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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,

vs.

VIGILANT INSURANCE COMPANY,
Respondent.

APPLICATION BY CALIFORNIA FAIR PLAN ASSOCIATION TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT VIGILANT INSURANCE COMPANY; PROPOSED BRIEF

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

LEWIS BRISBOIS BISGAARD & SMITH LLP
*Raul L. Martinez (SBN 82465)
Elise D. Klein (SBN 111712)
633 W. 5th Street, Suite 4000
Los Angeles, California 90071
Tel.: (213) 250-1800 • Fax: (213) 250-7900

Attorneys for Amicus Curiae,
CALIFORNIA FAIR PLAN ASSOCIATION

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

TABLE OF AUTHORITIES

Other Authorities **Page(s)**

APPLICATION TO FILE AMICUS CURIAE BRIEF

Pursuant to California Rules of Court, rule 8.520(f), California FAIR Plan Association hereby applies for permission to file a brief as amicus curiae in support of Respondent Vigilant Insurance Company ("Vigilant"). A copy of the proposed brief is attached to this application.

California FAIR Plan Association ("FAIR Plan") is an involuntary association of property insurers licensed to write property insurance in California pursuant to Chapter 9 of Part 1, Division 2 of the California Insurance Code, sections 10090 *et seq*. Specifically, the FAIR Plan is tasked with offering basic property insurance against direct loss to real or tangible personal property pursuant to Insurance Code section 10091(c)(1). Because the FAIR Plan's policies are written to insure against "direct physical loss," the FAIR Plan has an interest in how the Court interprets the phrase "direct physical loss or damage to property" as used in the Vigilant policy and other similar insurance policies across the country.

The FAIR Plan's proposed amicus brief addresses issues and cases not discussed by the parties and will assist the Court in deciding this matter. The brief addresses the following issues:

1. Whether the extrinsic evidence relied on by Another Planet Entertainment, LLC ("Planet") is relevant or probative with respect to the policy language at issue in this case.

2. Whether Vigilant's knowledge of pandemic risks is relevant or probative on the question of the interpretation of the term "direct physical loss or damage to property."

3. Whether the absence of a virus exclusion in a property insurance policy affects how the phrase "direct physical loss or damage to property" should be construed.

4. Whether *Marina Pacific Hotel & Suites, LLC v. Fireman's Fund Ins. Co.* (2022) 81 Cal.App.5th 96 was properly decided even under California's more liberal pleading rules.

5. Whether cases focusing on the functionality of property involving toxic substances are relevant in deciding whether the Covid-19 virus causes direct physical loss or damage to property.

Pursuant to California Rules of Court, rule 8.520, the FAIR Plan affirms that no party or counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the FAIR Plan made a monetary contribution to fund its preparation or submission.

DATED: August 2, 2023

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ Raul L. Martinez
Raul L. Martinez
Attorneys for Amicus Curiae,
CALIFORNIA FAIR PLAN ASSOCIATION

I. INTRODUCTION

The brief addresses the following issues:

1. Whether the extrinsic evidence relied on by Planet is relevant or probative with respect to the specific policy language at issue in this case.

2. Whether Vigilant's knowledge of pandemic risks is relevant or probative on the question of the interpretation of the term "direct physical loss or damage to property."

3. Whether the absence of a virus exclusion in a property insurance policy affects how the phrase "direct physical loss or damage to property" should be construed.

4. Whether *Marina Pacific Hotel & Suites, LLC v. Fireman's Fund Ins. Co.* (2022) 81 Cal.App.5th 96 was properly decided even under California's more liberal pleading rules.

5. Whether cases focusing on the functionality of property involving toxic substances are relevant in deciding whether the Covid-19 virus causes direct physical loss or damage to property.

