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U.S. Court of Appeals Case No. 21-16093
U.S. District Court Case No. 3:20-cv-07476-VC

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANOTHER PLANET ENTERTAINMENT, LLC,

Plaintiff-Appellant,

v.

VIGILANT INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of California, San Francisco
Hon. Vince Chhabria

APPELLANT'S REPLY BRIEF

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INTRODUCTION

When Another Planet Entertainment filed its Opening Brief, there was a conflict arising in the California Court of Appeal about the central question in this appeal: *Whether, under California law, the presence of SARS-CoV-2 may cause "physical loss" or "physical damage" as those concepts are used in "all-risks" insurance policies.* Since then, the conflict has only become more pronounced. The California Supreme Court has not addressed the question, and panels of the California Court of Appeal have issued four decisions in cases involving insurance coverage for business losses sustained during the COVID-19 pandemic:

1. *Inns by the Sea v. California Mutual Insurance Co.*, 71 Cal. App. 5th 688 (2021), *review denied*, S272450 (Mar. 9, 2022);
2. *Musso & Frank Grill Co. v. Mitsui Sumitomo Insurance USA Inc.*, 77 Cal. App. 5th 753 (2022), *review denied*, S274791 (Aug. 10, 2022);
3. *United Talent Agency v. Vigilant Insurance Co.*, 77 Cal. App. 5th 821 (2022), *depubl'n denied*, S275146 (July 20, 2022) ("*UTA*"); and
4. *Marina Pacific Hotel & Suites, LLC v. Fireman's Fund Insurance Co.*, 81 Cal. App. 5th 96 (2022).

Only *UTA* and *Marina* reviewed allegations like Another Planet's, that SARS-CoV-2 was physically present on, in, and around covered property, and that physical presence caused covered losses. *Inns* alleged only that shutdown orders caused loss, but that panel nevertheless hypothesized that the virus's presence could cause a covered loss. Thus, two of the three panels considering the virus's presence side with Another Planet.

Yes, SARS-CoV-2's Presence Can Cause Covered Losses	
Marina, 81 Cal. App. 5th at 109	"[T]he insureds have unquestionably pleaded direct physical loss or damage to covered property within the definition articulated in *MRI Healthcare*—a distinct, demonstrable, physical alteration of the property . . . ."
Inns, 71 Cal. App. 5th at 704	"Based on the case law we have cited above, it could be possible, in a hypothetical scenario, that an invisible airborne agent would cause a policyholder to suspend operations because of direct physical damage to property. However, the complaint here simply does not describe such a circumstance because it bases its allegations on the situation created by the Orders."
No, SARS-CoV-2's Presence Cannot Cause a Covered Loss	
UTA, 77 Cal. App. 5th at 838	"[T]he presence or potential presence of the virus does not constitute direct physical damage or loss."

Only *Marina* and *UTA* are controlling pronouncements of California law for purposes of Another Planet's First Amended Complaint ("FAC").[1] *UTA* is not reconcilable with *Marina* or the *Inns* hypothetical. Appellee Vigilant Insurance Company urges this Court to ignore *Marina* as an outlier and just adopt *UTA*'s approach. But, as *Marina* explained, *UTA* is a flawed application of California law. *Marina* and the *Inns* hypothetical are sound. For the reasons discussed below and in Another Planet's Opening Brief, the district court's judgment should be reversed.

ARGUMENT

I. California Law, as *Marina* Explains, Requires Reversal and Reinstatement of Another Planet's FAC

The *Marina* court explained that *UTA* misapplied California law by making factual conclusions contrary to those alleged in the operative complaint. 81 Cal. App. 5th at 111-12.[2] Analyzing the same cases and

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[1] 3 E.R. 379-426 (plus exhibits).

[2] Vigilant argues that *UTA* clarified the *Inns* hypothetical and that there is no split in California authority. Answering Brief ("A.B.") at 29-30. That is not right. *UTA* contradicted the *Inns* hypothetical, and *Marina* contradicted *UTA* and adopted the *Inns* hypothetical. We note that Vigilant has cited several decisions from the California Superior Court in support of its argument, but those authorities are not citable in the district court, N.D. Cal. L.R. Civ. L.R. 3-4(e), and are not reliable indications of how a California appellate court would rule in a

arguments that Another Planet presented to the district court—and which permeate its Opening Brief to this Court—the *Marina* panel concluded that the insured had stated a viable claim under California law because:

> [T]he insureds alleged [SARS-CoV-2] not only lives on surfaces but also bonds to surfaces through physicochemical reactions involving cells and surface proteins, which transform the physical condition of the property. The virus was present on surfaces throughout the insured properties, including the hotel lobby, kitchens at both the hotel and restaurant, employee breakroom, service elevator and parking garage, as well as on the properties' food, bedding, fixtures, tables, chairs and countertops. Because of the nature of the pandemic, the virus was continually reintroduced to surfaces at those locations. As a direct result, the insureds were required to close or suspend operations in whole or in part at various times and incurred extra expense as they adopted measures to restore and remediate the air and surfaces at the insured properties. The insureds specifically alleged they were required to "dispose of property damaged by COVID-19 and limit operations at the Insured Properties."

