No. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SAN JOSE SHARKS LLC, *et al.*,
Plaintiffs-Petitioners,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
COUNTY OF SANTA CLARA,
Respondent,

FACTORY MUTUAL INSURANCE COMPANY,
Defendant-Real Party in Interest.

Petition to Transfer to the Supreme Court to Petition for Writ of Mandate Concerning the Review of the August 8, 2022 Order Granting Defendant Factory Mutual Insurance Company's Motion to Strike, Entered by the Superior Court of the State of California, County of Santa Clara, No. 21CV383780
(Hon. Sunil R. Kulkarni, Presiding, Department 1)

PETITION TO TRANSFER CAUSE TO THE SUPREME COURT

COVINGTON & BURLING LLP
Benedict M. Lenhart+
Matthew J. Schlesinger+
One CityCenter, 850 Tenth Street NW
Washington, DC 20001-4956
Telephone: (202) 662-6000
blenhart@cov.com
mschlesinger@cov.com

+Pro hac vice forthcoming

COVINGTON & BURLING LLP
Rani Gupta (Bar No. 296346)
Thomas Martecchini (Bar No. 321515)
Sabrina T. McGraw (Bar No. 334120)
3000 El Camino Real
5 Palo Alto Square, 10th Floor
Palo Alto, CA 94306-2112
Telephone: (650) 632-4700
rgupta@cov.com
tmartecchini@cov.com
smcgraw@cov.com

Counsel for Petitioners

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PETITION TO TRANSFER CAUSE TO THE SUPREME COURT

To the Honorable Chief Justice and the Honorable Associate Justices of the California Supreme Court:

The Hockey Petitioners—the National Hockey League and 19 professional hockey teams that are parties to this case—request that this Court transfer to itself the petition for writ of mandate currently pending before the Court of Appeal, Sixth Appellate District, in *San Jose Sharks LLC v. Superior Court*, No. H050441. The Hockey Petitioners' mandamus petition presents the issue of whether, at the pleadings stage, a policyholder may state a claim for coverage under an "all risks" business interruption insurance policy by alleging that the COVID-19 virus caused "physical loss or damage" by being present in its business property, making the air and surfaces unsafe, and therefore preventing the policyholder from using that property to run its business, as three California appellate courts have held. The same issue is before the Court in *Another Planet Entertainment, LLC v. Vigilant Insurance Co.* (9th Cir. 2022) 2022 WL 17972557 (No. S277893), in which the Ninth Circuit certified a substantially similar question to this Court in light of a split in California appellate authority.[1]

As discussed in their January 17, 2023 letter in support of acceptance of the certification request in *Another Planet*, the Hockey Petitioners agree that the question certified in *Another Planet* is an important one that warrants this Court's review. However, this case presents a better vehicle for resolving this question than *Another Planet*. The Hockey Petitioners allege comprehensive facts showing that the

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[1] "Can the actual or potential presence of the COVID-19 virus on an insured's premises constitute 'direct physical loss or damage to property' for purposes of coverage under a commercial property insurance policy?" *Another Planet*, 2022 WL 17972557, at *3.

COVID-19 virus was present at insured properties and physically altered the air (and surfaces) in arenas, changing them from safe to unsafe, and forcing the Hockey Petitioners to close arenas and conduct significant repairs to reopen their properties. Those detailed allegations demonstrate that the COVID-19 virus caused "physical loss or damage" in the way that the virus affected other businesses in California—by preventing those insureds from using their property to conduct normal business. And the Sixth Appellate District has recognized that the Hockey Petitioners' case merits review, issuing a show cause order. Attach. A at 1.

In *Another Planet*, the insurer has raised arguments specific to the insurance policy language and factual allegations in that case—thus potentially limiting the applicability of a ruling to other COVID-19 insurance coverage cases. Specifically, the insurer contends that (1) the *Another Planet* policy excludes "air" from the definition of insured property, (2) Another Planet did not allege that the COVID-19 virus was present on insured property, and (3) Another Planet did not allege that insured losses were caused by the virus's presence at insured property.

The Hockey Petitioners' case presents none of those issues. The insurer here does not assert that the Hockey Petitioners' "all risks" insurance policies exclude "air" from the definition of insured property. The Hockey Petitioners also allege in detail (with specific dates and locations) that the virus was present at insured arenas, and that the Hockey Petitioners were forced to shut down due to this presence. Other policyholders in California have made similar allegations.

Therefore, granting immediate review of the Hockey Petitioners' case would allow the Court to decide the question certified in *Another Planet* on a record that would ensure its ruling provides the broadest possible guidance to lower courts. This Court should therefore grant the

motion to transfer, and designate this case as a lead (or co-lead) case in deciding the certified question in *Another Planet*.

I. ISSUE PRESENTED

The Hockey Petitioners' mandamus petition presents the following issue:

> Whether at the pleadings stage, a policyholder may state a claim for coverage under an "all risks" business interruption insurance policy by alleging that the COVID-19 virus caused "physical loss or damage" by being present in its business property, making the air and surfaces unsafe, and therefore preventing the policyholder from using that property to run its business, as three California appellate courts have held.[2]

This question presented is similar to the question that the Ninth Circuit certified to this Court in *Another Planet*. *See supra* note 1.

II. STATEMENT OF THE CASE[3]

A. The Hockey Petitioners Were Forced To Stop Using Their Indoor Arenas Because Of The COVID-19 Virus

In March 2020, the Hockey Petitioners were forced to stop using their indoor arenas to host games because the coronavirus known as SARS-

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[2] The issue presented has been updated from the two appellate cases cited in the mandamus petition to three cases to account for *Shusha, Inc. v. Century-National Ins. Co.* (2022) 87 Cal.App.5th 250, which was issued after the Hockey Petitioners filed their petition, and to reflect that the mandamus petition involves the same issue presented by the *Another Planet* certified question.

[3] The citations are to the record before the Court of Appeal in the mandamus petition. The facts are taken from the Hockey Petitioners' Second Amended Complaint and must be deemed true for the purposes of this appeal. *See Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 6; *Turman v. Turning Point of Cent. Cal., Inc.* (2010) 191 Cal.App.4th 53, 63.

CoV-2 that causes COVID-19 (the "COVID-19 virus") was present at those arenas and caused physical harm to the air and surfaces in arenas. 1A0155 ¶ 1; 1A0183 ¶ 106.[4]

On March 12, 2020, the Hockey Petitioners were forced to pause the regular season immediately after a number of infectious Boston Celtics and Utah Jazz basketball players were present at a shared hockey and basketball arena during a game attended by fans. *See* 1A0155 ¶ 1; 1A0183 ¶ 106. Those confirmed cases were indicative of a larger population of infected people who were present at hockey arenas before March 12, 2020, but whose cases of COVID-19 could not be detected early in the pandemic because of nascent testing. 1A0155 ¶ 1.

Later in March, after the closures described above, governmental orders issued across the United States and in Canada prevented fans and players from accessing the Hockey Petitioners' arenas for various periods of time. 1A0155 ¶ 2. Several of these orders expressly stated that they were issued because the COVID-19 virus caused "physical damage" to property. 1A0155 ¶ 2; 1A0185–1A0191 ¶¶ 113–122.

COVID-19 is highly transmissible, particularly within indoor spaces. 1A0173–1A0174 ¶¶ 87–88; 1A0179–1A0180 ¶ 98. The COVID-19 virus

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[4] The "Hockey Petitioners" are San Jose Sharks LLC; Sharks Sports & Entertainment LLC; Anaheim Ducks Hockey Club, LLC; IceArizona Holdings LLC; Hockey Western New York, LLC; DCP HH LLC; Dallas Sports & Entertainment, L.P.; Sunrise Sports & Entertainment LLC; Minnesota Hockey Ventures Group, LP; Club de hockey Canadien, Inc.; Predators Holdings LLC; Devils Holdco LP; NY Hockey Holdings LLC; Capital Sports Holdings Inc.; Team Lemieux LLC; SLB Acquisition LLC; Maple Leaf Sports & Entertainment Ltd.; Aquilini Investment Group Limited Partnership; Black Knight Sports and Entertainment LLC; Megill-Stephenson Company Limited; Osmington Inc.; National Hockey League; NHL Enterprises, L.P.; NHL Enterprises Canada, L.P.; and NHL Enterprises B.V.

harms people because it first harms property through its deleterious physical effects on the property's air and surfaces. The virus changes air and surfaces from safe to unsafe, because the air and surfaces—now physically altered by the virus—become capable of transmitting a deadly disease. 1A0155 ¶ 2. Therefore, as a result of the virus's presence in hockey arenas, and the resulting harm to air and surfaces, the Hockey Petitioners could no longer use their indoor arenas for their intended purpose: hosting thousands of fans to watch hockey games. 1A0155–1A0156 ¶¶ 2–3.

