No. 20-16858

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MUDPIE, INC.,

Plaintiff and Appellant,

v.

TRAVELERS CASUALTY INSURANCE COMPANY OF AMERICA,

Defendant and Appellee.

On Appeal from the United States District Court
for the Northern District of California
Case No. 20-cv-03213-JST
The Honorable Jon S. Tigar

ANSWERING BRIEF FOR DEFENDANT-APPELLEE TRAVELERS CASUALTY INSURANCE COMPANY OF AMERICA

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DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendant-Appellee Travelers Casualty Insurance Company of America discloses that:

It is 100% owned by Travelers Casualty and Surety Company, which is 100% owned by Travelers Insurance Group Holdings, Inc., which is 100% owned by Travelers Property Casualty Corp., which is 100% owned by The Travelers Companies, Inc. The Travelers Companies, Inc. (NYSE: TRV) is the only publicly held company in the corporate family. No individual or corporation owns 10% or more of the stock of The Travelers Companies, Inc.

/s/ Deborah L. Stein
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INTRODUCTION

The COVID-19 pandemic and the government orders issued to curtail the spread of the Coronavirus have impacted this country in unprecedented ways. Plaintiff-Appellant Mudpie Inc., a children's store in San Francisco, claims that it suffered economic losses as a result of several executive orders issued by California Governor Gavin Newsom to slow the spread of the Coronavirus and to protect the health and safety of California residents. Mudpie sued Defendant-Appellee Travelers Casualty Insurance Company of America seeking insurance coverage for these economic losses. The district court correctly dismissed Mudpie's complaint because Mudpie's Travelers property insurance policy does not insure this type of financial loss.

Mudpie sought coverage under the Policy's Business Income and Extra Expense coverages, which apply only where there is "direct physical loss of or damage to property" at its insured premises "caused by or resulting from a Covered Cause of Loss," which causes a suspension of the insured's operations. These coverages would apply where a fire, for example, damages the insured premises, requiring a suspension of operations. But here Mudpie does not claim that *anything* "direct" or "physical" happened to the insured property, only that Governor Newsom ordered that its store be closed to the public. And in any event, Mudpie's loss was not caused by a Covered Cause of Loss, but rather by the

Coronavirus, which is an expressly *excluded* cause of loss under the Policy's exclusion for "loss or damage caused by or resulting from any virus . . . that induces or is capable of inducing physical distress, illness or disease" (the "Virus Exclusion").

The district court correctly dismissed Mudpie's complaint, as dozens of other federal district courts have done when faced with similar allegations in Coronavirus-related cases. As the court properly concluded, a mere loss of *use* of property that has sustained no *physical* impact whatsoever is not "direct physical loss of or damage to property" under California law. Those words must be read in the context of the Policy as a whole, and the Business Income and Extra Expense coverages apply only during the "period of restoration," defined as the time period during which the lost or damaged property "should be repaired, rebuilt or replaced with reasonable speed and similar quality." As the court reasoned, "there is nothing to fix, replace, or even disinfect for Mudpie to regain occupancy of its property." 1-ER-9–10.

While the district court found it unnecessary to reach the Virus Exclusion, it is an independent ground for affirmance. Numerous courts in California and across the country have repeatedly dismissed similar Coronavirus-related cases based on similar or identical virus exclusions. To provide guidance to the district courts in this Circuit in managing the avalanche of Coronavirus-related insurance

litigation, this Court should affirm based on both the Virus Exclusion and the "direct physical loss of or damage to property" requirement.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under the Class Action Fairness Act of 2005, 28 U.S.C. § 1332(d)(2), because this case is a putative class action, Mudpie is a citizen of a California, Travelers is a citizen of Connecticut, and the amount in controversy exceeds $5 million. 2-ER-21 ¶¶ 11–13.

This Court has appellate jurisdiction under 28 U.S.C. § 1291. The district court entered a final judgment dismissing all of Plaintiff's claims with prejudice on September 23, 2020. 1-ER-2. Mudpie timely filed its notice of appeal on the same day. 2-ER-281–82.

STATEMENT OF THE ISSUES

1. Mudpie, which operates a retail store, bought an insurance policy from Travelers covering "direct physical loss of or damage to property . . . caused by or resulting from a Covered Cause of Loss." Mudpie claims it suffered financial losses as a result of the Coronavirus pandemic, but its property has not been physically lost or damaged. Was the district court correct to dismiss Mudpie's complaint because its claimed losses are not covered under its insurance policy?

2. Mudpie's policy excludes coverage for all "loss or damage caused by or resulting from any virus . . . that induces or is capable of inducing physical distress, illness or disease." Mudpie's claimed losses all result from the Coronavirus, which Mudpie does not dispute is a virus capable of inducing disease. Are Mudpie's claimed losses excluded from coverage by the Virus Exclusion?

3. Mudpie's policy also excludes coverage for all loss caused by or resulting from a "loss of use." Mudpie claims to have lost money because it has not been able to use its store because of government restrictions during the pandemic. Are Mudpie's claimed losses excluded from coverage by the Loss-of-Use Exclusion?

STATEMENT OF THE CASE

I. Mudpie buys a Travelers insurance policy that insures Mudpie's property against risks of direct physical loss.

Mudpie operates a retail store in San Francisco, selling children's clothing, toys, and other goods. 2-ER-23 ¶ 26.

Mudpie bought from Travelers an insurance policy (the "Policy") that covered Mudpie's business personal property (such as its inventory and equipment) from covered causes of loss, such as a fire or windstorm. 2-ER-47, 2-ER-52. The Policy did not insure the building in which Mudpie rents space. The Policy is incorporated by reference in the complaint. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007); *Knievel v. ESPN*, 393 F.3d 1068,

1076 (9th Cir. 2005).

The Policy covers "direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from a Covered Cause of Loss." 2-ER-115. This is the Policy's basic grant of coverage, which would apply, for example, if Mudpie's property was damaged in a fire or by a burst pipe. Mudpie makes no claim under this provision. The Policy specifically provides three types of coverage that are relevant to this case.

First, there is coverage for lost business income. 2-ER-116–17. The Policy describes the circumstances in which such coverage will be available:

- Business income losses must be "sustain[ed] due to the necessary 'suspension' of your 'operations' during the 'period of restoration'";
- "The 'suspension,'" in turn, "must be caused by direct physical loss of or damage to property at the described premises";
- and "[t]he loss or damage must be caused by or result from a Covered Cause of Loss."

2-ER-116–17. In other words, for Mudpie to make a valid claim for lost business income under the Policy, a Covered Cause of Loss must have created a direct physical loss of or damage to property, and that physical loss of or damage to property must then have caused a suspension of Mudpie's business operations:

Covered Cause of Loss

↓

Direct Physical Loss of or Damage to Property

↓

Suspension of Business Operations

↓

Business Income Losses

Second, there is coverage for certain extra expenses incurred by Mudpie. Here, too, the Policy explains when this coverage is available: The Policy pays Mudpie's extra expenses incurred only if Mudpie incurred those expenses as a result of "direct physical loss of or damage to property caused by or resulting from a Covered Cause of Loss." 2-ER-117.

Coverage for business income lost and extra expenses incurred is limited not only in scope—to losses caused by a Covered Cause of Loss and inflicting physical loss of or damage to property requiring a suspension of operations—but also in time—to the "period of restoration," which is defined by the Policy to begin with the date of the "direct physical loss or damage" and to end "when the property . . . should be repaired, rebuilt, or replaced." 2-ER-151.

The third species of coverage—for losses sustained as a result of "civil authority actions" (that is, government orders)—is narrower still. 2-ER-129. It extends coverage for business income lost and extra expenses incurred for three

weeks, but only if the losses are caused by a government order "that prohibits access to the described premises" and only if the government order was "due to direct physical loss of or damage to property at locations, other than described premises, that are within 100 miles of the described premises, caused by or resulting from a Covered Cause of Loss." 2-ER-129. So, for example, if a fire damaged property near Mudpie's store that required the fire department to block access to the store, the Policy would pay Mudpie for up to three weeks of business income lost and extra expenses incurred.

The Policy also makes clear what it does *not* insure. Two of these exclusions are particularly important in this case. First, the Policy specifically excludes any and all coverage for loss or damage "caused by or resulting from any virus." 2-ER-262 ("EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA"). This Virus Exclusion "applies to all coverage under all [property insurance] forms, . . . including but not limited to forms or endorsements that cover . . . business income, extra expense . . . or action of civil authority." 2-ER-262. Second, the Policy also contains a Loss-of-Use Exclusion: Travelers "will not pay for loss or damage caused by or resulting from . . . loss of use or loss of market." 2-ER-138.

II. The Coronavirus disrupts Mudpie's business, and Mudpie reports a claim to Travelers.

Beginning in January 2020, public-health officials became concerned about a "novel strain of coronavirus – COVID-19," which "was spreading through

human-to-human transmission and could be transmitted by asymptomatic carriers." 2-ER-22 ¶ 17. On March 11, 2020, "the World Health Organization declared COVID-19 a global health pandemic based on existing and projected infection and death rates and concerns about the speed of transmission and ultimate reach of this virus." *Id.* ¶ 19. Accordingly, public-health officials began recommending "social distancing" measures, i.e., "the maintenance of physical space between people," to slow the spread of the Coronavirus. *Id.* ¶ 20.

On March 12, 2020, California Governor Gavin Newsom issued a "Safer at Home" order, mandating social-distancing measures "to control the spread of COVID-19." 2-ER-23 ¶¶ 22–24; 2-ER-40–44. On March 19, 2020, Governor Newsom issued a "Stay at Home" order, "requiring retailers to cease in-person services," and later permitted curbside and delivery sales. 2-ER-23 ¶ 25; 2-ER-37–38.