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precedential opinion. *See State Farm Mut. Auto. Ins. Co. v. Penske Truck Leasing Co., L.P.*, --- F. App'x ---, 2021 WL 4810642, at *2 (9th Cir. Oct. 15, 2021).

Id. at 108-09. This is exactly what Another Planet has alleged in this case. 3 E.R. 380-406, ¶¶ 5, 51-79. *Marina* distinguished *Inns*, *Musso*, and this Court's decision of *Mudpie, Inc. v. Travelers Casualty Insurance Co.*, 15 F.4th 885 (9th Cir. 2021), specifically because none of those cases dealt with these allegations of the virus's physical presence, attributes, or interactions with insured property. 81 Cal. App. 5th at 110. The circumstances here mirror those in *Marina*, so here, too, none of those cases controls. Because Another Planet's plausible allegations must be taken as true at the pleading stage, the district court erred in dismissing the FAC.

Vigilant challenges *Marina*—not for its careful consideration of precedent or its unimpeachable analysis of *UTA*'s misapplication of that law—but on several far wobblier bases on which Vigilant argues that this Court should just press forward and decide this case in line with *UTA* because the California Supreme Court would not follow *Marina*.[3] A.B. 25-28. First, Vigilant points to the different pleading standards between federal and California courts to provide this Court with an

[3] Because of the split between *Marina* and *UTA*, Another Planet believes that it is appropriate for this Court to certify this case's central question to the California Supreme Court.

opening to short-circuit Another Planet's right to present its case. Second, Vigilant says that *Marina* misconstrued pleading standards and factual allegations about how SARS-CoV-2 physically alters property that are really just legal conclusions that this Court can ignore. Third, Vigilant claims that *Marina* failed to take judicial notice of the "common-sense reality that a virus can be removed from a surface with the swipe of a cloth," essentially urging this Court to just assume Vigilant's version of the facts. Fourth, Vigilant points to the fact that livestock are property and can be damaged by a virus to argue for an impermissibly narrow construction of the "all-risks" coverage grant. Finally, Vigilant incorrectly claims that the "sheer weight" of California authority dismissing COVID-19 coverage claims shows that the California Supreme Court would not follow *Marina*. As discussed below, *Marina* is sound and Vigilant is wrong.

A. The Federal Pleading Standard Requires Reversal.

Vigilant points out that *Marina* declined to follow decisions of federal courts, observing that *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), permits federal judges to resort to their own experience and common sense to make context-specific determinations of whether a complaint

states a plausible entitlement to relief. A.B. 25-26. It does not follow, however, that just because *Marina* pointed out this difference between California and federal procedure, the federal standard disposes of Another Planet's FAC—and Vigilant did not bother to explain why it would.

Indeed, the federal pleading standard requires reversal now. Under *Iqbal*'s standard, a court ruling on a Rule 12(b)(6) motion takes a "two-pronged approach." 556 U.S. at 679. First, the court should disregard legal conclusions unless they provide a framework for the claim for relief. *Id.* Second, the court *must* assume all factual allegations are true and determine whether, taken all together, they state a plausible entitlement to the relief claimed. *Id.* This does not mean that federal judges can just "go with their guts" and throw out a case they think unlikely to succeed at trial. "The plausibility standard is not akin to a 'probability requirement' . . . ." *Id.* at 678. A "plausible" pleading is one that provides factual information that constitutes "more than a sheer possibility" of liability, going beyond allegations that are "'merely consistent with'" the claimed liability. *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). The Supreme Court

recently clarified, "[T]o determine what the plaintiff must plausibly allege at the outset of a lawsuit, we usually ask what the plaintiff must prove in the trial at its end." *Comcast Corp. v. Nat'l Ass'n of African American-Owned Media*, --- U.S. ---, 140 S. Ct. 1009, 1014 (2020). In other words, if the facts that must be proven to obtain relief are alleged in the complaint, the motion to dismiss must be denied.

Another Planet's complaint is not of the sort that concerned the Supreme Court in *Iqbal* or *Twombly*. Both were concerned with undue litigation burdens—*Iqbal* sought to avoid unwarranted litigation from interfering with "the proper execution of the work of the Government," 556 U.S. at 685, and *Twombly* took issue with the extreme expense of forcing "America's largest telecommunications firms (with many thousands of employees generating reams and gigabytes of business records)" to search "for unspecified (if any) instances of antitrust violations that allegedly occurred over a period of seven years." 550 U.S. at 559. In both cases, the Supreme Court refused to countenance that interference and expense without more than "threadbare recitals of a cause of action's elements." *Iqbal*, 556 U.S. at 663. By contrast, Another

Planet's complaint contains dozens of paragraphs explaining the facts that entitle it to relief. *E.g.*, 3 E.R. 380-406, ¶¶ 5, 51-79.

