. 11 [quoting the complaint; alterations in *Inns*].) But applying the rule of *Perez*, the *Inns* court did not accept the truth of these general allegations, stating, "We base our analysis on the complaint's more specific causation allegations …." (*Ibid*.)

Endeavor's failure to allege losses *caused by* direct physical loss or damage to property provides another, independent reason that Endeavor did not plead a covered loss—*even if* the presence of COVID-19 virus could constitute direct physical loss or damage to property (which it cannot).

4. The Contaminants or Pollutants exclusion bars all of Endeavor's claimed losses—another independent ground for affirmance.

As shown, in two distinct ways, Endeavor failed to plead 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 either of those grounds; it need not reach further.

Independently, however, the alleged losses are also excluded by the policy's Contaminants or Pollutants exclusion. Affirmance may also rest on this basis.

A. Losses allegedly arising from the presence of COVID-19 virus on property fall within the Contaminants or Pollutants exclusion.

At the root of all its losses, Endeavor alleged that "[t]he SARS-CoV-2 virus" causes "a severe respiratory illness known as COVID-19." (AA-24, ¶ 45.) The virus "has spread to many locations across the globe," Endeavor alleged, carried by infectious individuals, "human-to-human contact, airborne viral particles in ambient air," and deposition onto surfaces. (AA-26, 28–31, ¶¶ 49, 51–64.)

Endeavor's policy states:

> **6. Loss or Damage Excluded**
>
> This policy does not insure the following:
>
> …
>
> M. Against loss or damage caused by, resulting from, contributed to or made worse by actual, alleged or threatened release, discharge, escape or *dispersal* of CONTAMINANTS OR POLLUTANTS ….
>
> …
>
> Contaminants or Pollutants means any material which after its release

> can cause or threaten damage to human health or human welfare or threatens damage, deterioration, loss of value, marketability or loss of use to property insured hereunder, including, but not limited to, bacteria, fungi, *virus*, or hazardous substances.

(AA-70–71, italics added; cf. AA-130, 144 [Policy B].)

Being a *virus*, SARS-CoV-2 is an enumerated "contaminant or pollutant." As for "dispersal," Endeavor alleged that there are "studies finding wide *dispersion* of the SARS-CoV-2 virus" through "airborne transmission," which results when infectious persons "cough, sneeze, scream, sing, or even speak loudly or breathe heavily." (AA-28, 31, ¶¶ 52, 63, italics added; see also *Disperse*, Merriam-Webster Online Dict. <https://www.merriam-webster.com/dictionary/disperse> [as of Jun. 22, 2023] ["to cause to become spread widely"].)

All Endeavor's alleged losses, therefore, fall within the Contaminants or Pollutants exclusion: All Endeavor's alleged losses were "caused by, resulting from, contributed to or made worse by" the "dispersal" of the "virus" that causes COVID-19. (See *TP Racing LLLP v. American Home Assurance Co.* (9th Cir. June 1, 2023) 2023 WL 3750395, at *2–3 [holding this exclusion bars a claim like Endeavor's]; *Northwell Health, Inc. v. Lexington Ins. Co.* (S.D.N.Y. 2021) 550 F.Supp.3d 108, 121 [same: "What is

a sneeze or cough if not a discharge or dispersal?"]; *Zwillo V, Corp. v. Lexington Ins. Co.* (W.D.Mo. 2020) 504 F.Supp.3d 1034, 1041–1043 [same]; *Circus Circus LV, LP v. AIG Specialty Ins. Co.* (D.Nev. 2021) 525 F.Supp.3d 1269, 1277–1278 [same].)

B. *MacKinnon* does not support a different interpretation of the Contaminants or Pollutants exclusion.

The plain language of the Contaminants or Pollutants exclusion applies to all Endeavor's losses. With the express policy language against it, Endeavor must argue that "[t]he SARS-CoV-2 virus" is not actually a "virus"—at least not in the sense intended by the exclusion. This argument rests on a faulty analogy between the Contaminants or Pollutants exclusion and the exclusion in *MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635 (*MacKinnon*). The analogy has two fatal flaws.

i. The language of the *MacKinnon* exclusion differs materially from that of the "Contaminants or Pollutants" exclusion here.

Policy language is the core of policy interpretation: "'[T]he mutual intention of the parties at the time the contract is formed governs interpretation," and "[s]uch intent is to be inferred, if possible, solely from the written provisions of the contract." (*MacKinnon*, *supra*, 31 Cal.4th at p. 647.)

