Supreme Court Case No. S277893

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ANOTHER PLANET ENTERTAINMENT, LLC,

Petitioner,

v.

VIGILANT INSURANCE COMPANY,

Respondent.

Request for Certification to Decide a Matter of California Law Presented in a Matter Pending in the U.S. Court of Appeals, Ninth Circuit Case No. 21-16093

PETITIONER ANOTHER PLANET ENTERTAINMENT'S REPLY BRIEF

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INTRODUCTION

This case presents novel issues because the COVID-19 Pandemic is the first event in which a virus has caused catastrophic losses since the Spanish Flu more than a century ago. Losses like these have never tested modern insurance law, which developed largely in the second half of the Twentieth Century. Respondent Vigilant Insurance Company's approach to these issues is to downplay both their novelty and importance and Vigilant and the insurance industry's knowledge that a pandemic was likely and that unless a clear exclusion was used, insurer losses could be substantial.

Vigilant argues that the key phrase "direct physical loss or damage to property" is crystal clear when it comes to losses caused by viruses: they cannot cause the requisite harm because their presence is just temporary. Still, Vigilant seeks to import new words and ideas into its Policy, insisting that "direct physical loss or damage to property" requires a "permanent" "structural alteration" or "complete dispossession." Not only would adopting this position rewrite the Policy, but it also would rewrite insurance law. Vigilant's arguments must be rejected.

First, extrinsic evidence shows insurers, including Vigilant, expected that a pandemic would lead to losses under commercial property policies. That Vigilant elected not to include the industry-standard exclusion for viruses and bacteria in its Policy shows its intent not to so limit coverage and underscores petitioner Another Planet Entertainment's reasonable expectation of coverage for pandemic-related losses.

Second, the Policy's third-party coverages contain a definition of "property damage" that deals with the concepts "physical," "loss," "damage," and "property." Construing the Policy as a whole, it was reasonable to conclude that "direct physical loss or damage to property" is as broad as "property damage," if not broader.

Third, Vigilant included an exclusion for virus-related losses in the Policy's third-party coverages, indicating Vigilant knew that viruses can and do cause damage to property. Vigilant could have included a virus-related exclusion in the first-party coverages as well, but did not. Thus, Another Planet's Pandemic-related losses caused by SARS-CoV-2 are covered, not excluded.

Fourth, the Court must reject Vigilant's arguments that the Policy does not cover SARS-CoV-2 losses because SARS-CoV-2 will

eventually degrade and can be removed from surfaces and air. When SARS-CoV-2 is present, it physically alters and damages property, just as asbestos does, by making it unsafe. Even if, as Vigilant claims, SARS-CoV-2 can be removed from surfaces and air, this raises a question of the extent of damage, not whether SARS-CoV-2 causes damage in the first place. And, when people continually reintroduce SARS-CoV-2 into the airspace and on surfaces by breathing, it is clean property—not the presence of SARS-CoV-2—that is temporary.

Fifth, courts the country over have relied on a flawed premise in defining what "direct physical loss" means. Vigilant argues that the sheer volume of these other courts' mistakes is reason enough to just follow them as the law. This Court, an unmatched leader in insurance law, is uniquely positioned to correct the error in California and allow the law to develop in responding to pandemics in a manner that is consistent with past precedent and insureds' reasonable expectations of coverage.

ARGUMENT

I. Extrinsic Evidence Shows Another Planet Reasonably Expected Its Policy to Respond in a Pandemic.

This Court has developed a clear set of rules to ascertain the meaning of an insurance policy. The guiding principle of these rules is to "protect[] not the subjective beliefs of the insurer but, rather, the 'objectively reasonable expectations of the insured.'" *Bank of the W. v. Superior Ct.*, 2 Cal. 4th 1254, 1265 (1992) (quoting *AIU Ins. Co. v. Superior Ct.*, 51 Cal. 3d 807, 822 (1990)). What expectations are objectively reasonable depends on the words of an insurance policy within the context of the claim for coverage. "The proper question is whether the [language] is ambiguous in the context of *this* policy and the circumstances of *this* case." *Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co.*, 5 Cal. 4th 854, 868 (1993); *accord Bank*, 2 Cal. 4th at 1265 ("'language in a [policy] must be construed in the context of that instrument as a whole, and in the circumstances of that case'" (italics and citations omitted)). Consequently, parties may offer extrinsic evidence "to prove a meaning to which the language of the instrument is reasonably susceptible," even if the policy language appears plain and unambiguous by itself. *Pacific Gas & Elec. Co. v. G. W.*

Thomas Drayage & Rigging Co., 69 Cal. 2d 33, 37 (1968); *accord Dore v. Arnold Worldwide, Inc.*, 39 Cal. 4th 384, 391 (2006) (same).

In keeping with these rules, Another Planet explained that courts have struggled to interpret the phrase "direct physical loss or damage" for some 60 years, that publicly available documents show that Vigilant knew and intended its commercial property policies to respond in a pandemic, and that Vigilant declined to use a standard exclusion for virus-caused losses to limit its "all-risks" coverage. O.B. at 27-39.

The sum of this evidence is that, in the context of COVID-19, Another Planet reasonably could expect that its Pandemic-related losses could be covered under its Policy. Vigilant's response to this evidence is to urge the Court to ignore it.

A. The Court Should Consider Extrinsic Evidence of Policy Intent.

Vigilant argues that extrinsic evidence can only be considered "if the insured *first* establishes an ambiguity in the policy language that cannot be resolved through 'standard rules of contract interpretation.'" A.B. at 55 (citations omitted). This is incorrect. Extrinsic evidence can expose a latent ambiguity, as discussed above. And in the context of this case, were the Policy's

language unambiguous as to the presence of SARS-CoV-2 in, on, and around insured property, we would not be before this Court now. Indeed, many other courts have found the same or similar language ambiguous, including in the COVID-19 context. *See* O.B. at 27-31. Thus, it is not only appropriate, but essential, to consider extrinsic evidence here. *See Pacific*, 69 Cal. 2d at 39-40 ("rational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties").