Vigilant asks the Court to sidestep all these factual allegations, trying to cast them as one big ignorable legal conclusion that Another Planet suffered losses because of "direct physical loss or damage" to property. A.B. 27. That is nonsensical and contrary to *Iqbal*'s two-pronged approach. It is nonsensical because litigants are required to state their legal entitlements to relief in their pleadings. Fed. R. Civ. P. 8(a)(2). If every complaint containing a legal conclusion could be ignored—regardless of the quantum of factual information contained alongside that conclusion—then no lawsuit would survive the federal pleading standard. It is contrary to *Iqbal* because the Court explained that legal conclusions can help provide a framework for the claim for relief. 556 U.S. at 679. Put simply, "This is the legal conclusion that entitles me to relief, and here are the facts that I will prove to for the fact finder to come to that conclusion." As long as the facts are there to lead to the conclusion—as is the case in Another Planet's FAC—Rule 8 and *Iqbal* are satisfied.

B. Judicial Notice Plays No Role in This Case.

Vigilant further criticizes *Marina* for not taking judicial notice of facts, such as "the common-sense reality that a virus can be removed from a surface with the swipe of a cloth." A.B. 27. This is simply wrong. *Marina* analyzed disinfecting surfaces, what constituted "common sense" in this regard, what the insured had alleged, and its obligations in ruling on the insurer's demurrer:

> We are not authorized to disregard [the insured's] allegations [that the virus can and did cause property damage] when evaluating a demurrer . . . based on a general belief that surface cleaning may be the only remediation necessary to restore contaminated property to its original, safe-for-use condition. That was not always the understanding of the appropriate precautions to take with items potentially exposed to the virus (many people, in the early months of the pandemic, left groceries and other items outside their homes for several days after first sanitizing them); the insureds expressly alleged disinfecting affected objects does not repair or remediate the actual physical alteration to property caused by the virus; and the trial court did not take judicial notice of the effectiveness of cleaning as a proposition "not reasonably subject to dispute" . . . .
>
> Even if there had been evidence subject to proper judicial notice to establish that disinfecting repaired any alleged property damage, it would not resolve whether contaminated property had been damaged in the interim, nor would it

> alleviate any loss of business income or extra expenses. As the insureds argue on appeal, the duration of exposure may be relevant to the measure of policy benefits; it does not negate coverage.

81 Cal. App. 5th at 111-12. There is no difference between *Marina* and Another Planet's case in this point.

For the same reason, Vigilant's reliance on the Policy's "period of restoration" is unfitting. A.B. 18-19. Although coverage is defined with reference to repairing or replacing property, in the context of SARS-CoV-2, the necessary repair to the property is disinfection. Because the property is damaged every time an infected person's exhaled aerosolized virus alights on property, *see* 3 E.R. 397-99 ¶¶ 51-54, a new period of restoration started each of those times and continued until the property was disinfected again. As *Marina* explains, this is a question of the extent of coverage afforded under the Policy, not of whether Another Planet has sufficiently alleged covered losses. 81 Cal. App. 5th at 112.

Regardless, Vigilant has made no request of this Court to take judicial notice of anything, nor did it do so in the district court proceedings. *See* 4 E.R. 791-96.

C. *Marina* Properly Applied California Insurance Law.

Vigilant argues that the *Marina* court misconstrued the insurance policy in that case when it looked to a different policy provision dealing with viruses to shed light on whether a virus could cause "direct physical loss or damage" to property. A.B. 27-28. Not only is Vigilant incorrect, but this Court should do just as *Marina* and look to a virus-related provision elsewhere in Vigilant's Policy to determine that the SARS-CoV-2 virus can cause covered losses.

Marina reviewed a different coverage grant, for losses attributable to communicable diseases, to construe that insurance policy. 81 Cal. App. 5th at 112-13. This is appropriate, and required, because "[t]he 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." Cal. Civ. Code § 1641. Reading different provisions "side by side" is an interpretive "key" to ascertain an insurance policy's meaning. *AIG Prop. Cas. Co. v. Cosby*, 892 F.3d 25, 28-29 (1st Cir. 2018) (Souter, J.).

The policy in *Marina* promised to pay for losses caused by "'direct physical loss or damage' to insured property 'caused by or resulting from a covered communicable disease event,' including necessary costs

to '[r]epair or rebuild [insured property] which has been damaged or destroyed by the communicable disease.'" 81 Cal. App. 5th at 113 (boldface omitted). The court concluded, "This language explicitly contemplates that a communicable disease, such as a virus, can cause damage or destruction to property and that such damage constitutes direct physical loss or damage as defined in the policy." *Id*.

The same is true of Vigilant's Policy. As discussed in the Opening Brief, the liability part of Vigilant's package Policy promises to provide coverage for damage to property of a third party, subject to an exclusion for damage caused by "Biological Agents," including viruses. *See* O.B. at 41-42. This exclusion does not appear in the first-party coverages under which Another Planet claims relief. Accordingly, a reasonable interpretation of the Policy is that a virus like SARS-CoV-2 can cause property damage, as the Policy frames that concept, and coverage for that damage is not excluded from the first-party coverages.