These orders were "needed to stop the transmission of COVID-19" because "shops . . . were likely to become hot-spots for local transmission of COVID-19." 2-ER-23 ¶ 22; *see also id.* ¶ 24 (Safer at Home order was intended "to control the spread of COVID-19"). According to Mudpie, the orders "caused direct physical loss of Mudpie's insured property in that the property has been made useless and/or uninhabitable; and its functionality has been severely reduced if not completely or nearly eliminated." 2-ER-23–24 ¶ 27.

On April 27, 2020, Mudpie reported an insurance claim to Travelers, asserting that it had sustained a loss of business income beginning on March 16, 2020. 2-ER-24 ¶ 32.

III. Travelers denies Mudpie's claim.

On May 6, 2020, Travelers sent a letter to Mudpie denying its claim. 2-ER-24 ¶ 33. The letter stated that the Policy's Business Income and Extra Expense provisions did not apply "[b]ecause the limitations on your business operations were the result of the Governmental Order, as opposed to 'direct physical loss or damage to property at the described premises.'" 2-ER-24 ¶ 33. Travelers further stated that Mudpie's claimed losses were excluded from coverage under the Policy's Virus Exclusion, which applies to "loss or damage caused by or resulting from any virus – such as the COVID-19 virus." 2-ER-24–25 ¶ 33 (quotation marks omitted).

IV. Mudpie sues Travelers.

Mudpie sued Travelers on May 11, 2020, on behalf of a class of "[a]ll retailers in California that purchased comprehensive business insurance coverage from Defendant which includes coverage for business interruption, filed a claim for lost business income following California's Stay at Home order, and were denied coverage by Defendant." 2-ER-26 ¶ 43; 2-ER-287.

Mudpie asserted three causes of action, all arising from Travelers' allegedly wrongful denial of coverage. Mudpie sought a declaratory judgment that "its business income losses are covered and not precluded by exclusions or other limitations" in the Policy. 2-ER-31 ¶ 62. It also alleged that Travelers' failure to pay its insurance claim constituted a breach of contract and a breach of the implied covenant and good faith dealing. 2-ER-31–32 ¶¶ 63–71 (breach of contract); 2-ER-32–33 ¶¶ 72–79 (breach of implied covenant).

Mudpie alleged that its Travelers Policy insures losses of "business income with extra expense coverage for the loss" "caused" by and a "result of" Governor Newsom's "Stay at Home Order," which was issued "to control the spread of COVID-19." 2-ER-22 ¶¶ 17, 19; 2-ER-23 ¶¶ 24–25, 27; 2-ER-24 ¶ 30; 2-ER-25 ¶ 38; 2-ER-30–31 ¶¶ 59–60. Mudpie initially sought payment under the Policy's Business Income, Extra Expense and Civil Authority provisions, but has since abandoned its claim to Civil Authority coverage. 2-ER-24 ¶ 30; 2-ER-31 ¶ 60; *see* Op. Br. at 8–9.

Mudpie's legal theory was that "[c]ompliance with [the government orders] has caused direct physical loss of Mudpie's insured property in that the property has been made useless and/or uninhabitable; and its functionality has been severely reduced." 2-ER-23 ¶ 27; *see also* 2-ER-25 ¶ 36 (alleging that Mudpie's loss of business income was covered "because its premises are unusable and

uninhabitable"). Mudpie did not allege that the Coronavirus ever entered its business premises or damaged any of its property (assuming it were even possible for the Coronavirus to damage property, and it is not). It instead alleged that its losses were sustained "as a result of the Stay at Home orders" that were issued to combat the Coronavirus. 2-ER-23–25 ¶¶ 22–25, 38; 2-ER-30–31 ¶ 59 (alleging that "[a]s a result of this mandate, the covered property of Plaintiff lost some or all of its functionality and/or became useless or uninhabitable, resulting in substantial loss of business income").

Mudpie acknowledged that the Policy "excludes loss 'caused by or resulting from' virus or bacteria," but did not explain why the Virus Exclusion would not bar coverage. 2-ER-24 ¶ 30.

V. Travelers moves to dismiss Mudpie's complaint, and the district court grants the motion.

Travelers moved to dismiss the complaint under Rule 12(b)(6). 2-ER-288. It argued that Mudpie was not entitled to Business Income or Extra Expense coverage because it had not alleged facts establishing "direct physical loss of or damage to property" at the insured premises, and that the Virus Exclusion barred coverage.

The district court granted the motion. It began with the question of coverage presented by Mudpie's appeal: "The parties dispute whether Mudpie's allegations establish 'a direct physical loss of' property as required by the Business Income

and Extra Expense provisions in the insurance policy," and "Mudpie claims that its inability to operate and occupy its storefront following the government closure orders is a direct physical loss of property covered by its insurance policy." 1-ER-8. The court held that Mudpie was not entitled to coverage because it had suffered no physical loss: "Mudpie's physical storefront has not been 'misplaced' or become 'unrecoverable,' and neither has its inventory." 1-ER-9.

The court found further support for this conclusion in the longstanding rule that an insurance policy provision must be read in the context of the policy as a whole. The Policy defines the "period of restoration" using the words "'[r]ebuild,' 'repair,' and 'replace'"—all of which "strongly suggest that the damage contemplated by the Policy is physical in nature"; "[b]ut here, there is nothing to fix, replace, or even disinfect for Mudpie to regain occupancy of its property, which Mudpie admits in its opposition brief." 1-ER-9–10.

Similarly, the court concluded that the Policy's Loss-of-Use Exclusion—barring coverage for "loss or damage caused by or resulting from . . . loss of use or loss of market"—shows that the Policy "was not intended to encompass a loss where the property was rendered unusable without an intervening physical force." 1-ER-13–14. The court also reasoned that the exclusion was inconsistent with "Mudpie's claim that 'a reasonable purchaser of insurance would read the policy as

providing coverage for a loss of functionality.'" 1-ER-14. The court found it unnecessary to consider the Virus Exclusion. 1-ER-15 n.9.

The court also rejected Mudpie's reliance on a series of cases from other jurisdictions in which pervasive, physical events caused an insured's premises to become uninhabitable in a manner that courts found to be tantamount to physical damage. The court explained that "numerous courts outside the Ninth Circuit have found that some outside physical force must have *induced* a detrimental change in the property's capabilities before a plaintiff alleging loss of use can establish a 'direct physical loss of property.'" 1-ER-11. Distinguishing *Studio 417, Inc. v. Cincinnati Insurance Company*, 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020)—one of the very few similar insurance cases involving the Coronavirus in which the district court *denied* the insurer's motion to dismiss—the court explained that Mudpie "does not allege, for example, that the presence of COVID-19 virus in its store created a physical loss. Rather, its sole focus is on the shelter-in-place orders that have prevented it from opening, a distinctly less physical phenomenon." 1-ER-13.

Because Mudpie had failed to plead facts showing it was entitled to coverage under any part of the Policy, the district court dismissed Mudpie's declaratory-judgment and breach-of-contract claims. 1-ER-15–16. The court also dismissed Mudpie's claim for breach of the implied covenant of good faith and fair

dealing, because such a claim cannot survive absent an entitlement to benefits under an insurance policy. 1-ER-16 (citing *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 35 (1995)).

VI. Mudpie appeals.

Although the district court gave Mudpie 21 days to amend its complaint, 1-ER-17, Mudpie declined to do so. After Mudpie filed a notice stating that it would not file an amended complaint, 2-ER-292, the court dismissed the case with prejudice and entered a final judgment for Travelers. 1-ER-2–3. Mudpie filed a timely notice of appeal the same day. 2-ER-281–82.

SUMMARY OF ARGUMENT

Mudpie's Policy provides coverage for the types of financial losses Mudpie claims only when it suffers a necessary suspension of its operations due to (1) "direct physical loss of or damage to property" that is (2) "caused by or result[ing] from a Covered Cause of Loss." 2-ER-116–17. The losses claimed by Mudpie do not satisfy either half of this test.

First, the losses Mudpie suffered were not direct and physical. They were purely financial. The Coronavirus and the government orders issued to stop its spread restricted Mudpie's use of its store—but they didn't damage or destroy the store or anything in it. Under California law (which applies in this diversity case concerning an insurance contract), "direct physical loss" means some "distinct,

demonstrable, physical alteration of the property." *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766 (2010). If nothing physically happens to the insured's property, there is no coverage. *Doyle v. Fireman's Fund Ins. Co.*, 21 Cal. App. 5th 33, 38–39 (2018). The Policy's "period of restoration" provision further confirms this intent. Unless there is loss or damage that can be "repaired, rebuilt or replaced," there is no "direct physical loss of or damage to property." That's the case here: None of Mudpie's property was physically lost, stolen, or damaged, and nothing happened to the building where it rents space. That makes this case like the dozens of others in which courts have dismissed claims for Coronavirus-related losses brought under property-insurance policies. Put simply, property insurance insures *property*; if the property isn't lost (such as by theft) or damaged (such as by fire), there can't be a covered claim.

Second, Mudpie's losses were not caused by a Covered Cause of Loss. To the contrary, they were caused by expressly *excluded* causes of loss. The Policy unambiguously excludes coverage for (1) all losses caused by viruses and all (2) claims for losses caused by or resulting from loss of use. But Mudpie is claiming that it lost the use of its store on account of the Coronavirus. The judgment can be affirmed under either of these exclusions.

This is a straightforward case that can and should be decided under settled law. There is no need, as Mudpie claims, for the Court to certify the case to the California Supreme Court. California courts have already decided the lone question presented by Mudpie's appeal against it. There is no "direct physical loss" here—and therefore no coverage. And even if Mudpie had suffered such a loss, it would make no difference, for two different exclusions unambiguously bar coverage for its claims.

The Court should affirm the judgment for Travelers.