Even without hockey games being played at arenas, from March through December 2020, the Hockey Petitioners confirmed more than 285 instances of people infected with COVID-19 being present at insured locations, including arenas, of every Hockey Petitioner. 1A0155–1A0156 ¶ 3; 1A0205–1A0209 ¶¶ 182–202. The Hockey Petitioners also allege, based on retrospective statistical analyses, that many more people infected with COVID-19 were present at hockey arenas before the closure of arenas in March 2020 due to "significant underreporting" early in the pandemic. 1A0205 ¶ 182. The Hockey Petitioners could not reopen their arenas in the midst of the pandemic without reintroducing the virus into the arenas. 1A0184 ¶ 110; 1A0195 ¶ 144; 1A0210 ¶ 204. Thus, in May 2020, the National Hockey League was forced to cancel the rest of the 2019–2020 NHL regular season. 1A0156 ¶ 4; 1A0195 ¶ 144.

Importantly, the mere cleaning of surfaces could not make indoor properties safe to reopen to host fans in 2020. 1A0175 ¶ 90; 1A0182–1A0183 ¶ 104; 1A0184 ¶ 110; 1A0192–1A0193 ¶ 134. Fans touch thousands of surfaces throughout a typical hockey game, and those surfaces could not be continuously cleaned throughout a game to remove the virus from all surfaces. 1A0157 ¶ 8. Additionally, the virus would be constantly reintroduced into the air in the arenas through infected people who could

not be identified because they were at their most infectious when they showed no symptoms. 1A0175–1A0176 ¶ 90.

During the following 2020–2021 NHL season, the presence of the COVID-19 virus in the arenas forced the NHL to truncate its regular season schedule and play hundreds fewer games than in a typical season. 1A0156 ¶ 4. Once the 2020–2021 regular season finally began in January 2021, the Hockey Petitioners also had to play with severe fan capacity restrictions due to the virus's presence at arenas. 1A0156 ¶¶ 4–5; 1A0199 ¶ 161.

The Hockey Petitioners lost more than $1 billion in earnings and incurred substantial expenses to remediate the physical damage to their arenas, including by complex cleaning and disinfection of surfaces and replacing air filtration systems. 1A0156–1A0157 ¶ 7; 1A0211–1A0212 ¶¶ 208–213; 1A0193 ¶ 137.

B. The Hockey Petitioners' All Risks Policies Cover Their Losses

Professional hockey derives much of its business from hosting fans in arenas. 1A0211 ¶ 208. Therefore, the Hockey Petitioners purchased from Real Party in Interest Factory Mutual Insurance Company business interruption insurance policies ("the Policies") that insure the Hockey Petitioners for this exact scenario: when they are unable to use their insured arenas because of a harmful substance that affected the arenas and prevented the Hockey Petitioners from conducting normal business. 1A0211 ¶ 208. These policies insure the loss of a single hockey game.

The two Policies sold by Factory Mutual contain a basic insuring agreement that covers the Hockey Petitioners' insured property "against ALL RISKS OF PHYSICAL LOSS OR DAMAGE," except as specifically excluded. 1A0235, 1A0484.

Two main coverages are at issue in this case. First, the Policies insure lost earnings "directly resulting from physical loss or damage of the

type insured" to property that is insured under the Policies, including hockey arenas. 1A0286, 1A0529. Second, the Civil or Military Authority coverage in the Policies pays for earnings loss "if an order of civil or military authority" (1) "limits, restricts or prohibits partial or total access to an insured location" and (2) the order results from "physical damage of the type insured" within five miles of an insured location. 1A0298, 1A0541.

The Hockey Petitioners' Policies do not set forth a minimum duration of damage, confirming that even losses of short duration—a single hockey game—are covered. 1A0286, 1A0298, 1A0529, 1A0541.

The insurance industry previously recognized that a virus could cause insured physical loss or damage after insurers paid millions to insureds because of the SARS pandemic. 1A0168 ¶ 68. Consequently, in 2006, an insurance trade group made available to insurers a standard "Exclusion of Loss Due to Virus or Bacteria," which purports to preclude coverage for all losses relating to a virus. 1A0168 ¶ 68. However, the Hockey Petitioners purchased Policies that do not contain this broad virus exclusion or similarly worded exclusions. 1A0168–1A0169 ¶¶ 70–73.

Despite this, Factory Mutual has taken the position that the only portions of the Policies that could cover the Hockey Petitioners' damages are two limited Communicable Disease coverages that are triggered by the actual presence of "communicable disease" on insured property. 1A0271, 1A0305, 1A0316, 1A0732–1A0733. Nothing in the Policies limits coverage for the Hockey Petitioners' losses to these provisions. 1A0167 ¶ 64.

C. The Respondent Court Dismissed The Majority Of The Hockey Petitioners' Complaint

This petition arises from the Respondent Court's order of August 8, 2022, granting Factory Mutual's motion to strike the majority of the Hockey Petitioners' Second Amended Complaint ("Complaint").

The Respondent Court overruled Factory Mutual's demurrer because it determined that the Hockey Petitioners alleged "that Communicable Disease coverage was denied," and it could not sustain the demurrer as to a portion of a cause of action. 1A1178–1A1180. However, the Respondent Court granted the motion to strike as to allegations regarding coverages requiring "physical loss or damage," without leave to amend. Attach. B at 8; 1A1179–1A1180, 1A1190. That ruling dismissed almost all of the Hockey Petitioners' case, which seeks more than $1 billion in damages, because the recovery under the Communicable Disease coverages is limited to $1 million per policy period. 1A0244, 1A0494.

The Court justified its ruling by stating that it could determine, as a matter of law, that the COVID-19 virus was incapable of causing insured "physical loss or damage" in light of *United Talent Agency v. Vigilant Insurance Co.* (2022) 77 Cal.App.5th 821, which the Respondent Court followed over the conflicting decision in *Marina Pacific Hotel & Suites, LLC v. Fireman's Fund Insurance Co.* (2022) 81 Cal.App.5th 96.

The Hockey Petitioners filed their petition for writ of mandate in the Court of Appeal for the Sixth Appellate District on October 7, 2022. On February 10, 2023, the Court of Appeal ordered the Respondent Court to show cause as to why a preemptory writ should not be issued. Attach. A at 1. In addition to the issues presented by the Hockey Petitioners' mandamus petition, the Court of Appeal asked the parties to brief the following questions:

> Was it *procedurally* appropriate on a demurrer and motion to strike for the trial judge to find, as a matter of law, that petitioners' second amended complaint failed to allege sufficient facts to support their claim for coverage for physical loss or damage to insured property? Did the trial court exceed its authority at the pleading stage by challenging the truth of the factual allegations in the second amended complaint supporting petitioners' claim for coverage based on physical loss or damage to insured property?

Attach. A at 1. The mandamus petition is still pending before the Court of Appeal.

III. REASONS FOR GRANTING THE PETITION TO TRANSFER

The pending mandamus petition presents an issue of public interest in California and nationwide: whether a plaintiff states a claim by alleging—as the Hockey Petitioners did—that the presence of the COVID-19 virus within their business property causes harm—or "physical loss or damage" in the parlance of the policies at issue—that triggers an insurer's duty to pay under a property and business interruption policy. Dozens of actions involving claims for insurance coverage for COVID-19-related losses are pending in the California state and federal courts, and out-of-state courts frequently look to California for guidance on important issues of insurance interpretation.[5] The Courts of Appeal are divided on this issue. Further, the courts that have decided this issue in favor of insurers have largely ignored California's longstanding pleading standards and principles of insurance interpretation, and the flawed precedent set by them may affect future insurance coverage disputes about other physical perils, such as wildfire smoke, that prevent businesses from operating as intended.

