Supreme Court of California
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Supreme Court of California
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No. S277893

**IN THE
SUPREME COURT
OF THE
STATE OF CALIFORNIA**

ANOTHER PLANET ENTERTAINMENT, LLC,

Petitioner,

v.

VIGILANT INSURANCE COMPANY,

Respondent.

FOLLOWING CERTIFICATION ORDER BY THE
U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT
CASE NO. 21-16093

SUPPLEMENTAL BRIEF OF RESPONDENT

Susan Koehler Sullivan
(SB# 156418)
Douglas J. Collodel (SB# 112797)
Gretchen S. Carner (SB# 132877)
Brett C. Safford (SB# 292048)
CLYDE & CO US LLP
355 S. Grand Avenue, Suite 1400
Los Angeles, CA 90071
Telephone: (213) 358-7600
Facsimile: (213) 385-7650
susan.sullivan@clydeco.us
douglas.collodel@clydeco.us
gretchen.carner@clydeco.us
brett.safford@clydeco.us

Jonathan D. Hacker
(*pro hac vice*)
Jenya Godina
(*pro hac vice*)
O'MELVENY & MYERS LLP
1625 Eye St., NW
Washington, DC 20006
Telephone: (202) 383-5300
Facsimile: (202) 383-5414
jhacker@omm.com
jgodina@omm.com

Attorneys for Respondent

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Pursuant to California Rule of Court 8.520(d), respondent Vigilant Insurance Company ("Vigilant") submits this supplemental brief regarding a "matter[] that w[as] not available in time to be included in [Vigilant's] brief on the merits." Rule 8.520(d)(1).

Another Planet's reply brief, filed on July 3, 2023, repeatedly quotes the 2020 Annual Report of Chubb Limited, Vigilant's parent company. Reply Br. 15-16. Another Planet has not previously cited this extrinsic evidence—not in its complaint, not in its briefs in opposition to two motions to dismiss in district court, not in either of its appellate briefs in the Ninth Circuit, and not in its opening brief before this Court.[1] The evidence accordingly was not available in the record of this case for Vigilant to address in its answering brief on the merits.

ARGUMENT

Another Planet errs in relying on the 2020 Annual Report for two reasons.

First, because Another Planet did not raise the Report until its reply brief in this Court, it forfeited any argument based on the Report. *See Gund v. County of Trinity*, 10 Cal. 5th 503, 525 (2020) (argument "not raise[d] … in the trial court, the Court of Appeal, or [appellant's] opening brief" in Supreme Court was "forfeited").

Second, Another Planet misconstrues the 2020 Annual Report in any event. Another Planet quotes a passage observing

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[1] Another Planet's opening brief cited only the 2017 and 2019 Chubb Limited Annual Reports. *See* Opening Br. 34-35.

that “COVID-related claims” created a “broad range of exposures,” including exposures from “business interruption losses” claimed by “businesses that had coverage and were shut down during the pandemic.” Reply Br. 16. But Another Planet inexplicably omits a subsequent passage in the Report specifying the nature of that exposure:

> [T]he trial bar … initiated a spree of litigation that attempts to *twist the intent of contracts* and reinterpret insurance contract language to force pay-outs in situations that in most cases insurers *never intended to cover*, and in which *no premium was charged for the risk*, specifically when city and state governments mandated pandemic-related business closures. This litigation relied on *implausible arguments that COVID causes direct physical loss or damage to a business's property*, in the same way as a fire.

Chubb Limited 2020 Annual Report at 10 (emphasis added) (excerpt attached hereto as Exhibit 1). The Report thus in no way suggests that “insureds like Another Planet” could “reasonably expect[] that their losses would be covered in the event of a pandemic and that Vigilant knew it when it sold the Policy.” Reply Br. 16. Exactly the opposite is true: the 2020 Annual Report expressly states that Chubb faced exposure only to *baseless* business-interruption claims that “twist the intent” of the policies and make “implausible arguments” that viral particles can cause direct physical loss or damage to property.

If it was reasonable for insureds to rely on the 2020 Annual Report for their coverage expectations, as Another Planet now insists, the only reasonable expectation they could have developed is that Chubb's policies would *not* cover pandemic-related losses, as the Report expressly states.