STANDARD OF REVIEW

This Court reviews an order granting a Rule 12(b)(6) motion to dismiss *de novo*. *Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204, 1208 (9th Cir. 2020). A complaint should be dismissed when "there is no cognizable legal theory or an absence of sufficient facts alleged to support a cognizable legal theory." *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A complaint must "state a claim to relief that is plausible on its face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), and a claim is facially plausible only "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

ARGUMENT

I. Mudpie is not entitled to coverage because it has not suffered any "direct physical loss of or damage to property."

Under California law—which applies to diversity cases concerning insurance contracts, like this one, *St. Paul Mercury Ins. Co. v. Ralee Eng'g Co.*, 804 F.2d 520, 522 (9th Cir. 1986)—Mudpie bears "the burden . . . to prove facts establishing that [its] claimed loss falls within the coverage provided by the policy's insuring clause." *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 777 (2010). Mudpie tries to flip that standard, arguing that there is a "presumption of coverage" under a so-called "all risk" policy, i.e., a policy that covers risks of direct physical loss that are not excluded. Op. Br. at 15. But California law is clear that the "direct physical loss requirement is part of the policy's insuring clause and accordingly falls within [the insured's] burden of proof." *MRI Healthcare Ctr.*, 187 Cal. App. 4th at 778; *see also Garvey v. State Farm Fire & Cas. Co.*, 48 Cal. 3d 395, 406 (1989).

So the question is whether Mudpie has alleged facts showing that it suffered some "direct physical loss of or damage to property . . . caused by or result[ing] from a Covered Cause of Loss." 2-ER-116–17. The district court correctly held that it has not. Mudpie's loss of the use of its store (because of government orders requiring it to close its doors) did not constitute "direct physical loss of or damage to property." The district court gave those words their "ordinary and popular

sense" and let the "clear and explicit" policy language govern. *Palmer v. Truck Ins. Exch.*, 21 Cal. 4th 1109, 1115–17 (1999) (quotation marks omitted); Cal. 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.").

The district court's decision is supported by the fundamental nature and purpose of property insurance, the uniform decisions of California appellate courts, a plain reading of the Policy as a whole (which California law requires), and an overwhelming majority of decisions holding that insureds are not entitled to coverage for Coronavirus-related business interruptions under similar or identical policies.

A. The requirement of "physical" loss or damage to the insured property is fundamental to property insurance.

As the California Court of Appeal has recognized, there can be no coverage under a property insurance policy when the insured sustains a financial loss but "nothing happened *to the covered property*." *Doyle v. Fireman's Fund Ins. Co.*, 21 Cal. App. 5th 33, 38 (2018). To state the obvious, "property insurance is insurance of *property*," and "[g]iven this premise, the threshold requirement for recovery under a contract of property insurance is that the insured property has sustained physical loss or damage." *Simon Mktg., Inc. v. Gulf Ins. Co.*, 149 Cal. App. 4th 616, 622–23 (2007); *see also Doyle*, 21 Cal. App. 5th at 38 ("The self-evident point is that property insurance is insurance of *property*.").

Business Income and Extra Expense coverages, like those in Mudpie's policy, are secondary to coverage for direct physical loss of or damage to property that requires repair or replacement. In other words, the insured's "*operations* are not what is insured—the building and the personal property in or on the building are." *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.,* 2020 WL 6503405, at *8 (S.D. Miss. Nov. 4, 2020) ("One does not buy simply 'business interruption insurance.' Policyholders are not insuring against 'all risks' to their income—they are insuring against 'all risks' *to their property*"). Coverage for business financial losses is available only when there is a "loss of or damage to the building or any personal property" that causes the insured to "suspend[] operations" and undertake repairs—not when, for some reason having nothing to do with physical loss or damage, a business's income happens to fall. *Id.* at *5 n.9.

Mudpie's policy is perfectly consistent with "the fundamental nature of property insurance," as it insures Mudpie only "against potential harms to the [property] itself"—not against "any potential financial losses" in the absence of any physical impact on property. *Doyle*, 21 Cal. App. 5th at 39. Mudpie's brief amounts to one long request for this Court to "rewrite a policy to bind the insurer to a risk that it did not contemplate and for which it has not been paid." *Safeco Ins. Co. v. Gilstrap*, 141 Cal. App. 3d 524, 533 (1983); *see also Certain Underwriters at Lloyd's of London v. Superior Court*, 24 Cal. 4th 945, 968 (2001) ("we do not

rewrite any provision of any contract, including the [insurance policy at issue], for any purpose").

B. Under the uniform decisions of California courts, Mudpie has not alleged "direct physical loss of or damage to property."

California courts consistently interpret the plain meaning of "direct physical loss" to require "distinct, demonstrable, physical alteration of the property." *MRI Healthcare Ctr.*, 187 Cal. App. 4th at 779. "That the loss needs to be 'physical,' given the ordinary meaning of the term, is 'widely held to exclude alleged losses that are intangible or incorporeal.'" *Id.* (quoting 10A COUCH ON INSURANCE § 148:46). "For there to be a 'loss' within the meaning of the policy, some *external force* must have acted upon the insured property to cause a *physical change* in the condition of the property, i.e., it must have been 'damaged' within the common understanding of that term." *Id.* at 780. "The word 'direct' used in conjunction with the word 'physical' indicates the change in the insured property must occur by the action of the fortuitous event triggering coverage." *Id.* "Physical loss" of moveable, personal property can also occur when the property is stolen or becomes unrecoverable. *See Total Intermodal Servs., Inc. v. Travelers Prop. Cas. Co. of Am.*, 2018 WL 3829767, at *3–4 (C.D. Cal. July 11, 2018) (physical loss occurred under cargo policy where cargo had been mistakenly returned to China, where it became unrecoverable).

Economic loss alone does not suffice. In *MRI Healthcare*, for example, a company that performed MRI scans had to shut down its MRI machine so that the building housing it could be repaired. 187 Cal. App. 4th at 772. When the company turned the machine back on, it didn't work properly and took months to be repaired. *Id.* The company made an insurance claim, but the Court of Appeal held that the insurer correctly denied it. The insurance policy, like the one in this case, covered only "direct physical loss," and there had been no "distinct, demonstrable, [or] physical alteration of the MRI machine." *Id.* at 778–79. "The failure of the MRI machine" to work after being turned back on "emanated from the inherent nature of the machine itself rather than actual physical 'damage.'" *Id.* at 780. "[T]he machine was turned off and could not be turned back on. This does not constitute a compensable 'direct physical loss' under the policy." *Id.*

In *Doyle*, too, the loss was only economic rather than direct and physical. There, a wine collector who was deceived into buying counterfeit wine attempted to recover under his property-insurance policy. *Doyle*, 21 Cal. App. 5th at 36. The Court of Appeal affirmed the dismissal of his complaint "because nothing happened *to the covered property* (i.e., the wine that [the insured] purchased and insured)." *Id.* at 38. The policy insured only "against potential harms to the wine itself, such as fire, theft, or abnormal spoilage; [the insured] did not insure himself

against any potential losses." *Id.* at 39. In other words, he "did not buy a *provenance* insurance policy; [he] bought a *property* insurance policy." *Id.*

This case is much the same as *Doyle*, because nothing physically happened to the covered property (Mudpie's inventory and equipment), and nothing happened to the building in which Mudpie rented space. Nothing disappeared or was physically lost, stolen, or damaged. Mudpie has suffered a purely *financial* loss that did not result from any *physical* loss of or damage to property. As the district court correctly noted, "Mudpie's physical storefront has not been 'misplaced' or become 'unrecoverable,' and neither has its inventory." 1-ER-9. That means there was no "direct physical loss of or damage to property" within the meaning of the Policy. *See, e.g.*, *Ward Gen. Ins. Servs., Inc. v. Employers Fire Ins. Co.*, 114 Cal. App. 4th 548, 556 (2004) ("the loss of [a] database, with its consequent economic loss, but with *no loss of or damage to tangible property*, was not a 'direct physical loss of or damage to' covered property," and therefore not covered) (emphasis added); *Commercial Union Ins. Co. v. Sponholz*, 866 F.2d 1162, 1163 (9th Cir. 1989) (defective title to a vessel was not "physical loss or damage").

If Mudpie's position were "adopted, [it] would mean that direct physical loss or damage is established whenever property cannot be used for its intended purpose." *Pentair, Inc. v. Am. Guarantee & Liab. Ins. Co.*, 400 F.3d 613, 616 (8th

Cir. 2005) (holding that power outage was not "direct physical loss of or damage to property"). That result would fly in the face of an extensive body of case law. Before the Coronavirus, courts nationwide consistently rejected arguments that a temporary loss of use of property—in the absence of any physical impact on the property—constitutes a "direct physical loss of . . . property" under a property insurance policy.

In *Northeast Georgia Heart Center, P.C. v. Phoenix Insurance Company*, 2014 WL 12480022, at *2 (N.D. Ga. May 23, 2014), for example, the manufacturer of a machine that made radioactive dye for use in PET scans recalled the machine because of the risk of excessive radiation exposure. A cardiology practice that used one of the machines made an insurance claim for lost business income. *Id.* at *3. The court held that the insurer properly denied the claim, because the plaintiff had not alleged any "kind of physical effect on the covered property." *Id.* at *5. The court declined to "expand 'direct physical loss' to include loss-of-use damages when the property has not been physically impacted in some way. To do so would be equivalent to erasing the words 'direct' and 'physical' from the policy." *Id.* at *6; *accord J. O. Emmerich & Assocs., Inc. v. State Auto Ins. Cos.*, 2007 WL 9775576, at *5 (S.D. Miss. Nov. 19, 2007) (same result in case involving power outage); *Roundabout Theatre Co., Inc. v. Cont'l Cas. Co.*, 302 A.D.2d 1, 7–8 (N.Y. App. Div. 2002) (loss of access to theatre did

not constitute "direct physical loss" of property); *Harry's Cadillac-Pontiac-GMC Truck Co., Inc. v. Motors Ins. Co.*, 486 S.E.2d 249, 250–51 (N.C. Ct. App. 1997) (inability to access insured car dealership due to snowstorm did not give rise to a covered business-income loss). As explained further in Part I.D below, in the recent flood of Coronavirus-related litigation, numerous courts have agreed with these decisions and with the district court's decision below.