Because this issue is before the Court in *Another Planet*, this is the rare case where a motion to transfer should be granted. The Hockey Petitioners' case presents a better and more representative vehicle than *Another Planet* for answering the certified question because the Hockey Petitioners' factual allegations and insurance policies do not implicate the arguments raised by Another Planet's insurer that are specific to Another

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[5] For instance, the Vermont Supreme Court followed *Marina Pacific*'s reasoning in holding that the insured had alleged "direct physical loss or damage" from the COVID-19 virus. *Huntington Ingalls Indus., Inc. v. Ace Am. Ins. Co.* (Vt. Sept. 23, 2022) 2022 VT 45, ¶¶ 26, 44.

Planet and unrelated to the certified question. *See infra* Section III.B. Therefore, this case better ensures that the Court has a record that permits it to issue guidance to federal and state courts on the certified question of whether the COVID-19 virus can cause physical loss or damage for the purposes of insurance coverage and resolve the split in California appellate authority. This Court should grant the motion to transfer, designate this case as a lead case, and rule consistent with the better-reasoned California appellate decisions that such allegations state a claim for coverage at the pleadings stage.

A. The Courts Of Appeal Have Divided On The Issue Presented In The Hockey Petitioners' Case

California appellate courts have divided on the issue of whether the presence of the COVID-19 virus can cause "physical loss or damage." Three California appellate cases have held that a plaintiff can state a claim by alleging that the virus on its property prevented the normal use of property, thus sufficiently pleading "physical loss or damage."[6] Under these cases and long-settled California pleading standards, whether the virus was actually present and caused harm that triggers business

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[6] Other California appellate cases have reversed orders sustaining demurrers to COVID-19 insurance coverage complaints without leave to amend. *See Tarrar Enters., Inc. v. Associated Indem. Co.* (2022) 83 Cal.App.5th 685 (superior court erred by denying leave for the policyholder to amend to plead that the COVID-19 virus caused direct physical loss or damage); *Amy's Kitchen, Inc. v. Fireman's Fund Ins. Co.* (2022) 83 Cal.App.5th 1062 (holding, in the context of a communicable disease coverage provision triggered by "direct physical loss or damage," that the superior court erred in denying leave to amend based on the incorrect assumption that "no potential COVID-related harm could amount to 'direct physical loss or damage'").

interruption coverage is a question that can only be determined based on facts, not at the pleadings stage—as has long occurred in non-COVID-19 insurance coverage cases.

The first California appellate case to hold that the COVID-19 virus could cause physical loss or damage is *Inns by the Sea v. California Mutual Insurance Co.* (2021) 71 Cal.App.5th 688.[7] *Inns* held that the COVID-19 virus is a "physical force" that can cause physical loss or damage and trigger property insurance coverage. *Id.* at 703. *Inns* analogized the COVID-19 virus to noxious substances such as carbon monoxide, wildfire smoke, asbestos, and odors that have been held to trigger coverage because they—like the COVID-19 virus—alter the air or surfaces of property such that the insured cannot operate its business as usual, even though the insured buildings remain standing.[8] *Inns* ruled against the insured only on

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[7] This Court denied *Inns*' transfer petition, but at the time, there were no California appellate decisions on this issue. Further, there was no split in California appellate authority until the conflicting decisions in *United Talent* and *Marina Pacific*, and no party in those cases sought review before this Court.

[8] *Inns*, 71 Cal.App.5th at 701–703 (citing, *e.g.*, *Or. Shakespeare Festival Ass'n v. Great Am. Ins. Co.* (D.Or. June 7, 2016) 2016 WL 3267247, at *6, *9 (wildfire smoke triggered coverage because "air has physical properties cannot reasonably be disputed" though it is often "invisible") (vacated by stipulation); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.* (D.N.J. Nov. 25, 2014) 2014 WL 6675934, at *6 (ammonia "physically transformed the air" inside the insured property and rendered the property unsafe until it dissipated); *Mellin v. N. Sec. Ins. Co.* (N.H. 2015) 115 A.3d 799, 805 (urine odor); *W. Fire Ins. Co. v. First Presbyterian Church* (Colo. 1968) 437 P.2d 52, 55 (gasoline fumes); *Farmers Ins. Co. of Or. v. Trutanich* (Or.Ct.App. 1993) 858 P.2d 1332, 1338 (methamphetamine odor); *Port Auth. of N.Y. & N.J. v. Affiliated FM Ins. Co.* (3rd Cir. 2002) 311 F.3d 226, 236 (asbestos); *Matzner v. Seaco Ins.*

causation grounds that are not present in the Hockey Petitioners' case. *Id.* at 703 (Inns "does not make the proximate cause allegation based on the particular presence of the virus on its premises" but instead based only on the government orders).[9]

Subsequently, *Marina Pacific*, 81 Cal.App.5th 96, reversed an order sustaining a demurrer, holding that it was "error at this nascent phase of the case" for the superior court to rule that "the COVID-19 virus cannot cause direct physical loss or damage to property for purposes of insurance coverage." *Id.* at 99. *Marina Pacific* held that the plaintiffs "unquestionably pleaded direct physical loss or damage to covered property" consistent with pre-pandemic California law. *Id.* at 109. The court pointed to the insureds' allegations—which are substantially similar to those made by the Hockey Petitioners—that: (1) the COVID-19 virus "transform[s] the physical condition of the property" through its physical effects on surfaces; (2) the virus was "present" throughout the insured properties and was "continually reintroduced to surfaces at those locations"; and (3) as a result, the insureds were forced to close to "restore and remediate the air and surfaces at the insured properties." *Id.* at 102, 108–109.

Marina Pacific found the federal cases cited by insurers such as Real Party in Interest Factory Mutual to be "readily distinguishable," including because they applied a heightened "plausibility" standard not applicable in

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Co. (Mass.Super.Ct. Aug. 12, 1998) 1998 WL 566658, at *4 (carbon monoxide)).

[9] *Shusha, Inc. v. Century-National Ins. Co.* (2022) 87 Cal.App.5th 250 noted that *Inns* ruled against the insured on causation grounds only, while recognizing that different allegations might state a claim for direct physical loss or damage. *Id.* at 262 fn. 6.

California courts. *Id.* at 109–110. *Marina Pacific* also distinguished cases, including *Musso & Frank Grill Co. v. Mitsui Sumitomo Insurance USA Inc.* (2022) 77 Cal.App.5th 753, because the plaintiffs in those cases alleged only the loss of use of property caused by government *orders* rather than a claim—like that pleaded by the Hockey Petitioners—that "the presence of the *virus* on the insured premises caused physical damage to covered property, which in turn led to business losses." 81 Cal.App.5th at 110 (emphasis added).[10]

The third case, *Shusha, Inc. v. Century-National Ins. Co.* (2022) 87 Cal.App.5th 250, adopted the reasoning in *Marina Pacific* and rejected the insurer's attempts to characterize that holding as a "narrow" one. *Id.* at 265. *Shusha* confirmed that the plaintiff stated a claim for business interruption coverage by alleging that it lost business revenue and incurred substantial costs because of the physical loss or damage to insured property caused by the COVID-19 virus. *Id.* at 266.

In the Hockey Petitioners' case, the Respondent Court refused to apply *Marina Pacific* and *Inns*. (*Shusha* was not yet decided at the time.) Instead, it followed *United Talent*, 77 Cal.App.5th 821, which affirmed an order sustaining an insurer's demurrer based on facts assumed by that court, but which were not included in the Complaint and were in fact contrary to the plaintiff's allegations.