The "pollution exclusion" in *MacKinnon* read, "We do not cover Bodily Injury or Property Damage (2) Resulting from the actual, alleged, or threatened discharge, dispersal, release or escape of pollutants: (a) at or from the insured location"; "pollutants" are "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste materials." (*MacKinnon*, *supra*, 31 Cal.4th at p. 639.)

Endeavor's exclusion, in contrast, refers to both "contaminants" and "pollutants"; it is not a "pollution exclusion." And the list of "contaminants" and "pollutants" includes an entire category absent from the *MacKinnon* exclusion: infectious agents harmful to human health, that is, "any material which after its release can cause or threaten damage to human health … including, but not limited to, bacteria, fungi, [or] virus." (AA-71.) Endeavor describes this exclusion as "*even broader* than the one at issue in *MacKinnon*" (*ibid.*); that's true, but the items that make Endeavor's exclusion broader—infectious agents including "virus"—have the clear effect of excluding all losses flowing from "Contamination" by "virus."

Endeavor argues that the word "virus" is limited to instances of "conventional environmental pollution" (AOB 62), but the word does not bear this interpretation. "Virus" 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 Dict. <https://www.merriam-webster.com/dictionary/virus> [as of Jun. 22, 2023] ["any of a large group of submicroscopic infectious agents"].)

Nor does other policy language support limiting the meaning of "virus" as Endeavor argues. The use of the word "pollutant" within the exclusion certainly imposes no such limitation. The policy uses this word always within the phrase "contaminants or pollutants": an exclusion referring consistently and only to "contaminants *or* pollutants," never to "pollutants" alone, obviously is not limited to "pollutants"; "contaminants" must add something.

Endeavor also draws a faulty analogy to the "mortality and disease" exclusion at issue in *Marina Pacific, supra*, 81 Cal.App.5th 96. (See AOB 63.) *Marina Pacific* held that that exclusion could reasonably be read not to bar pandemic-related property insurance claims. (*Marina Pacific*, at pp. 112–113.) But that exclusion does not resemble the Contaminants or Pollutants exclusion in Endeavor's policy. The latter applies to losses "caused by … dispersal of CONTAMINANTS OR POLLUTANTS" including "virus" (AA-71) and therefore squarely excludes Endeavor's alleged losses.

Because policy language is the core of policy interpretation, and the Contaminants or Pollutants exclusion has its own

language, *MacKinnon*'s and *Marina Pacific*'s holdings on the scope of their exclusions do not affect the scope of the Contaminants or Pollutants exclusion. The exclusion bars Endeavor's claim.

ii. The *MacKinnon* policy differs materially from this one.

Endeavor claimed losses under a commercial property insurance policy. In contrast, *MacKinnon* announces in its first sentence, "In this case, we consider the meaning of an exclusionary clause *in a comprehensive general liability (CGL) insurance policy*," that is, a policy insuring the holder against lawsuits brought by third parties. (*MacKinnon*, *supra*, 31 Cal.4th at p. 639, italics added.)

This isn't some irrelevant detail; *MacKinnon*'s interpretation depends on it. The court delves into the exclusion's "historical background," reviewing "the standard-form CGL policy" as it existed before 1966, how "the insurance industry revised the CGL policy in 1966," "the addition of an endorsement to the standard-form CGL policy in 1970," and how the "broadening of the pollution exclusion" in 1985 was a response to the "expansion of liability for remediating hazardous wastes." (*MacKinnon*, *supra*, 31 Cal.4th at pp. 643–645.) The court states, "One of the primary arguments for a narrow interpretation of the pollution exclusion"—the interpretation the court ultimately adopts—"is

based on the history reviewed above," and the court says it would be "remiss" to "ignore [the exclusion's] *raison d'être*." (*Id.* at p. 645.)

The Supreme Court has remarked upon the "substantial analytical differences between first party property and third party liability policies," including "differing causation analyses that must be undertaken to determine coverage under each type of policy." (*Montrose Chemical Corporation v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 654, 663.)