II. PLANET'S PROFFERED INTERPRETATION DOES NOT COMPORT WITH CALIFORNIA'S RULES OF CONTRACT INTERPRETATION.

A. The Term "Direct Physical Loss or Damage to Property" Is Not Ambiguous and Has Not Been Found To Be Ambiguous By California Appellate Courts

Going against the vast majority of cases around the country that have found the phrase "direct physical loss or damage to property" is unambiguous, Petitioner Another Planet Entertainment, LLC ("Planet") strains to argue that the phrase is ambiguous, and that as a result, should be interpreted in its favor because it had a reasonable expectation of coverage. Amicus California FAIR Plan Association ("FAIR Plan") takes issue with several points made by Planet concerning the interpretation of the policy language at issue in this case.

First, Planet argues that the "direct physical loss" language should be interpreted in the context of the Covid-19 virus and the Pandemic. This is not entirely accurate. The subject language should be interpreted in the context of whether a virus like Covid-19 can cause physical damage or loss to property and whether a reasonable person would have a reasonable expectation that the virus would cause physical damage to property items like chairs and tables. While an ordinary person could reasonably believe that a virus like Covid-19 could cause serious bodily injury, even death, such person would not reasonably expect that a mere virus would cause physical loss or damage to property. This is especially true

since it has been widely known since the beginning of the Pandemic that the Covid-19 virus can be removed through proper cleaning. In this context, an ordinary person would not find the phrase "direct physical loss or damage to property" ambiguous.

Second, Planet mistakenly tries to analogize the presence of Covid-19 on property to cases involving contamination by toxic or caustic substances like methamphetamine, carbon monoxide, asbestos, ammonia and other noxious substances. The analogy is not apt since, as Planet repeatedly acknowledges, whether a term is ambiguous must be analyzed in the context of the policy and the circumstances of ***this*** case. A policy term cannot be found to be ambiguous in the abstract but must be construed in the context of the case. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1265.)[1]

[1] "While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply." (*Id.* at p. 1264.) "Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. (Civ. Code, § 1636.) Such intent is to be inferred, if possible, solely from the written provisions of the contract. (*Id.*, § 1639.) . . . Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning. [Citations.]" (*AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 821-822.) An ambiguity is resolved by interpreting the provision in the sense the promisor (i.e., the insurer) believed the promisee understood it at the time of contract formation. (*AIU, supra*, 51 Cal.3d at p. 822; Civ. Code, § 1649.)

Third, Planet argues that Vigilant should have written a narrower, unambiguous coverage grant. However, a policy term is not ambiguous merely because it is not defined or could have been written differently. (*Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, 867; *Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal.4th 377, 390 ["The fact that a term is not defined in the policies does not make it ambiguous."].)

Nor is a policy term ambiguous because of a "[d]isagreement concerning the meaning of a phrase," or "'the fact that a word or phrase isolated from its context is susceptible of more than one meaning.'" (*State of California v. Continental Ins. Co.* (2012) 55 Cal.4th 186, 195.) A perceived ambiguity is construed against the insurer only as a last resort, after other principles of interpretation have been exhausted. (*Bank of the West, supra,* 2 Cal.4th at p. 1265; Civ. Code, § 1654.) "If an asserted ambiguity is not eliminated by the language and context of the policy, courts then invoke the principle that ambiguities are generally construed against the party who caused the uncertainty to exist (i.e., the insurer) in order to protect the insured's reasonable expectation of coverage." (*La Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity Co.* (1994) 9 Cal.4th 27, 37.) An insured's reasonable expectation of coverage comes into play *only* where there is an ambiguity in the policy. (*Helfand v. National Union Fire Ins. Co.* (1992) 10 Cal.App.4th 869, 884.)

Here, no California appellate decision has found that the phrase "direct physical loss or damage to property" is ambiguous. Therefore, because the term is not ambiguous, Planet's purported reasonable expectations simply do not come into play in this case.