Vigilant counters this interpretation, and *Marina*'s conclusion, arguing that viruses could damage property in circumstances other than the COVID-19 pandemic—specifically, that pigs can get sick. A.B. 28. That may be, but it does not justify dismissing Another

Planet's FAC, for "even if [Vigilant's] interpretation is considered reasonable, it would still not prevail, for in order to do so it would have to establish that its interpretation is the *only* reasonable one." *MacKinnon v. Truck Ins. Exch.*, 31 Cal. 4th 635, 655, 73 P.3d 1205, 1218 (2003); *see also Ticketmaster, LLC v. Illinois Union Ins. Co.*, 524 F. App'x 329, 331-32 (9th Cir. 2013) (rejecting insurer's interpretation of exclusion because insurer "failed to satisfy its burden of showing that . . . its interpretation of [the exclusion] is the *only* reasonable one").

Marina's interpretation of that policy is consistent with the purpose of "all-risks" coverage—that all risks of loss are covered unless specifically, plainly, clearly, and conspicuously excluded—and with California's maxim that reasonable interpretations maximizing insurance coverage must be given effect. *E.g.*, *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 822 (1990) ("we generally interpret the coverage clauses of insurance policies broadly, protecting the objectively reasonable expectations of the insured").

If Vigilant wanted to limit coverage for viruses to just livestock losses, it could (and should) have done so. Further, the fact that it did not include an exclusion to the first-party coverages that it used in

third-party coverages carries legal significance, for "an insurance company's failure to use available language to exclude certain types of liability gives rise to the inference that the parties intended not to so limit coverage." *Fireman's Fund Ins. Cos. v. Atlantic Richfield Co.*, 94 Cal. App. 4th 842, 852 (2001), *accord Safeco Ins. Co. v. Robert S.,* 26 Cal. 4th 758, 764 (2001) ("[W]e cannot read into the policy what [the insurer] has omitted. To do so would violate the fundamental principle that in interpreting contracts, including insurance contracts, courts are not to insert what has been omitted.").

This bedrock principle of insurance policy interpretation contradicts Vigilant's position when it argues that the long availability and far-flung use of a standard Insurance Services Office ("ISO") virus exclusion for "all-risks" policies is "irrelevant." A.B. 42-43. Far from irrelevant, the California Supreme Court stated long ago that "rational interpretation [of contract language] requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties." *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 39-40 (1968); *see also Pardee Constr. Co. v. Ins. Co. of*

the W., 77 Cal. App. 4th 1340, 1359 (2000) (ascertaining policy meaning by reviewing later drafts of ISO forms not used in the policy at issue).

Vigilant asks this Court to ignore *Atlantic* and *Pardee*, citing *UTA*'s unexplained distinguishing of these cases on the basis that the language missing from those policies involved construing a coverage grant, not an entirely absent exclusion. A.B. 43-44. The Court should reject that invitation because *UTA*'s analysis-free conclusion on this point is incorrect. Both cases involved a coverage extension for additional insureds, not a coverage grant. *Atlantic*, 94 Cal. App. 4th at 844; *Pardee*, 77 Cal. App. 4th at 1345. And there is no logical distinction to be made between limiting language missing from a coverage grant (or extension) and limiting language missing from a policy entirely. The concept is the same no matter the place in the policy from which limiting language is absent. There was limiting language available to Vigilant—the ISO exclusion and other language it used elsewhere in its own Policy—and Vigilant chose not to use it in the first-party coverages.

Vigilant also argues that it is inappropriate to look to other portions of the Policy because it would "cross wires" and conflate property coverages with arguably broader liability coverage. A.B. 40.

Not so. True, the liability part covers many things, but germane to this issue is that it covers claims of damage to third-party property and excludes such damage if caused by viruses. The lack of a similar exclusion for damage suffered to Another Planet's own property leads to the reasonable expectation that a virus can create covered losses and those losses are not excluded for Another Planet's first-party claims. At the very least the appearance of a virus exclusion applicable to third-party claims of property damage creates ambiguity as to what constitutes property damage under the first-party coverages, and that ambiguity must be resolved in Another Planet's favor. *Safeco*, 26 Cal. 4th at 763 ("Any ambiguous terms are resolved in the insureds' favor, consistent with the insureds' reasonable expectations.").

Vigilant counters this by saying a virus can cause damage to living property (swine), but that fact "does not establish that the *SARS-CoV-2 virus* damages inert property that it alights upon, any more than a flu virus does." A.B. 41. In this, Vigilant puts the cart before the horse. A complaint is not meant to establish anything, but rather to apprise the defendant and the court as to what the plaintiff *intends to establish* to obtain relief. The time for proof is not yet upon this case.