MacKinnon's analysis depends in part on liability policies' relationship to tort concepts: *MacKinnon* reasons that the exclusion does not apply unless the language "clearly apprises the insured that certain acts of ordinary *negligence*, such as the spraying of pesticides in this case, will not be covered"; "injuries arising from the normal, *though negligent*, residential application of pesticides" would not clearly be "thought of as pollution." (*MacKinnon*, *supra*, 31 Cal.4th at pp. 648, 654, italics added.) And the analysis also depends on liability policies' generally broader coverage compared to property policies: "an interpretation limiting the exclusion to environmental pollution appears reasonable *in light of the purpose of CGL policies*—which 'is "to provide the insured with the broadest spectrum of protection against liability for unintentional and unexpected personal injury or property damage arising out of the conduct of

the insured's business."'" (*Id.* at p. 654, italics added.) Endeavor's opening brief quotes this passage—but omits the reference to CGL policies. (AOB 57.)

In short, the fact that the *MacKinnon* exclusion appears in a liability policy determined the court's interpretation. *MacKinnon*'s reasoning therefore cannot assist interpretation of the different exclusion in Endeavor's *property* policy.[6]

It's true that one court has applied *MacKinnon* to an exclusion in a first-party property policy. (*The Villa Los Alamos Homeowners Assn. v. State Farm General Ins. Co.* (2011) 198 Cal.App.4th 522 (*Villa Los Alamos*).) But three features of that case make its approach wrong here:

1) *Villa Los Alamos* involved an insurance policy that covered both first-party property and third-party liability, the first-party and third-party coverages both included a similar

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[6] Endeavor also cites a set of cases applying *MacKinnon* (AOB 62, fn. 14), but they are inapposite for the same reasons: their exclusions use different language and appear in *liability* policies. (See *Crosby Estate at Rancho Santa Fe Master Association v. Ironshore Specialty Ins. Co.* (S.D.Cal. 2020) 498 F.Supp.3d 1242, 1248, 1257; *Travelers Property Cas. Co. of America v. City of Los Angeles Harbor Dept.* (C.D.Cal. Sept. 9, 2015) 2016 WL 11520822, at p. *1; *American Zurich Ins. Co. v. James N. Gray Co.* (C.D.Cal. May 11, 2015) 2015 WL 10990360, at pp. *1–2; *Great American Assurance Co. v. MS Industrial Sheet Metal, Inc.* (C.D.Cal. Jan. 31, 2012) 2012 WL 13018550, at p. *1; *Santaluz, LLC v. American Home Assurance Co.* (S.D.Cal. Aug. 6, 2010) 2010 WL 11509307, at pp. *1, 4).

pollution exclusion, and the policyholder originally brought first- *and* third-party claims (*id.* at pp. 528–529, 534–535);

2) Like *MacKinnon*, and unlike Endeavor's case, *Villa Los Alamos* involved an intentional release of a toxic substance onto the property (compare *MacKinnon*, *supra*, 31 Cal.4th at p. 640 with *Villa Los Alamos*, at p. 537);

3) The language of the exclusion in *Villa Los Alamos* closely resembled that in *MacKinnon* and differed in the same way from the Contaminants or Pollutants exclusion in Endeavor's policy (see *Villa Los Alamos*, at p. 527).

Absent these differences from Endeavor's case, *Villa Los Alamos* would likely have reached a different result.

The plain language of the Contaminants or Pollutants exclusion applies to Endeavor's claim, and *MacKinnon* provides no reason to hold otherwise. Accordingly, this Court may affirm the judgment on this third independent ground.

5. Endeavor's claims under the Civil or Military Authority and Ingress/Egress coverage extensions fail on the same grounds.

Endeavor suggests that even if it failed to plead direct physical loss or damage to property, and even if most of its losses fall under the Contaminants or Pollutants exclusion, it has a backup argument: its claims under the Civil or Military Authority and Ingress/Egress coverage extensions, which,

according to Endeavor, don't require direct physical loss or damage and aren't subject to the Contaminants or Pollutants exclusion. Endeavor has misread the policy.

Endeavor's argument on this issue wholly depends on supposedly significant differences between Policy A and Policy B. Though the Civil or Military Authority and Ingress/Egress coverages are largely equivalent in both policies, the relevant provisions in Policy B do not use the word "event"—a single word on which, as will be seen, Endeavor piles more weight than it can possibly bear.

A. The Civil or Military Authority and Ingress/Egress coverage extensions cover only losses caused by direct physical loss or damage to property.

i. Reasonably reading the policy as a whole.