Dated: July 14, 2023

Respectfully submitted,
/s/_*Jonathan D. Hacker*__

Susan Koehler Sullivan
Douglas J. Collodel
Gretchen S. Carner
Brett C. Safford
CLYDE & CO US LLP
355 S. Grand Avenue, Suite 1400
Los Angeles, CA 90071
Telephone: (213) 358-7600
Facsimile: (213) 385-7650
susan.sullivan@clydeco.us
douglas.collodel@clydeco.us
gretchen.carner@clydeco.us
brett.safford@clydeco.us

Jonathan D. Hacker
Jenya Godina
O'MELVENY & MYERS LLP
1625 Eye St., NW
Washington, DC 20006
Telephone: (202) 383-5300
Facsimile: (202) 383-5414
jhacker@omm.com
jgodina@omm.com

Attorneys for Respondents Vigilant Insurance Company

CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies that pursuant to Rule 8.520(d) of the California Rules of Court, the enclosed brief was produced using 13-point Century Schoolbook type and contains 507 words (including footnotes) as counted by Microsoft Word.

Dated: July 14, 2023

By: /s/_*Jonathan D. Hacker*__

Jonathan D. Hacker

Attorney for Respondent
Vigilant Insurance Company

EXHIBIT 1

Chubb Limited
Annual Report
2020

expanding their capabilities in terms of products, technology and, most importantly, distribution partnerships. We will see them return to growth once the pandemic subsides.

Chubb signed an impressive 21 new distribution partnerships last year with a range of partners, including airlines, consumer finance companies and digital platforms. Digital channels are yielding exciting results as we sell simple personal accident, life, supplemental health and personal lines insurance products via e-commerce companies, digital banks and digitally native players seeking to add insurance to their services, as well as through traditional channels like banks and agents as they digitize. These new products and partnerships only serve to enhance our growth capabilities when demand returns. They are the seeds we plant for future growth.

The changing specter of risk

Our industry is managing two powerful forces that are changing the nature of risk – climate change and the legal environment. Again, both are enduring trends. Sizable weather-related loss events are more common, from a record U.S. hurricane season to wildfires in California, Australia and Greece, as well as flooding in areas like China's Yangtze River. The industry's global insured natural catastrophe losses came in at $76 billion, up from $54 billion prior year and one of the costliest on record.

As a result, Chubb posted pre-tax net losses of $1.7 billion last year from natural catastrophes, compared to $1.2 billion in 2019. This was $648 million more than we planned when calculating our expected CAT losses at the start of the year. With every year that passes, the amount we expect to pay out from a given set of exposures increases, a reality of climate change.

Given our business of assuming risk, it is our job to better understand evolving exposures that emanate from climate change. Flood models and evaluation tools are improving to consider factors like elevation and flood defense. Wildfire modeling now includes factors like topography, vegetation, drought conditions and wind patterns – allowing us to assess more accurately the risks faced by an individual or a business, as well as aggregations of risk in a given geography. These tools are far from perfect – they don't represent absolute truth – but they continue to advance and provide us with greater insight. Chubb is investing a lot of time and money to improve our risk-based analytics, not just in climate but in many areas of risk.

The worsening legal environment is systemic and, for clarity, coming from two principal sources. The first is litigation as a business, in which lawyers drive up insurance costs with excessive or abusive claims. Litigation that should provide fair redress has metastasized into a huge money-making system. This abuse of late is partially fueled by increased litigation funding, a speculative new asset class that is more akin to horse racing. Rising legal costs are unnecessarily costly for society and a tax on business.

The Boy Scouts of America litigation is a case in point. When the group filed for bankruptcy in 2020, it faced about 1,700 claims alleging sexual abuse by scout leaders. That number grew 55 fold to 95,000 claims, driven by what *The Wall Street Journal* described as "a sophisticated new tort machine" that raises investment to fund speculative litigation and push

> "Our industry is managing two powerful forces that are changing the nature of risk – climate change and the legal environment. Both are enduring trends."

new claims on a massive scale, often by recruiting claimants via misleading mass advertising and social media campaigns. Tens of thousands of the claims upon preliminary inspection appear to be invalid or fraudulent. We deeply sympathize with the victims of sexual abuse, but justice is not served by the filing of specious claims.