Marina Pacific described *United Talent* as misapplying California pleading law by "disregard[ing]" the plaintiff's factual "allegations" about the harm caused by the virus based on the *United Talent* panel's "general

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[10] For this reason, *Musso* and the similar case *Apple Annie, LLC v. Oregon Mutual Insurance Co.* (2022) 82 Cal.App.5th 919, are irrelevant to the Hockey Petitioners' case and other cases alleging that the COVID-19 *virus* (rather than an order) caused physical loss or damage to property.

belief that surface cleaning may be the only remediation necessary to restore contaminated property to its original, safe-for-use condition." *Marina Pacific*, 81 Cal.App.5th at 111. Further, *Marina Pacific* held that even if a court could assume—contrary to the complaint's allegations—that cleaning could make property safe for normal use, such evidence would "not negate coverage" but would only affect the "measure of policy benefits" because property could be "damaged in the interim" by the virus. *Id.* at 112.

B. The Hockey Petitioners' Case Presents A Better Vehicle For Resolving The Certified Question Than *Another Planet*

The question that the Ninth Circuit certified in *Another Planet* is very similar to the issue presented in this appeal. However, the Hockey Petitioners' case presents a better vehicle for resolving this question than *Another Planet*. In briefing before this Court and the Ninth Circuit, Another Planet's insurer has raised several contentions specific to the policy language and factual allegations in *Another Planet* that are not presented in many other COVID-19 insurance coverage actions. Because the Hockey Petitioners' case presents none of those issues, it provides a stronger record for the Court to consider the certified question. Therefore, the Court should transfer this case and make it the lead case (or a co-lead case with *Another Planet*). More specifically:

First, Vigilant Insurance Company, the insurer in *Another Planet*, has argued that Another Planet's insurance policy "explicitly disclaims coverage for any damage to 'air' inside an otherwise covered structure" and contended that "the coverage question" in *Another Planet* "must be answered solely with reference to the alleged presence of the virus on the *physical structures* insured by the policy issued to petitioner Another Planet." Vigilant Ins. Co. Ltr. ISO Certified Question at 2, *Another Planet*

Ent. v. Vigilant Ins. Co., No. S277893. Most property policies, including the Hockey Petitioners' Policies, do not contain any exclusion for "air."

The Hockey Petitioners' Complaint—like others—alleges in detail facts supporting that the COVID-19 virus caused physical loss or damage to air, consistent with pre-pandemic cases holding that perils such as wildfire smoke, fumes, and odors cause insured physical loss or damage by changing the air in insured property. *See supra* Section II.A. The virus's effect on air is important to resolution of the certified question because authorities such as the California Medical Association have stated that "the danger of COVID-19 transmission comes primarily from the presence of the COVID-19 virus in the indoor air of buildings and other enclosed premises." Cal. Med. Ass'n *Amicus* Br. at 11, *Saddle Ranch Sunset, LLC v. Fireman's Fund Ins. Co.* (Ct.App. Oct. 7, 2022) 2022 WL 16959294 (No. B313609). The Hockey Petitioners' case therefore permits the Court to consider allegations concerning the COVID-19 virus's effect on *air* and *surfaces*—both of which are part of property—without needing to consider any effect of a policy exclusion for "air."

Second, Vigilant argued in the Ninth Circuit that Another Planet's complaint does not "allege that SARS-CoV-2 was actually present on insured … premises" and instead bases its coverage arguments on "the *potential* presence of the virus." Defendant Answering Br. at 31, 32, *Another Planet Ent., LLC v. Vigilant Ins. Co.* (Aug. 5, 2022) 2022 WL 3347003 (No. 21-16093) (italics in original) (citing *Another Planet* FAC ¶ 76). The Hockey Petitioners' Complaint alleges in detail that the COVID-19 virus was present at insured premises, including through confirmed cases of COVID-19 (with dates and locations) and statistical evidence demonstrating that far more infected people were present at insured hockey premises than could be confirmed contemporaneously. 1A0191–1A0192 ¶¶ 126–132; 1A0205–1A0209 ¶¶ 182–204. Therefore,

granting review of the Hockey Petitioners' case would avoid a factual dispute about whether the insured actually alleged the presence of the virus that could distract from the core issue of whether the on-site presence of the COVID-19 virus can cause "physical loss or damage" to property.

Finally, Vigilant has argued that the *Another Planet* complaint does not allege that any presence of the virus *caused* the insured's losses, asserting instead that Another Planet alleged that "governmental orders" alone (absent the presence of the virus at Another Planet's properties) caused physical loss or damage. Defendant Answering Br. at 33, *Another Planet*, 2022 WL 3347003(italics omitted). Because the Hockey Petitioners (like other policyholders) allege that business income losses were *caused* by the presence of the virus in arenas and the resulting physical harm to property, designating this case as a lead case would again ensure that this Court has the best factual record to answer the certified question. *See* 1A0155, 1A0183–1A0184, 1A0198–1A0199, 1A0201–1A0203.

Therefore, the Hockey Petitioners' case presents the same central issue as *Another Planet*, but does not implicate any of the insurer arguments that are specific to Another Planet's complaint and insurance policy and ensures that this Court has the strongest possible record to answer the certified question in a way that provides the most guidance to courts applying California law. The Court should transfer the Hockey Petitioners' case and designate it a lead case (or co-lead case with *Another Planet*).

C. The Hockey Petitioners Have Alleged A Claim For Insurance Coverage

Marina Pacific and *Shusha* correctly applied California law and held that an insurance policyholder alleges an insurance claim based on "physical loss or damage" by making allegations similar to those alleged by

the Hockey Petitioners. But the Respondent Court adopted the contrary analysis of *United Talent*, which reached its conclusion that the COVID-19 virus did not cause "direct physical loss or damage" based on its own incorrect factual findings about the COVID-19 virus and conclusions about insurance coverage, specifically that (1) routine surface cleaning was all that was needed to reopen properties, (2) insurance policies required "repairs" to trigger coverage and that this requirement was not satisfied by the Hockey Petitioners' extensive repair measures, (3) insurance only covers physical harms that can be immediately and completely remediated, and (4) physical risks that harm people (such as the COVID-19 virus) cannot also cause physical loss or damage to property. All of these rationales—newly minted for COVID-19 coverage cases—are contrary to pre-pandemic insurance law. This Court should grant the transfer petition to correct these errors, as they are recurring questions in COVID-19 insurance coverage cases.

1. *United Talent* Erred In Assuming That Simple Surface Cleaning Could Make Property Safe To Reopen

The Respondent Court, first, relied on *United Talent*'s incorrect suggestion that the COVID-19 virus does not cause physical damage because it found that the virus "can be cleaned from surfaces through general disinfection measures." 77 Cal.App.5th at 838; Attach. B at 3; 1A1185. But insurance coverage does not depend on whether a discrete instance of the virus being present on a surface could conceivably be cleaned. Rather, the key point is that routine surface cleaning alone could not make buildings affected by the COVID-19 virus (such as hockey arenas) ready to reopen. The COVID-19 virus is transmitted primarily by air, and the virus cannot simply be wiped from the air. 1A0156 ¶ 7; 1A0177–1A0178 ¶¶ 92–93. Moreover, people infected with COVID-19

would constantly reintroduce the virus into property, undoing any temporary effect of surface cleaning or similar measures. 1A0182–1A0183 ¶ 104; 1A0184 ¶ 110; 1A0192–1A0193 ¶ 134. *See also* Cal. Med. Ass'n *Amicus* Br. at 14–15, *Saddle Ranch*, 2022 WL 16959294 ("[N]o amount of cleaning, disinfection or even the dissipation of the COVID-19 virus with the passage of time, will protect an indoor space from reintroduction of the virus if the space is open to persons infected with COVID-19."). And those people cannot be identified because they are at their most infectious when they show no symptoms. 1A0175–1A0176 ¶ 90.

In a typical hockey game, thousands of people gather in an arena, breathing shared indoor air and touching countless surfaces such as elevator buttons, bathroom faucets, and seat rests—which cannot be fully cleaned each time they were touched, particularly in early 2020, when cleaning supplies were nearly impossible to find. 1A0157 ¶ 8. Therefore, as *Marina Pacific* recognized, *United Talent* improperly based its ruling on a "general belief"—contrary to the insured's allegations—that "surface cleaning may be the only remediation necessary to restore" property affected by the virus "to its original, safe-for-use condition." 81 Cal.App.5th at 111.