Like every other form of coverage, the coverage extensions can be triggered only by direct physical loss or damage to property. As explained at pages 23–26 above:

- The "Limits of Liability" clause controls each of these coverage extensions, and requires that "*Insured physical loss or damage* must occur within one (10) [*sic*] statute mile from the Insured's premises in order for this coverage to apply." (AA-66, italics added.)

- This reflects the policy's core Clause 5, "Loss or Damage Insured":

> This policy insures against all risk of *direct physical loss or damage to property* ….

(AA-70, italics added.)

In short, Civil or Military Authority coverage and Ingress/Egress coverage require "direct physical loss or damage to property" to occur within one mile of Endeavor's insured premises.

Endeavor's argument contradicts not only the policy's language but also its broader purpose: "'property insurance is insurance of *property*,'" not insurance against economic loss that applies regardless of whether any property has experienced any physical change; "'[w]hile in the modern setting "just about any type of property" may be insured, the insured item must nonetheless be property.'" (*Doyle v. Fireman's Fund Ins. Co.* (2018) 21 Cal.App.5th 33, 38, italics in original.)

Endeavor's opening brief does not even quote the Limits of Liability provisions requiring "insured physical loss or damage" for coverage under these extensions. Rather than apply these provisions, Endeavor has ignored them. This Court cannot accept such a position. (See *Forecast Homes, Inc. v. Steadfast Ins. Co.* (2010) 181 Cal.App.4th 1466, 1475 ["[Insurance] policies must be interpreted as a whole, giving force and effect to every provision where possible"]; accord, Civ. Code, § 1641.)

Endeavor focuses instead on the single word "event" within these coverage extensions: "This policy is extended to insure loss sustained during the period of time when, as a result of loss, damage or an event not excluded in Clause 6," either "access to property is impaired by order or action of civil or military authority" (Clause 8.B.) or "ingress to or egress from real or personal property is impaired" (Clause 8.C.). (AA-82.) Endeavor is wrong, however, that the word "event" here negates the policy's general requirement of direct physical loss or damage to property or the more specific requirement for these coverage extensions that physical loss or damage to property occur within one mile of Endeavor's premises.

Endeavor fails to see that the specific requirement—"Insured physical loss or damage must occur within [one] mile from the Insured's premises"—*controls* the general phrase "loss, damage or an event not excluded in Clause 6." Both phrases refer to an actuating circumstance: the "loss, damage or an event" that must result in an impairment of access, ingress, or egress implicates the same cause as the "insured physical loss or damage" that must occur within one mile of Endeavor's property. "[A] specific provision" in an insurance policy "relating to a particular subject will govern in respect to that subject, as against a general provision." (*Kavruck v. Blue Cross of California* (2003) 108 Cal.App.4th 773, 781, internal quotations omitted; see

also Civ. Code, § 3534 ["Particular expressions qualify those which are general"].) The general reference to "loss, damage or an event" is therefore governed by the specific reference to "insured physical loss or damage."

Accordingly, there is only one way to read all together Clause 3 (Limits of Liability), Clause 5 (Loss or Damage Insured), and Clause 8 (Extensions of Coverage). For Civil or Military Authority or Ingress/Egress coverage to apply:

- There must be insured physical loss or damage, that is, direct physical loss or damage to property, within one mile of Endeavor's premises (Clauses 3 and 5); and
- as a result, either "access to property is impaired by order or action of civil or military authority" (8.B.) or "ingress to or egress from real or personal property is impaired" (8.C.).[7]

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[7] Although this is the only way to read the policy as a whole, the word "event" does do substantive work in the policy: it prevents a possible misunderstanding.

Not every item "excluded in Clause 6" qualifies as "physical loss or damage." For example, "dampness of atmosphere and changes in temperature or humidity" are excluded in Clause 6 (AA 70–71), but these circumstances in themselves are not a form of physical loss or damage.

Suppose Clause 8.B. omitted the word "event," and instead read, "… as a result of physical loss or damage not excluded in Clause 6, …." Further suppose that potholes appear in a street owing to dampness of atmosphere and changes in temperature and humidity. To repair the street, the city government gives an order

As for causation, Clause 8.B. and 8.C. require the loss to be "a result of loss, damage or an event not excluded in Clause 6," which ties causation to "loss, damage or an event." (AA-82.) But as explained, "loss, damage or an event" refers to the same circumstance as "insured physical loss or damage" in Clause 3. So like the other forms of coverage, these coverage extensions also require the claimed loss to be *caused by* direct physical loss or damage to property (not just coincident with it). As explained, Endeavor failed to plead this causal link (see § 3., *ante*), and this failure precludes coverage under the Civil or Military Authority

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impairing access and causing business losses. The insured asserts a claim for Civil or Military Authority coverage.