And the comparison to the flu is inapt. Asbestos is not the flu, either, but the deadly danger it poses makes it capable of causing covered losses.

D. Nothing Suggests that the California Supreme Court Would Follow *UTA* over *Marina*.

Vigilant also points out that the California Supreme Court did not grant review of *UTA* on its own motion or grant a non-party's request to decertify the Court of Appeal's decision from publication, arguing that this shows that the high court agrees with *UTA*. A.B. 26-27. At best, this is reading tea leaves. While it may be that an order denying a depublication request carries some meaning, it certainly is not "convincing evidence" that the high court would refuse to follow *Marina*.

The "sheer weight" of COVID-19 coverage decisions finding for insurers is no argument at all. As laid out above, there are just two controlling pronouncements of California law on the facts of this case: *Marina* and *UTA*. In terms of "sheer weight," the scales actually weigh in favor of Another Planet, given *Marina* and the *Inns* hypothetical.

Furthermore, as *Marina* explains, *UTA* misapplied California law by assuming the truth of facts contrary to those in the pleadings "without evidence," and failing to give credence to reasonable

interpretations of "all-risks" insurance that would maximize coverage. 81 Cal. App. 5th at 111. Vigilant does not explain why the California Supreme Court would upend decades of procedural and insurance law in favor of following *UTA* over *Marina*. Vigilant does not address *Marina*'s critique of *UTA* at all.

II. Another Planet's Allegations Are More than Adequate.

Vigilant argues that, never mind *Marina*, Another Planet's allegations do not fit the *Inns* hypothetical because the FAC equivocates as to whether SARS-CoV-2 was present in, on, and around covered properties, and that even were the virus present, the FAC does not adequately allege causation. A.B. 31-34. Both arguments are incorrect.

A. Another Planet Does Not Equivocate.

Vigilant points to several allegations in the FAC to the effect that SARS-CoV-2 was present on covered property or would have been present were it not for efforts to slow SARS-CoV-2's spread or remove it from the premises. A.B. 31-32. Seizing on the "or would have been present" language, Vigilant argues that Another Planet equivocates as to whether SARS-CoV-2 actually was there. Not so.

Another Planet seeks insurance for losses sustained because SARS-CoV-2 was present on its property. 3 E.R. 405-06 ¶¶ 76-78. That

entitlement is afforded under the Business Income with Extra Expense Coverage, the Building and Personal Property Coverage, and the Extra Expense Coverage. *Id.* at 393-96 ¶¶ 36-48.

Another Planet also seeks insurance coverage for losses sustained when SARS-CoV-2 was present on other property, thus forcing government officials to issue orders that shut down or slowed down Another Planet's business. *Id.* at 397-406 ¶¶ 51-78. In other words, orders designed to slow SARS-CoV-2's spread that, by design, kept SARS-CoV-2 from being present in, on, and around covered properties. That entitlement is afforded in the Additional Coverage for Civil Authority. *Id.* at 395 ¶ 45.

Another Planet also seeks insurance for losses sustained by mitigation efforts that prevented SARS-CoV-2 from coming onto its property, thereby avoiding a covered loss. *Id.* at 405 ¶¶ 76-77; *id.* at 409 ¶ 92; *id.* at 412-413 ¶ 102. That entitlement is afforded under California Insurance Code section 531, case law spanning decades, *see* O.B. at 47-48, and the Policy's condition that Another Planet "[t]ake every reasonable step to protect the covered property from further loss or damage." 3 E.R. 559.

Thus, the FAC alleges, simultaneously, that SARS-CoV-2 was present and caused covered damage, *and* that even more of SARS-CoV-2 would have been present were it not for the covered civil authority orders, *and* that even more of SARS-CoV-2 would have been present were it not for Another Planet's own efforts to mitigate covered damage. All are true. None is alleged in the alternative. None is equivocal.

Vigilant argues further that federal courts find that allegations based on the mere ubiquity of the virus are not enough to survive a motion to dismiss. A.B. 32-33. But none of the cases that Vigilant references to support this argument contained the allegations in Another Planet's FAC—to wit, that science would carry the burden of proof on this issue. 3 E.R. 397-401 ¶¶ 51-57. While those other cases may have wanted for factual allegations of SARS-CoV-2's presence, *e.g.*, *Kim-Chee LLC v. Phila. Indem. Ins. Co.*, --- F. App'x ---, 2022 WL 258569, at *2 (2d Cir. Jan. 28, 2022) (complaint "offer[ed] only conclusory assertions" of virus's ubiquity), Another Planet provided more than a dozen citations to scholarly articles and findings of

governmental institutions to support its claims. That is the opposite of a "threadbare" conclusion.

Vigilant may be skeptical of this evidence, but it must be accepted as true on a motion to dismiss. *Iqbal*, 556 U.S. at 678. The time to test its sufficiency is not yet here. *Cf. Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993).

