S277893

IN THE SUPREME COURT OF CALIFORNIA

ANOTHER PLANET ENTERTAINMENT, LLC,
Petitioner,

vs.

VIGILANT INSURANCE COMPANY
Respondent.

Following Certification Order by the U.S. Court of Appeals,
Ninth Circuit
Case No. 21-16093

Application For Leave to File Amicus Curiae Brief In Support of Respondent; Amicus Curiae Brief

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT

California and federal courts across the nation have correctly and almost uniformly rejected insurance claims for business interruption caused by the COVID-19 pandemic. Amicus curiae Oregon Mutual Insurance Company believes that it can assist this Court in resolving this and related cases by presenting the views of an insurer that has faced hundreds of similar claims. Oregon Mutual and its counsel do not wish to restate the thorough discussion and citations set forth in the parties' briefing. We wish to present to this Court a context in which insurers were presented with these cases and, perhaps more importantly, the context in which the COVID-19 case law has developed in the real world.

Oregon Mutual and its counsel here have been involved in many similar cases, including *Apple Annie, LLC v. Oregon Mutual Ins. Co.* (2022) 82 Cal.App.5th 919, *Dakota Ventures, LLC v. Oregon Mutual Ins. Co.* (D.Or 2021) 553 F.Supp.3d 848, and many other similar cases in both California state and federal courts.

Sometimes theoretical questions posed to a Court fail to recognize how a theoretical answer might be used in a real-world context. Amicus Oregon Mutual wants to ensure that this Court understands how the pandemic impacted California businesses and how that impact should be considered in addressing the insurance questions raised in this and other pending cases. For these reasons, the following amicus curiae respectfully requests leave to file the accompanying brief.

No party or party's counsel authored this brief in whole or in part or made any monetary contribution to fund the preparation or submission of the brief. Only Oregon Mutual Insurance Company and its counsel had any impact in funding and preparing this brief. Oregon Mutual Insurance Company as amicus curiae respectfully requests leave to file this brief.

DATED: June 31, 2023 PACIFIC LAW PARTNERS, LLP

/s/ Clarke B. Holland
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BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTRODUCTION

This Court is currently considering two cases addressing the question of whether business closures or use mandates caused by the COVID-19 pandemic are covered under standard physical loss and damage business interruption commercial insurance policies. (See *John's Grill, Inc. v. The Hartford Financial Services Group, Inc.* (2022) 86 Cal.App.5th 1195, review granted March 20, 2022, S278481 (*John's Grill)* and the Ninth Circuit's certification request in this case.) Although the policies in the two cases are slightly different, the issue presented is largely the same: did or, in fact does, the COVID-19 pandemic constitute a direct physical loss to California businesses under standard commercial insurance policies? The issue certified by the Ninth Circuit here, and the position of plaintiffs in *John's Grill*, fail to set forth the context in which this question is asked.

The purpose of this brief is not to reiterate legal analysis an already presented, but to provide this Court with an accurate context in which the Court's answer to the question may be applied. More specifically, because the vast majority of published and unpublished California cases on the subject involve

restaurants, we seek to provide this Court with some guidance as to how the pandemic impacted those California businesses.

In the instant case, the Ninth Circuit posed the simple question of whether "the actual or potential presence of the COVID-19 virus on an insured's premises constitute 'direct physical loss or damage to property' for purposes of coverage under a commercial property insurance policy?" Amicus here contends that this is not a fair and accurate statement of the issue in the many cases that have already addressed the pandemic's impact.

Regardless of how one categorizes the impact of the existence and presence of COVID-19, the physical presence of the virus in a building or on business property surfaces did not cause economic loss to Another Planet, John's Grill, the French Laundry, or any other California business. Those losses were instead caused by governmental orders whose purpose was to keep people away from one another as much as possible in order to disrupt the spread of the virus.

