S277893

No. S277893

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ANOTHER PLANET ENTERTAINMENT, LLC,
Petitioner,

vs.

VIGILANT INSURANCE COMPANY,
Respondent.

Review of Question of California Law
Certified by the United States
Court of Appeals for the Ninth Circuit
Case No. 21-16093

APPLICATION OF MAJOR LEAGUE BASEBALL AND NATIONAL HOCKEY LEAGUE FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER ANOTHER PLANET ENTERTAINMENT, LLC

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APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Rule 8.520(f) of the California Rules of Court, Major League Baseball (MLB) and the National Hockey League (NHL) respectfully apply for this Court's permission to file the accompanying *amicus curiae* brief in support of Petitioner Another Planet Entertainment, LLC concerning the question of California law that the United States Court of Appeals for the Ninth Circuit certified to this Court in Petitioner's pending appeal against Respondent Vigilant Insurance Company.

RULE 8.520(f)(4) DISCLOSURE

Pursuant to California Rule of Court 8.520(f)(4), MLB and NHL state that no party or any counsel for any party in the pending appeal authored this *amicus* brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of this brief. No other person or entity made a monetary contribution to fund the preparation or submission of the brief other than the *amici* and their counsel.

STATEMENT OF INTEREST OF *AMICI CURIAE*

MLB and NHL (along with professional baseball and hockey teams) are plaintiffs in separate cases filed against their property and business interruption insurers for losses suffered when they were forced to stop using baseball stadiums and hockey arenas in March 2020, due to the presence of the COVID-19 virus and its harm to the air and surfaces of properties. Specifically, MLB is an appellant in *Oakland Athletics Baseball Company v. Factory Mutual Insurance Co.*, No. A166541, pending before the Court of Appeal for the First Appellate District, Division 3. NHL is a petitioner in a mandamus proceeding pending before the Court of Appeal for the Sixth Appellate District in *San Jose Sharks LLC v. Superior Court*, No. H050441.

In both cases, the superior courts determined that the COVID-19 virus cannot cause "physical loss or damage" as a matter of law and dismissed the bulk of MLB and NHL's complaints at the pleadings stage, based on the Second

Appellate Division's decision in *United Talent Agency v. Vigilant Insurance Co.* (2022) 77 Cal.App.5th 821. These appeals may be affected by the Court's decision in this case.

MLB and NHL submit this brief to provide context about the different facts and policy language that are at issue in their cases, and that differ from that alleged in the *Another Planet* complaint. Therefore, MLB and NHL fulfill the "valuable role" of *amici* by providing the Court different facts that may affect the Court's consideration of the certified question and context for how the ruling may affect litigants beyond Another Planet and Vigilant. (See *Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1177.)

CONCLUSION

MLB and NHL respectfully request that the Court grant this application and permit them to file the accompanying joint *amicus curiae* brief in support of Petitioner Another Planet.

DATE: August 2, 2023

Respectfully submitted,

COVINGTON & BURLING LLP

By: */s/ Rani Gupta*
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INTRODUCTION

In deciding the certified question in this case, the Court should consider the many ways that the COVID-19 virus affected the property and business of different policyholders, such as *amici*, whose insured properties and businesses were especially vulnerable to the damage and disruption caused by the virus. Under long-settled California law, whether the virus was present and caused harm that triggers business interruption coverage is a question that can only be determined based on facts, not at the pleadings stage—as has long occurred in non-COVID-19 insurance coverage cases. The Court should answer the certified question in the affirmative so that Petitioner Another Planet Entertainment and other insurance policyholders can present evidence of the physical harm the virus caused to their properties and the losses they suffered as a result.[1]

A ruling in Another Planet's favor would be consistent with the majority of published California Court of Appeal cases. Three published California decisions—*Inns by the Sea v. California Mutual Ins. Co.* (2021) 71 Cal.App.5th 688; *Marina Pacific Hotel and Suites, LLC v. Fireman's Fund Insurance Company* (2022) 81 Cal.App.5th 96; and *Shusha, Inc. v. Century-National Insurance Company* (2022) 87 Cal.App.5th 250—have held that a plaintiff can state a claim for insurance coverage by alleging that the COVID-19 virus was present in its property and made the air or surfaces of that property unsafe, preventing the use of the property for its intended purpose. Other cases have ruled consistently with these cases by reversing orders sustaining demurrers without leave to amend. These decisions are consistent with pre-pandemic insurance law, including cases

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[1] The certified question is: "Can the actual or potential presence of the COVID-19 virus on an insured's premises constitute 'direct physical loss or damage to property' for purposes of coverage under a commercial property insurance policy?" (*Another Planet Entertainment, LLC v. Vigilant Insurance Company* (9th Cir. 2022) 56 F.4th 730, 734.)

that have held that noxious substances such as odors, fumes, and smoke trigger property and business interruption policies.

But Respondent Vigilant Insurance Company relies on the single published California case to hold the opposite, *United Talent Agency v. Vigilant Insurance Company* (2022) 77 Cal.App.5th 821. As described more below, *United Talent* based its decision on (1) facts assumed by that court, but which were contrary to the plaintiff's allegations, and (2) requirements for insurance coverage that *United Talent* invented, but that contravene decades of pre-pandemic precedent.

As another appellate court recognized, this approach was contrary to established California law: "[W]hen a pleading alleges facts sufficient to constitute a cause of action, what we think we know—beliefs not yet appropriately subject to judicial notice—has never been a proper basis for concluding, as a matter of law, those alleged facts cannot be true and, on that ground, sustaining a demurrer without leave to amend." (*Marina Pacific*, 81 Cal.App.5th at pp. 98–99.) Adopting Vigilant and *United Talent*'s position could have far-reaching negative effects on policyholders who suffered losses due to the COVID-19 virus and its effects on property.