2. The Respondent Court Erred In Holding That The Hockey Petitioners Failed To Allege "Repairs" That It Incorrectly Found Were Required To Obtain Insurance

The Respondent Court's ruling against the Hockey Petitioners also relied on its incorrect conclusion (citing *United Talent*) that the Policies required a "repair" to establish "physical loss or damage" and that the Hockey Petitioners' Complaint "does not identify anything that could reasonably be interpreted as a 'repair.'" Attach. B at 7; 1A1189.

This reasoning misunderstands that insurance policies like the Hockey Petitioners' do not require "repairs" to trigger coverage; they expressly provide coverage if damaged property is "*not* repaired or

replaced" at all. 1A0264–1A0265, 1A0509–1A0510 (emphasis added).[11] Indeed, courts have found coverage for noxious substances such as wildfire smoke that often resolve or dissipate without specific remediation. *See Inns*, 71 Cal.App.5th at 702 (citing cases, including *Or. Shakespeare*, 2016 WL 3267247, at *6 (insurance covered days for wildfire smoke to "dissipate before business could be resumed")).

Even assuming that repair or remediation were necessary under the Policies, the Hockey Petitioners pleaded such repairs, including:

- Clubs responded to "the presence of the COVID-19 virus on insured property" by "cleaning and disinfecting areas where the infected individual had been and equipment that the infected individual had used." 1A0192–1A0193 ¶ 134.
- Certain hockey clubs "discarded and replaced items, including portions of mechanical and HVAC systems that had been exposed to the COVID-19 virus" and "replaced air filtration systems." 1A0199–1A0200 ¶ 162.
- Clubs installed "special systems to permit increased levels of outside air without negatively impacting the quality of the ice." 1A0199–1A0200 ¶ 162.

The Respondent Court did not explain why such measures could not constitute "repairs," except to state that *United Talent* and other "courts have held" that "cleaning or employing minor remediation or preventive

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[11] The civil authority coverage provision does not use the "repair" language at all. *See* 1A0298, 1A0541. Repairs are mentioned only in the "period of liability" provision, which sets forth a period of time during which business interruption loss is measured. 1A0292–1A0293, 1A0535.

measures" do not "constitute direct property damage or loss." Attach. B at 7; 1A1186, 1A1189.

But before the pandemic, courts long held that perils that can be remediated through cleaning can cause insured "physical loss or damage."[12] The Hockey Petitioners' insurer, Factory Mutual, conceded in 2019 that an insured's "time and cost to clean" mold is covered. 1A0790. The California Association of Public Insurance Adjusters confirmed that insurance companies have "regularly" paid for property insurance claims "where cleaning or other measures are the only remediation required" (for instance, from smoke), underscoring that physical harms that can be remediated through cleaning cause physical loss or damage. CAPIA *Amicus* Letter ISO Writ Pet. at 2. *Inns* also recognized that coverage could be triggered if the presence of COVID-19 merely required an insured property "to be thoroughly sanitized and remain empty for a period." 71 Cal.App.5th at 704–705.

As discussed above, routine surface cleaning does not alone remediate the effects of the virus; the virus can still be transmitted by air and is constantly reintroduced to the property. The Hockey Petitioners alleged repairs far more extensive than cleaning that were required to mitigate the effects of the virus and reopen arenas.

But *United Talent* also erred in concluding that the question of whether physical loss or damage occurred depended on the *duration* of

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[12] *See, e.g.*, *Farmers Ins. Co. of Or. v. Trutanich* (Or.Ct.App. 1993) 858 P.2d 1332, 1336 (odor requiring insured to "clean the house"); *Graff v. Allstate Ins. Co.* (Wash.Ct.App. 2002) 54 P.3d 1266, 1267 (costs to "clean up" methamphetamine residue); *Nat'l Union Fire Ins. Co. of Pittsburgh v. CML Metals Corp.* (D.Utah Aug. 11, 2015) 2015 WL 4755207, at *4 (oil spray "caused physical damage to the building roof (necessitating cleaning)").

harm from the virus. As *Marina Pacific* recognized, even if a court could assume that routine surface cleaning could make property safe for normal use in spring of 2020, an insured could receive insurance coverage for the portion of time that property was "damaged" by the virus—that is, the ability to clean the virus would affect the "measure" of damages, not the threshold question of whether physical loss or damage occurred at all. 81 Cal.App.5th at 112.

The Hockey Petitioners' Policies cover the loss of a single game. They do not set forth a minimum duration of time that that damage must last before the insurer must pay, confirming that coverage does not depend on property remaining unusable for a lengthy period of time due to the virus or any other physical peril. 1A0286, 1A0298, 1A0529, 1A0541.

The Respondent Court—like *United Talent*—misunderstood this principle of insurance law. It also foreclosed consideration of the type of extrinsic evidence about terms in the policies commonly introduced in insurance coverage actions to explain key policy language. The Respondent Court adopted this faulty analysis, leading the Court of Appeal to request briefing on whether the Respondent Court "exceed[ed] its authority at the pleading stage by challenging the truth of the factual allegations in the second amended complaint supporting petitioners' claim for coverage based on physical loss or damage to insured property." Attach. A at 1.

In contrast, by accepting their plaintiffs' allegations as true, *Marina Pacific* and *Shusha* accord with decades of case law in which determinations about whether a noxious substance caused insured physical loss or damage were made only with evidence, at summary judgment or

trial.[13] It is only in COVID-19 insurance coverage cases that courts such as *United Talent* and the Respondent Court incorrectly made these factual determinations at the pleadings stage.

3. Insurance Coverage Does Not Depend On Whether The Hockey Petitioners Could Fully Remediate The Effects Of The Virus On Hockey Arenas

The Respondent Court—again relying on *United Talent*—further justified its ruling by asserting that the Hockey Petitioners' Complaint "reveal[s] that COVID-19 is not a truly remediable contaminant like asbestos" because the Hockey Petitioners alleged that "anything that could

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[13] *See, e.g.*, *W. Fire Ins. Co. v. First Presbyterian Church* (Colo. 1968) 437 P.2d 52, 55 (affirming jury verdict for policyholder and relying on facts from record to determine gasoline fumes triggered coverage); *Farmers Ins. Co. of Or. v. Trutanich* (Or.Ct.App. 1993) 858 P.2d 1332, 1335 (affirming jury verdict for policyholder by relying on "evidence that the house was physically damaged by the odor that persisted in it"); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.* (D.N.J. Nov. 25, 2014) 2014 WL 6675934, at *3, *8 (granting partial summary judgment based on "substantial evidence that the ammonia discharge physically incapacitated its facility"); *Sentinel Mgmt. Co. v. N.H. Ins. Co.* (Minn.Ct.App. 1997) 563 N.W.2d 296, 300 (affirming denial of insurer's summary judgment where policyholder "presented evidence showing that released asbestos fibers have contaminated the buildings, creating a hazard to human health" constituting "direct, physical loss"); *Mellin v. N. Sec. Ins. Co.* (N.H. 2015) 115 A.3d 799, 803–805 (overruling grant of summary judgment and remanding for additional fact-finding on whether an odor caused physical loss or damage).

Even courts that ultimately ruled in favor of insurers did so only after discovery. *See, e.g.*, *Mama Jo's Inc. v. Sparta Ins. Co.* (11th Cir. 2020) 823 F.App'x 868, 879 (considering expert testimony in considering whether dust caused "direct physical loss" on appeal from summary judgment); *Mastellone v. Lightning Rod Mut. Ins. Co.* (Ohio Ct.App. 2008) 884 N.E.2d 1130, 1143–1145 (assessing whether mold caused "physical injury" after considering expert testimony on appeal of denial of motion notwithstanding the verdict).

be reasonably considered remediation—*i.e.*, cleaning and sanitization—was insufficient" to make the property safe "because *people* would inevitably bring the virus back." Attach. B at 7; 1A1189. This is wrong on two counts.