B. Public Statements Inform Another Planet's Reasonable Expectations of Coverage.

Vigilant argues that the insurance industry's multiple public statements regarding insurers' exposures to pandemic-related losses are "untested hearsay," off topic, and to be disregarded. A.B. at 56-58. This is incorrect.

Ambiguous terms should be given the meaning that Vigilant believed Another Planet understood the term to mean at the time it issued the Policy. Cal. Civ. Code § 1649. What Vigilant's parent company, Chubb Ltd., said about pandemics, including that its financial position would be significantly compromised in the event of a pandemic, is thus highly relevant. O.B. at 34-35. For example, Chubb's 2019 Annual Report states:

> We have substantial exposure to losses resulting from natural disasters, man-made catastrophes such as terrorism or cyberattack, and other catastrophic events, *including pandemics*. This could impact a variety of our businesses, including our *commercial* and personal lines, and life and accident and health (A&H) products.[1]

Vigilant responds, "On its face that comment addresses a variety of broad societal threats and calls out risks to many different policy lines, including . . . life insurance policies . . . ." A.B. at 57. That is true, but it calls out the risk to commercial lines first.

Indeed, pointing to Chubb's life insurance lines is misdirection. Chubb reported that of its 2019 "core operating income of $4.6 billion,"[2] its two largest profit sectors were "Chubb's North America Commercial [Property and Casualty] Insurance operation" and "North America middle-market and small business commercial [Property and Casualty] franchise."[3] Another Planet's

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[1] Chubb Limited Annual Report 2019 at 19 (emphasis added), https://s1.q4cdn.com/677769242/files/doc_financials/2020/ar/2019-Chubb-Limited-Annual-Report.pdf (*last visited* July 3, 2023).

[2] *Id.* at 4.

[3] *Id.* at 10-11.

Policy falls within the latter. By contrast, Chubb's entire global life insurance sector generated some $366 million in income—less than 8% of the total $4.6 billion.[4] Per Chubb, "Life insurance is today a relatively modest business for Chubb."[5]

Vigilant argues, "There are innumerable ways in which the financial health of a large insurance company like Chubb could be impacted by the pandemic," and lists basically every other conceivable business sector other than Chubb's two largest. A.B. at 57. Vigilant concludes, "[T]he pandemic could and did have myriad effects on Chubb's business without the COVID-19 virus ever triggering coverage under Chubb's commercial property policies." *Id.* at 58. This, however, is not what happened. According to Chubb's 2020 annual report, "We ended the year with a stronger balance sheet than we began,"[6] and, "We entered '21 in a stronger position financially, operationally, and strategically,"

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[4] *Id.* at 38. In 2019, Chubb wrote over $17.6 billion in commercial property and casualty insurance in North America alone, *id.* at 24, compared to less than $2.4 billion in life insurance worldwide. *Id.* at 38.

[5] *Id.* at 13.

[6] Chubb Limited Annual Report 2020 at 3, https://www.chubb.com/content/dam/chubb-sites/chubb/about-chubb/pdfs/2020-Chubb-Annual-Report.pdf.

buoyed by a "record cash flow of $9.8 billion."[7] And, *again*, Chubb's Chairman and CEO stated *after* 2020:

> Our and the industry's COVID-related claims come from a broad range of exposures, principally in four areas. The first occurred as people suffered from ill health or death . . . affecting everything from life and health insurance to workers compensation. The second source of exposures come from liability-related insurance, including employment practices, directors and officers (D&O) and medical malpractice. *Next are business interruption losses, from businesses that had coverage and were shut down during the pandemic*.[8]

The only reasonable interpretation of Chubb's statements is that a pandemic could and would cause significant losses from Chubb's core products: commercial property and casualty insurance. Based on statements like these, insureds like Another Planet reasonably expected that their losses would be covered in the event of a pandemic and that Vigilant knew it when it sold the Policy.

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[7] *Id.* at 4.

[8] *Id.* (emphasis added).

Vigilant accuses Another Planet of not having read the white paper available via the Insurance Library Association of Boston about the risks posed to insurers by pandemics, arguing it only addressed life insurance, not property insurance. A.B. at 56. The accusation is discourteous and, more importantly, incorrect. True, the article singled out life insurance as a particularly vulnerable sector, but it also discussed the exposure of the insurance industry overall, which is the portion Another Planet cited.

In any event, neither Chubb's statements nor the white paper are hearsay because they are a sample of the information available to inform Another Planet's objectively reasonable expectations of coverage, not offered for the veracity of the statements therein. *See* Cal. Evid. Code § 1200; Fed. R. Evid. 801(c)(2).[9] This evidence shows that Vigilant knew that a reasonable insured like Another Planet would understand its Policy to provide coverage for Pandemic-related losses and is directly relevant to how this Court should interpret the Policy. Cal. Civ. Code § 1649.

[9] Chubb's statements are admissible as statements of a party-opponent because Chubb speaks for Vigilant, including in denying Another Planet's coverage claim. 4-E.R.-770-81.

C. The Absence of a Virus Exclusion Is Significant.

The Policy lacks ISO's standard exclusion for first-party losses caused by viruses and bacteria, and that omission informed Another Planet's reasonable expectation of coverage. O.B. 35-39. Vigilant responds that the absence of an exclusion cannot create ambiguity or coverage "'in an otherwise unambiguous insuring clause.'" A.B. at 59 (quoting *Inns-by-the-Sea v. Cal. Mut. Ins. Co.*, 71 Cal. App. 5th 688, 709 (2021)). *Inns* did not address claims like Another Planet's. In that case, the losses stemmed solely from county-mandated closure orders, not from the actual presence of SARS-CoV-2. 71 Cal. App. 5th at 704. Vigilant elides that *Inns* hypothesized that a virus's presence *could* cause "direct physical loss or damage" to property in certain instances. *Id.* at 704-05.

Vigilant further argues that Another Planet failed to cite authority that "'deal[s] with the absence of an *exclusion* in a policy,' but instead 'discuss[ed] the significance of missing language *in the insuring clause itself*.'" A.B. at 59. This is incorrect. Another Planet cited *Fireman's Fund Insurance Cos. v. Atlantic Richfield Co.*, 94 Cal. App. 4th 842, 852 (2001), for the proposition that "an insurer's 'failure to use available [exclusionary language] gives rise to the inference that the parties intended not to so limit coverage.'"