Major League Baseball (MLB) and National Hockey League (NHL) submit this *amicus* brief to demonstrate how professional baseball and hockey, because of the nature of their businesses and operations, were affected by the COVID-19 virus, which rendered the air and surfaces in sports stadiums and arenas harmful. Baseball and hockey rely upon highly trained athletes who must play in peak physical condition and interact in close quarters. And both sports are played in venues that normally hold thousands of fans. Therefore, the particular nature of how their businesses utilize their properties forced teams to take extraordinary measures to address the physical effects of the virus in order to resume play, even without fans. The property and business interruption insurance policies that

these sports leagues purchased insure precisely this situation: The inability to use their properties as intended because of a physical peril that changed the air and surfaces of their properties—or caused "physical loss or damage" in the parlance of the policies at issue.

This Court should reject the approach taken by *United Talent* and answer the certified question in the affirmative.

ARGUMENT

I. Baseball And Hockey Demonstrate How Physical Harm From The COVID-19 Virus Prevented Normal Business Operations

Vigilant contends that the Court can answer the certified question in the abstract, without the benefit of facts or evidence about the specific effects of the COVID-19 virus on Another Planet's and other policyholders' properties. But evaluating whether the presence of the COVID-19 virus caused physical loss or damage to a given insured's property requires consideration of the particular nature of the insured's business and the extent to which its specific property was harmed by the virus. In answering the certified question, the Court should consider how the COVID-19 virus has affected other policyholders, such as *amici*, who have been harmed by the presence of the virus, and provide policyholders with the chance to introduce evidence about the virus's particular effects on their business and properties. (See *St. Mary & St. John Coptic Orthodox Church v. SBC Insurance Services, Inc.* (2020) 57 Cal.App.5th 817, 825 [courts "must consider" the "circumstances of the case in which the claim arises" in interpreting "disputed policy language"], citation omitted.)

The experiences of MLB and NHL provide stark examples of how the COVID-19 virus affected the air and surfaces of insured business property and prevented policyholders from using their business property during the relevant time period. Starting in March 2020, professional baseball and hockey teams were affected by the COVID-19 virus's harm to

air and surfaces of property because their businesses depend on trained athletes staying healthy and playing in sports venues in front of thousands of fans. During the course of a normal hockey or baseball game, thousands of fans touch countless surfaces (such as seats, railings, elevators, concessions, bathroom faucets, etc.) that cannot be effectively and continuously cleaned throughout a game to remove all traces of the virus after every contact with an infected person.

Further, surface cleaning does not remove the COVID-19 virus from the air. The COVID-19 virus can be spread throughout the air by cheering, yelling, shouting, or even breathing—activities undertaken by thousands of fans during the course of a typical sports game. In hockey arenas, remediating the virus's effects on the indoor air is particularly complex because arenas are carefully temperature controlled. Therefore, NHL teams had to install special systems to increase external air in arenas without affecting ice quality. Additionally, NHL teams were required to replace air filtration systems, install physical dividers, reconfigure physical spaces, and implement specialized disinfection, in order to reopen arenas.

Professional baseball, too, relies upon countless enclosed indoor spaces within a baseball stadium (such as clubhouses, weight rooms, training rooms, and locker rooms), as well as partially enclosed spaces (such as dugouts) where the COVID-19 virus could be transmitted throughout the course of a normal game. Therefore, to reopen baseball stadiums in 2020 (even without fans), MLB teams were forced take extensive measures to remediate the virus's effects on air and surfaces, including constructing extended dugouts and bullpens; installing physical barriers; repairing and replacing air filtration systems; and undertaking complex cleaning and disinfection of surfaces (such as electrostatic spraying).

As a result of the COVID-19 virus, and because of government orders that issued due to the virus's harm to air and surfaces, professional baseball and hockey teams were forced to stop using their venues to play games or host fans for significant time periods, starting in March 2020. As a result, MLB, NHL, and their associated teams lost billions of dollars in earnings. MLB and NHL purchased property and business interruption coverage precisely to protect against losses from an external force that rendered their properties unusable for their intended purpose (hosting fans to watch sports).

Vigilant has relied upon cases ruling against coverage for insureds that—unlike Another Planet, MLB, and NHL—were able to operate their businesses throughout the pandemic. (See *Sandy Point Dental, P.C. v. Cincinnati Insurance Company* (7th Cir. 2021) 20 F.4th 327, 330 [dentist office that continued to practice emergency service dental procedures throughout the pandemic]; *Brown Jug, Inc. v. Cincinnati Insurance Company* (6th Cir. 2022) 27 F.4th 398, 405 [restaurant able to offer takeout and delivery throughout the pandemic].) While those different facts do render those decisions correctly decided, insureds such as MLB and NHL have particularly strong claims for coverage due to the unusual nature of their businesses and properties: Unlike many businesses, professional sports games cannot be played at home, and fan attendance cannot be staggered throughout a day or week since fans attend only during the hours when a game is played.

To ensure that policyholders have a chance to present the facts specific to their particular circumstances that support their claims for insurance coverage, the Court should answer the certified question in the affirmative and hold that the actual or potential presence of the COVID-19 virus on an insured's premises can constitute or cause "direct physical loss or damage to property."