B. Another Planet Has Alleged Physical Nature and Presence of SARS-CoV-2 Caused Loss.

Vigilant next argues that Another Planet "cannot plausibly allege that the *presence of the virus* is what *caused* its business interruption losses, especially given [Another Planet's] own allegation that *governmental orders* caused its losses by limiting use of its property." A.B. 33. This is incorrect for two reasons.

First, Vigilant is urging the Court to misapply the federal pleading standard. As discussed above, *supra*, Section I.A, "[t]he plausibility standard is not akin to a 'probability requirement.'" *Iqbal*, 556 U.S. at 678. All that is required is that the facts needed to prove entitlement to relief are pled in the operative complaint. *Comcast*, 140 S.Ct. at 1014. Another Planet's FAC points to statements from the World Health Organization, scientific journals, and news media

explaining that SARS-CoV-2 can survive on physical surfaces for long periods of time, transforming them into dangerous vectors for the disease and "render[ing] both real and personal property unusable for its intended purpose and function . . . ." 3 E.R. 397-99 ¶¶ 51, 53. These are clear factual allegations that the presence of the physical substance that is SARS-CoV-2 caused Another Planet's losses. When accepting them as true, they lead to the conclusion that Another Planet is entitled to relief under Vigilant's Policy. That is sufficient for Rule 8 and *Iqbal*. If Vigilant believes that Another Planet will be unlikely to prove those facts (despite all the supporting science), Vigilant may test the sufficiency of the evidence after discovery. But it cannot just ask this Court to decide at the pleading stage that Another Planet will not be able to prove its allegations.

Second, as discussed above, *supra*, Section II.A, Another Planet suffered losses in the coincidence of several different aspects of the pandemic: (i) SARS-CoV-2's physical presence on its property and the property of dependent premises; (ii) the shut-down orders issued in response to the damage that SARS-CoV-2 was causing in the vicinity of covered properties; and (iii) the costs of sanitizing and modifying

property to render it safe and usable and reduce covered losses. Vigilant's reliance on *Inns* to refute these allegations is misplaced because, again, those plaintiffs did not allege any losses caused by the presence of the virus—just the fact that they were ordered to close. 71 Cal. App. 5th at 703.

Vigilant argues that there is a difference between SARS-CoV-2 particles *on* property and physical alteration *to* property. A.B. 22. This semantic distinction does not have any legal basis. There is no reason why smoke particles *on* property should constitute damage *to* property, *see, e.g.*, *Or. Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, 2016 WL 3267247, at *9 (D. Or. June 7, 2016), but SARS-CoV-2 particles on property would not—especially when smoke is a mere irritant, but SARS-CoV-2 is highly communicable and causes a deadly disease. *See* 3 E.R. 399 ¶ 54 ("Scientists have likened the ubiquitous aerosolized droplets of the virus to smoke"). The crux of Vigilant's argument is that SARS-CoV-2 can be removed from surfaces with common disinfectants. A.B. 22-24. However, as discussed above, *supra*, Section I.B, the efficacy of such efforts has not been established here, and the manner of cleaning up damage to property is a question of the extent of damage,

not whether property suffered damage in the first place. *Marina*, 81 Cal. App. 5th at 112.

III. Another Planet Is Entitled to Civil Authority Coverage.

Vigilant relies heavily on *Inns* to argue that there cannot be any coverage for losses sustained in compliance with civil authority orders. A.B. 44-49. First, it contends that because SARS-CoV-2 cannot cause "direct physical loss or damage" to property, the claim necessarily fails. As discussed above, *supra*, Section I.C, that is inconsistent with Another Planet's FAC and the principles discussed in *Marina*.

Next Vigilant claims that *Inns* shows that civil authority orders issued during the pandemic were not concerned with damage to property, justifying dismissal of Another Planet's claim for civil authority coverage. A.B. 45-47. However, the orders in *Inns* were silent on SARS-CoV-2's damage to property. 71 Cal. App. 5th at 703. Another Planet's FAC, by contrast, plainly alleges that officials in San Francisco and Alameda Counties issued closure orders "in response to the rapid spread of SARS-CoV-2 and the resulting damage to individuals *and property* that it causes." 3 E.R. 402 ¶ 62 (emphasis added). Another Planet buttressed this notion with the fact that the Governor of Nevada

(a jurisdiction germane to Another Planet's coverage claim) explained that the "drastic shut down measures were necessary in light of 'the ability of the novel coronavirus that causes COVID-19 to survive on surfaces for indeterminate periods of time, [which] renders some property unusable' and contributes to 'damage . . . and property loss.'" 3 E.R. 403 ¶ 64.