O.B. at 39. That case involved interpretation of an additional insured endorsement containing *limiting* language. 94 Cal. App. 4th at 846, 852. Coverage limitations are interpreted the same way exclusions are. *Smith Kandal Real Estate v. Cont'l Cas. Co.*, 67 Cal. App. 4th 406, 414 (1998) ("an exclusion *or limitation* on coverage must be clearly stated and will be strictly construed against the insurer" (emphasis added)). Just as *Atlantic* dealt with an absence of limiting language, this case deals with the absence of exclusionary language. There is no conceptual or doctrinal distinction that supports Vigilant's contrary argument.

Next, Vigilant argues that a virus exclusion may be relevant in the case of spoiled goods or sick livestock, but not when it comes to a virus in, on, or around property. A.B. at 60. This argument is not consistent with ISO's stated purpose for developing its standard exclusion:

> Disease-causing agents may render a product impure (change its quality or substance), or *enable the spread of disease by their presence on interior building surfaces* or the surfaces of personal property. When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement

> of property (for example, the milk), *cost of decontamination (for example, interior building surfaces), and business interruption (time element) losses*.[10]

ISO specified concern about "rotavirus, SARS, influenza (such as avian flu), legionella and anthrax"[11]—to wit, diseases that present dangers to *humans*, including the exact type of virus that caused the COVID-19 Pandemic.

Another Planet does not argue that the absence of a virus exclusion creates new coverage. Instead, Another Planet claims that (i) the existence of the ISO virus exclusion demonstrates that even industry leaders like ISO understood that the presence of a deadly virus in, on, and around property could cause the precise covered losses that Another Planet in fact suffered, and (ii) Another Planet's interpretation of its right to coverage in the absence of such an exclusion is objectively reasonable.

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[10] ISO Circular, "New Endorsements Filed to Address Exclusion of Loss Due to Virus or Bacteria," (July 6, 2006) (emphasis added), https://www.propertyinsurancecoveragelaw.com/files/2020/03/ISO-Circular-LI-CF-2006-175-Virus.pdf.

[11] *Id*.

In sum, extrinsic evidence demonstrates that, in context, "direct physical loss or damage" to property shows: (i) Another Planet's understanding, that a viral pandemic would trigger coverage under its Policy, was reasonable; and (ii) Vigilant knew its insureds believed their commercial policies would respond in a pandemic.

Turning to the Policy, Vigilant's arguments again fail to demonstrate that Another Planet's interpretation of its Policy is unreasonable.

II. Construing "Direct Physical Loss or Damage," Alongside the Policy's Other Provisions Provides a Reasonable Interpretation Conferring Coverage.

Despite many courts asking insurers to define "direct physical loss or damage to property" for decades, *see* O.B. at 27-31, Vigilant's Policy does not do so. Following canons of insurance policy construction, the reasonableness of Another Planet's expectation of coverage is evident.

A. The Liability Coverages' Definition of "Property Damage" Helps Interpret "Direct Physical Loss or Damage to Property."

If Vigilant intended "direct physical loss or damage to property" to carry the meaning that it urges this Court to adopt, it could (and should) have included such a definition in the Policy.

O.B. at 26-31. As Vigilant points out, A.B. at 62, the Policy's liability section does contain a definition for "property damage" that also deals with "loss":

> **Property damage** means:
>
> - physical injury to tangible property, including resulting loss of use of that property. . . . ; or
> - loss of use of tangible property that is not physically injured. . . . .

4-E.R.-662.

It is reasonable to conclude that this definition of "property damage" has some interpretive value when construing the similar, but undefined, "direct physical loss or damage to property." "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Cal. Civ. Code § 1641. As the Honorable Justice David Souter explained, when construing similar policy provisions drafted by the same insurance company, holding them "side by side" can provide an interpretive "key" to ascertaining the meaning of an undefined term. *AIG Prop. Cas. Co. v. Cosby*, 892 F.3d 25, 28-29 (1st Cir. 2018); *see also, e.g.*, *Palmer v. Truck Ins. Exch.*, 21 Cal. 4th 1109, 1116-17 (1999) (giving term defined in

coverage grant the same meaning when used in an exclusion); *Caminetti v. Pac. Mut. Life Ins. Co.*, 22 Cal. 2d 344, 358 (1943) ("Words used in a certain sense in one part of an instrument are deemed to have been used in the same sense in another.").

To be clear, Another Planet does not seek to import the liability coverages' definition of "property damage" into the first-party property coverages. The definition simply offers some utility because Vigilant failed to define "direct physical loss or damage to property." Insurance policy terms are supposed to be interpreted the way a layperson would ascribe meaning to them. *E.M.M.I. Inc. v. Zurich Am. Ins. Co.*, 32 Cal. 4th 465, 472 (2004). In this light, there is no readily discernable difference between "direct physical loss or damage to property" and the concepts described in the "property damage" definition.

Vigilant argues that "property damage" in the third-party context means something different from "direct physical loss or damage to property" in the first-party context because the "property damage" definition does not use the modifiers "direct" or "physical," and the definition's second prong includes coverage for loss of use of property that is not physically damaged. A.B. at 62. This, Vigilant argues, makes the liability coverages for third-party

property losses broader than the first-party coverage's "all-risks" coverage grant. *Id.* Vigilant is wrong.

First, the definition of "property damage" is specific when it comes to physicality, not silent. The first prong refers to "*physical* injury to *tangible* property." 4-E.R.-662 (emphasis added). The second prong refers to "loss of use of *tangible* property that is not *physically* injured." *Id.* (emphasis added). "Tangible" and "physical" are synonyms. *Physical*, Merriam-Webster, https://www.merriam-webster.com/thesaurus/physical. Because it deals with "physical," "loss," "damage," and "property," the defined term can help shed light on the undefined phrase "direct physical loss or damage to property."