II. Other Policies Do Not Contain Exclusions Referencing "Air"

Vigilant and Another Planet also dispute how exclusionary language for "'air' inside a covered structure" affects Another Planet's claim for coverage. (See Opening Brief at pp. 52–56 [arguing "airspace" is covered property]; Reply Brief at pp. 42–44 [same]; Answer Brief at p. 35 [contending the policy does not cover damage to "air"].) But the effect (if any) of this provision is not within the scope of the certified question. Like other policyholders, Another Planet has alleged that the COVID-19 virus causes "direct physical loss or damage" to property, in part because it alters the composition of the air or airspace of insured property. (See 3ER380–381 at ¶ 5, 3ER398–399 at ¶¶ 53–54.) Therefore, the Court should consider the virus's effects on air and airspace in answering the certified question.

Regardless, other insurance policies—including those purchased by MLB and NHL—do *not* exclude or limit "air" from the definition of covered property, confirming that such policies cover physical loss and damage to air from the COVID-19 virus.

III. The Court Should Adopt The Majority View Among California Appellate Courts That The COVID-19 Virus Can Cause "Direct Physical Loss Or Damage"

Vigilant attempts to sidestep the majority of California appellate law. Most published California appellate cases to consider the issue have held that a policyholder can state a claim based on "direct physical loss or damage" under a property and business interruption insurance policy by alleging that the COVID-19 virus was present on the property, changed the air or surfaces of that property from safe to unsafe, and prevented the insured from using their property to run their business as normal. These well-reasoned decisions are consistent with California insurance law and pre-pandemic cases holding that noxious substances, such as odors, fumes, and smoke, trigger property and business interruption coverage.

A. Most Published California Appellate Decisions Have Concluded That The Virus Can Cause "Direct Physical Loss Or Damage"

1. *Inns by the Sea*

Inns by the Sea, which Vigilant ignores, was the first California appellate decision to consider whether the COVID-19 virus can cause "physical loss or damage," and held that the COVID-19 virus is a "physical force" that can impair the normal use of property and trigger insurance coverage. (71 Cal.App.5th at pp. 702–703.)

Inns surveyed—and endorsed—a long line of pre-pandemic cases holding that physical perils such as wildfire smoke, odors, ammonia fumes, gasoline vapor, and asbestos caused insured "direct physical loss of or damage" to property, even though those perils do not damage the structure of a property and are often invisible to the naked eye. (*Id.* at pp. 701–702 [citing, e.g., *Oregon Shakespeare Festival Association v. Great American Insurance Company* (D.Or. June 7, 2016) 2016 WL 3267247, at pp. *5, *9 [wildfire smoke triggered coverage because fact that "air has physical properties cannot reasonably be disputed" though it is often "invisible"], vacated by stipulation; *Gregory Packaging, Inc. v. Travelers Property Cas. Co. of America* (D.N.J. Nov. 25, 2014) 2014 WL 6675934, at p. *6 [ammonia "physically transformed the air" inside the insured property and rendered the property unsafe until it dissipated]; *Western Fire Ins. Co. v. First Presbyterian Church* (Colo. 1968) 437 P.2d 52, 55 [real property suffered "direct physical loss" despite any structural change to the property when gasoline vapors from adjacent property "infiltrated and saturated" insured building]].)[2]

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[2] (See also, e.g., *Farmers Ins. Co. of Oregon v. Trutanich* (Or.Ct.App. 1993) 858 P.2d 1332, 1338 [methamphetamine odor]; *Port Authority of New York and New Jersey v. Affiliated FM Ins. Co.* (3d Cir. 2002) 311 F.3d

Analogizing to these cases, *Inns* held that "the COVID-19 virus—like smoke, ammonia, odor, or asbestos—is a physical force" that can impair the normal use of property and trigger coverage. (71 Cal.App.5th at p. 703.) *Inns* explained that "if a business—which could have otherwise been operating—had to shut down because of the presence of the virus within the facility," it could "successfully allege that the virus created physical loss or damage." (*Id.* at pp. 704–705, citations omitted.) *Inns* confirmed throughout its opinion that the COVID-19 virus can cause insured physical loss and damage.[3] (*Inns* held against the policyholder only on separate causation grounds that are not encompassed in the certified question. (See *id.* at pp. 703–704.))

2. *Marina Pacific* and *Shusha*

Marina Pacific and *Shusha* held that it was "error at this nascent phase of the case" for a superior court to rule that "the COVID-19 virus cannot cause direct physical loss or damage to property for purposes of insurance coverage." (*Marina Pacific*, 81 Cal.App.5th at p. 99; see also *Shusha*, 87 Cal.App.5th at p. 261.)

Marina Pacific and *Shusha* correctly rejected the same argument that Vigilant makes here: that the COVID-19 virus does not cause "direct physical loss or damage to property," assuming that requires "a 'distinct, demonstrable, physical alteration' of the property.'" (Answer Brief at 24–

226, 236 [asbestos]; *Matzner v. Seaco Ins. Co.* (Mass.Super.Ct. Aug. 12, 1998) 1998 WL 566658, at p.*4 [carbon monoxide].)

[3] (See *id.* at 710 ["a virus could cause a suspension of operations through direct physical loss of or damage to property"]; *id.* at p. 710, fn. 21 ["an invisible substance or biological agent might give rise to coverage because it causes a policyholder to suspend operations due to direct physical loss of or damage to property"]; *id.* at pp. 709–710 ["our analysis does not depend on an across-the-board rule that a virus can *never* give rise to a 'direct physical loss of or damage to property'"].)

25 [quoting *MRI Healthcare Center of Glendale, Inc. v. State Farm General Ins. Co.* (2010) 187 Cal.App.4th 766, at pp. 778–779], citation omitted; see also Answer Brief at pp. 11, 29–31.) Even under the "physical alteration" standard favored by Vigilant, the insureds "unquestionably" pleaded "direct physical loss or damage" consistent with the standard that Vigilant urges. (*Marina Pacific*, 81 Cal.App.5th at p. 109.)