C. Mudpie's argument is contrary to a plain reading of the Policy as a whole.

The district court also correctly applied the rule that California courts "interpret contracts (including insurance policies) as a whole, with each clause lending meaning to the others," and "in a manner which gives force and effect to every clause rather than to one which renders clauses nugatory." *Titan Corp. v. Aetna Cas. & Sur. Co.*, 22 Cal. App. 4th 457, 473–74 (1994); *see also* Cal. Civ. Code § 1641 ("The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."). This rule strongly supports Travelers' position in three respects, as explained below.

1. Mudpie's interpretation conflates or reorders the requirements of Business Income and Extra Expense coverage.

The Policy requires that direct physical loss of or damage to property result in a suspension of business operations, like this:

Covered Cause of Loss

↓

Direct Physical Loss of or Damage to Property

↓

Suspension of Business Operations

↓

Business Income Losses and Extra Expenses

But Mudpie's interpretation muddies these distinct requirements, or at least flips their order. Mudpie argues that the shutdown orders suspended its business and that this suspension rendered it unable to use its property. This reordering illustrates why Mudpie's interpretation of "direct physical loss of or damage to property" doesn't comport with the Policy as a whole. The Policy contemplates that a covered "risk of direct physical loss" (e.g., wildfire or tornado) acts upon the property, causing direct physical loss of or damage to that property. In turn, because of that loss or damage, the insured is forced to suspend its business until the property can be rebuilt, repaired, or replaced—as explained below. Mudpie's interpretation doesn't work because the direct physical loss or damage must cause the suspension, not the other way around. And as Mudpie would have it, the loss of use of its store is both the "direct physical loss" and the suspension of its operations, while the Policy treats these as two separate requirements.

2. The "period of restoration" provision underscores the need for *physical* loss or damage.

Mudpie seeks payment from Travelers under the Business Income and Extra Expense coverages in its Policy. Those coverages are available only for the "period of restoration," which generally ends on "[t]he date when the property at the described premises should be *repaired, rebuilt or replaced* with reasonable speed and similar quality."[1] 2-ER-151 (emphasis added). The district court reasoned that "[t]he words '[r]ebuild,' 'repair' and 'replace' all strongly suggest that the damage contemplated by the Policy is physical in nature.' But here, there is nothing to fix, replace, or even disinfect for Mudpie to regain occupancy of its property, which Mudpie admits in its opposition brief." 1-ER-10 (quoting *Philadelphia Parking Auth. v. Fed. Ins. Co.*, 385 F. Supp. 2d 280, 287 (S.D.N.Y. 2005) (citation omitted)). Mudpie argues that this reading defeats its "reasonable expectations" of coverage. Op. Br. at 32–34. But where "the pertinent policy language is not ambiguous . . . under California law there is no reason to look to the insured's reasonable expectations." *Merrill & Seeley, Inc. v. Admiral Ins. Co.*, 225 Cal. App. 3d 624, 626 (1990).

[1] There is an alternative endpoint on "[t]he date when business is resumed at a new permanent location," but that has no application here. 2-ER-151. This applies where, for example, the insured building is a total loss and the insured elects to move to a new permanent location.

Before the pandemic, courts repeatedly cited similar or identical definitions of the "period of restoration" in holding that a mere loss of use of property does not constitute "direct physical loss . . . of property" under property insurance policies. *See Roundabout Theatre Co.*, 751 N.Y.S.2d at 8; *Harry's Cadillac*, 486 S.E.2d at 251; *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323, 332 (S.D.N.Y. 2014). In recent Coronavirus-related decisions, courts have reached the same conclusion as the district court here. For example:

- *Water Sports Kauai, Inc. v. Fireman's Fund Insurance Company*, 2020 WL 6562332, at *7 (N.D. Cal. Nov. 9, 2020): "As in *Mudpie*, here there is nothing on any of [the insured's] premises that allegedly needs to be repaired, rebuilt or replaced."
- *West Coast Hotel Management, LLC v. Berkshire Hathaway Guard Insurance Companies*, 2020 WL 6440037, at *4 (C.D. Cal. Oct. 27, 2020): "Plaintiffs do not claim that any property has undergone a physical alteration or needs to be 'repaired, rebuilt, or replaced.'"
- *Real Hospitality, LLC v. Travelers Casualty Insurance Company of America*, 2020 WL 6503405, at *6 (S.D. Miss. Nov. 4, 2020): "If there is no requirement that physical loss of or physical damage to the property be involved, the definition of the time period for paying the claim makes no sense."

Mudpie challenges the district court's analysis without addressing these or other cases, instead erroneously asserting that the "period of restoration" is merely a "cut-off date." Op. Br. at 33–34. Mudpie fails to explain how its position could reasonably be squared with the expectation that the lost or damaged property be "repaired, rebuilt or replaced" during the "period of restoration."

The cases cited by Mudpie in support of its cut-off-date theory either support the district court's decision or are inapposite. Some of the cases reinforce that the period of restoration is not arbitrary, but the length of time required to repair "property damaged or destroyed by reason of a covered peril." *Buxbaum v. Aetna Life & Cas. Co.*, 103 Cal. App. 4th 434, 443 (2002). In *Rogers v. American Insurance Company*, 338 F.2d 240, 243 (8th Cir. 1964), for example, the court held that the owner of a bowling alley that burned to the ground could recover only "the loss of income that would have been earned during the reconstruction period."

Other cases accept the premise that an insured's recovery is limited to the period of restoration, but hold that just how long that period should be is a factual question. *G&S Metal Consultants, Inc. v. Cont'l Cas. Co.*, 200 F. Supp. 3d 760, 769–73 (N.D. Ind. 2016); *Fresno Rock Taco, LLC v. National Surety Insurance Corporation*, 2015 WL 135720, at *22 (E.D. Cal. Jan. 9, 2015).

And still others are irrelevant because they did not address the period of restoration at all, *Home Indem. Co. v. Hyplains Beef, L.C.*, 893 F. Supp. 987, 991–

92 (D. Kan. 1995), or because the term was not defined in the same way as in Mudpie's Policy. *Gus Meat Co. v. Hartford Steam Boiler Inspection & Ins. Co.*, 1992 WL 107313, at *3 (N.D. Ill. May 14, 1992) ("restoration period" defined as time "to restore 'normal' operation of your business," not time to repair or replace damaged or lost property). On reply, in an effort to get around the requirement of physical loss or damage that is capable of being repaired or replaced implied by the period of restoration, Mudpie might cite a recent outlier case from the Northern District of Ohio, *Henderson Road Restaurant Systems, Inc. v. Zurich American Insurance Company*, 2021 WL 168422 (N.D. Ohio Jan. 19, 2021). But in that case, too, the policy didn't define the "period of restoration" in the same way as Mudpie's Policy. *Id.* at *2, *13 (period ends on "date when the location where the loss or damage occurred could have been physically capable of resuming the level of 'operations' which existed prior to the loss or damage"). A court in the same district reached the opposite result relying on the same "period of restoration" language in Mudpie's Policy. *Santo's Italian Café LLC v. Acuity Ins. Co.*, 2020 WL 7490095, at *10 (N.D. Ohio Dec. 21, 2020).

3. The Loss-of-Use Exclusion further supports the district court's decision.

The Policy also includes a Loss-of-Use Exclusion, which provides that Travelers "will not pay for loss or damage caused by or resulting from . . . loss of use or loss of market." 2-ER-138. The district court concluded that this provision

"suggests that the 'direct physical loss of . . . property' clause was not intended to encompass a loss where the property was rendered unusable without an intervening physical force," and "[t]he provision also undermines Mudpie's claim that 'a reasonable purchaser of insurance would read the policy as providing coverage for a loss of functionality." 1-ER-13–14. Other recent Coronavirus-related decisions have agreed with this analysis. *E.g.*, *Ballas Nails & Spa, LLC v. Travelers Cas. Inc. Co. of Am.*, 2021 WL 37984, at *4 (E.D. Mo. Jan. 5, 2021) ("construing the policy's requirement of 'direct physical loss or damage' to include the mere loss of use of insured property with nothing more would negate the 'loss of use' exclusion."); *accord Mortar & Pestle*, 2020 WL 7495180, at *4.

Mudpie has two responses to the district court's conclusion that the Loss-of-Use Exclusion reinforces the requirement of *physical* loss. First, Mudpie asserts that the district court concluded that Travelers had waived reliance on this exclusion. Op. Br. at 35. Not so. The issue was fully briefed below, with the district court even granting Mudpie a sur-reply to address another exclusion. 2-ER-291 at 38; *see also* Case No. 4:20-cv-03213 (N.D. Cal.), Dkt. 11 at 14 n.7, Dkt. 20 at 13 (Travelers making argument that district court adopted in its dismissal order).

Second, Mudpie cites a vacated district-court decision, *Oregon Shakespeare Festival Association v. Great American Insurance Company*, 2016 WL 3267247

(D. Or. June 7, 2016), *vacated*, 2017 WL 1034203 (D. Or. Mar. 6, 2017). That court explained that "[t]he delay and loss of use of the theater for performance was caused by smoke. Thus it was caused by the claimed damage." 2016 WL 3267247 at *6. Here, in contrast, Mudpie's loss of use of its store was not caused by any physical impact on the premises. Enforcing the exclusion here, where Mudpie has alleged no physical impact on its property or its premises, would not render the Business Income coverage "illusory," as Mudpie suggests. Op. Br. at 36. Rather, as the district court reasoned, the Loss-of-Use Exclusion reinforces the requirement that a covered Business Income loss must begin with "direct physical loss of or damage to property" at the insured premises.