Second, Vigilant argues that the liability coverages' definition of "property damage" lacks the modifier "direct," implying that liability coverages extend to "indirect" losses to which first-party coverages do not. A.B. at 62. We do not know what "*indirect* physical loss or damage to property" might mean or how that may be relevant in this case, and again, Vigilant does not tell us. *See id.* But Another Planet alleges that SARS-CoV-2 was present in, on, and around, covered property, so whatever difference there may be is not germane now. *See Marina Pac.*

Hotel & Suites LLC v. Fireman's Fund Ins. Co., 81 Cal. App. 5th 96, 109 (2022) (allegations of SARS-CoV-2's physical presence satisfies "direct" and "physical" requirements).

Third, Vigilant argues the third-party coverage grant covers a broader spectrum of risks than the first-party coverages, A.B. at 62, but it does not adequately explain how it could possibly be broader than the promise to insure against "all risks" of "direct physical loss or damage to property" unless plainly, clearly, conspicuously, and explicitly excluded. *See* 3-E.R.-456. "Indeed, one would struggle to think of damage *not* covered by this language." *K.V.G. Props., Inc. v. Westfield Ins. Co.*, 900 F.3d 818, 821 (6th Cir. 2018) (considering insurance for "all 'Risks of Direct Physical Loss'").

Arguing the liability coverage is broader, Vigilant points out that "property damage" "expressly includes 'loss of use of tangible property that is not physically injured.'" A.B. at 62. The attempt to draw this distinction belies a superficial understanding of the history of property insurance.

For a very long time, courts have construed "loss of use" as indirect economic damages attendant to, but distinct from, property damage. *See, e.g.*, *Connecticut Fire Ins. Co. v. W.H.*

Roberts Lumber Co., 89 S.E. 945, 945 (Va. 1916) ("The terms used in the [fire insurance] policy . . . contract to insure the interests of the plaintiff . . . in the lumber itself, existing at the time of the loss by fire, and not profits which might arise from the dealing of the plaintiff with such lumber."); *St. Paul Fire & Marine Ins. Co. v. Johnson*, 77 Ill. 598, 602 (1875) (error to introduce evidence of lost rent in action on fire policy). So, courts addressing "pure *property* coverage" regard "[l]oss of use [as] a separate interest which may be specifically insured, but [one that] is not covered by a general property loss or damage, fire or marine insurance policy." *Jarvis Towing & Transp. Corp. v. Aetna Ins. Co.*, 72 N.Y.S. 2d 696, 697 (N.Y. Sup. Ct. 1947), *rev'd on other grounds*, 82 N.E. 2d 577 (N.Y. 1948).

Thus, the inclusion of "loss of use" in defining "property damage" is meant to insure against third-party claims of consequential damages, including business interruption losses, that follow a "physical injury to property" or a "loss of use" of property. In the first-party property insurance context, the "loss of use" concept developed into the suite of time-element coverages, several of which form the basis for Another Planet's claims. Time-element coverages are specifically designed to provide coverage for

consequential economic damage following property damage or loss. That includes "loss of use" resulting from "physical injury to tangible property" (*e.g.*, Business Income With Extra Expense coverage, 3-E.R.-485), as well as "loss of use of tangible property that is not physically damaged" (*e.g.*, Civil Authority coverage, 3-E.R.-485-88, 569-70).

Put differently, the Policy's property-related concepts across first-party and third-party coverages can be framed as an analogy: "direct physical damage" is to "physical injury to tangible property" as "direct physical loss" is to "loss of use of tangible property."

It is far more reasonable to understand the third-party coverages' definition of "property damage" as addressing concepts like those embodied in "direct physical loss or damage to property" than to give credence to Vigilant's overly simplistic read of the Policy's language.

In sum, Vigilant argues that a defined term involving similar concepts of "physical," "loss," "damage," and "property," is broader than the undefined term "direct physical loss or damage to property." That argument inverts fundamental rules of insurance policy interpretation, in which ambiguous terms are resolved to give effect to the reasonable expectations of the insured,

maximizing coverage. *Safeco Ins. Co. v. Robert S.*, 26 Cal. 4th 758, 763 (2001). If anything, the undefined term is more susceptible to broader interpretations. The only reasonable way to understand "direct physical loss or damage to property" in light of a "property damage" definition elsewhere in the same Policy is to acknowledge that the first-party coverages' undefined term embodies at least the concepts defined as "property damage" in the liability coverages, if not more.

B. Vigilant's Use of an Exclusion for Property Damage Caused by Viruses for Third-Party Coverages Is Meaningful.

Vigilant's decision not to include an exclusion in the first-party coverages indicates that Vigilant did not intend to exclude property losses caused by viruses from the first-party coverages. *See* O.B. at 39-41. In response to this straightforward interpretation of the Policy as a whole, Vigilant seems to argue that an exclusion for property losses caused by viruses was necessary in the third-party coverages because they are broader. As discussed above, Vigilant has it backward. The undefined term "direct physical loss or damage" is susceptible to a reasonable construction that is as broad as, if not broader than, the definition of "property damage."

Vigilant argues that we must be careful in honoring the differences between first-party coverages and third-party coverages and cites four cases in support. A.B. at 62. None provides a reason to discount Another Planet's reasonable interpretation of its Policy.

Vigilant advances *Garvey v. State Farm Fire & Casualty Co.*, 48 Cal. 3d 395 (1989), for the general statement that "'[T]he operation of the exclusion clauses . . . [is] different in the separate policy portions and should be treated as such.'" A.B. at 62 (quoting *Garvey*, 48 Cal. 3d at 406). That seems fair enough, but Vigilant does not apply that tenet to the circumstances of this case to explain how it relates to the presence of a virus exclusion in one coverage and the absence of such an exclusion in another.

Garvey addressed how to handle concurrent causation in first-party claims when at least one cause of loss could be subject to an exclusion. This Court reasoned that in the first-party context, the insurer and insured can bargain over what should be excluded from "all-risks" coverage, but when facing a third-party claim, the focus is on whether the insured could be legally obligated to pay for damages under tort law's causation standards. 48 Cal. 3d at 407-08. To create certainty and efficiency while

protecting the reasonable expectations of the insured, this Court adopted the "efficient proximate causation" doctrine but limited it to first-party coverages. *Id*. at 408. Thus, *Garvey* lacks any application here because in Another Planet's Policy, *the first-party coverages contain no virus exclusion*.