First, the ability (or inability) of certain measures to fully remediate the harm caused by a physical peril and restore a property to its normal purposes is irrelevant to whether physical loss or damage occurred in the first place. The phrase "physical loss or damage" does not require the damage to be "truly remediable" to be insured, and courts have not previously held that coverage depends on whether the damage from a physical peril can be fully remediated or not. For instance, physical damage from an environmental contaminant often cannot be entirely remediated, but courts have still found such contaminants to cause "physical loss of, or damage to" the property. *See, e.g.*, *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.* (Wash. 2000) 998 P.2d 856, 883 (finding coverage for environmental contamination).

Indeed, if *United Talent*'s belief that a physical risk must be "truly remediable" to trigger insurance coverage were followed to its logical conclusion, an insured would receive no coverage for a peril that caused such severe damage that it could not be remediated at all, but would receive insurance coverage for a less severe peril that caused damage that could be repaired. That is not the law. *Marina Pacific*, in contrast, recognized that allegations that the COVID-19 virus was constantly reintroduced into insured properties supported the plaintiffs' claims for coverage by showing why the property could not be made usable through routine cleaning alone. 81 Cal.App.5th at 108–109. Any remediation or removal of the virus is temporary, lasting only until the next infected person—symptomatic or not—brings it back to the property.

Second, the Hockey Petitioners do not allege that nothing could ever remediate the virus, but rather that the ability to remediate the physical effects of the virus on arenas changed over time. In the pandemic's early months, cleaning and other remediation measures were insufficient to permit the Hockey Petitioners to reopen arenas and resume playing hockey because the virus would have been constantly reintroduced into arenas. 1A0181–1A0182 ¶¶ 101–102, 1A0184 ¶ 110.

Later, the Hockey Petitioners were able to partially resume hockey operations, but could only do so without fans and then, later, with greatly reduced fan capacity. 1A0195–1A0196 ¶¶ 144–148, 1A0199–1A0200 ¶¶ 161–162. During this period, the Hockey Petitioners were able to reopen, first, because of "significant repairs and preventive measures" made at arenas to address the presence of the virus, and "*subsequently*, the wide availability of vaccines." 1A0199–1A0200 (emphasis added).

This gradual reopening is similar to that often required in response to other insured perils, such as fires or floods (which might require an insured to reopen part of a property while continuing to remediate some damage). The Hockey Petitioners' Policies provide coverage during such a partial reopening—paying for earnings lost until insured arenas can be "made ready for operations, under the same or equivalent physical and operating conditions that existed prior to the damage." 1A0292–1A0293, 1A0535. Thus, the Respondent Court erred in holding—at the pleadings stage—that the inability to fully remediate the damage from the COVID-19 virus and immediately reopen arenas forecloses coverage under the Policies.

4. *United Talent* Impermissibly Relied On Novel Requirements For Establishing "Physical Loss Or Damage"

In addition to the rationales cited above, *United Talent* espoused other justifications for its ruling that are contrary to insurance coverage law predating the pandemic.

First, *United Talent* suggested that the COVID-19 virus "can carry great risk to people but no risk at all to a physical structure." 77 CalApp.5th at 833. But harm to people and property are not mutually exclusive; in fact, insurance commonly covers perils that cause both types of harm. *Inns* recognized that the virus was akin to substances such as asbestos, wildfire smoke, and toxic fumes that have been found to trigger coverage. *See* 71 Cal.App.5th at 701–702. While those noxious substances may not alter the physical integrity of a structure, they harm people by physically altering the air or surfaces within that property, changing them from safe to dangerous. These harms—to property and people—prevent an insured from using the property to run its business, thus causing "physical loss or damage" to property within the meaning of an insurance policy. *See also Huntington Ingalls Indus., Inc. v. Ace Am. Ins. Co.* (Vt. Sept. 23, 2022) 2022 VT 45, ¶¶ 26, 44 (property policies can pay when insured "property is unusable due to a health hazard").

Second, *United Talent* reasoned that the COVID-19 virus could not cause physical loss or damage as a matter of law because, unlike other perils like asbestos or environmental contamination, the COVID-19 virus was purportedly not "tied to a location." 77 Cal.App.5th at 838. But an insured peril need not be "tied to a location." Environmental releases can spread over hundreds of miles, and insured perils such as hurricanes or forest fires can damage vast areas. If insurance only covered damage cabined to specific properties, it would lead to the absurd result that a fire

that burns one building would trigger coverage while a fire that burns thousands would not. And even if the Hockey Petitioners were required to allege a peril was "tied to a location," they did so by alleging that the virus was present at specific insured properties during specific time periods. 1A0183–1A0184 ¶¶ 106–107.

Finally, *United Talent* asserted that COVID-19 virus transmission could be reduced with "social distancing, vaccination, and the use of masks," suggesting that those mitigation measures somehow mean that the property was not rendered unfit for use. 77 Cal.App.5th at 838. *See also id.* at 839. But vaccination and widespread masking were not available at the outset of the pandemic. Moreover, the Policies do not distinguish between an insured physical peril that is introduced into the properties through people or some other way. *See, e.g.*, *Farmers Ins. Co. of Or. v. Trutanich* (Or.Ct.App. 1993) 858 P.2d 1332, 1335 (physical loss or damage covered methamphetamine odor introduced through people).

None of *United Talent*'s invented "requirements" are based in relevant insurance policy language or California pre-pandemic law. *United Talent* erred in adopting these novel standards solely for COVID-19 insurance cases.

CONCLUSION

For the reasons set forth above, the Hockey Petitioners respectfully request that this Court transfer the pending mandamus petition and designate it the lead case (or co-lead case with *Another Planet*).

DATED: February 17, 2023

Respectfully submitted,

COVINGTON & BURLING LLP

By: */s/ Rani Gupta*
Rani Gupta

Counsel for Petitioners

CERTIFICATE OF WORD COUNT

Pursuant to Rules 8.504(d)(1) and 8.552(d) of the California Rules of Court, I hereby certify that the text of this brief contains 7,689 words, including footnotes. In making this certification, I have relied upon the word count of Microsoft Word, used to prepare the brief.

DATED: February 17, 2023 COVINGTON & BURLING LLP

By: */s/ Rani Gupta*
Rani Gupta

Counsel for Petitioners

ATTACHMENT A

Sixth Appellate District's
February 10, 2023 Order to Show Cause

IN THE COURT OF APPEAL OF THE S
SIXTH APPELLATE DISTRICT

SAN JOSE SHARKS LLC et al.,
Petitioners,
v.
THE SUPERIOR COURT OF SANTA CLARA COUNTY,
Respondent;
FACTORY MUTUAL INSURANCE COMPANY,
Real Party in Interest.

H050441
Santa Clara County Super. Ct. No. 21CV383780

BY THE COURT:

Respondent superior court is ordered to show cause before this court at a time and place to be specified by court order why a peremptory writ should not issue as requested in the petition for writ of mandate.

Real party in interest may file a return in opposition to the petition on or before March 13, 2023. Petitioners may reply to the return within 20 days after it is filed in this court.

In addition to the points raised by the petition for writ of mandate, the court requests that the parties address the following questions in the return and the reply: Was it *procedurally* appropriate on a demurrer and motion to strike for the trial judge to find, as a matter of law, that petitioners' second amended complaint failed to allege sufficient facts to support their claim for coverage for physical loss or damage to insured property? Did the trial court exceed its authority at the pleading stage by challenging the truth of the factual allegations in the second amended complaint supporting petitioners' claim for coverage based on physical loss or damage to insured property?

(Greenwood, P.J., Bamattre-Manoukian, J. and Lie, J.
participated in this decision.)

Date: 02/10/2023 _____ P.J.

ATTACHMENT B

Excerpts from Respondent Court's August 8, 2022 Order Granting Factory Mutual's Motion to Strike

ORDER ON SUBMITTED MATTER

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

SAN JOSE SHARKS LLC, et al.,

Plaintiffs,

vs.

FACTORY MUTUAL INSURANCE COMPANY, et al.,

Defendants.

Case No.: 21CV383780

ORDER CONCERNING DEFENDANT FACTORY MUTUAL INSURANCE COMPANY'S: (1) DEMURRER; AND (2) MOTION TO STRIKE

The plaintiffs in this action are nineteen National Hockey League Clubs (the "Clubs"), the National Hockey League ("NHL"), NHL Enterprises, L.P., NHL Enterprises Canada, L.P., and NHL Enterprises B.V. (collectively, the "Hockey Plaintiffs"). The Hockey Plaintiffs have sued their insurer, Defendant Factory Mutual Insurance Company, seeking compensation under their policies for losses resulting from the COVID-19 pandemic.

theory, which is among those still alleged by the Hockey Plaintiffs here, does not work in California.