The insurer responds that "dampness of atmosphere and changes in temperature or humidity" are excluded causes of loss. The insured replies, however, that "dampness of atmosphere and changes in temperature or humidity" are not "*physical loss or damage* excluded in Clause 6"—the exact words of the extension provision—so this particular exclusion does not apply to this coverage. Adding the word "event" precludes this form of argument.

To be sure, Clauses 8.B. and 8.C. did not need to say "not excluded in Clause 6" at all. Every form of coverage is automatically subject to every exclusion in Clause 6, because Clause 6 states, "This policy does not insure the following," and then lists the exclusions. (AA-70.) This means the insured's argument about dampness of atmosphere would ultimately fail on the merits. But insurance policies "often use overlapping provisions to provide greater certainty on the scope of coverages and exclusions." (*Crescent Plaza Hotel Owner, L.P. v. Zurich American Ins. Co.* (7th Cir. 2021) 20 F.4th 303, 311.) On the whole, Insurers' reading of the provisions related to these coverage extensions is the only reasonable one.

and Ingress/Egress extensions just as it did under the other coverage provisions.

ii. Endeavor's unreasonable reading.

Endeavor proposes an unreasonable reading based on an outsize role for the word "event." Endeavor defines an "event" as any "'discrete happening that occurs at a specific point in time'" (AOB 67); thus defined, an event need not be *physical* at all, and even a non-physical "event" can trigger coverage extensions 8.B. and 8.C. This interpretation is unreasonable for several reasons.

First, it erases the entire sentence, "Insured physical loss or damage must occur within one (10) [*sic*] statute mile from the Insured's premises in order for coverage to apply." (AA-66.) As explained, "direct physical loss or damage to property" (AA-70) is the core of the entire policy structure, and cannot be ignored for provision "extending" that core—least of all for coverage extensions that bear express "Limitations" requiring such physical loss or damage within one mile. Endeavor does allude to the one-mile distance limit (see AOB 38 ["Endeavor alleged" loss or damage "occurring within the requisite distance from its covered locations"])—but ignores the rest, shirking the interpretative duty to "give effect 'to every part' of the [insurance] policy." (*Palmer v. Truck Ins. Exchange* (1999) 21 Cal.4th 1109, 1115.)

What's more, on Endeavor's definition of an "event" and interpretation of the word's function in the policy, every instance of "loss" or "damage" is also an "event." In that case, there would be no reason for the Clause 8 provisions to say "*loss, damage or* an event."

Finally, Endeavor's interpretation leads to absurdity—and courts "avoid interpretations" of insurance policies "that create absurd or unreasonable results." (*Sequeira v. Lincoln National Life Ins. Co.* (2015) 239 Cal.App.4th 1438, 1445; see also Civ. Code, § 1638 ["The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity"].)

On Endeavor's reading of the Ingress/Egress coverage extension, if any non-excluded event within one mile of its property impairs ingress or egress to its property, then this policy covers its resulting losses. A traffic jam is a non-excluded event, and a traffic jam within one mile of Endeavor's property would likely impair ingress or egress. (*Impair*, Merriam-Webster Online Dict. <https://www.merriam-webster.com/dictionary/impair> [as of Jun. 22, 2023] ["to diminish in function, ability, or quality: to weaken or make worse"].) In an analogous case for the Civil or Military Authority coverage extension, a parade within one mile of Endeavor's property—another event—could cause a local government to close nearby streets and thereby impair access.

The traffic jam or parade could thus cause business losses, even in the absence of any harm whatsoever to property. Endeavor reads its commercial property policy also to insure against traffic jams and parades.

Endeavor's interpretation of the policy is unreasonable; Insurers' is reasonable. Coverage under the Civil or Military Authority and Ingress/Egress extensions requires losses caused by direct physical loss or damage to property.

B. The Contaminants or Pollutants exclusion applies to Endeavor's claims under the Civil or Military Authority and Ingress/Egress extensions.