ARGUMENT

I. The Physical Presence of COVID Caused No Loss, Physical or Otherwise.

Virtually every Complaint filed in COVID-19 business interruption cases outlined and attached various state and local orders setting the ground rules as to how businesses needed to operate to reduce the transmission of COVID-19. Some businesses were effectively closed, including movie theatres and business offices. A middle ground existed for other businesses including restaurants, which had to restrict on-site eating, but were encouraged to provide delivery and take-out services. Another category of businesses, like grocery stores, gas stations, medical facilities, etc., were allowed to remain open full-time with some restrictions on the number of people allowed in the business at any time, or, later, mandatory masking for employees and customers.

Most California appellate courts and courts nationwide recognized the obvious issue-how is it that the presence of COVID-19 could cause direct physical damage resulting in the closure of Another Planet or the limitations of service at restaurants while the neighboring Whole Foods or Trader Joes

could be open for thriving business with no apparent negative impact to those facilities caused by the presence of the very same virus? The simple answer announced by virtually every court is that the virus' presence had the same impact on the facilities at Whole Foods as it did at Another Planet:-zero.

Essential businesses, including restaurants, could continue conducting business at those premises with some restrictions. Employees could go to work and use all of the business facilities and property. Cooking, cleaning and food sales continued at restaurants with no negative effect on the business property. Stoves and refrigerators operated with no apparent damage from COVID-19. This was and is the real-world context in which the insurance issues are presented.

It is important to note that there has been an evolution in the pleadings of cases alleging business interruption claims caused by the pandemic. Initially, most complaints set forth straight-forward facts alleging that governmental mandates forced closures or business restrictions causing business income losses. The court in *Inns-by-the-Sea v. California Mutual Ins. Co.* (2021) 71 Cal.App.5th 688 recognized that even though the complaints alleged some physical presence of the virus, there was

a "lack of causal connection between the alleged physical presence of the virus" and the suspension. The court noted that no repair or cleaning of the property would change the circumstances because the orders would continue to control the business suspension. *Id. at* 704.

After *Inns,* courts saw a distinct change in the pleadings, but there was no corresponding change in the real-world facts. Plaintiffs attempted to allege some form physical damage, but the causal connection remained completely hypothetical. Restaurants and other businesses could not reasonably allege that their business was specifically impacted and closed because of physical loss and damage.

In *Cajun Conti, LLC v. Certain Underwriters at Lloyds, London* (2023) 359 So.3d 922, the Louisiana Supreme Court addressed these same issues and noted what virtually every court has held:

> While government restrictions on dining capacity and public health guidance regarding social distancing reduced Oceana's in-person dining capacity and restricted its use, again, Oceana's property was not physically lost in any tangible or corporeal sense. Even when in-person dining was prohibited, Oceana's kitchen continued to provide take-out and delivery service, and the restaurant's physical structure was neither lost nor changed.

(*Id.* at p. 927.)

This Court should not ignore the absence of cases filed by businesses that continued to operate full speed during the pandemic, including businesses that actually profited by the limitations on others. Amazon, for example, kept open its warehouses and delivered millions of products with no apparent damage to its facilities and trucks. Such absence reinforces the conclusion that the loss of income faced by restaurants and other businesses was not caused by the virus.

II. The Continued Physical Presence of COVID Causes No Suspension of Business Once Closure Orders Disappear.

We move to today, or in fact, any day after the closure restrictions and mandates were reduced or removed. COVID-19 variants still spread, and some variants are more transmissible and infectious than early versions. Yet now the same businesses that claimed business interruption because of physical damage caused by the presence virus particles are doing completely normal business. The logical consequence of the plaintiffs' position would be that the virus remains and continues to infect people, but no longer causes damage to property.

In fact, fomites have not disappeared and there is no evidence that COVID impacts property any differently now than three years ago. So why are there no suspensions of business? The simple answer, and the answer recognized by many courts, is that the economic losses were caused solely by the governmental orders, not any physical presence of virus on surfaces.