The second force behind our worsening legal environment is "social inflation," meaning the populist notion that if something goes wrong in modern society, someone must also be at fault. Set against a backdrop of rising anti-corporate sentiment, this phenomenon has been driven by a range of factors, from changing definitions of legal liability to more costly jury awards.

The overall result has been a severe and ultimately unsustainable inflation in legal awards and legal costs that translates to higher costs of insurance. To highlight the problem, the total expense of legal costs and compensation paid in the U.S. tort system in 2019 amounted to $510 billion, or 2.3 percent of GDP. The U.S. needs litigation reform at both the state and federal level to combat the abusive power of the trial bar and address out-of-control awards. Working with the wider industry, this remains a Chubb priority.

The challenging environment was exemplified writ large during the pandemic over the issue of business interruption. Our industry first came under attack from some in the political establishment, who considered federal and state legislation to force insurers retroactively to pay out on risks not covered in our policies. Chubb became involved early on, assuming a public profile and helping to lead an industrywide effort to defend the sanctity of our contracts. We argued that these measures were unconstitutional, not to mention that they would bankrupt the industry and do huge damage to the financial system as a whole. The industry, supported by regulators, managed to blunt this threat – although attempts to enact legislation continue at the state level.

Then came the trial bar, which initiated a spree of litigation that attempts to twist the intent of contracts and reinterpret insurance contract language to force pay-outs in situations that in most cases insurers never intended to cover, and in which no premium was charged for the risk, specifically when city and state governments mandated pandemic-related business closures. This litigation relied on implausible arguments that COVID causes direct physical loss or damage to a business's property, in the same way as a fire. The industry has been pushing back successfully in the courts, for now at least. But there are still some 1,500 lawsuits in the U.S. against insurance companies on this business interruption issue.

Investing in a "lower for longer" world

Chubb's earnings come from both sides of the balance sheet: on the liability side we generate underwriting income from the exposures we take for customers; on the asset side we generate income from our investment portfolio, which is mostly investment-grade bonds. We invest conservatively because we have a fiduciary responsibility: those funds represent policyholder claim reserves and shareholder capital. The pandemic has affected our investment returns, driven substantially by the emergency fiscal and monetary responses to the pandemic.

Governments around the world were right to support individuals and business. Fiscal responses in large economies like the U.S. have been sizable and successful. Without additional stimulus, the U.S. was likely to grow in the range of 5% to 6% during 2021, with unemployment hovering below 5%. With the additional $1.9 trillion stimulus passed by Congress in early '21, which in my judgment is excessive and not well directed, there is a risk of overheating with a rising specter of inflation. U.S. debt levels have already ballooned above 100% of GDP, with over 80% of government tax revenue going to debt service and entitlement programs. The federal budget deficit topped more than $3 trillion during 2020, or 15% of GDP – the highest since World War II – and that is before the additional $1.9 trillion. Our deficits have the potential to crowd out future private sector and real public investments. Respectable economists now often say "deficits don't matter," mostly because borrowing costs are so low. But this won't last. Rates will rise, pressuring our fiscal position and potentially the dollar's status as the reserve currency, as history shows.

As the pandemic struck, central banks throughout developed economies launched massive asset purchases, which pushed up money supplies and drove global yields to zero. These actions were historic. While these policies were justified to bridge a potential economic and financial market chasm, the Fed, in my opinion, has overstayed its "easy money" mandate. These policies distort markets, push investors into riskier assets and inflate financial valuations, as witnessed by the recent extraordinary rise in global equity markets. Excessive monetary

PROOF OF SERVICE

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/s/*Jonathan D. Hacker*
Jonathan D. Hacker

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Supreme Court Case No. S277893

Kirk Pasich, SBN 94242 KPasich@PasichLLP.com Nathan M. Davis, SBN 287452 NDavis@PasichLLP.com Kayla M. Robinson, SBN 322061 KRobinson@PasichLLP.com PASICH LLP 10880 Wilshire Boulevard, Suite 2000 Los Angeles, CA 90024 Tel.: (424) 313-7860 Fax: (424) 313-7890	*Attorneys for Petitioner Another Planet Entertainment, LLC* *VIA TRUEFILING*

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
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STATE OF CALIFORNIA
Supreme Court of California

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Hacker, Jonathan (456553)
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