2. *United Talent*

United Talent does address allegations that the virus was physically present at insured property, in addition to rejecting the closure order theory. The allegations supporting the physical presence theory were summarized at length, and are indistinguishable from those at issue here:

> UTA alleged that it was "informed and believes, and on that basis alleges, that SARS-CoV-2 has been present in the vicinity of and on and in its [insured] properties, or would have been present but for [UTA's] efforts to reduce, prevent, or otherwise mitigate its presence" and "had the Closure Orders not been issued." UTA alleged when "an infected person breathes, speaks, coughs, or sneezes," the virus permeates the air, settles on surfaces, and also "remain[s] airborne for a time sufficient to travel a considerable distance, filling indoor and outdoor spaces, and lingering in, attaching to, and spreading through heating, ventilation, and air conditioning ('HVAC') systems." In addition, "[s]tudies suggest that SARS-CoV-2 can remain contagious on some surfaces for at least 28 days." Thus, "respiratory droplets … expelled from infected individuals land on and adhere to surfaces and objects. In doing so, they physically change the property by becoming a part of its surface. This physical alteration makes physical contact with those previously safe, inert surfaces (e.g., handrails, doorknobs, bathroom fixtures) unsafe. When SARS-CoV-2 attaches or binds to surfaces and objects, it converts those surfaces and objects to active fomites, which constitutes physical loss and damage." UTA alleged, "Just like invisible smoke in air alters the air, the presence of the SARS-CoV-2 virus *alters* the air and airspace in which it is found and the property on which it lands. This physical change constitutes physical loss and damage." UTA asserted that "SARS-CoV-2 is no different from mold, asbestos, mudslides,

> smoke, oil spills, or other similar elements that cause property damage, although they later might be removed, cleaned, or remediated."

(*United Talent, supra*, 77 Cal.App.5th at pp. 826–827.)

Like the plaintiff here, "UTA argue[d] that its allegations are different than those in *Inns-by-the-Sea, Mudpie* [(also cited in the March 2022 Order)], and other cases in that UTA alleged not only loss of use, but also that the physical presence of the virus on UTA's insured premises constituted 'physical damage.' " (*United Talent, supra*, 77 Cal.App.5th at p. 834.) However, explaining that "[m]any courts have rejected the theory that the presence of the virus constitutes physical loss or damage to property" (*id.* at pp. 835–836), *United Talent* unequivocally "agree[d] with the majority of the cases finding that the presence or potential presence of the virus does not constitute direct physical damage or loss." (*Id.* at p. 838.) The opinion explained:

> While the infiltration of asbestos … or environmental contaminants … constituted property damage in that they rendered a property unfit for a certain use or required specialized remediation, the comparison to a ubiquitous virus transmissible among people and untethered to any property is not apt. Asbestos in installed building materials … and environmental contaminants … are necessarily tied to a location, and require specific remediation or containment to render them harmless. Here, by contrast, the virus exists worldwide wherever infected people are present, it can be cleaned from surfaces through general disinfection measures, and transmission may be reduced or rendered less harmful through practices unrelated to the property, such as social distancing, vaccination, and the use of masks. Thus, the presence of the virus does not render a property useless or uninhabitable, even though it may affect how people interact with and within a particular space.

(*United Talent, supra*, 77 Cal.App.5th at p. 838.)

Critically, *United Talent* specifically rejected a potential "closure to sanitize" theory based on dictum in *Inns-by-the-Sea*, which was discussed in the March 2022 Order and which the Court allowed plaintiffs to assert by amendment here. The Court of Appeal reasoned:

[A] discussion of a hypothetical scenario is not a statement of California law, and UTA cites no other case suggesting that such a scenario demonstrates "direct physical loss or damage." To the contrary, other courts have rejected similar claims. In the Sixth Circuit case *Brown Jug,* [*Inc. v. Cincinnati Ins. Co*. (U.S.6th Cir. 2022)], 27 F.4th 398, for example, a plaintiff restaurant, Dino Drop, "alleges that several of its employees and customers tested positive for COVID-19, likely after exposure to the virus by a live band that played at one of its restaurants. This outbreak purportedly 'damaged' the property, because Dino Drop had to take remediation measures, such as cleaning and reconfiguring spaces, to reduce the threat of COVID-19." (*Id.* at p. 404.) The Sixth Circuit held that such a claim did not constitute property damage…

Other courts have also held that cleaning or employing minor remediation or preventive measures to help limit the spread of the virus does not constitute direct property damage or loss. (See, e.g., *L&J Mattson's Co. v. Cincinnati Ins. Co., Inc.* (N.D. Ill. 2021) 536 F.Supp.3d 307, 315, fn. 3 ["additions such as Plexiglas, hand sanitizer, air purifiers or improved HVAC systems do not constitute repairs to damaged property where a plaintiff has not alleged damage to property. Instead, those additions constitute improvements to stop the spread of virus from one person to another"]; *Cafe La Trova LLC v. Aspen Specialty Ins. Co.* (S.D. Fla. 2021) 519 F.Supp.3d 1167, 1182 ["Plaintiff's rearranging of furniture and installation of partitions cannot 'reasonably be described as repairing, rebuilding, or replacing'" and cannot constitute "the very 'damage' it now asserts is sufficient to invoke coverage"]); *Independence Restaurant Group v. Certain Underwriters at Lloyd's, London* (E.D.Pa. 2021) 513 F.Supp.3d 525, 534–535 [moving equipment and adding plexiglass to make property "functional and reasonably safe for patrons" cannot reasonably be described as repairing, rebuilding, or

replacing. "Neither can disinfecting or cleaning property that is contaminated."].)

Moreover, UTA has not alleged that its properties required unique abatement efforts to eradicate the virus.

(*United Talent, supra*, 77 Cal.App.5th at p. 839.)

3. *Marina Pacific*

Finally, while "recogniz[ing] this conclusion is at odds with almost all (but not all) decisions considering whether business losses from the pandemic are covered by the business owners' first person commercial property insurance," *Marina Pacific* held that the issue of whether COVID-19 causes direct physical loss or damage to property is not appropriately resolved on demurrer. (*Marina Pacific, supra*,___Cal.App.5th___ [2022 Cal. App. LEXIS 608, at *20].) It expressly disagreed with *United Talent* in this regard. (See *id.* at *23–24.)

C. Discussion

The Court follows *United Talent*. The Hockey Plaintiffs contend that *United Talent* conflicts with *Inns-by-the-Sea*, and the Court should follow the latter authority. But as *United Talent* specifically holds, the discussion in *Inns-by-the-Sea* that the Hockey Plaintiffs rely on is dictum. The Court finds that *United Talent* controls here given its thorough, persuasive reasoning and discussion of authorities.

The Hockey Plaintiffs urge that their policies "include coverage-promoting language not contained in the *Inns*, *UTA*, and *Musso* policies." But ultimately, the policies at issue here—like those in all three authorities—all require physical loss or damage to property. *United Talent* conclusively holds that the presence of COVID-19 in the air and on surfaces is not physical loss or damage to property.

The Hockey Plaintiffs argue that "UTA's broad statement that the 'presence or potential presence of the virus does not constitute direct physical damage or loss,' [*United Talent, supra*] 77 Cal.App.5th at 838, is not binding as applied to Hockey's distinguishable facts and policy language." In a footnote, they explain:

Unlike Hockey, the *UTA* plaintiff did not allege that (1) anyone who tested positive for COVID-19 was "present at UTA property while infected"; (2) any

insured "facilities were closed as a direct result" of the COVID-19 virus on site; (3) it lost earnings because of physical damage to *insured* business premises rather than third-party properties; or (4) it undertook any "remedial measures" at its properties or any "unique abatement efforts to eradicate the virus." *Compare* 77 Cal.App.5th at 835, 838, fn. 12, 839, *with* SAC ….