B. Vigilant's and the Insurance Industry's Public Statements Regarding Exposures To Pandemic-Related Losses Are Not Relevant or Probative On The Meaning of "Direct Physical Loss or Damage To Property"

Planet argues that public statements made by Vigilant and the insurance industry regarding exposures to pandemic-related losses are relevant to addressing the alleged ambiguity in the phrase "direct physical loss or damage to property." (Opening Brief, p. 11.) Planet points to Chubb's 2017 Annual Report which indicated it had substantial exposure to natural disasters and catastrophic events, including pandemics, which could impact a variety of its businesses, including commercial and personal lines. (Opening Brief, p. 34.)

In particular, such statements are hardly probative of the interpretation of the phrase "direct physical loss or damage to property" or any other *specific* term contained in the Vigilant policy issued to Planet. (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 37 [Proffered extrinsic evidence must be *relevant* to prove a meaning to which the language is reasonably susceptible.].) The fact that natural disasters and pandemics present substantial risks to insurance companies is a truism and contributes nothing to the meaning of

"direct physical loss." Notably, the statements attributed to Vigilant in Chubb's Annual Report are not linked to any particular type of policy or policy language. None of these public pronouncements specifically addressed the meaning of the specific words "direct physical loss or damage to property." There is no denying that pandemics and viruses can trigger coverage for illnesses and bodily injury claims under various types of policies, including worker's compensation, liability coverages and health insurance. The Covid-19 Pandemic has resulted in 7 million deaths worldwide and 1.3 million deaths in the U.S., so one would expect substantial losses from insurance claims involving claims for bodily injury and death. An ordinary policyholder would not have a reasonable expectation that a virus like Covid-19 would cause property damage. Chubb's public statements at best reflect the reality that natural disasters and pandemics can result in substantial insurance losses.

Moreover, the extrinsic evidence Planet relies on does not reflect the drafting history of any particular provision of any insurance policy. While policy drafting history may properly be used by courts as an aid to discern the meaning of disputed policy language, see *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 670-671, it may not be relied on if it contradicts the basic rule that words in insurance policies should be interpreted as laypersons would interpret them. (*ACL Technologies, Inc. v. Northbrook Property & Casualty Ins. Co.* (1993) 17 Cal.App.4th 1773, 1791 ["Whatever else extrinsic evidence may be used for, it

may not be used to show that words in contracts mean the exact opposite of their ordinary meaning."].)

Planet's argument also runs directly counter to the objective theory of contracts under which the subjective intent of one of the parties is disregarded. "It is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that controls interpretation." (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 956 [citations omitted].) "The parties' undisclosed intent or understanding is irrelevant to contract interpretation." (*Iqbal v. Ziadeh* (2017) 10 Cal.App.5th 1, 8; *Meyer v. Benko* (1976) 55 Cal.App.3d 937, 942-943 ["The existence of mutual consent is determined by objective rather than subjective criteria, the test being what the outward manifestations of consent would lead a reasonable person to believe."].) Parol evidence of the subjective, uncommunicated intent of one of the parties is not admissible to contradict the express terms of an agreement. (*Winet v. Price* (1992) 4 Cal.App.4th 1159, 1167.)

Planet does not claim it relied on any public statements (or was even aware of them). Planet cannot reasonably claim it had an objectively reasonable expectation of coverage based on subjective, public statements it never saw and never relied on.

C. The Absence of a Virus Exclusion Is Not Probative of the Interpretation of "Direct Physical Loss or Damage To Property."

Planet also points to the fact that the Insurance Services Office ("ISO") had developed a standard virus and bacteria exclusion in 2006. This exclusion is not relevant or probative of the discrete coverage issue presented in this case since the basic coverage grant in an insurance policy must be analyzed first before considering the effect of exclusions. If the insuring clause of a policy does not cover a claimed loss, then there is no coverage and there is no need to consider policy exclusions, because exclusions serve to limit coverage granted by an insuring clause. (*Ray v. Valley Forge Ins. Co.* (1999) 77 Cal.App.4th 1039, 1048.) An exclusion cannot act as an additional grant or extension of coverage. (*Id.*; *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 16 ["Before 'even considering exclusions, a court must examine the coverage provisions to determine whether a claim falls within [the policy terms].'"].)