4. The Civil Authority provision further supports the district court's decision.

The Policy includes a Civil Authority provision that extends Business Income and Extra Expense coverages for three weeks in the event that certain requirements are met: (1) an "action of civil authority" (for example, a government order or police roadblock) (2) "prohibits access to the described premises" (here, Mudpie's store) (3) "due to direct physical loss of or damage to property at locations, other than the described premises," within 100 miles (e.g., a fire nearby) (4) "caused by or resulting from a Covered Cause of Loss." 2-ER-129. In other words, a Covered Cause of Loss has to damage nearby property, resulting in government action prohibiting Mudpie from using its own store.

Mudpie maintains that a mere loss of the use of its premises resulting from a governmental order constitutes "direct physical loss of or damage to property" at the insured premises, triggering coverage under the main Business Income and Extra Expense provisions discussed above. But if Mudpie's position were correct, there would be no reason for the Policy to include the "Coverage Extension" for Civil Authority because that extension of coverage would be subsumed within the Business Income and Extra Expense provisions. As a case cited by Mudpie itself explains, a "coverage extension gives additional coverage *not available elsewhere* under the Policy." *Sierra Pacific Power Co. v. Hartford Steam Boiler Inspection & Ins. Co.*, 665 F.3d 1166, 1173 (9th Cir. 2012) (emphasis added). An insurance policy also should not be construed in a manner that renders any of its provisions superfluous. *Titan Corp.*, 22 Cal. App. 4th at 473–74; Cal. Civ. Code § 1641.

Mudpie argues that the Civil Authority provision is a "supplemental" coverage that cannot "limit" the scope of the main Business Income coverages. Op. Br. at 36. But Travelers does not seek to use the Civil Authority provision as a limitation on the Business Income provision; it simply asks the Court to construe the entire Policy, as California law requires, in a manner that gives *all* provisions reasonable force and effect. As Mudpie apparently would have it, the only circumstance in which the Civil Authority provision would not be subsumed by the Business Income and Extra Expense provisions would be if the entire 12 months of

Business Income and Extra Expense coverage were exhausted, 2-ER-51, and a government order continued in place thereafter for up to three weeks. That is nonsensical and belied by the Policy's express terms. A coverage extension, like Civil Authority, is "subject to and not in addition to the applicable limits of insurance" so it cannot extend coverage beyond the 12-month limit. 2-ER-125; *see* 2-ER-51 (displaying "Business Income/Extra Expense Limit" as "Actual loss for 12 consecutive months"). Mudpie's construction of the Policy would render the Civil Authority coverage nugatory, which is perhaps why it has abandoned its Civil Authority claim.[2]

D. An overwhelming majority of courts across the country, including in California, have agreed with the district court's decision.

Mudpie does not even acknowledge that the decision below is strongly supported by an "overwhelming majority of courts" addressing the same issue presented here and reaching the same result. *Water Sports Kauai, Inc.*, 2020 WL 6562332, at *3. "In policies with similar language and scope, numerous courts have now held that neither the presence of COVID-19 in society nor government restrictions can by themselves constitute direct physical loss or direct physical damage under California law." *BA LAX, LLC v. Hartford Fire Ins. Co.*, 2021 WL 144248, at *3 (C.D. Cal. Jan. 12, 2021) (collecting cases).

[2] *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, 2020 WL 7249624

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For example, in one recent Coronavirus-related case involving the same Travelers policy provisions at issue here, the court held there was no "direct physical loss of or damage to property" because the restrictions did not "physically alter any [insured] property." *10E, LLC v. Travelers Indem. Co. of Conn.*, 2020 WL 5359653 (C.D. Cal. Sept. 2, 2020), *appeal pending*, No. 20-56206 (9th Cir.). "Under California law," the court explained, "losses from inability to use property do not amount to 'direct physical loss of or damage to property' within the ordinary and popular meaning of that phrase." *Id.* at *4. Many other cases involving the same Travelers policy language ended in dismissal for the same reason. *Pez Seafood DTLA, LLC v. Travelers Indem. Co.*, 2021 WL 234355, at *4–5 (C.D. Cal. Jan. 20, 2021), *appeal pending*, No. 21-55100 (9th Cir.); *Travelers Cas. Ins. Co. of Am. v. Geragos & Geragos*, 2020 WL 6156584, at *4–5 (C.D. Cal. Oct. 19, 2020); *Mark's Engine Co. No. 28 Restaurant, LLC v. Travelers Indem. Co. of Conn.*, 2020 WL 5938689, *3–4 (C.D. Cal. Oct. 2, 2020), *appeal pending*, No. 20-56031 (9th Cir.); *Jonathan Oheb MD, Inc. v. Travelers Cas. Ins. Co. of Am.*, 2020 WL 7769880, at *3–4 (C.D. Cal. Dec. 30, 2020).

Courts have dismissed cases involving other insurers' policies for the same reason. In *Water Sports Kauai*, for example, the court held that "deprivation of the

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(E.D. Va. Dec. 9, 2020), cited by Mudpie, does not address this issue.

functionality of the property" as a result of Coronavirus-related government orders was not "direct physical loss of or damage to property" because the insured "has not alleged any *direct physical* anything that happened to or at its specific properties. Moreover, it has not been dispossessed or deprived *of* any specific property; its inventory and equipment remain." 2020 WL 6562332, at *6.

Another court persuasively explained that the same interpretation advocated by Mudpie here "is not a reasonable one because it would be a sweeping expansion of insurance coverage without any manageable bounds." *Plan Check Downtown III, LLC v. AmGuard Ins. Co.*, 2020 WL 5742712, at *6 (C.D. Cal. Sept. 10, 2020), *appeal pending*, No. 20-56020 (9th Cir.). If a governmental order restricting the use of property amounted to a direct physical loss of property, it wouldn't be hard to imagine absurd results. Insureds could make claims "[i]f a building's elevator system had a software bug that temporarily shut down all the elevators," or if "a snowstorm . . . interfere[d] with a restaurant's outdoor dining service." *Id.* "The list of losses that do not fit within the parties' expectations of what property insurance should cover would be a very, very long one," and Mudpie's theory would be "a major departure from established California law." *Id.* at *6–7.

Numerous other California federal district court decisions are in accord with these decisions.[3]

The long line of decisions resoundingly rejecting Plaintiff's position is not limited to California, but includes dozens of cases nationwide arising from the Coronavirus—far too many to cite here. "[N]early every court to address this issue has concluded that loss of use of a premises due to a governmental closure order does not trigger business income coverage premised on physical loss to property." *Michael Cetta, Inc. v. Admiral Indem. Co.*, 2020 WL 7321405, at *8 (S.D.N.Y. Dec. 11, 2020) (collecting cases); *see also Promotional Headwear Int'l v. Cincinnati Ins. Co.*, 2020 WL 7078735, at *6 (D. Kan. Dec. 3, 2020) ("[T]he overwhelming majority of cases to consider business income claims stemming from COVID-19 with similar policy language hold that 'direct physical loss or

[3] *Robert W. Fountain, Inc. v. Citizens Ins. Co. of Am.*, 2020 WL 7247207, at *4 (N.D. Cal. Dec. 9, 2020), *appeal pending*, No. 21-15053 (9th Cir.); *Palmdale Estates, Inc. v. Blackboard Ins. Co.*, 2021 WL 25048, *2–3 (N.D. Cal. Jan. 4, 2021); *Baker v. Or. Mut. Ins. Co.*, 2021 WL 24841, at *2–3 (N.D. Cal. Jan. 4, 2021); *Mortar & Pestle Corp. v. Atain Specialty Ins. Co.*, 2020 WL 7495180, *3–4 (N.D. Cal. Dec. 21, 2020); *Selane Prods., Inc. v. Cont'l Cas. Co.*, 2020 WL 7253378, at *4–6 (C.D. Cal. Nov. 24, 2020); *Long Affair Carpet & Rug, LLC v. Liberty Mut. Ins. Co.*, 2020 WL 6865774, at *2–3 (C.D. Cal. Nov. 12, 2020); *W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos.*, 2020 WL 6440037, at *3–4 (C.D. Cal. Oct. 27, 2020); *Pappy's Barber Shops, Inc. v. Farmers Group, Inc.*, 2020 WL 5500221, at *4–5 (S.D. Cal. Sept. 11, 2020).

damage' to property requires some showing of actual or tangible harm to or intrusion on the property itself.").

E. The cases Mudpie cites in an effort to circumvent the requirement of physical harm only underscore that dismissal was proper.

The district court also properly rejected Mudpie's reliance on various cases, largely from outside California, that "involved an intervening physical force which 'made the premises uninhabitable or entirely unusable." 1-ER-10–12. Mudpie again relies on these cases on appeal, asserting that "the district court overread cases from other jurisdictions as requiring some sort of structural change in property." Op. Br. at 31. But Mudpie has missed the district court's point. The court did not read the cases to require some "structural change," but instead only some "physical" impact on the property—as the Policy requires. 1-ER-10.

Mudpie's cases reinforce that physical loss or damage is a prerequisite to coverage. Some involve damage to real property. One case, for example, involved a building that was physically affected by leaked gasoline saturating the premises, *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 56 (Colo. 1968), and another case concerned an ammonia leak requiring an evacuation and extensive remediation. *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2014 WL 6675934, at *3–4, *6 (D.N.J. Nov. 25, 2014). In these cases, "there was a *pervasive, physical impact* on the insured property for which each court concluded was *tantamount to physical loss or damage*." *Real Hospitality*, 2020 WL 6503405

at *6 n.11 (emphasis added). In *Western Fire*, the court acknowledged that "*[i]t is perhaps quite true that* the so-called 'loss of use' of the church premises, standing alone, does not in and of itself constitute a 'direct physical loss,'" but concluded that the "direct physical loss" requirement was met because of the accumulation of gasoline around and under the church. 437 P.2d at 55. In other words, "[a] physical loss occurred when the foundations became saturated with gasoline." *Ward Gen. Ins. Servs.*, 114 Cal. App. 4th at 558. Here, in contrast, Mudpie does not claim its property became contaminated, by the Coronavirus or otherwise.