Vigilant also cites *Michael Cetta, Inc. v. Admiral Indemnity Co.*, 506 F. Supp. 3d 168 (S.D.N.Y. 2020), for the proposition that "business income coverage and commercial general liability sections 'protect entirely different interests'" and that court declined to "'cross wires between different definition sections of the Policy.'" A.B. at 60 (quoting *Michael*, 506 F. Supp. 3d at 181). Vigilant may find the soundbites attractive, but they do not provide any analytical help in assessing the significance of a virus exclusion in the liability coverages and the absence of such an exclusion in the first-party coverages. *Michael* did not address that question and is a federal district court decision applying New York law, providing little guidance.

Vigilant also cites a footnote in *Mudpie, Inc. v. Travelers Casualty Insurance Co.*, 487 F. Supp. 3d 834 (N.D. Cal. 2020), *aff'd*, 15 F.4th 885 (9th Cir. 2021), for the same proposition that it quotes from *Michael*. A.B. at 62. Like *Michael*, that footnote just declines

to import a liability section's "property damage" definition into the first-party property section for the sole reason that it appears in a different place in the policy. *Mudpie*, 487 F. Supp. 3d at 843 n.8. In doing so, the district court dismissed the insured's reasonable interpretation of its policy, *id.*, so *Mudpie* diverged from this Court's mandate that ambiguities in insurance policies be resolved to protect reasonable expectations of coverage. It also ignored the maxim that different policy clauses should help inform one another's meanings. Moreover, *Mudpie* did not involve allegations that the insured's losses arose from the presence of SARS-CoV-2 in, on, or around covered property, but rather were solely the result of closure orders. *Id.* at 836. Also, that insurance policy contained a virus exclusion pertinent to first-party coverages. *Id.* at 836-37.

Finally, Vigilant cites *United Talent Agency v. Vigilant Insurance Co.*, 77 Cal. App. 5th 821 (2022), but that case misapplied California law based on the very question this Court is considering now. *See Marina*, 81 Cal. App. 5th at 111 (recognizing *United*'s error); *Shusha, Inc. v. Century-Nat'l Ins. Co.*, 87 Cal. App. 5th 250, 265 (2022) (refusing to follow *United* and following *Marina*, instead); *Santa Ynez Band of Chumash Mission Indians v.*

Lexington Ins. Co., 90 Cal. App. 5th 1064, 1071-72 (2023) (recognizing Ninth Circuit's certified question and courts' departures from *United*).

Contrary to Vigilant's insistence that the Court disregard the existence of a virus exclusion applicable to third-party property losses, California law is clear that it must be considered. The terms of an insurance policy must be read in light of the *entire* policy, and a court must "interpret these terms 'in context' and give effect 'to every part' of the policy with 'each clause helping to interpret the other.'" *Palmer*, 21 Cal. 4th at 1115 (citations omitted). As discussed in *Atlantic*, an insurer's failure to use available language to exclude coverage gives rise to the inference that the parties did not intend to so limit coverage. 94 Cal. App. 4th at 852; *accord Safeco*, 26 Cal. 4th at 764 ("[W]e cannot read into the policy what [the insurer] has omitted. To do so would violate the fundamental principle that . . . courts are not to insert what has been omitted."). Following these precepts, Another Planet's understanding of the meaning of a missing virus exclusion in its first-party coverages is objectively reasonable.

Thus, reviewing the Policy as a whole, with each clause helping to shed light on the meanings of others, this Court should

give effect to Another Planet's reasonable interpretation that (i) "direct physical loss or damage to property" must mean something similar to the liability coverages' definition of "property damage," and (ii) if a virus can cause "property damage" sufficient to necessitate an exclusion pertaining to viruses in the liability coverages, the absence of a virus exclusion in the first-party coverages means that virus-caused losses are covered and not excluded.

Turning to how SARS-CoV-2 interacts physically with and behaves within property, Another Planet has sufficiently alleged that it caused the distinct, demonstrable alteration to its property that Vigilant insists did not happen.

III. SARS-CoV-2 Causes "Direct Physical Damage."

Robust scientific evidence shows that SARS-CoV-2, a physical substance, interacts with property to make spaces hazardous to human health. O.B. at 41-56. Vigilant responds by arguing that "direct physical loss or damage to property" requires a distinct, demonstrable alteration to property, and SARS-CoV-2 cannot produce that effect as a matter of law, never mind the science. A.B. at 23-25.

The heart of Vigilant's position is *MRI Healthcare Center, Inc. v. State Farm General Insurance Co.*, 187 Cal. App. 4th 766 (2010), which Vigilant raises some 20 times and describes as the "standard" for interpreting "direct physical loss or damage to property." A.B. at 11, 25, 30, 41, 48. Vigilant argues that "direct physical loss or damage" "requires 'an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it [satisfactory].'" *Id.* at 24-25 (quoting *MRI*, 187 Cal. App. 4th at 799). Of course, this language does not appear in the Policy. If that is what Vigilant wanted the phrase to mean, it should have defined it thusly. But it did not, and "courts are not to insert what [Vigilant has] omitted." *Safeco*, 26 Cal. 4th at 764.

From that language, Vigilant proposes an even more stringent standard, saying "direct physical loss or damage" requires a "structural alteration" that the presence of a virus cannot cause because it will degrade over time. A.B. at 26, 32-34. Again, that is not what the Policy says, and not what *MRI* says, either.

Although *MRI* does introduce the concept of property becoming "unsatisfactory for future use," Vigilant urges a requirement of *permanent* damage that "'will not be changed back simply by the passage of time.'" *Id.* at 31 (citation omitted). If that is what Vigilant meant, it should have included the word "permanent" somewhere alongside "direct physical loss or damage." Once again, this is not what the Policy (or *MRI*) says.