Marina Pacific and *Shusha* assumed—without deciding—that under *MRI Healthcare*, "direct physical loss or damage" requires that a peril cause a "distinct, demonstrable or physical alteration" to property, as Vigilant contends. (*Marina Pacific*, 81 Cal.App.5th at pp. 101–102; *Shusha*, 87 Cal.App.5th at p. 264.) *MRI Healthcare* held that a "physical alteration" required only that "some *external force* must have acted upon the insured property to cause a *physical change* in the condition of the property." (187 Cal.App.4th at pp. 779–780.)[4]

Marina Pacific and *Shusha* held that the insureds pleaded "physical alteration" consistent with *MRI Healthcare* by alleging that the COVID-19 virus alters the surfaces of property by changing those surfaces from safe to unsafe, preventing the insureds from using their property as a result.

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[4] *MRI Healthcare* found that the "physical alteration" standard was not met when the insured intentionally turned off a defective MRI machine, knowing the machine might not restart. (187 Cal.App.4th at p. 770.) The policy did not insure the machine's failure to restart because it was not caused by any "*external force*" that "acted upon the insured property to cause a *physical change* in the condition of the property" but rather resulted from "the inherent nature of the machine itself." (*Id.* at p. 780.)

Marina Pacific distinguished *MRI Healthcare* because the plaintiffs alleged that an external force (the COVID-19 virus) acted upon the insured property, causing a physical change in the condition of the air and surfaces of property. (Cf. *Inns*, 71 Cal.App.5th at p. 706, fn. 19 ["'distinct, demonstrable, physical alteration'…could include damage that is not structural, but instead is caused by a noxious substance or an odor"].)

(*Marina Pacific*, 81 Cal.App.5th at pp. 108–109; *Shusha*, 87 Cal.App.5th at pp. 264–265 [refusing insurer's attempt to categorize *Marina Pacific* as a "narrow exception"].) Other Court of Appeal cases have acted consistent with *Inns*, *Marina Pacific*, and *Shusha* by reversing orders sustaining demurrers to COVID-19 insurance coverage complaints without leave to amend.[5]

Marina Pacific and *Shusha* are in accord with nearly all pre-pandemic cases, in which the assessment of whether noxious substances caused "physical loss or damage" was decided only after extensive fact and expert discovery or trial. (See, e.g., *First Presbyterian*, 437 P.2d at pp. 55–56 [affirming jury verdict for policyholder and relying on facts from record to determine gasoline seepage triggered coverage]; *Farmers Ins. Co. of Oregon v. Trutanich* (Or.Ct.App. 1993) 858 P.2d 1332, 1335 [affirming jury verdict for policyholder by relying on "evidence that the house was physically damaged by the odor that persisted in it"].)[6]

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[5] (See *Amy's Kitchen, Inc. v. Fireman's Fund Ins. Co.* (2022) 83 Cal.App.5th 1062, 1071 [COVID-19 virus triggered policy's communicable disease coverage provision triggered by "direct physical loss or damage" because "the need to clean or disinfect infected or potentially infected covered property constitutes 'direct physical loss or damage' of that property"]; *Tarrar Enterprises, Inc. v. Associated Indemnity Corp.* (2022) 83 Cal.App.5th 685, 689 [denial of leave to amend was "error" in light of facts that insured stated it would allege in an amended complaint, recognizing that denying leave to amend is appropriate only when there is "no possibility of alleging facts under which recovery can be obtained"], citation omitted.)

[6] (See also, e.g., *Gregory Packaging*, 2014 WL 6675934, at pp. *3, *8 [granting partial summary judgment based on "substantial evidence that the ammonia discharge physically incapacitated its facility"]; *Sentinel Management Co. v. New Hampshire Ins. Co.* (Minn.Ct.App. 1997) 563 N.W.2d 296, 300 [affirming denial of insurer's summary judgment because the policyholder "presented evidence showing that released asbestos fibers

B. *United Talent* Erred In Construing The Facts And Insurance Policies Against Policyholders

Though Vigilant attempts to dismiss *Marina Pacific* as an "outlier" case, Answer Brief at pp. 39–41, the opposite is true: The case that Vigilant relies upon, *United Talent*, is the only published California appellate decision to hold that a plaintiff can never allege facts supporting a claim that the COVID-19 virus causes "direct physical loss or damage" triggering insurance coverage. No Court of Appeal has followed *United Talent*, and *Marina Pacific* and *Shusha* expressly rejected *United Talent*'s reasoning.

As described further below, *United Talent* made two fundamental errors: (1) it disregarded the complaint's factual allegations, and (2) it invented requirements for insurance coverage that were not supported by the policy language or pre-pandemic law.

1. *United Talent* Turns On Improper Judicial Fact-Finding

United Talent determined that the COVID-19 virus could not cause physical loss or damage only by refusing to accept its plaintiff's allegations as true. *Marina Pacific* correctly recognized that *United Talent* "found—without evidence—the COVID-19 virus does not damage property" based on the court's "general belief" about what is needed to restore property

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have contaminated the buildings, creating a hazard to human health" constituting "direct, physical loss"].)

Even courts that ultimately ruled in favor of insurers in non-COVID-19 cases did so only after discovery. (See, e.g., *Mama Jo's Inc. v. Sparta Insurance Company* (11th Cir. 2020) 823 F.App'x 868, 879 [(considering expert testimony in considering whether dust caused "direct physical loss" on appeal from summary judgment]; *Mastellone v. Lightning Rod Mut. Ins. Co.* (Ohio Ct.App. 2008) 884 N.E.2d 1130, 1143–1145 [assessing whether mold caused "physical injury" after considering expert testimony on appeal of denial of motion notwithstanding the verdict].)

damaged by the virus to "its original, safe-for-use condition." (81 Cal.App.5th at p. 111.)