But while the plaintiff in *United Talent* did not allege these things with precision, it argued that they could be inferred from its allegations, and the Court of Appeal allowed the plaintiff this "generous interpretation of [its] allegations." (*United Talent, supra*, 77 Cal.App.5th at p. 838, fn. 12; see also *id.* at p. 838 ["UTA asserts, 'This is exactly what UTA has alleged: the presence of the virus, confirmed by its employees testing positive for COVID-19, and the resulting closure of facilities.' "].) *United Talent* held, not that the plaintiff failed to allege the virus was present at its properties, but that it "has not established that the presence of the virus *constitutes physical damage* to insured property." (*Id.*, p. 840, italics added.) And as the Hockey Plaintiffs acknowledge, *United Talent* applied this holding in the specific context of civil authority coverage, too. (See *id.* at p. 840 ["just as the presence of the virus does not constitute physical loss or damage to insured property, it also does not constitute physical loss or damage to" neighboring properties—even where closure orders attempted to characterize the pandemic this way].)

The Hockey Plaintiffs argue that *United Talent* conflicts with non-California cases, and they cite four cases from Nevada, New Jersey, Texas, and Pennsylvania in a footnote. But the Hockey Plaintiffs do not actually argue that these specific states' laws apply here. And they make no attempt to show that these few, unpublished trial court rulings accurately represent the state of the law in those jurisdictions.[4] As stated in *United Talent*, "[t]he majority of cases in California (and elsewhere)" have "rejected the theory that the presence of the virus constitutes

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[4] Indeed, Factory Mutual cites a more recent and directly contrary Texas authority on reply. (See *NTT Data Int'l LLC v. Zurich Am. Ins. Co.* (N.D.Tex. Jan. 21, 2022, No. 3:21-CV-890-S) 2022 U.S.Dist.LEXIS 11439.) And *United Talent* cites a directly contrary Pennsylvania authority. (*See Indep. Rest. Grp. v. Certain Underwriters at Lloyd's* (E.D.Pa. 2021) 513 F. Supp. 3d 525.)

physical loss or damage to property." (*United Talent, supra*, 77 Cal.App.5th at p. 835.) The Hockey Plaintiffs fail to identify a contrary state's law that applies in this case.

Finally, the Hockey Plaintiffs urge the Court to apply *Marina Pacific*, a decision which is admittedly "at odds with almost all … decisions" dismissing claims for business losses due to COVID-19. (*Marina Pacific, supra*, ___Cal.App.5th___ [2022 Cal. App. LEXIS 608, at *20].) Respectfully, the Court declines to follow this case. *Marina Pacific* essentially held that the nature of the virus's impact on air and surfaces is a factual issue that is not properly resolved on demurrer, even though "common sense" theoretically might dictate that it does not cause physical loss or damage to property. (*Id.* at *30.)

But in the Court's view, it need only consider the SAC itself, giving it "a reasonable interpretation, reading it as a whole and its parts in their context," and without being "required to accept the truth of the factual or legal conclusions" it may assert. (*Id.* at *13–14, internal citations and quotation marks omitted.) The SAC describes physical and procedural *upgrades* that were necessitated by the virus and expressly alleges that anything that could be reasonably considered remediation—i.e., cleaning and sanitizing—was insufficient, because *people* would inevitably bring the virus back. (SAC, ¶ 102.) The Hockey Plaintiffs allege that they were "able to re-open their doors to fans only because of significant repairs and preventive measures they took and, subsequently, the wide availability of vaccines." (*Id.*, ¶ 162.) But the SAC does not identify anything that could reasonably be interpreted as a "repair." The Court agrees with *United Talent*: Plaintiffs' allegations inevitably reveal that COVID-19 is not a truly remediable contaminant like asbestos, and—as the clear majority of courts have held by now—"cleaning or employing minor remediation or preventive measures to help limit the spread of the virus does not constitute direct property damage or loss." (*United Talent, supra*, 77 Cal.App.5th at p. 839.)

In addition, the Hockey Plaintiffs distinguish the numerous federal cases arrayed against them, citing the arguable difference in pleading standards between California and federal courts. But in the Court's views, none of these federal cases relied solely upon the "plausibility" (or lack thereof) of the insured's allegations. Rather, these cases noted that when looking at the insured's

allegations as a whole, there was no showing of direct property damage or loss. "Plausibility" had little to do with that determination.

In the end, applying *United Talent*, the Court concludes that the Hockey Plaintiffs fail to allege covered physical loss or damage to property due to COVID-19.

D. Scope of Motion to Strike

In response to Factory Mutual's amended notice of motion, the Hockey Plaintiffs argue that the motion to strike is overbroad in targeting general factual allegations relevant to their surviving Communicable Disease claims as well as allegations concerning non-Communicable Disease coverages. The Court agrees. It will therefore grant the motion to strike as to the narrower set of allegations stated below.[5]

E. Conclusion

The Court GRANTS IN PART Factory Mutual's motion to strike allegations concerning non-Communicable Disease coverages, and does so WITHOUT leave to amend.[6] The following allegations are hereby STRUCK from the SAC:

- Paragraphs 219–244;
- Paragraphs 253–258;
- Paragraphs 278–282;
- The following portion of paragraph 291, at p. 77, ll. 12–20:

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[5] In its tentative ruling, the Court had asked the parties to meet and confer as to the propriety of striking the specific allegations identified by the Court in light of its rulings on coverage, and note any areas of disagreement at the hearing. At the July 21 hearing, the parties did not discuss this issue; rather, they focused on the merits of the Court's tentative coverage rulings. Therefore, the Court assumes the Hockey Plaintiffs, while certainly objecting to some of the Court's coverage rulings, are not objecting to striking certain allegations in the FAC in light of those rulings.

[6] The Hockey Plaintiffs have not shown specifically how they could further amend their complaint to comply with *United Talent*. And the Hockey Plaintiffs already had one chance to fix previous pleading problems. Therefore, the Court is granting the motion to strike *without* leave to amend.

PROOF OF SERVICE

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action. My business address is 415 Mission St., Suite 5400, San Francisco, California 94105. On February 17, 2023, I caused to be served the following document(s) described as:

- **PETITION TO TRANSFER CAUSE TO THE SUPREME COURT**

on the interested parties in this action as follows:

Chet A. Kronenberg (Bar No. 222335)
SIMPSON THACHER & BARTLETT LLP
1999 Avenue of the Stars, 29th Floor
Los Angeles, California 90067
Telephone: (310) 407-7500
ckronenberg@stblaw.com

Bryce Friedman
Isaac Rethy
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017
Tel: (212) 455-2000
bfriedman@stblaw.com
irethy@stblaw.com

Joyce C. Wang (Bar No. 121139)
CARLSON, CALLADINE & PETTERSON LLP
353 Sacramento Street, 16th Floor
San Francisco, California 94111
Telephone: (415) 391-3911
jwang@ccplaw.com

Attorneys for Defendant-Real Party in Interest
FACTORY MUTUAL INSURANCE COMPANY

[x] (BY TRUEFILING) By filing and serving the foregoing through Truefiling such that the document(s) will be sent electronically to the eservice list on February 17, 2023;

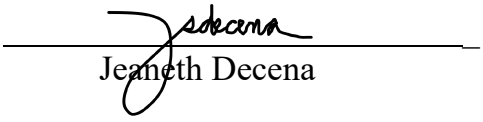
[x] (BY OVERNIGHT DELIVERY) By causing the document(s) to be sealed in an envelope and delivered to an overnight delivery carrier (Federal Express) with delivery fees provided for, addressed to the person(s) on whom it is to be served; and

Hon. Sunil R. Kulkarni
Superior Court of California
County of Santa Clara
191 North First Street
San Jose, CA 95113

The Court of Appeal, Sixth Appellate District
333 West Santa Clara Street
Suite 1060
San Jose, CA 95113

[x] (BY MAIL) By causing the document(s) to be sealed in an envelope addressed to the recipient above, with postage thereon fully prepaid, and placed in the United States mail at Los Angeles, California;

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this proof of service is executed at Oakland, California on February 17, 2023.



Jeaneth Decena