There was also physical damage to real property in *Hughes v. Potomac Insurance Co.*, 199 Cal. App. 2d 239 (1962). There, a landslide stripped the soil from around and beneath the insureds' house, leaving it perched over the edge of a newly formed, 30-foot cliff. "It goes without question," the court concluded, that the house "suffered real and severe damage when the soil beneath it slid away and left it overhanging a 30-foot cliff." *Id.* at 249. "*Until such damage was repaired* and the land beneath the building stabilized, the structure could scarcely be considered a 'dwelling building' in the sense that rational persons would be content to reside there." *Id.* at 249 (emphasis added). As another case later explained, "[q]uite clearly, the loss of the backyard was a physical loss of tangible property. The essential question decided by the *Hughes* court was whether the insured 'dwelling' included the ground under the building." *Ward Gen. Ins. Servs.,*

114 Cal. App. 4th at 558; *see also Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 17 (W. Va. 1998) (relying on *Hughes*, in case involving unstable retaining wall that damaged and physically threatened homes). Here, in contrast, nothing physically happened to Mudpie's store.

Mudpie also cites cases in which personal property was physically lost. In *Universal Savings Bank v. Bankers Standard Insurance Company*, 2004 WL 3016644, at *6 (Cal. Ct. App. Dec. 30, 2004) (unpublished), for example, personal property that a bank was relying upon as collateral went missing. The court held that the disappearance of the collateral was a "physical loss" because it was a "physical displacement or loss of physical possession" of the property. *Id.* It was much the same story in *Total Intermodal*: Cargo was physically lost when it was "misplaced" and became "unrecoverable," resulting in "permanent dispossession." 2018 WL 3829767, at *3–4. Here, in contrast, none of Mudpie's property has been misplaced or is unrecoverable, nor has Mudpie been dispossessed (permanently or otherwise) of any of its property. What Mudpie alleges is a *financial* loss from being required to close its store temporarily to slow the spread of a virus.

Mudpie otherwise relies on a few Coronavirus-related decisions from courts outside of California, some of which already have been repeatedly criticized and distinguished by other courts.

North State Deli, LLC v. Cincinnati Insurance Company, 2020 WL 6281507 (N.C. Super. Ct. Oct. 9, 2020), a state trial-court order drafted by the plaintiffs' lawyers in that case, is contrary to California law, ignored the numerous decisions nationwide supporting the insurer's position, and failed to address *Harry's Cadillac*, controlling appellate authority in North Carolina that is directly contrary to the outcome reached. *See Kevin Barry Fine Art Assoc. v. Sentinel Ins. Co. Ltd.*, 2021 WL 141180, at *5 n.1 (N.D. Cal. Jan. 13, 2021) (rejecting *North State Deli*).

Perry Street Brewing Company v. Mutual of Enumclaw Insurance Company, 2020 WL 7258116 (Wash. Super. Ct. Nov. 23, 2020), another out-of-state trial-court order, failed to give any effect to the words "direct" or "physical" in the phrase "direct physical loss." In asserting that the insurer treated "loss" and "damage" as identical, the court ignored that a "physical loss" would include a theft or total loss.[4]

Studio 417, Inc. v. Cincinnati Insurance Co., 2020 WL 4692385 (W.D. Mo. Aug. 12, 2020), relied on the plaintiffs' allegations that "over the last several months, it is likely that customers, employees, and/or other visitors to the insured properties were infected with COVID-19 and thereby infected the insured

[4] *Nautilus Group, Inc. v. Allianz Global Risks US*, 2012 WL 760940, at *7 (W.D. Wash. Mar. 8, 2012), cited in *Perry Street*, simply concluded that a theft of personal property was a physical loss.

properties with the virus." *Id.* at *2. While that allegation should not have been sufficient to plead "direct physical loss of or damage to property" (and few courts other than the same judge who decided *Studio 417* have so concluded), Mudpie makes no such allegation here.[5] In addition, unlike the Policy here, the policies in *North State Deli* and *Studio 417* had no virus exclusion, and the *Perry Street* court did not mention any virus exclusion.

The state trial court decision in *U.S. Airways, Inc. v. Commonwealth Insurance Company*, 2004 WL 1094684 (Va. Cir. Ct. May 14, 2004), has no bearing on the issues here. The court found potential coverage under an unusual civil authority provision that made no reference "to what property must be damaged or where the loss must have occurred prior to civil authority intervention," and thus damage to the insured property was not required. *Id.* at *4–5.

Lastly, Mudpie cites *Elegant Massage*, which concluded, under Virginia law, that "impacts from intangible noxious gasses or toxic air particles that make

[5] Numerous Coronavirus-related decisions have distinguished or declined to follow *Studio 417*. *E.g.*, *Water Sports Kauai, Inc.*, 2020 WL 6562332, at *4 (distinguishing *Studio 417* where there was no allegation that the Coronavirus was on the insured premises); *Michael Cetta, Inc.*, 2020 WL 7321405, at *10 (same). Two judges of the same court have disagreed with or distinguished *Studio 417*. *Zwillo V, Corp. v. Lexington Ins. Co.*, 2020 WL 7137110, at *4, *8 (W.D. Mo. Dec. 2, 2020) (disagreeing with *Studio 417*); *BBMS, LLC v. Cont'l Cas. Co.*, 2020 WL 7260035, at *4 (W.D. Mo. Nov. 30, 2020) (distinguishing *Studio 417*).

the property uninhabitable or dangerous to use" could potentially constitute "direct physical loss" of property, citing cases in which there was a pervasive, physical impact on the property. 2020 WL 7249624, at *8–9. The court stated that "it is plausible that Plaintiff's [sic] experienced a direct physical loss when the property was deemed uninhabitable, inaccessible, and dangerous to use by the Executive Orders because of its high *risk* for spreading COVID-19, an invisible but highly lethal virus." *Id.* at *10 (emphasis added). But the mere threat of a possible physical impact cannot be sufficient to trigger coverage. *Water Sports Kauai*, 2020 WL 6562332, at *4 ("the overwhelming majority of courts . . . have determined that the mere threat of coronavirus cannot cause a 'direct physical loss of or damage to' covered property as required under the Policy"); *Whiskey River on Vintage, Inc. v. Ill. Cas. Co.*, 2020 WL 7258575, at *10 ("'physical loss or damage' requires a material loss, which calls for something more than a threat of loss"), *appeal pending*, No. 20-3707 (8th Cir.); *Phoenix Ins. Co. v. Infogroup, Inc.*, 147 F. Supp. 3d 815, 825 (S.D. Iowa 2015) (threat of flooding was insufficient to constitute "physical loss or damage").

Mudpie's reply no doubt will focus on the *Henderson Road* court's recent suggestion that "real property can be lost and later returned or restored," 2021 WL 168422, at *12, but real property plainly cannot physically disappear or be misplaced. The court failed to explain how *anything* "physical," i.e., "perceptible

especially through the senses and subject to the laws of nature" or "measurable by weight, motion and resistance" occurred to the insured's property, and nothing physical happened to Mudpie's property here. *Id.* at *13 (quoting a *Merriam-Webster* online dictionary). In any event, the policy in *Henderson Road* was different in several respects: (1) the policy specifically covered "direct physical loss of or damage to 'real property,'" leading to the court's conclusion that "real property" could be physically "lost," *id.* at *13; (2) the policy defined "covered cause of loss" as a "fortuitous cause or event" rather than a risk of direct physical loss, *id.*; and (3) the "period of restoration" definition was substantially different as noted above.

F. Mudpie's other attacks on the district court's reasoning lack merit.

Mudpie raises two additional conceptual disagreements with the district court's reasoning that are meritless and should be rejected. First, Mudpie maintains that the district court incorrectly concluded that a "direct physical loss of . . . property" must be a "permanent dispossession." Op. Br. at 26–28. That was just one ground on which the court distinguished *Total Intermodal*. The court also recognized that nothing "direct" or "physical" had happened to Mudpie's property, and none of its property had been lost—"Mudpie's physical storefront has not been 'misplaced' or become 'unrecoverable,' and neither has its inventory." 1-ER-9. Mudpie did not lose possession of any of its property; it merely lost, temporarily,

the right to open its doors to the public. *See Pez Seafood*, 2021 WL 234355, at *4 ("Plaintiff's property was not misplaced or unrecoverable—the restaurant remained physically present and within Plaintiff's possession.").

California courts "do not abandon common sense when reading an insurance policy." *Mitroff v. United Servs. Auto. Ass'n*, 72 Cal. App. 4th 1230, 1239 (1999). A business owner who loses the keys to her store or who loses the legal right to use the premises because she fails to pay the rent or the mortgage has not sustained a "direct physical loss of . . . property." When a health department shuts down a restaurant because of unsanitary practices, that is not a "direct physical loss of . . . property." *Plan Check Downtown*, 2020 WL 5742712, at *6 (using various hypothetical examples to explain why insured's interpretation of "direct physical loss" "is not a reasonable one because it would be a sweeping expansion of insurance coverage without any manageable bounds").

As one of Mudpie's *amici* admits, what Mudpie lost temporarily due to the shutdown orders is best characterized as the legal right to open the doors of its store to the public. *See* Restaurant Law Ctr. Amicus Br. at 21 ("Mudpie no longer possessed the same rights to its property as it did before."). That is not a "direct physical loss of . . . property." *See Sponholz*, 866 F.2d at 1163 (defective title to a vessel was not "physical loss or damage"). Another court persuasively explained with hypothetical examples why the same argument made by Mudpie here defies

common sense. For example, if "a teenager broke curfew, and his parents punished him by taking away the keys to his car," then he "undoubtedly" would have "lost the ability to use the car." *Michael Cetta, Inc.*, 2020 WL 7321405, at *6. But "we would not say that there had been a "direct physical loss of or damage to" the car." *Id.* Mudpie didn't lose its store or the property within it. It instead lost its ability to use the store—a property right that was never insured.