For instance, *United Talent* suggested that the virus does not cause physical damage because it "can be cleaned from surfaces through general disinfection measures," 77 Cal.App.5th at p. 838, despite United Talent Agency alleging that "[e]ven frequent cleanings cannot be assured to eliminate SARS-CoV-2 from a premises, given its ability to spread easily and quickly as long as people are entering the premises during an outbreak at or near the premises," *United Talent* (No. 20STCV43745), First Amended Complaint at ¶ 47.

United Talent also erred in relying on the fact-finding of *other* courts. For instance, *United Talent* relied upon a federal case that stated—incorrectly and without citation to authority—that the virus is "inconsequential" because "it may be wiped off surfaces using ordinary cleaning materials, and it disintegrates on its own in a matter of days." (77 Cal.App.5th at p. 835 [quoting *Sandy Point Dental,* 20 F.4th at p. 335].)

United Talent's improper reliance on the fact-finding of other judges was particularly problematic where those cases did not involve allegations that the COVID-19 virus physically altered property. For example, the plaintiffs in *Barbizon School of San Francisco, Inc. v. Sentinel Insurance Company LTD.* (N.D.Cal. 2021) 530 F.Supp.3d 879—whose policy contained a broad exclusion for "loss or damage" caused by a "virus"—"concede[d] there has been no physical damage to or alteration of their property." (*Id.* at p. 889 [cited by *United Talent*, 77 Cal.App.5th at p. 835, fn. 10].) Thus, instead of limiting the record to the allegations of the complaint before it*, United Talent* relied on unsubstantiated second-hand fact-finding in cases involving far more narrowly pleaded complaints.

Here, rather than accept that it is bound by the allegations in Petitioner Another Planet's complaint, Vigilant urges this Court to adopt

United Talent's improper fact-finding. (See Answer Brief at p. 32 [asserting virus "may be wiped off surfaces using ordinary cleaning materials, and it disintegrates on its own in a matter of days," quoting *United Talent*, 77 Cal.App.5th at 835].) The Court should decline to do so.

2. *United Talent* Invented Requirements For Insurance Coverage

Vigilant's arguments before this Court are premised on *United Talent*'s reasoning. (Answer Brief at pp. 26, 27, 32.) But *United Talent* invented purported requirements for insurance coverage that are contrary to the language of "all risks" policies and pre-pandemic case law, and based its analysis on unfounded assumptions about the virus. Specifically, *United Talent* incorrectly assumed requirements for coverage that are contrary to pre-pandemic law, including that: (1) the virus hurts only people and not property; (2) physical harm must last a certain time period to constitute "direct physical loss or damage"; (3) coverage requires repairs that could not be alleged by any policyholder; and (4) insurance only covers physical perils whose effects are limited to an isolated location. Because these bases for the *United Talent* decision are mistaken, the Court should not adopt its approach here.

a) The COVID-19 Virus Harms People *And* Property

United Talent reached its "no coverage" determination by concluding that the COVID-19 virus "can carry great risk to people" but poses "no risk at all to a physical structure," 77 Cal.App.5th at pp. 833, 837, an argument that Vigilant repeats throughout its brief. (Answer Brief at pp. 12, 29, 32, 34, 36.)

But, contrary to *United Talent*'s assumption, harm to people and property are not mutually exclusive. In fact, cases of property damage covered by insurance commonly involve perils causing both types of harm. *Inns* recognized that the virus was akin to substances such as wildfire

smoke and asbestos that have been found to trigger coverage—not because they endanger a physical structure, but because they prevent people from using the property as it was intended to be used. (See 71 Cal.App.5th at pp. 701–702; see also *Huntington Ingalls Industries, Inc. v. Ace American Insurance Company* (Vt. 2022) 2022 VT 45, at ¶ 29 [property policies can pay when insured "property is unusable due to a health hazard"].)

Though substances such as asbestos, carbon monoxide, wildfire smoke, and toxic fumes do not affect the physical structure of a building, such substances long have been found to trigger coverage because when they intrude upon property, they make it unsafe for people to use the property normally. (See *Graff v. Allstate Ins. Co.* (Wash.Ct.App. 2002) 54 P.3d 1266, 1270 [finding coverage when "methamphetamine lab released hazardous vapor"]; *First Presbyterian*, 437 P.2d at p. 55 [gasoline fumes caused physical loss or damage by making "further use of the building *highly dangerous*"], emphasis added.) This is what "physical loss or damage" means for the purposes of a property and business interruption policy.

United Talent also asserted that the COVID-19 virus could not cause "direct physical loss or damage" based on its assumption that transmission could be reduced with "social distancing, vaccination, and the use of masks." (77 Cal.App.5th at pp. 838–840.) But vaccination and widespread masking were not available at the outset of the pandemic. Moreover, Another Planet's and *amici*'s policies do not distinguish between a physical peril that is introduced into to the properties through people or some other way. (See, e.g., *Trutanich*, 858 P.2d at p. 1335 [physical loss or damage covered methamphetamine odor introduced into property through people].)

b) *United Talent* Invented A Lengthy Duration Requirement For Coverage

As discussed above, *United Talent*'s ruling depended on its mistaken factual assumptions about the ability to clean the virus, which Vigilant repeats in its brief. (Answer Brief at pp. 32–33, 39, 53–54.) *United Talent* compounded that factual error by assuming, incorrectly, that whether an insured pleaded "direct physical loss or damage" depended on the length of time that property was harmed by the virus. It does not.