III. The Physical Presence of COVID Required No Restoration or Repair

Absent from virtually every complaint in the California COVID cases are allegations that businesses were suspended by the need to replace or repair any property allegedly damaged by COVID-19. All business interruption losses under standard commercial policies are measured by the losses incurred during the "period of restoration," which is measured by the reasonable time to repair the physical damage that caused the business interruption. The complaints, however, uniformly seek damages for business interruption measured by the duration of the government orders impacting the use of the facility.

In a normal business interruption case, a business suffering damage caused by a fire or wind or the like will allege that it took some days, weeks or months to repair or replace

specially damaged property. The period of repair also has to account for the time it takes to obtain the necessary permits and inspections by local building officials before reopening. These allegations are nowhere to be found in the current COVID-19 cases and many courts have recognized this absence.

> The Period of Restoration clause reinforces the conclusion that Goodwill did not suffer a "direct physical loss of or damage" to property. The Business Income provision applied only "during the 'period of restoration,' " which "[e]nds on the earlier of: (1) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or (2) The date when business is resumed at a new permanent location." App., Vol. 2 at 459, 467.
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> The policy thus covered only "direct physical loss of or damage to" property that could be remedied by the physical acts of repairing, rebuilding, or replacing the affected property or by relocating the insured's business. "That the policy provides coverage until property 'should be repaired, rebuilt or replaced' or until business resumes elsewhere assumes physical alteration of the property, not mere loss of use." *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141, 1144 (8th Cir. 2021); *see also Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327, 332–33 (7th Cir. Dec. 9, 2021). After suspending business due to COVID restrictions, Goodwill had nothing to repair, rebuild, or replace before it could resume operations. Nothing "physical" happened to its property—Goodwill simply had to wait until the government lifted the restrictions.

(*Goodwill Indus. of Cent. Okla, Inc. v. Phila. Indem. Ins. Co.* (10th Cir. 2021) 21 F.4th 704, 711.)

No plaintiff, including Another Planet, claimed that it closed because it tested and found COVID-19 damage on its property, or that any governmental entity ordered repairs. Indeed, once the mandates ended, businesses reopened and assertions of COVID-19 related direct physical loss ceased. The court in *United Talent Agency v. Vigilant Ins. Co.* (2022) 77 Cal.App.5th 821 noted what many courts have recognized about the impact of COVID-19 on businesses-if a business had eradicated all presence of any virus, the suspension of business would still remain. The only thing that was required for plaintiffs to return to full working order was for government mandates to be lifted. (*Id.* at pp. 831-832.)

IV. CONCLUSION

The healthy development of case law builds on both precedent and common sense. Counsel for Vigilant has admirably expounded on the precedent and its application to the COVID-19 cases. Amicus trusts that the common sense illustrations above will also help the Court see the flaws in plaintiffs' argument for coverage.

It defies common sense to say that the COVID virus previously caused physical damage to property, but stopped

causing that damage once the governmental orders were lifted. It defies common sense that the damage supposedly caused by the virus should change just because the orders were lifted, so that the virus-caused damage no longer caused a business interruption. It also defies common sense to say that the virus physically damaged the property at a concert venue, causing it to shut down, while the grocery store next store could continue in business despite the presence of the same virus.

Applying common sense as well as the common law, the only reasonable conclusion is that plaintiffs' business interruption was not caused by direct physical damage.

DATED: July 31, 2023 PACIFIC LAW PARTNERS, LLP

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CERTIFICATE OF COMPLIANCE WITH CRC 8.504(d)(1)

The undersigned certifies that pursuant to California Rules of Court, the attached brief has been prepared in proportionately spaced Century Schoolbook typeface of thirteen points, and the word count, as determined by the word processing system used in preparing the brief, is 2,014 words.

DATED: July 31, 2023 PACIFIC LAW PARTNERS, LLP

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I, the undersigned, declare that I am, and was at the time of service of the papers herein referred to, over the age of eighteen years and not a party to the within action or proceeding. My business address is the law firm of Pacific Law Partners, LLP, 2000 Powell Street, Ste. 950, Emeryville, California, 94608.

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7/31/2023

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/s/Tina McCarthy

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