Vigilant's argument regarding "direct physical damage" is a plea for the Court to rewrite the Policy so that—regardless of how SARS-CoV-2 actually alters the physical substances with which it interacts, making them unsafe—only "permanent" "structural alterations" merit coverage. The Court should decline to do so. *See, e.g.*, *Powerine Oil Co. v. Superior Ct.*, 37 Cal. 4th 377, 401 (2005) ("We will not rewrite the policies to insert a provision that was omitted."). California law does not allow insurers to rely on cases like *MRI* to impute new meaning to the words they actually used in drafting an insurance policy. *Vandenberg v. Superior Ct.*, 21 Cal. 4th 815, 840 (1999) ("Even if a provision raises doubts as to coverage in the minds of legally trained observers due to a sophisticated legal distinction, courts will not assume the distinction was incorporated into the policy. Whatever ambiguity a

phrase possesses due to a party's legal knowledge is resolved in favor of coverage." (citation omitted)).

A. SARS-CoV-2's Presence Physically Changes Property, Regardless of How It Can Be Removed or How Long It Takes to Degrade.

Although Vigilant downplays the *seriousness* of the virus's presence, it concedes that SARS-CoV-2 changes inert property to vectors for COVID-19's spread. A.B. at 29-31. Vigilant emphasizes that SARS-CoV-2 exists only temporarily until it naturally degrades or is removed by cleaning or filtration. *Id.* at 27-41. "Because the mere temporary presence of an easily removed foreign substance—a water spill, a wafting odor, or microscopic aerosolized droplets—does not distinctly and demonstrably alter the property itself, it does not qualify as direct physical damage . . . ." *Id.* at 29-30.[12]

The argument's flaw is that it rests on a matter of degree, rather than analyzing what "physical damage" means. Vigilant's illustration shows why insurance policies typically contain deductibles or retentions: insurance kicks in when the damage is serious enough to rise to the level of risk contemplated in the

[12] Vigilant cites nothing to support its view that SARS-CoV-2 can be removed "easily" from property.

policy. Although the policy may allocate the risk of damage from a mere water spill to the insured, a watermain break up the street could cause enough damage to exceed the risk the insured agreed to bear.

Each example that Vigilant references constitutes *physical changes to property*; the difference is that people only seek insurance coverage for the presence of those substances when they are dangerous or damaging enough to merit a claim. Water may not require insurance coverage when a child overturns their cup, but that changes when there is a flood. *E.g.*, *Cooper v. Travelers Indem. Co.*, 2002 WL 32775680, at *2-*3 (N.D. Cal. Nov. 4, 2022). A woodburning fireplace smells of embers months after the fire has died, but when a home smells like methamphetamine vapor, the property has suffered physical loss or damage. *E.g.*, *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332, 1335 (Or. App. 1993). Airborne agents invisible to the eye are present in each breath we take, but when a house is contaminated with mold spores, it is physically damaged. *E.g.*, *Roger Cleveland Golf Co., Inc. v. Affiliated FM Ins. Co.*, 2008 WL 11338244, at *1 (C.D. Cal. Oct. 15, 2008).

This also is true of different microscopic agents because of their different effects on people. Food companies often add live

bacterial cultures to milk products because of their benefits to the digestive biome, but when listeria bacteria are present in food products, they have suffered "direct physical loss or damage." *E.g.*, *HoneyBaked Foods, Inc. v. Affiliated FM Ins. Co.*, 757 F. Supp. 2d 738, 745 (N.D. Ohio 2010).

The same is true of viruses. Cold and flu season introduces viruses to property that make people ill. *See A.B.* at 29. But SARS-CoV-2 is 10 times deadlier than cold or flu viruses. *See* O.B. at 57. That the risk of COVID-19 was dramatically reduced when vaccines became available, such that people could again enjoy property without such an acute threat of becoming grievously sick or dying, does not change this analysis, as Vigilant suggests. A.B. at 34. Vaccines are why, in part, cold and flu season does not present a threat serious enough that the presence of those viruses gives rise to insurance claims, even though they alter physical property when they are present. If we find a cure for cancer, we may not need to worry about asbestos fibers as much anymore. But in the meantime, their presence constitutes "direct physical damage" to property. *E.g.*, *Port Auth. v. Affiliated FM Ins. Co.*, 311 F.3d 226, 236 (3d Cir. 2002).

Vigilant also argues that SARS-CoV-2 harms people, not property. A.B. at 34, 36. But asbestos was a common construction material—intentionally used to build property—until we discovered that its fibers could cause cancer and asbestosis when people inhaled them. We call its presence "direct physical loss or damage to property" because of its risk to human health. SARS-CoV-2, like asbestos fibers, poses an even more serious risk to human health, and like asbestos fibers, is microscopic and dangerous to humans inside of buildings.

B. The "Period of Restoration" Does Not Prove that SARS-CoV-2 Cannot Cause "Direct Physical Damage."

Vigilant argues that because several time element coverages are limited by a "period of restoration," "defined as the time required to 'repair or replace the property,'" this shows that SARS-CoV-2 cannot cause "direct physical damage" because there is nothing to repair, rebuild, or replace when SARS-CoV-2 is present in and on property. A.B. at 25-26.

This argument is flawed because there is, of course, a way to repair property that has been made dangerous because of the presence of SARS-CoV-2. The property can be repaired by cleaning, i.e., physically ridding surfaces and airspaces of the virus

and returning the property to its original condition. The time it takes to eradicate SARS-CoV-2 from property is the period of restoration. There is no difference between that and decontaminating surfaces that have been damaged by, say, soot or mold except perhaps in the amount of time, effort, or cleaning agents it may require. Moreover, the time and effort it took to render property safe was not well known in the early months of the Pandemic. O.B. at 50-51. People went to great lengths to decontaminate their properties, and the amount of work required varies depending on the characteristics of the substance that has been contaminated by SARS-CoV-2. *See id.* And cleaning products were nearly impossible to find in the Pandemic's early months. *See id.* Vigilant is wrong to suggest that an ability to clean up SARS-CoV-2 means that there is no damage in the first place.

Vigilant cites *Mudpie* for the proposition that "'to interpret the Policy to provide coverage absent physical damage would render the "period of restoration" clause superfluous.'" A.B. at 26 (quoting *Mudpie*, 15 F.4th at 892). That reasoning may have made sense in *Mudpie*—which alleged losses stemming solely from closure orders—but it does not considering Another Planet's

allegations that it suffered damage because of SARS-CoV-2's presence.