Despite these allegations, Vigilant further argues that the closure orders were made in response to protecting people, not property. A.B. 46-47. Vigilant offers no proof and just asks the Court to take its word for it, which is impermissible on a motion to dismiss. But more fundamentally, the difference between protecting people and protecting property is an imagined distinction. SARS-CoV-2 is a problem precisely because its presence on and in property is gravely injurious to human health. That is the same reason why asbestos is a problem. If asbestos were not so deadly, we would not call its presence on property "damage" or the resulting remediation expenses and inability to use property "loss." The same is true of SARS-CoV-2: it has killed millions of people in mere months and dreadfully sickened millions more. *See* 3 E.R. 400-401 ¶¶ 55-57. Illustratively, Vigilant argues that the COVID-19

pandemic is like the annual cold and flu season. A.B. 22-23. When was the last time this Court held remote arguments for more than two years because of flu season? The COVID-19 pandemic is not a cold and flu season, just like asbestos fibers are not mere pet dander. In some cases, the substance's presence and the substance's ability to harm humans are what tilt the balance.

The orders were issued to protect public health, and that meant keeping people away from and out of buildings where SARS-CoV-2 was physically present and, because of its presence, they may contract COVID-19. Vigilant's argument is a distinction without a difference in the COVID-19 context.

Nor does the Policy make this distinction. All that is required for coverage is a civil authority order that prohibits access to premises because of "direct physical loss or damage to property" within one mile. 3 E.R. 394 ¶ 39. The additional requirement that Vigilant asks the Court to read into the Policy's civil authority coverage—that the orders' purpose must be to keep the public away from property that has been damaged—is missing from the Policy's plain language. Coverage is not conditioned on an order's purpose, and courts are not to insert what

Vigilant omitted. *Safeco*, 26 Cal. 4th at 764 ("we cannot read into the policy what [the insurer] has omitted").

Third, Vigilant argues that because SARS-CoV-2 is ubiquitous in communities and throughout the country, the resulting civil authority orders are not of a nature to trigger coverage. A.B. 47. Again, Vigilant asks the Court to read into the civil authority coverage conditions just not there. Nothing in the Policy conditions coverage on a specific localization of property damage or loss, except that in some cases property loss or damage must occur within 1,000 feet or 1 mile of covered premises or those of dependent businesses. Another Planet has alleged that those requirements have been met with respect to its losses. 3 E.R. 380-81 ¶ 5. Nowhere does the Policy state that, within that radius, just one building or road or park or seaport, etc., must suffer property loss or damage and if more than one (or a dozen or a hundred) so suffer, there is no coverage. Vigilant's argument simply has no basis in the Policy's plain language.

Fourth, Vigilant argues that because the civil authority orders did not close the relevant premises entirely—that it was still possible for

some people to enter them—there was no "prohibition of access," as required for civil authority coverage. A.B. 48-50. Not so.

Another Planet alleges, in non-conclusory terms, 10 paragraphs describing the civil authority orders and how they impacted Another Planet's business. 3 E.R. 399-403 ¶¶ 54-64. These paragraphs describe how it became unlawful for Another Planet to operate its facilities to conduct its business. *Id.* at 401 ¶ 58. They also describe how California placed criminal penalties on residents that disobeyed the orders of the State Public Health Officer. *Id.* at 402 ¶ 61. Taking these allegations as true, Vigilant's arguments do not make sense. The orders prohibited people from accessing premises relevant to the Policy's coverage grants. By any interpretation, facing criminal penalties for going to Another Planet's offices or entertainment venues is a "prohibition" of "access" to relevant premises.

Basic principles of contract construction support this conclusion. Because Vigilant chose not to define "prohibition" or "access," those terms must be understood in accord with the plain meaning a layperson would attach. *See* Cal. Civ. Code § 1644. "Prohibit" is "to forbid by authority" and "to prevent from doing something." *Prohibit*, Merriam-

Webster Online Dictionary (Jan. 12, 2021). "Access" means "permission, liberty, or ability to enter, approach, or pass to and from a place." *Access,* Merriam-Webster Online Dictionary (Mar. 28, 2021). Based on these ordinary understandings of the Policy's language, Another Planet has sufficiently alleged that the orders "prohibit[]" "access" in the manner required to trigger coverage. Employees and the public were not at liberty to enter Another Planet's offices or entertainment venues that are critical to Another Planet's business. *See Ungarean v. CNA*, 2021 WL 1164836, at *10 (Pa. Ct. Com. Pl. Mar. 25, 2021) (the Closure Orders "effectively prevented, or forbade by authority, citizens of the Commonwealth from accessing Plaintiff's business in any meaningful way for normal, non-emergency procedures"); *accord Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 488 F. Supp. 3d 867, 879 (W.D. Mo. 2020) ("Plaintiffs allege three of their dental clinics were closed entirely and, for the clinic that did continue to provide treatment, only emergency dental services were offered. The allegations [] sufficiently establish access to the clinics was prohibited to such a degree that the Civil Authority provision could be invoked.").

Vigilant argues that reading the Policy as Another Planet does would lead to "wholly untenable results" because banning the use of alcohol near schools could adversely affect the business of liquor stores and restaurants, or a new zoning law could restrict the use of property. A.B. 50. This argument is hollow. As Vigilant argues, the *sine qua non* of all-risks coverage is loss or damage to property. These scenarios have nothing to do with Another Planet's claim for coverage.