Second, Mudpie maintains that the district court erred in referencing the absence of any "intervening physical force" because that "is not language found in the policy." Op. Br. at 29. Mudpie further asserts that "the more reasonable interpretation is that direct physical loss of property means the deprivation or dispossession of physical (tangible) property." *Id.* But it is the *loss* that must be "physical," not the property (which is always physical). The district court correctly recognized that, to the extent that some non-California courts have found coverage where a building was not physically damaged, such as where there was an ammonia leak in *Gregory Packaging*, it was because there was "an intervening physical force which 'made the premises uninhabitable or entirely unusable.'" 1-ER-10; *see also* Part I.E, *supra*.

II. The Virus and Loss-of-Use Exclusions in the Policy bar coverage for all of Mudpie's claimed losses.

This Court can "can affirm on any ground supported by the record," including an exclusion in an insurance policy. *Biltmore Assocs., LLC v. Twin City*

Fire Ins. Co., 572 F.3d 663, 668 (9th Cir. 2009) (affirming Rule 12(b)(6) dismissal of complaint based on exclusion where district court had dismissed complaint for failure to plead claims falling within policy's coverage). Here, the Virus and Loss-of-Use Exclusions completely bar coverage for all of Mudpie's claimed losses, and so they are independent bases for affirmance. The Court can therefore decide this case in Travelers' favor even without reaching the lone question presented by Mudpie's opening brief.

A. The Virus Exclusion unambiguously bars coverage.

The Policy does not cover business-income losses or extra expenses arising from any and all direct physical losses of or damage to property, as Mudpie's brief suggests. It instead covers such financial losses only if the predicate physical loss or damage is "caused by or result[s] from a Covered Cause of Loss." 2-ER-116–17. The cause of Mudpie's claimed losses of use is the Coronavirus, and a virus is not a "Covered Cause of Loss": The Policy's Virus Exclusion bars coverage for all loss and damage "caused by or resulting from any virus . . . that induces or is capable of inducing physical distress, illness or disease." 2-ER-262. The plain language of an insurance policy controls when it is "is clear and explicit," as it is here. *Palmer*, 21 Cal. 4th at 1115; Cal. Civ. Code, § 1638.

Legions of courts in California and elsewhere have enforced the same Virus Exclusion to dismiss lawsuits against Travelers and other insurers seeking

business-income and extra-expense coverage attributable to the Coronavirus and government orders issued to slow its spread. In each case, the court held the Virus Exclusion was unambiguous and dismissed the claims against the insurers. *See, e.g.*, *10E, LLC v. Travelers Indem. Co. of Conn.*, 2020 WL 6749361, at *2 (C.D. Cal. Nov. 13, 2020); *Geragos & Geragos*, 2020 WL 6156584, at *4; *Mark's Engine*, 2020 WL 5938689, at *5; *Real Hospitality*, 2020 WL 6503405, at *8; *Pez Seafood*, 2021 WL 234355, at *7; *Riverwalk Seafood Grill Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 20 C 3768, 2021 WL 81659, at *3 (N.D. Ill. Jan. 7, 2021) (courts have "nearly unanimously determined that these exclusions bar coverage of similar claims").[6] This Court should do the same.

B. Mudpie's attempts to avoid the Virus Exclusion are meritless.

In the district court, Mudpie did not dispute that the Coronavirus was an excluded cause of loss under the Virus Exclusion, and instead asserted that its claimed losses stemmed only from the Stay at Home Order, not the Coronavirus

[6] There are many more such cases besides these. *See, e.g.*, *Karen Trinh, DDS, Inc. v. State Farm Gen. Ins. Co.*, 2020 WL 7696080, at *3–4 (N.D. Cal. Dec. 28, 2020); *Healthnow Med. Ctr., Inc. v. State Farm Gen. Ins. Co.*, 2020 WL 7260055, at *2 (N.D. Cal. Dec. 10, 2020); *Toppers Salon & Health Spa, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2020 WL 7024287, at *3 (E.D. Pa. Nov. 30, 2020); *Natty Greene's Brewing Co., LLC v. Travelers Cas. Ins. Co. of Am.*, 2020 WL 7024882 (M.D.N.C. Nov. 30, 2020); *Edison Kennedy, LLC v. Scottsdale Ins. Co.*, 2021 WL 22314, at *7–8 (M.D. Fla. Jan. 4, 2021); *Musso & Frank Grill Co., Inc. v. Mitsui Sumitomo Ins. USA Inc.*, 2020 WL 7346569 (Cal. Super. Nov. 9, 2020).

itself. This argument strains credulity: The Stay at Home Order was, obviously, issued *because of* the Coronavirus.

Mudpie seems to suggest that only the narrowest proximate cause of its losses—the Stay at Home Order, in its telling—matters. But California courts have consistently interpreted exclusions like the Virus Exclusions here broadly—especially those barring coverage for any losses "resulting from" an excluded cause of loss. In one recent case, for example, the Court of Appeal explained that "[t]he term 'resulting from' broadly links a factual situation with the event creating liability, and connotes only a minimal causal connection or incidental relationship." *Mosley v. Pac. Specialty Ins. Co.*, 49 Cal. App. 5th 417, 424 (2020). The phrase is "generally equated" with "origination, growth or flow from the event." *Id.* In *Mosley*, the insurance policy excluded losses "resulting from any manufacturing, production or operation, engaged in . . . [t]he growing of plants." *Id*. at 423. Applying "common sense," the court held that this exclusion applied to fire losses where alterations to a property's electrical system were made to power a marijuana-growing operation. *Id*. at 424 (concluding the losses "resulted from" the growing of plants because there was the requisite causal connection between growing marijuana, the fire, and the resulting loss).

Here, Mudpie's complaint makes clear that the Coronavirus has far more than a "minimal causal connection" to its claimed losses. Mudpie acknowledges

that the Stay at Home Order that required it to shut its doors was issued "to stop the transmission of COVID-19" and "control the spread of COVID-19." 2-ER-22–23 ¶¶ 17, 22–25; *see also* 2-ER-23 ¶ 22 (alleging that "shops" and other "densely occupied spaces, heavily traveled spaces, and frequently visited spaces–were likely to become hot-spots for local transmission of COVID-19" without "population-wide social distancing"); *see also* 2-ER-25 ¶ 38 (alleging that Plaintiff's claimed losses are "a result of" the Coronavirus Orders). Mudpie's claimed losses therefore were caused by, or result from, the Coronavirus. And because the Coronavirus is a virus, it is not a Covered Cause of Loss, and Mudpie isn't entitled to coverage.

Insureds have made much the same causation argument as Mudpie's in insurance cases litigated across the country, including in California. Courts have consistently rejected the idea that the Virus Exclusion does not apply to government shutdown orders issued because of the Coronavirus. Here are but a few of many examples:

- *Franklin EWC, Inc. v. Hartford Financial Services Group, Inc.*, 2020 WL 5642483, at *2 (N.D. Cal. Sept. 22, 2020): "under Plaintiffs' theory, the loss is created by the Closure Orders rather than the virus, and therefore the Virus Exclusion does not apply. Nonsense."

- *10E, LLC*, 2020 WL 6749361, at *3: "Even if, as Plaintiff alleges, business restrictions enacted in response to COVID-19 were disproportionate to the magnitude of the public health problem, they would still have a 'minimal causal connection' to or 'flow from' the COVID-19 virus. Therefore, the plain meaning of the virus exclusion does foreclose coverage under the Policy."
- *BA LAX, LLC*, 2021 WL 144248, at *4 (C.D. Cal. Jan. 12, 2021): "Numerous California courts have concluded that similar virus exclusions preclude coverage for business losses resulting from the spread of COVID-19 in society and from public health restrictions intended to mitigate that spread."

In the district court, Mudpie cited California's efficient proximate cause doctrine, which the *Mosley* court found no need to even mention, and which numerous courts have rejected in the Coronavirus context. The doctrine cannot aid Mudpie because the Virus Exclusion "plainly and precisely communicate[s] an excluded risk," *De Bruyn v. Superior Court*, 158 Cal. App. 4th 1213, 1224 (2008), and Mudpie simply attempts to "affix[] an additional label or separate characterization to the act or event causing the loss"—the Coronavirus. *Chadwick v. Fire Ins. Exch.*, 17 Cal. App. 4th 1112, 1117 (1993). Moreover, "[a]n 'efficient proximate cause' is a cause of loss that predominates and sets the other cause of

loss in motion"; "[t]he Civil Authority Orders would not exist absent the presence of COVID-19; COVID-19 is therefore the efficient proximate of Plaintiffs' losses." *Boxed Foods Co. v. California Capital Ins. Co.*, 2020 WL 6271021, at *4 (N.D. Cal. Oct. 26, 2020); *accord BA LAX, LLC*, 2021 WL 144248, at *4.

In the face of the overwhelming weight of authority enforcing identical or similar virus exclusions, Mudpie will likely again cite *Henderson Road*. In that case, the court granted summary judgment to the plaintiff insureds and declined to enforce the insurers' exclusion. But the exclusion wasn't a virus exclusion at all; it was a microorganism exclusion requiring "the presence, growth, proliferation, spread, or any activity of microorganisms." *Henderson Road*, 2021 WL 168422, at *14. That exclusion is nothing like the one here. Travelers' Virus Exclusion not only pertains specifically to viruses, but also does not require the presence of a virus on the insured's premises (or any other premises); it requires only that the "loss or damage" be "caused by or resulting from any virus." 2-ER-262. Mudpie's claimed losses did result from the Coronavirus, so they are not covered.