The absence of a virus exclusion also does not inform how the "direct physical loss" language is interpreted, as Planet claims. Certainly, the fact that ISO had developed a standard virus and bacteria exclusion is not a concession that the insurance industry believed viruses could cause physical damage or loss to property under circumstances presented by the Covid-19 virus. The 2006 ISO circular noted that "building and personal property could *arguably* become contaminated (often temporarily)" by viruses and bacteria. (ISO Circular, "New Endorsements Filed to Address

Exclusion of Loss Due to Virus or Bacteria," (July 6, 2006); https://www.propertyinsurancecoveragelaw.com/files/2020/03/ISO-Circular-LI-CF-2006-175-Virus.pdf.) The ISO Circular simply pointed out that "[a]n allegation of property damage may be a point of disagreement in a particular case." (*Id.*) Indeed, ISO noted rather presciently that insurers could face claims seeking to "*expand coverage and to create sources of recovery for such losses, contrary to policy intent*." (*Id.* [italics added].) These statements simply demonstrate that the virus exclusion was designed to serve as a "belt-and-suspenders" approach to address future claims seeking to expand coverages under various policies and factual scenarios beyond their plain terms, as is the case here.

It is also noteworthy that the examples cited in the ISO Circular are a far cry from the circumstances presented in this case. The examples cited included bacterial contamination of milk due to the growth of listeria bacteria. There is no denying that contamination of food by E.coli bacteria can cause food to spoil, and thus cause property damage. But that is not the case here. Covid-19 does not contaminate property in the way E.coli or listeria cause food to spoil.

Furthermore, whatever ISO or Chubb knew about viruses or pandemics is not binding on the entire industry or any particular insurer. The insurance industry is not monolithic. (*ACL Technologies, supra,* 17 Cal.App.4th at p. 1792 ["The drafting history argument assumes that all insurers and all policyholders were aware of 'industry interpretations' of the 1973 pollution exclusion, a proposition for which there is obviously no support in

either this record or in the briefs of amici curiae."].) Consequently, the promulgation of a virus exclusion is in no way probative of how the term "direct physical loss or damage to property" should be construed in this case.

III. THE COURT SHOULD REJECT THE CONCLUSION IN *MARINA PACIFIC* THAT PHYSICAL INJURY CAN BE ALLEGED THROUGH CREATIVE, YET FICTIOUS PLEADING

The Ninth Circuit's certified questions is premised on the apparent conflict between *United Talent Agency v. Vigilant Ins. Co.* (2022) 77 Cal.App.5th 821 and *Marina Pacific Hotel & Suites, LLC v. Fireman's Fund Ins. Co.* (*Marina*) (2022) 81 Cal.App.5th 96. Resolution of this conflict turns to a great extent on the different pleading requirements in Federal court as compared to California state courts. In *Marina Pacific*, the court of appeal felt constrained to accept the truth of the allegations of the complaint of direct physical loss purportedly caused by the Covid-19 virus. The court of appeal followed the traditional rule that in deciding a demurrer a court must accept as true the allegations of the complaint even if they are improbable. (*Marina Pacific, supra*, 81 Cal.App.5th at pp. 104-105; see also, *Friends of Glendora v. City of Glendora* (2010) 182 Cal.App.4th 573, 576.)

Still, when ruling on a demurrer, a court does not accept *conclusions of fact* or law to be true. (*Blank v. Kirwin* (1985) 39 Cal.3d 311, 318; *Serrano v. Priest* (1971) 5 Cal.3d 584, 591 ["We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law."].)