Finally, Vigilant points to *Southern Hospitality, Inc. v. Zurich American Insurance Co.*, 393 F.3d 1137 (10th Cir. 2004), claiming it "properly distinguishes between orders that prohibit access to property and orders that have only the effect of reducing the public's use of the premises." A.B. 49. It does not, however, have any bearing on Another Planet's claim for civil authority coverage. In that case, the civil authority orders shut down an airport that drove much of the plaintiff hotel companies' business following the September 11, 2001, terrorist attacks. 393 F.3d at 1138. Thus, the orders were directed at property other than the hotels, which were permitted to operate as usual. *Id.* That is different from the circumstances leading to Another Planet's losses, where the orders *applied directly to Another Planet, forbidding it*

to do business on its own premises. In that sense, Another Planet is better analogized to the plaintiff in *US Airways, Inc. v. Commonwealth Insurance Co.*, 64 Va. Cir. 408, 2004 WL 1094684 (Va. Cir. Ct. May 14, 2004), in which the plaintiff airline was ordered to ground and not use its fleet following the September 11 attacks. *Id.* at *2. The policy contained civil authority coverage similar to Vigilant's Policy in this case. *See id.* at *1. Applying principles consistent with California law, that court held that the insurer was not entitled to summary judgment because a reasonable jury could find that the orders prohibited the plaintiff and the public from accessing the airplanes, constituting a "direct, physical 'loss'" of the plaintiff's property. *Id.* at *3, *5.

IV. Another Planet Has Adequately Alleged Bad Faith and Fraud.

Another Planet has alleged that Vigilant acted in bad faith because it failed to investigate the coverage claim and wrongfully denied coverage, even though it knew—and had said for years—that it would face significant exposure under all-risks policies in the event of a pandemic. 3 E.R. 384-92 ¶¶ 19-30. Now, Vigilant argues that there can be no bad faith because (i) there can be no bad faith absent a failure to pay for covered losses and (ii) there was no unreasonable denial of

benefits because even if they ultimately are found liable, the many cases finding for insurers "in this exact situation" shows it was reasonable for them to believe there was no coverage. A.B. 52-53.

First, Another Planet's claim does merit coverage for the reasons discussed above. Second, the only California cases addressing "this exact situation" are *UTA* and *Marina*, and neither of those had been decided when Vigilant denied coverage. Another Planet alleges physical alteration to covered property caused by SARS-CoV-2 and resulting in losses. Vigilant was required to consider the nuances of Another Planet's claim carefully and set forth all the reasons it believed there was no coverage. Instead, Vigilant performed the most superficial of inquiries and towed its corporate parent's line: deny all pandemic-related claims. Vigilant's failures, refusals, sham investigations, specious arguments, and participation in campaigns—in and out of courts nationwide—to avoid pandemic-related coverage obligations that it foresaw and planned for over many years, are the quintessence of bad faith.

These same allegations are more than adequate to satisfy Rule 9(b)'s pleading requirements. "To satisfy Rule 9(b), a pleading must

identify 'the who, what, when, where, and how of the misconduct charged,' as well as 'what is false or misleading about [the purportedly fraudulent] statement, and why it is false.'" *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1055 (9th Cir. 2011). Another Planet has alleged that Vigilant (and its parent company, Chubb) publicly stated for years that a pandemic would trigger coverage obligations under its commercial lines and sold policies to Another Planet and others, who bought those policies based on their understandings of the coverage as represented. 3 E.R. 416-19 ¶¶ 113-125. Vigilant's coverage denial was thus fraudulent based on what Vigilant had represented and what it knew about pandemic risks, or its act of selling policies with the promise of coverage for pandemic risks was fraudulent if it always intended to contest pandemic-related losses. *Id.*; *id.* at 419-422 ¶¶ 126-144. At the very least, these representations were baseless and negligently harmed Another Planet. *Id.* at 422-423 ¶¶ 145-148. This is more than the specificity required under Rule 9(b).

V. Conclusion

California law is not clear in the manner that Vigilant advances. What is clear is that Vigilant (and Chubb) long knew that a pandemic

could trigger property policies like Another Planet's, and the Policy's words and structure reflect that. Vigilant could have excluded coverage for virus-related property losses—as it did in the Policy's liability part—but it did not. Therefore, the pandemic's impact from the physical presence of SARS-CoV-2 is among the "all risks" of loss that Vigilant agreed to insure. Another Planet's FAC contains detailed factual information leading to the conclusion that Vigilant is liable for Another Planet's pandemic-related losses, and this is the only consistent conclusion under federal pleading standards. For the reasons expressed in *Marina*, the judgment must be reversed.

DATED: August 26, 2022 PASICH LLP

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CERTIFICATION OF WORD COUNT

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Reply Brief of Appellant Another Planet Entertainment, LLC is proportionately spaced, has a typeface of 14 points or more, and contains 6,989 words (and, therefore, is within the permissible limit of 7,000 words).

DATED: August 26, 2022 PASICH LLP

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