Vigilant also cites *United*, arguing, "To make sense of the period of restoration provision," coverage only applies to damage or loss "that requires replacement or repair to correct, i.e., destruction, structural alteration, or dispossession." A.B. at 26.[13] As discussed above, *United* was wrongly decided. *See supra*, section II.B.

Vigilant further argues that Another Planet "tacitly confirms that sanitation measures do not constitute repairs of broken property" because "'[E]ven such measures, including frequent cleanings, cannot be assured to eliminate or exclude SARS-CoV-2 from a premises' because 'disinfecting property works only until the next infected person . . . enters the room and causes the space to be infiltrated anew with SARS-CoV-2.'" A.B. at 34 (citations omitted). That SARS-CoV-2 naturally degrades but can be reintroduced does not negate its physicality or the way it changes property while it is viable. In this sense, SARS-CoV-2 is like mold.

[13] This also misses the point that a common definition of "repair" is includes "to restore to a sound or healthy state." *Repair*, Merriam-Webster, https://www.merriam-webster.com/dictionary/repair.

Take away the moisture, and the mold dies, but only until the moisture comes back and more mold begins to grow.[14]

C. SARS-CoV-2's Presence in Airspaces Is "Direct Physical Damage to Property."

Airspace legally constitutes insurable "property," and SARS-CoV-2 physically alters airspaces. O.B. at 42-46, 51-56. Vigilant responds that, just like when SARS-CoV-2 is present on surfaces, its presence is only temporary in airspaces and can be removed by "[r]egular air circulation." A.B. at 35-36. Vigilant cites no scientific authority for this assertion, and therefore, it must be ignored. In fact, scientists have described evidence of SARS-CoV-2's ability (i) to remain viable and airborne for long periods of time after the infected person has gone, (ii) to be spread *because of* circulation through HVAC systems, and (iii) to spread particularly efficiently in enclosed places where people are singing—like Another Planet's indoor concert venues. O.B. at 45-46. Thus, the premise for Vigilant's argument does not hew to the circumstances of this case.

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[14] *See, e.g.*, U.S. Env't Protection Agency, *A Brief Guide to Mold, Moisture, & Your Home* 2 (reprint of Sept. 2012) ("There are many types of mold, and none of them will grow without water or moisture."), https://www.epa.gov/sites/default/files/2016-10/documents/moldguide12.pdf.

Although SARS-CoV-2 degrades over time and eventually succumbs to gravity, that does not negate how it alters the composition of the air and the particles with which it bonds. Although there are filters and other technology that can remove viruses from airspaces, taking steps to purchase, install, and operate those systems to return the airspace to an undamaged condition involves costs. Even then, as with cleaning surfaces, airspaces only remain undamaged until the next infected person enters the room and expels more live virus.

Vigilant also argues that the Policy does not cover damage to "'air' inside a covered structure." A.B. at 35. This is a fight for another day.[15] Regardless of whether the Policy excludes coverage for damage to airspaces, Vigilant does not contest that airspace constitutes insured property, making it an essential aspect of the Ninth Circuit's certified question. And it is SARS-CoV-2's presence

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[15] Vigilant's brief is the first time it has raised this issue, even though it was required to state all factual and legal bases to deny Another Planet's claim within 40 days of receiving notice of it in 2020. 10 Cal. Code Regs. §§ 2695.7(b) & (b)(1). Among other things, the definition that Vigilant cites is a de facto exclusion hidden in a definition and, thus, not conspicuous enough to be enforceable. *E.g.*, *Haynes v. Farmers Ins. Exch.*, 32 Cal. 4th 1198, 1209 (2004). Anyway, the application of exclusions was not raised in the district court or the Ninth Circuit and is not a question before this Court.

inside the airspace that causes damage to property, just as the presence of asbestos inside a building is property damage. *Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 90 (1996) ("courts have held that contamination of buildings and their contents from released fibers constitutes a physical injury and, hence, property damage covered under the terms of the insurance policies"). Vigilant's argument also shows it knew its Policy reasonably could be interpreted to cover physical alterations to air inside property.

IV. SARS-CoV-2 Causes "Direct Physical Loss."

Even if SARS-CoV-2 did not cause "direct physical damage" to property, the Policy still would provide coverage because its physical presence caused Another Planet to lose its ability to use its property; in other words, Another Planet suffered "direct physical loss." O.B. at 59-68. Vigilant responds that most courts considering this issue have found against insureds. A.B. at 42-44. True enough, but most of those decisions did not apply California law, and they did not meaningfully consider whether insureds reasonably could have expected coverage when SARS-CoV-2 made using their property prohibitively dangerous.

The core of Vigilant's argument, and of many of the decisions it cites, is its proposed definition of "direct physical loss": "damage" means injury to property, while "loss" means destruction, ruin, or complete dispossession of property. A.B. at 24, 26, 27, 46-50. Of course, this definition does not appear in the Policy, and accepting Vigilant's approach would not adhere to bedrock principles of insurance policy interpretation.

When a term is undefined, it must be construed in the manner a layperson would give it meaning. *E.M.M.I.*, 32 Cal. 4th at 472. If the term is susceptible to more than one reasonable meaning, it must be given that which the insurer believed its insured understood at the time it issued the policy. Cal. Civ. Code § 1649. If the ambiguity persists, it must be resolved in favor of coverage. *AIU*, 51 Cal. 3d at 822.

"Direct physical loss" "has been subject to a spectrum of interpretations . . . ranging from direct tangible destruction of the covered property to impacts from intangible noxious gasses or toxic air particles that make the property uninhabitable or dangerous to use." *Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, 506 F. Supp. 3d 360, 373 (E.D. Va. 2020); *see also Huntington Ingalls*

Indus., Inc. v. Ace Am. Ins. Co., 2020 VT 45 ¶ 29, 287 A.3d 515, 523 (Vt. 2022) (collecting cases); O.B. at 59-61.

Although "loss" can be interpreted as Vigilant proposes, that is not the only reasonable interpretation. In *Huntington*, the Vermont Supreme Court concluded that "loss" means "[d]eprivation or destruction of property," including when property "is harmed to the extent that it is physically gone from the world," but also "*circumstances in which property is not harmed but may not be used for some reason*." 2022 VT 45, ¶ 29 (emphasis added). "[D]eprivation may also occur when property is unusable due to a health hazard." *Id.* Because these additional definitions are reasonable and expand coverage, they must be given effect. *AIU*, 51 Cal. 3d at 822.