Marina Pacific erroneously accepted as true the allegation in the amended complaint that the COVID-19 virus causes physical damage because it "'actually bonds and/or adheres to such objects through physico-chemical reactions involving, *inter alia*, cells and surface proteins" and "caus[es], among other things, a distinct, demonstrable or physical alteration to property.'" (*Marina Pacific, supra*, 81 Cal.App.5th at p. 101.) The court noted that the pleading rules in Federal court are significantly different from those in California state courts. (*Id.* at pp. 109-110.) "Unlike in federal court, the plausibility of the insureds' allegations has no role in deciding a demurrer under governing state law standards, which, as discussed, require us to deem as true, 'however improbable,' facts alleged in a pleading—specifically here, that the COVID-19 virus alters ordinary physical surfaces transforming them into fomites through physicochemical processes, making them dangerous and unusable for their intended purposes unless decontaminated." (*Id.*)

It is submitted that even under California's more flexible pleading rules, the allegations in *Marina Pacific* still fell short of alleging direct physical damage. An allegation that the Covid-19 virus "adheres to" or "bonds to" surfaces is not an allegation of

physical loss or damage. Many substances adhere to other substances but do not cause physical damage. For example, water is considered as having adhesive properties, but does not necessarily cause damage to surfaces it comes into contact with.[2] Thus, the mere allegation that the Covid-19 virus adheres or bonds to surfaces is not the equivalent of physical damage.

Similarly, the allegation in *Marina Pacific* that the Covid-19 virus acts through "physico-chemical reactions involving, *inter alia*, cells and surface proteins" is not an allegation of physical loss or damage. The court of appeal should not have allowed the plaintiff to invent nonexistent damage by using pseudoscientific jargon. The fact that the Covid-19 virus bonds or adheres to property through some "physico-chemical" process falls short of alleging any actual distinct, demonstrable, physical alteration of the property.

Likewise, the allegation that the Covid-19 virus transforms objects into "fomites" is equally unavailing in demonstrating physical damage. A fomite is simply an object that serves as the vehicle to transfer viruses or bacteria. (See *Best Rest Motel, Inc. v. Sequoia Ins. Co.* (2023) 88 Cal.App.5th 696, 702, fn. 3 [Citing Merriam Webster Dictionary defining a fomite as an object that "may be contaminated with infectious agents (such as bacteria or viruses) and serve in their transmission."].) The fact that an object like a doorknob can be a vehicle for transmission of viruses or bacteria is not an allegation of physical damage.

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[2] Properties of Water | Polarity | Hydrogen Bonds | Adhesion & Cohesion https://www.youtube.com/watch?v=VzJliO8URVM

Therefore, the allegation in *Marina Pacific* that the Covid-19 virus causes actual physical property damage amounts to a mere "conclusion of fact" which the court erroneously accepted as true for purposes of the demurrer. As noted, in ruling on a demurrer California courts must disregard "conclusions of ***fact***," just as they must disregard "conclusions of ***law***." (*C & H Foods Co. v. Hartford Ins. Co.* (1984) 163 Cal. App.3d 1055, 1062 [". . . contentions, deductions or conclusions of fact or law alleged in the complaint are not considered in judging its sufficiency."].)

By comparison *United Talent* correctly did not accept as true similar conclusory statements that the Covid-19 virus altered property by adhering to its surface. The *United Talent* court found that allegation insufficient. The difference between *Marina Pacific* and *United Talent* is that the plaintiff in *Marina Pacific* sought to "dress up" its allegations by using "scientific-sounding" terminology that the virus adheres to property via "physico-chemical reactions" involving cells and proteins and thereby causes physical damage. This Court should reject the fiction and legal alchemy that the Covid-19 viruses physically damages property.

Marina Pacific noted that there was no judicially noticeable evidence in that case supporting the proposition that cleaning surfaces can eliminate the threat of Covid-19. (*Marina Pacific, supra*, 81 Cal.App.5th at p. 112). However, the fundamental question is not necessarily whether the virus can be removed from physical objects through cleaning, but whether it causes physical damage in the first place.