Marina Pacific correctly recognized that even if a court could assume that "disinfecting repaired any alleged property damage," that would not "negate coverage." (81 Cal.App.5th at p. 112.) That is because the policyholder would be entitled to insurance coverage for the period that the "property had been damaged in the *interim*" before it was restored to normal use, and the policy could cover the business income lost during that period. (*Id.*, emphasis added.) Thus, any dispute about the length of time property is damaged by the virus (a quintessential factual issue) would affect only the "measure of policy benefits"—not the threshold question whether the virus can cause "direct physical loss or damage." (*Id*.)

Before the pandemic, courts commonly held that physical perils causing damage that affects property for hours or days can cause "physical loss or damage" to property. (See *Oregon Shakespeare*, 2016 WL 3267247, at p. *6 [wildfire smoke that took "several days" to dissipate]; *Gregory Packaging*, 2014 WL 6675934, at p. *2 [ammonia dissipation; 5 days]; *Wakefern Food Corp. v. Liberty Mut. Fire Ins. Co.* (N.J.Super.Ct.App.Div. 2009) 968 A.2d 724, 729 [power outage; 4 days]; *Brand Management, Inc. v. Maryland Cas. Co.* (D.Colo. June 18, 2007) 2007 WL 1772063, at p. *1 [listeria; 15 days]; *Interpetrol Bermuda, Ltd. v. Lloyd's Underwriters* (S.D.N.Y. 1984) 588 F.Supp. 1199, 1201 [oil contamination; 15 days].)

Another Planet's property insurance policy confirms that perils that affect property for mere days are insured, providing only a 24-hour "waiting period" for coverage to be triggered. (3ER442, 3ER492.) Another Planet has alleged that the COVID-19 virus adheres to surfaces for much longer than that. (3ER407 at ¶ 53 [28 days].)

Other policies, like those purchased by *amici*, do not impose *any* waiting periods before coverage is triggered. Thus, *United Talent* erred in assuming that whether "direct physical loss or damage" occurred depends on the length of time that property is rendered unusable by the virus. Rather, that issue must be developed with evidence and compared to the policy at issue—determinations that cannot be made at the pleading stage.

3. "Direct Physical Loss Or Damage" Does Not Require Repairs

United Talent based its conclusion on its assertions that the plaintiff did not allege "that its properties required unique abatement efforts to eradicate the virus,'" and that the necessity of "cleaning or employing minor remediation" did not demonstrate that physical loss or damage occurred. (*United Talent*, 77 Cal.App.5th at p. 839.) Vigilant, again, urges the Court to adopt this reasoning, arguing that Another Planet did not "repair or replace the property where viral particles were present." (Answer Brief at pp. 32–34.)

But Another Planet's policy does not require repairs for coverage to be triggered.[7] And, in fact, other policies (such as those purchased by MLB

[7] The civil authority coverage provision does not use the "repair" language at all. (See 3ER487-488, 3ER517.) Repairs are mentioned only in the "period of restoration" provision, which sets forth a period of time during which business interruption loss is measured. (3ER578.) (See also *Coast Restaurant Group, Inc. v. AmGUARD Ins. Co.* (2023) 90 Cal.App.5th 332, 341 [The "'period of restoration' only provides one

and NHL) specifically provide coverage if damaged property is "*not* repaired or replaced." (See Appendix [Policy Excerpts].) Courts, too, find coverage for noxious substances such as wildfire smoke that often resolve or dissipate without specific remediation. *See Oregon Shakespeare*, 2016 WL 3267247, at p. *6 [insurance covered days for wildfire smoke to "dissipate before business could be resumed"]; *Gregory Packaging*, 2014 WL 6675934, at p. *3 [policy covered closure until ammonia "dissipated"].)

Further, contrary to *United Talent*'s assumption and Vigilant's argument, pre-pandemic cases held that perils that can be remediated through cleaning can cause insured "physical loss or damage." (See, e.g., *Trutanich*, 858 P.2d at p. 1336 [odor requiring insured to "clean the house"]; *Graff*, 54 P.3d at p. 1267 [costs to "clean up" methamphetamine residue]; *National Union Fire Ins. Co. of Pittsburgh v. CML Metals Corp.* (D.Utah Aug. 11, 2015) 2015 WL 4755207, at p. *4 [oil spray "caused physical damage to the building roof (necessitating cleaning)"].) And *Inns* recognized that coverage could be triggered if the presence of COVID-19 required an insured property "to be thoroughly sanitized and remain empty for a period." (71 Cal.App.5th at pp. 704–705.)

In any case, even if repairs were required, MLB, NHL, and many other insureds have alleged that they took extensive physical measures to

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method of calculating the duration of coverage, and does not purport to define the scope of coverage."])

The "period of restoration" does not narrow the insuring agreement covering "all risks of physical loss or damage," and no reasonable insured would expect to find a significant limitation on coverage to be buried in such a provision. (See *Haynes v. Farmers Ins. Exchange* (2004) 32 Cal.4th 1198, 1206 [limitations on coverage must be "conspicuous, plain and clear" to be enforced].)

remediate and repair the harm from the virus. As discussed above, the measures alleged by MLB and NHL clubs include:

- Installing special systems in hockey arenas to permit increased levels of outside air without negatively impacting the quality of the ice.
- Constructing extended dugouts and bullpens in baseball stadiums and creating new dining, training, and isolation areas to allow for physical distancing.
- Extensive cleaning and disinfection (including using electrostatic sprayers) of equipment used by infected individuals and areas where infected individuals had been present.
- Discarding and replacing items, including portions of mechanical and HVAC systems, that had been exposed to the COVID-19 virus.
- Repairing and replacing air filtration systems.
- Remodeling and reconfiguring physical spaces and installing physical shields and barriers.