Vigilant points to *Inns*' observation that "'[l]oss' is often used to refer to 'destruction' and 'ruin.'" A.B. at 24. But *Inns* went on to review several more definitions of "loss," concluding, "the dictionary definition of 'loss' could encompass the mere loss of use of real property . . . ." 71 Cal. App. 5th at 705 n.18.

A. *MRI* Is Not Inconsistent with Another Planet's Understanding of "Direct Physical Loss."

Vigilant reasserts *MRI*'s statement that "direct physical loss or damage" "requires a 'distinct, demonstrable, physical alteration of the property,'" so "'intangible or incorporeal'" losses are not covered. A.B. at 42 (quoting *MRI*, 187 Cal. App. 4th at 779, 891). Thus, Vigilant argues, "[F]or the 'physical' modifier of 'loss' to have meaning, the *property itself* must either experience tangible alteration or be removed from the insured's possession." *Id.* at 47. But Another Planet *did* allege that its property suffered a tangible alteration when SARS-CoV-2 entered its properties and turned them into dangerous vectors of COVID-19. *Marina,* 81 Cal. App. 5th at 109. There is nothing "intangible" or "incorporeal" about SARS-CoV-2 or Another Planet's losses.

B. The "Distinct, Demonstrable, Physical Alteration" Fallacy Must Be Stopped.

MRI nonetheless is flawed because of its reliance on Steven Plitt, *et al.*, *Couch on Insurance*, chapter 10A, section 148:46 (3d ed. 2010). *See* O.B. at 69-75. Vigilant responds that Another Planet is "upset," being "absurd," and at this point, *Couch* is right because of insurers' many wins in COVID-19 coverage cases. A.B. at 48-50. No, Another Planet brought *Couch*'s problematic history

to the Court's attention because *Couch*'s use in COVID-19 cases is misshaping the law. *See* Richard P. Lewis, Lorelie S. Masters, Scott D. Greenspan & Chris Kozak, *Couch's "Physical Alteration" Fallacy: Its Origins and Consequences*, 56:3 Tort, Trial & Ins. Prac. L. J. 621 (Fall 2021).

Even *Couch*'s primary author recognized the treatise is wrong: "The modern interpretive trend is liberalizing the meaning of direct physical loss to focus upon loss of use as opposed to direct physical loss involving physical alteration."[16] Mr. Plitt concluded, "The modern trend signals that courts are not looking for physical alteration, but for loss of use. This is the trend of where the law is going."[17] This Court can and should correct the mistakes that lower California courts are now more frequently making.

V. Another Planet Is Entitled to Reimbursement for Mitigation Costs.

Another Planet explained that it is entitled to reimbursement for all steps taken to reduce the likelihood that

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[16] Steven Plitt, *Direct Physical Loss in All-Risk Policies: The Modern Trend Does Not Require Specific Physical Damage, Alteration*, Claims J. (Apr. 15, 2013), https://amp.claimsjournal.com/magazines/idea-exchange/2013/04/15/226666.htm.

[17] *Id.*

SARS-CoV-2 would be in, on, or around covered property, including complying with shutdown orders. O.B. at 75-82.

Vigilant responds only that SARS-CoV-2 cannot cause "direct physical loss or damage" to property, so trying to keep it away from and out of covered property does not inure to Vigilant's benefit. A.B. at 62-64. But Vigilant misses the point. Even if Vigilant were correct that there is no "physical loss or damage," what matters is whether the insured's mitigation efforts were reasonable at the time. *See Ins. Co. of N. Am., Inc. v. U.S. Gypsum Co., Inc.*, 870 F.2d 148, 154 (4th Cir. 1989) (insured entitled to mitigation costs "whether or not [its] attempts were successful," as long as "the claimed expenditures were reasonable under the circumstances"). Vigilant does not challenge that, based on what was known in 2020, Another Planet acted reasonably. And it matters not that Another Planet took mitigation at its own initiative or because of guidelines or directions. Mitigation is still mitigation. *See AIU*, 51 Cal. 3d at 830-33.

CONCLUSION

The last three years truly constitute the first time that courts have had to consider insurance coverage for losses sustained in a global pandemic. Vigilant has not been shy in pointing out

that many more cases have been decided in the insurers' favor than in their insureds'. That does not mean they are right. As G. K. Chesterton said long ago, "Right is right, even if nobody does it. Wrong is wrong even if everybody is wrong about it." *Illustrated London News*, May 11, 1907 & *Collected Works* 27:463.

This is only the beginning. All indicators point to increasing frequency of pandemics in the years to come. Insurance and the law governing it has not had time to develop carefully to respond to these types of losses. This Court has always been at the vanguard of insurance law and has not been daunted to make pronouncements that challenge the insurance industry and courts nationwide to rethink and adapt to sound principles that provide stability and uniformity to commerce.

Finding coverage here would honor those principles, reaffirm decades of insurance law regarding invisible but hazardous materials, and provide sound footing for California's businesses to prepare for and respond to pandemics in the future. And it would not jeopardize the future of the insurance industry, which simply

can use industry-standard exclusions to limit its financial exposure—something Vigilant knew it could do here, but did not.

DATED: July 3, 2023

PASICH LLP

By: 

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CERTIFICATE OF COMPLIANCE WITH RULE 8.520

I, the undersigned, Nathan M. Davis, declare that:

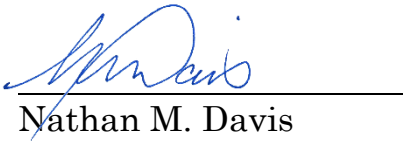
1. I am an attorney licensed to practice in all courts of the state of California and a partner at the law firm of Pasich LLP, attorneys of record for petitioner Another Planet Entertainment, LLC.

2. This certificate of compliance is submitted in accordance with rule 8.520 of the California Rules of Court.

3. This brief was produced with a computer. It is proportionately spaced in 13-point Century Schoolbook typeface. The brief contains 8,375 words, including footnotes.

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

Executed at Wilmington, North Carolina, on July 3, 2023.



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