C. The Loss-of-Use Exclusion also unambiguously bars coverage.

The Virus Exclusion is not the only exclusion that completely bars coverage for Mudpie's claimed losses. The Loss-of-Use Exclusion does, too. The Policy straightforwardly states that Travelers "will not pay for loss or damage caused by or resulting from . . . loss of use or loss of market." 2-ER-138. But that is

precisely what Mudpie has claimed—financial losses resulting from its inability to use its store. Courts routinely enforce loss-of-use exclusions just like the one in the Policy. *E.g.*, *Selane Prod., Inc. v. Cont'l Cas. Co.*, 2020 WL 7253378, at *6 (C.D. Cal. Nov. 24, 2020).

The Loss-of-Use Exclusion is an independent basis for affirmance.

III. Mudpie waived its breach-of-the-implied-covenant claim on appeal.

Mudpie asserted three claims in its complaint, one of which was for breach of the implied covenant of good faith and fair dealing. The district court dismissed this claim because it cannot survive where no policy benefits are due. 1-ER-16. A bad-faith claim "cannot be maintained unless policy benefits are due under a contract." *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 35 (1995); *see also Brown v. Mid-Century Ins. Co.*, 215 Cal. App. 4th 841, 858 (2013) ("Because the policy did not cover the [insureds'] claims, however, the [insureds] do not have a claim for breach of the implied covenant of good faith and fair dealing.")

Mudpie seeks reversal of this portion of the dismissal order only in a single sentence in the conclusion of its brief. Op. Br. at 37. By not addressing the issue substantively, Mudpie has waived it. *Autotel v. Nevada Bell Tel. Co.*, 697 F.3d 846, 857 n.9 (9th Cir. 2012); *Halicki Films, LLC v. Sanderson Sales & Mktg.*, 547 F.3d 1213, 1229–30 (9th Cir. 2008). The Court should therefore affirm the district court's dismissal of Mudpie's bad-faith claim.

IV. The Court should not certify Mudpie's physical-loss-or-damage question to the California Supreme Court.

This Court should decline Mudpie's request to certify to the California Supreme Court the question whether "business interruption insurance for all risks of 'direct physical loss of or damage to' covered property [could] be reasonably construed to insure against" business losses stemming from the Coronavirus pandemic. Op. Br. at 38. There are five reasons not to certify that question.

First, that question isn't even presented by this case. Mudpie didn't buy insurance for financial losses arising from *all* "direct physical loss of or damage to" its property that requires a suspension of its operations. It bought insurance only for direct physical loss or damage that is "caused by or resulting from a Covered Cause of Loss." 2-ER-115. Because Mudpie's losses were caused by or resulted from the Coronavirus, which is *not* a Covered Cause of Loss, the Court need not resolve what the phrase "direct physical loss of or damage to" means to decide this case. There is no need to certify to a state supreme court a question that need not be resolved at all.

Second, even if Mudpie's proposed question were presented by this case, it would not be the *only* question presented by this case. Another question—whether the Loss-of-Use Exclusion or the Virus Exclusion in Mudpie's Policy bars coverage—is case-dispositive and therefore eliminates the need for certifying any other question to the California Supreme Court. Each of those exclusions squarely

applies, and each is an independent basis for affirming the judgment. See Parts II.A–C, *supra*. Circuit courts, including this one, routinely deny certification requests when a case can be resolved without an answer to the proposed question. *See*, *e.g.*, *State Farm Mut. Auto. Ins. Co. v. Pate*, 275 F.3d 666, 672 (7th Cir. 2001) ("Of course, if a question may not be dispositive to a case, then it is a weak candidate for certification."); *Stollenwerk v. Tri-W. Health Care All.*, 254 F. App'x 664, 668–69 (9th Cir. 2007) (declining to certify question to state supreme court because the "answer to the legal question on which Plaintiffs seek certification would not affect our disposition of this case"). Certification of a question that is not case-dispositive would also be inconsistent with the California Rules of Court, which authorize certification only if "[t]he decision could determine the outcome" of a case. Cal. R. Ct. 8.548(a)(1).

Third, the proposed question is straightforward and can be resolved in Travelers' favor without certification. There are several California Court of Appeal decisions construing the "direct physical loss" requirement in property insurance policies, including *MRI Healthcare*, *Ward General Insurance Services*, and *Doyle*. *See* Part I.B, *supra.* These decisions provide this Court with ample guidance. *See Herrera v. Zumiez, Inc.*, 953 F.3d 1063, 1070 (9th Cir. 2020) (declining to certify question because "there are no conflicting California Courts of Appeal decisions," and this Court had "no reason to doubt" that the California

Supreme Court would adopt the rationale of those courts); *Ultrasystems Envtl., Inc. v. STV, Inc.*, 674 F. App'x 645, 649 (9th Cir. 2017) (declining to certify question to California Supreme Court "because it is one of straightforward plain language interpretation"). The cases Mudpie cites in support of its certification request are irrelevant because there the Courts of Appeal were split. Op. Br. at 40–41 (citing *Sierra Pac. Power Co. v. Hartford Steam Boiler Inspection & Ins. Co.*, 665 F.3d 1166, 1172 (9th Cir. 2012), and *Patterson v. City of Yuba City*, 884 F.3d 838, 841 (9th Cir. 2018)). There is no split here.

Fourth, the California Supreme Court recently denied a petition to transfer an appeal from the Court of Appeal in a similar Coronavirus-related insurance case. *See Inns by the Sea v. Cal. Mut. Ins. Co.*, Case No. S265034 (Cal. Dec. 23, 2020). While the California Supreme Court may eventually reach the issue Plaintiff seeks to certify,[7] that court appears to have decided to allow the case law to develop in the Courts of Appeal first. *See Anderson v. Deutsche Bank Nat'l Trust Co. Americas*, 649 F. App'x 550, 552 n.1 (2016) ("We decline to certify this question to the Supreme Court of California, [citation], as it seems clear that the

[7] The Amicus Brief of the American Association for Justice incorrectly suggests that absent certification all of the Coronavirus-related litigation will be in federal court. As *Inns by the Sea* demonstrates, some cases do not qualify for federal jurisdiction, either because there is no diversity of citizenship or an insufficient amount in controversy.

California Supreme Court is aware of the emergence of this issue, but has not indicated a readiness to address it."). And the California Supreme Court may benefit from this Court's opinion. For example, in an important insurance case arising out of the devastation caused by Hurricane Katrina, the Louisiana Supreme Court had the benefit of, and agreed with, a decision of the Fifth Circuit. *In re Katrina Canal Breaches Litig.*, 495 F.3d 191 (5th Cir. 2007); *Sher v. Lafayette Ins. Co.*, 988 So. 2d 186 (La. 2008).

Fifth, Mudpie chose to bring this suit in federal court, and Travelers has a right to a federal forum under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2). The Second Circuit recently declined to certify to a state supreme court a question of insurance law that applied to many policyholders' claims, explaining that certification not only delays resolution of a case and adds substantial costs, but also defeats a litigant's right to a federal forum. *Valls v. Allstate Ins. Co.*, 919 F.3d 739, 743 (2d Cir. 2019). The insurer's interest in remaining in federal court "is entitled to significant weight in a federal court's decision whether to certify." *Id.*

For all of these reasons, the Court should deny Mudpie's request for certification to the California Supreme Court.

CONCLUSION

The district court correctly dismissed the complaint because Mudpie has not alleged that it suffered any "direct physical loss of or damage to property," as its Policy requires. Nothing has happened to Mudpie's *property*. That Mudpie had to shut its doors is not the same as Mudpie finding its store burned down or its property destroyed by water from a burst pipe. And even if Mudpie had suffered some physical loss or damage, it would make no difference, because the Virus Exclusion and the Loss-of-Use Exclusion both preclude coverage and are independent grounds for affirmance.

The Court should affirm the judgment.

Dated: February 8, 2021

Respectfully submitted,

/s/ Deborah L. Stein
Deborah L. Stein

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STATEMENT OF RELATED CASES

Under Ninth Circuit Rule 28-2.6, Travelers states that it is aware of related cases currently pending in this court:

1. The following cases pending in this Court involve Coronavirus-related insurance claims made in California under insurance policies issued by affiliates of Travelers, and may raise some of the same or closely related issues:

   a. *Mark's Engine Co. No. 28 Restaurant, LLC v. Travelers Indem. Co. of Conn.*, No. 20-56031

   b. *10E LLC v. Travelers Indem. Co. of Conn.*, No. 20-56206

   c. *Pez Seafood DTLA, LLC v. Travelers Indem. Co.*, No. 21-55100

2. The following cases pending in this Court involve Coronavirus-related insurance claims made in California under insurance policies *not* issued by affiliates of Travelers, and may raise some of the same or closely related issues:

   a. *Plan Check Downtown III, LLC v. AmGUARD Ins. Co.*, No. 20-56020

   b. *HealthNOW Med. Ctr., Inc. v. State Farm Gen. Ins. Co.*, No. 21-15054

   c. *Robert W. Fountain, Inc. v. Citizens Ins. Co. of Am.*, No. 21-15053

   d. *Trinh v. State Farm Gen. Ins. Co.*, 9th Cir. No. 21-15147

Dated: February 8, 2021

/s/ Deborah L. Stein
Deborah L. Stein

CERTIFICATE OF COMPLIANCE

I certify that under Federal Rule of Appellate Procedure 32(a)(7)(B) and Ninth Circuit Rule 32-1, this brief is proportionately spaced, has a typeface of 14 points, and contains 13,547 words, excluding the portions excepted by Federal Rule of Appellate Procedure 32(f), according to the word-count feature of Microsoft Word used to generate this brief.

Dated: February 8, 2021

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