These measures are more than sufficient to constitute "repairs" consistent with the plain meaning of repair: "to restore to a sound or healthy state." (Repair, Merriam-Webster Dict., https://www.merriam-webster.com/dictionary/repair.)

Therefore, the Court should reject Vigilant's request to adopt *United Talent*'s faulty reasoning.

4. Physical Perils That Affect Multiple Properties Are Insured

United Talent also reasoned that the COVID-19 virus could not cause physical loss or damage as a matter of law because, unlike other perils like asbestos or environmental contamination, the COVID-19 virus

was purportedly not "tied to a location." (77 Cal.App.5th at p. 838.) But an insured peril need not be "tied to a location."

Environmental releases can spread over hundreds of miles, and insured perils such as hurricanes or forest fires can damage vast areas. If insurance only covered damage cabined to specific properties, it would lead to the absurd result that a fire that burns one building would trigger coverage while a fire that burns thousands would not.

C. Cases Concerning Pure "Loss Of Use" Are Inapposite

The Court should also reject Vigilant's reliance on cases that concern a legal argument not implicated by the certified question. As *Marina Pacific* observed, most COVID-19 insurance coverage cases ruling in favor of insurers concern a legal theory that is not at issue in this case or in *amici*'s appeals. Several policyholders have alleged that a government *order* causes physical loss or damage to property, a theory that some California appellate courts—and courts in other states—have rejected. But, as *Marina Pacific* recognized, these cases are "readily distinguishable" from cases like this one and *amici*'s alleging that the COVID-19 *virus* causes physical loss or damage. (81 Cal.App.5th at pp. 109–111 & fn. 13.)

Vigilant acknowledges, as it must, that Another Planet does not allege that its losses were caused solely by the loss of use of its property due to government closure orders. (Answer Brief at pp. 44, 46–47.) Yet Vigilant continues to rely upon cases that rejected this inapposite theory of physical loss, namely *Starlight Cinemas, Inc. v. Massachusetts Bay Insurance Company* (2023) 91 Cal.App.5th 24; *Apple Annie, LLC v. Oregon Mutual Ins. Co.* (2022) 82 Cal.App.5th 919; and *Musso & Frank Grill Co., Inc. v. Mitsui Sumitomo Ins. USA Inc.* (2022) 77 Cal.App.5th 753. (Answer Brief at pp. 42–43.)

The plaintiffs in these cases did not allege—as Another Planet and *amici* do—that the COVID-19 virus was present on their insured property.

(*Starlight Cinemas*, 91 Cal.App.5th at p. 38 ["Starlight did not allege that the COVID-19 virus was present in its theaters or that there was any physical alteration of its property as a result of either the virus or the government orders"]; *Apple Annie*, 82 Cal.App.5th at p. 937 [plaintiff "did not allege that the presence of the virus on the premises triggered coverage"]; *Musso*, Complaint (Super. Ct. L.A. County, May 1, 2020) 2020 WL 2096329, at ¶ 59 [plaintiff "was not aware of the presence of any COVID-19 virus on its premises, and no employee or customer had reported a COVID-19 infection"].) Rather, those plaintiffs argued that the loss of use of their insured business property from an order *alone* constituted physical loss or damage to insured property. (*Starlight Cinemas*, 91 Cal.App.5th at p. 38; *Apple Annie*, 82 Cal.App.5th at p. 934; *Musso*, 77 Cal.App.5th at p. 756; *Musso*, App. Brief (Cal.Ct.App. Aug. 26, 2021), 2021 WL 4169380, at pp. *28–38.)[8]

Contrary to Vigilant's suggestion, those cases did not consider whether the COVID-19 virus could cause direct physical loss or damage to property. Indeed, *Apple Annie* recognized that the *Marina Pacific* plaintiffs "pled the element missing" from other cases that did not allege that the virus on site caused insured losses. (82 Cal.App.5th at pp. 933–934; see also *id.* at p. 936 [*Apple Annie* plaintiff conceded that "*Marina Pacific* does not directly implicate its theory of coverage"], brackets omitted.) And the same panel that issued *Apple Annie* later, in *Tarrar Enterprises, Inc. v.*

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[8] Also unlike Another Planet and *amici*, the plaintiffs in these cases did not seek civil authority coverage based on physical loss or damage caused by the *virus* that results in a government order restricting access to insured property. (*Starlight Cinemas*, 91 Cal.App.5th at p. 30, fn. 5; *Apple Annie*, 82 Cal.App.5th at p. 924, fn. 2; *Musso*, 77 Cal.App.5th at p. 756; *Musso*, App. Brief, 2021 WL 4169380, at pp. *28–38.) Instead, the plaintiffs argued that the government orders *themselves* caused physical loss or damage to property.

Associated Indemnity Corp. (2022) 83 Cal.App.5th 685, reversed a superior court sustaining a demurrer without leave to amend in another COVID-19 insurance coverage case. (*Id.* at 689.) Therefore, these cases are irrelevant to resolution of the certified question.

CONCLUSION

For the reasons above, and the reasons set forth in Another Planet's briefs, the Court should answer the certified question in the affirmative.