Because the Civil or Military Authority and Ingress/Egress coverage extensions, like all other forms of coverage, require direct physical loss or damage to property, claims under these extensions are therefore subject to the Contaminants or Pollutants exclusion. It states, "This policy does not insure the following: [¶] … *loss or damage* caused by … dispersal of … virus" and other contaminants or pollutants. (AA-70–71.) The exclusion bars coverage of such claims, full stop. (§ 4., *ante*.)

But what if, as Endeavor contends, these coverage extensions could be triggered by non-physical "events"? (Endeavor is wrong about this, but set that aside for a moment.) Endeavor argues that such claims would then not be subject to the Contaminants or Pollutants exclusion—because, according to

Endeavor, the exclusion applies to "*loss or damage* caused by" virus, but not to mere *events* caused by virus. (AOB 70–71.)

Endeavor is wrong. The exclusion applies to *all* of Endeavor's alleged losses—even those based on non-physical events. Endeavor's argument fails because the exclusion uses the general phrase "loss or damage"—as distinct from the more specific phrase "loss or damage insured herein" (or "Insured physical loss or damage"). This general phrase makes the exclusion apply to *all* losses for which Endeavor seeks recovery under the policy, including non-physical, "event"-based losses.

The policy affords this general phrase its own meaning. "Loss or damage" refers generically to any injury to Endeavor's interests that is even potentially covered or excluded from coverage. Here are examples of the phrase "loss or damage" in the policy reflecting this generic meaning (all italics added):

- "In the event of *loss or damage* involving more than one deductible …" (AA-69);
- "In any occurrence where *loss or damage* is caused by more than one cause of loss or damage (peril) insured against under this policy …" (AA-69);
- "In the event of *loss or damage* to records or accounts receivable from customers caused by loss or damage insured herein …" (AA-78);

- "The Insured shall report to the Insurer any *loss or damage* which may become a claim under this insurance policy …" (AA-86);
- "*Loss or damage*, if any, under this policy shall be payable to the mortgagee(s) …" (AA-90).

As can be seen, the policy sometimes even uses the phrases "loss or damage" and "loss or damage insured herein" within a single sentence—and the policy uses each phrase intentionally in various places. This confirms that the generic, unmodified phrase "loss or damage" means something different from, and broader than, "loss or damage insured herein" or similar phrases. "'Words used in a certain sense in one part of an instrument are deemed to have been used in the same sense in another.'" (*Mirpad, LLC v. California Ins. Guarantee Assn.* (2005) 132 Cal.App.4th 1058, 1069; see also *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, 868 ["a word [in an insurance policy] with a broad meaning or multiple meanings may be used for that very reason—its breadth—to achieve a broad purpose"].)

Again, Endeavor posits that if coverage extensions 8.B. and 8.C. can be triggered by non-physical "events," an event-based claim could evade the Contaminants or Pollutants exclusion because an "event" caused by virus wouldn't qualify as excluded "loss or damage caused by" virus. (AOB 70–71.) But the

Contaminants or Pollutants exclusion applies to *all* "loss or damage" to Endeavor's interests caused by the dispersal of virus—not just to direct physical loss or damage to property. All the claims Endeavor attempted to plead under these coverage extensions do in fact involve at least that generic form of "loss or damage." (See AA-37–40, ¶¶ 89–90, 93, 96 [claiming that these extensions cover various forms of "loss or damage"].) All these claims, accordingly, are excluded.

CONCLUSION

For any of these three independent reasons, this Court should affirm the judgment.

DATED: June 23, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **RESPONDENTS' BRIEF** contains **13,012** words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

DATED: June 23, 2023

/s/ *Stefan C. Love*
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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 6420 Wilshire Boulevard, Suite 1100, Los Angeles, California 90048, and my email address is pherndon@gmsr.com.

On June 23, 2023, I served the foregoing document described as **RESPONDENTS' BRIEF** on the interested parties in this action by serving:

***** SEE ATTACHED SERVICE LIST *****

I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered TrueFiling users will be served by the TrueFiling system.

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

Executed on June 23, 2023 at Los Angeles, California.

Pauletta L. Herndon

Pauletta L. Herndon

Endeavor Operating Co., LLC v. HDI Global Insurance Co., et al.
Court of Appeal, Second Appellate District Case No. B323865
Los Angeles County Superior Court Case No. 21STCV23693

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