DATE: August 2, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies, pursuant to California Rule of Court 8.520(c)(1), that the foregoing *amicus curiae* brief of Major League Baseball and National Hockey League in support of Petitioner Another Planet Entertainment, LLC was produced using 13-point Times New Roman type and contains 6,089 words, including footnotes, which is less than the total number of words permitted by the Rules of Court. Counsel relies upon the word count of the computer program (Microsoft Word) used to prepare this brief.

DATE: August 2, 2023

Respectfully submitted,

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APPENDIX

MAJOR LEAGUE BASEBALL AND NATIONAL HOCKEY LEAGUE'S *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER ANOTHER PLANET ENTERTAINMENT, LLC

Representative Insurance Policy Excerpts
(Excerpted from *San Jose Sharks LLC v. Superior Court*, No. H050441 (6th Appellate District) Appendix of Exhibits in Support of Petition for Writ of Mandate, Tab 12, 1A0264–1A0265)

4. APPLICATION OF POLICY TO DATE OR TIME RECOGNITION

With respect to situations caused by any **date or time recognition** problem by **electronic data processing equipment or media** (such as the so-called Year 2000 problem), this Policy applies as follows.

A. This Policy does not pay for remediation, change, correction, repair or assessment of any **date or time recognition** problem, including the Year 2000 problem, in any **electronic data processing equipment or media**, whether preventative or remedial, and whether before or after a loss, including temporary protection and preservation of property. This Policy does not pay for any TIME ELEMENT loss resulting from the foregoing remediation, change, correction, repair or assessment.

B. Failure of **electronic data processing equipment or media** to correctly recognize, interpret, calculate, compare, differentiate, sequence, access or process data involving one or more dates or times, including the Year 2000, is not insured physical loss or damage. This Policy does not pay for any such incident or for any TIME ELEMENT loss resulting from any such incident.

Subject to all of its terms and conditions, this Policy does pay for physical loss or damage not excluded by this Policy that results from a failure of **electronic data processing equipment or media** to correctly recognize, interpret, calculate, compare, differentiate, sequence, access or process data involving one or more dates or times, including the Year 2000. Such covered resulting physical loss or damage does not include any loss, cost or expense described in A or B above. If such covered resulting physical loss or damage happens, and if this Policy provides TIME ELEMENT coverage, then, subject to all of its terms and conditions, this Policy also covers any insured Time Element loss directly resulting therefrom.

5. VALUATION

Adjustment of the physical loss amount under this Policy will be computed as of the date of loss at the place of the loss, and for no more than the interest of the Insured.

Unless stated otherwise in an Additional Coverage, adjustment of physical loss to property will be subject to the following:

A. On stock in process, the value of raw materials and labor expended plus the proper proportion of overhead charges.

B. On finished goods manufactured by the Insured, the regular cash selling price, less all discounts and charges to which the finished goods would have been subject had no loss happened.

C. On raw materials, supplies or other merchandise not manufactured by the Insured:

1) if repaired or replaced, the actual expenditure incurred in repairing or replacing the damaged or destroyed property; or

2) if not repaired or replaced, the **actual cash value**.

D. On exposed films, records, manuscripts and drawings that are not **valuable papers and records**, the value blank plus the cost of copying information from back-up or from originals of a previous generation. These costs will not include research, engineering or any costs of restoring or recreating lost information.

E. On property that is damaged by fire and such fire is the result of **terrorism**, the **actual cash value** of the fire damage loss. Any remaining fire damage loss shall be adjusted according to the terms and conditions of the Valuation clause(s) in this section of the Policy and shall be subject to the limit(s) of liability for TERRORISM, and if stated the limit of liability for SUPPLEMENTAL UNITED STATES CERTIFIED ACT OF TERRORISM ENDORSEMENT(S), as shown in the LIMITS OF LIABILITY clause in the DECLARATIONS section.

F. On all other property, the lesser of the following:

1) The cost to repair.

2) The cost to rebuild or replace on the same site with new materials of like size, kind and quality.

3) The cost in rebuilding, repairing or replacing on the same or another site, but not to exceed the size and operating capacity that existed on the date of loss.

4) The selling price of real property or machinery and equipment, other than stock, offered for sale on the date of loss.

5) The cost to replace unrepairable electrical or mechanical equipment, including computer equipment, with equipment that is the most functionally equivalent to that damaged or destroyed, even if such equipment has technological advantages and/or represents an improvement in function and/or forms part of a program of system enhancement.

6) The increased cost of demolition, if any, directly resulting from insured loss, if such property is scheduled for demolition.

7) The unamortized value of improvements and betterments, if such property is not repaired or replaced at the Insured's expense.

8) The **actual cash value** if such property is:

a) useless to the Insured; or

b) not repaired, replaced or rebuilt on the same or another site within two years from the date of loss, unless such time is extended by the Company.

The Insured may elect not to repair or replace the insured real or personal property lost, damaged or destroyed. Loss settlement may be elected on the lesser of repair or replacement cost basis if the proceeds of such loss settlement are expended on other capital expenditures related to the Insured's operations within two years from the date of loss. As a condition of

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I am a resident of the State of California and over the age of eighteen years, and not a party to the within action. My business address is 415 Mission Street, Suite 5400, San Francisco, CA 94105. On August 2, 2023, I served the following document(s) described as:

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- **[PROPOSED] *AMICUS CURIAE* BRIEF OF MAJOR LEAGUE BASEBALL AND NATIONAL HOCKEY LEAGUE IN SUPPORT OF PETITIONER ANOTHER PLANET ENTERTAINMENT, LLC**

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Ellen Chiulos

Ellen Chiulos

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Supreme Court of California

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8/2/2023

Date

/s/Rani Gupta

Signature

Gupta, Rani (296346)

Last Name, First Name (PNum)

Covington & Burling LLP

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