It is also noteworthy that by asserting that property is only contaminated "in the interim" between exposure and cleaning. Planet effectively concedes that the Covid-19 virus does not cause physical damage. (Opening Brief, p. 50, citing *Marina Pacific*.) Obviously, if the Covid-19 virus can be removed by basic cleaning, the notion that Planet's property sustained damage "in the interim" between exposure and cleaning refutes any conclusion that physical alteration to property occurred. (See *10E, LLC v. Travelers Indem. Co. of Conn.* (C.D. Cal. 2020) 483 F.Supp.3d 828, 836 ["An insured cannot recover by attempting to artfully plead temporary impairment to economically valuable use of property as physical loss or damage."].)

In addition, Planet's concession that the Covid-19 virus only causes "interim damage" (i.e., temporary damage) must be viewed in the context of the typical "period of restoration" provision which contemplates actual repair or replacement of property, rather than a process that requires cleaning resulting from "interim damage." The Vigilant policy provides business income loss and extra expense incurred only during the "period of restoration." The "period of restoration" provision refutes the notion that there can be physical injury during the interim period between exposure and cleaning. (See *United Talent*, *supra*, 77 Cal.App.5th at p. 833 [The "period of restoration" provision "demonstrates that coverage requires a physical loss requiring repair or replacement, not simply loss of use."].)

It is also significant that the complaint in *Marina Pacific* did not allege that the supposed loss or damage to property caused by the Covid-19 virus is perceptible through the senses. Planet does not claim that damage caused by the Covid-19 virus is perceptible or can be detected or even measured. The virus cannot be seen or smelled and leaves no perceptible trace. This supports the conclusion that the virus does not cause physical damage. (See *Ward General Ins. Services, Inc. v. Employers Fire Ins. Co.* (2003) 114 Cal.App.4th 548, 556 ["The word "physical" is defined, inter alia, as "having material existence" and "perceptible esp. through the senses and subject to the laws of nature." "]; *Inns-by-the-Sea v. California Mutual Ins. Co.* (2021) 71 Cal.App.5th 688, 699-700 ["Physical" is defined as "having material existence: perceptible especially through the senses and subject to the laws of nature."].) Importantly, the *Marina Pacific* court did not take into account the definition of physical damage as noted in cases like *Ward* and *Inns-by-the-Sea, supra,* and simply accepted as true the allegation that by adhering or bonding to property the virus thereby causes physical damage.

IV. THE COURT SHOULD AFFIRM THE "WALL OF PRECEDENT" THAT SUPPORTS VIGILANT'S POSITION

Planet's claim for coverage is based on the faulty premise that physical damage can occur where a policyholder loses functionality of its property. Planet maintains that "direct physical loss" has long been interpreted to mean loss of use, or an inability

to use property for its intended purpose. (Opening Brief, p. 69.) It claims the *Couch* treatise and the multitude of cases in California and throughout the country which require "a distinct, demonstrable, physical alteration of the property" are wrong.

Planet's proffered loss of use or functionality interpretation "reads out" of the policy the word "physical" from "direct physical loss of or damage to property." Ignoring the word "physical" opens the door to claims involving alleged losses that are intangible or incorporeal, which is contrary to established California cases. (*Inns-by-the-Sea, supra*, 71 Cal.App.5th at p. 699 ["'The cases consistently conclude that there needs to be some *physical* tangible injury ... to support 'loss of property' or a physical alteration or active presence of a contaminant to support 'damage to' property.'" (Italics in original.)]; *Doyle v. Fireman's Fund Ins. Co.* (2018) 21 Cal.App.5th 33, 38 [no physical damage alleged where wine collection diminished in value after counterfeit wine was added, because no wine was physically lost]; *Simon Marketing, Inc. v. Gulf Ins. Co.* (2007) 149 Cal.App.4th 616, 623 [The ordinary definition of "physical," excludes alleged losses that are intangible or incorporeal absent a distinct, demonstrable, physical alteration of the property.]; *MRI Healthcare Center of Glendale, Inc. v. State Farm General Ins. Co.* (2010) 187 Cal.App.4th 766, 779; *see also*, *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.* (9th Cir. 2021) 15 F.4th 885, 892 ["California courts have carefully distinguished 'intangible,' 'incorporeal,' and 'economic' losses from 'physical' ones."]; *Couch on Insurance* § 148:46 (3d ed. 2021) ["The requirement that the loss be 'physical' ... is widely held to exclude

alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property."].)

Disregarding the word "physical" also violates the "fundamental principle that policy language be so construed as to give effect to every term." (*Mirpad, LLC v. California Ins. Guarantee Assn.* (2005) 132 Cal.App.4th 1058, 1072.) An insurance policy must be read as a whole, to avoid rendering any policy term as surplusage or superfluous. (*ACL Technologies, supra*, 17 Cal.App.4th at pp. 1785-86; Civ. Code, § 1641.)

Planet's alleged losses were the result of government closure orders, not from physical losses due to the Covid-19 virus. While physical contamination of a structure by certain toxic substances may seriously impair the functionality of property and even cause physical loss or damage, Covid-19 does not impair its functionality, nor cause physical changes in property. The virus is short-lived and/or can be easily cleaned. Its presence on surfaces and air does not prevent the use of the structure and does not qualify as direct physical loss. The Covid-19 virus is like smoke and ash which can be cleaned and removed from surfaces. (See *Promotional Headwear Int'l v. Cincinnati Ins. Co.* (D. Kan. Dec. 3, 2020) 504 F.Supp.3d 1191, 1203-1204, ["Much like the dust and debris at issue in Mama Jo's, routine cleaning and disinfecting can eliminate the virus on surfaces."]; *Uncork & Create LLC v. Cincinnati Ins. Co.* (S.D.W. Va. 2020) 498 F. Supp. 3d 878, 883-84 ["Because routine cleaning, perhaps performed with greater

frequency and care, eliminates the virus on surfaces, there would be nothing for an insurer to cover, and a covered 'loss' is required to invoke the additional coverage for loss of business income under the Policy."].)

In sum, Planet faces a "wall of precedent" that correctly holds that direct physical loss or damage requires physical alteration of the covered property. (*Apple Annie, LLC v. Oregon Mutual Ins. Co.* (2022) 82 Cal.App.5th 919, 935.) Planet's criticism of the Couch treatise is beside the point. As observed in *Apple Annie*: "At this point in time, any analytical flaws in the Couch formulation have become largely academic in light of the now-existing wall of precedent confronting Apple Annie. When originally published, the Couch formulation may not have reflected widespread acceptance by the courts, but such acceptance has now been achieved." (*Id.*)

Finally, Planet's reliance on a 60-year old California decision, *Hughes v. Potomac Ins. Co.* (1962) 199 Cal.App.2d 239, does not compel a different result. In *Hughes* the soil underneath the house slid away and left the house overhanging on a thirty-foot cliff. The insurer argued that the "dwelling building" was not damaged because the paint and walls were intact, even though the building was not fit to live in. The court rejected that argument and interpreted "dwelling building" to include the underlying land so that the policy would not be illusionary. (*Id.* at pp. 248-49.) The land underlying the house was deemed to be encompassed within the word "dwelling." (*Id.*) The policy covered "all physical loss to the dwelling" or "dwelling building" and nowhere provided that the

ground underlying the dwelling was to be excluded from coverage. (*Id.* at p. 248.) *Hughes* also did not purport to interpret a "direct physical loss" provision similar to the one at issue in this case. *Hughes* is entirely inapposite.

V. CONCLUSION

The Court is urged to rule that the Covid-19 virus does not cause physical loss or damage to property and that California's liberal pleading rules do not alter this result. The Court should reject the conclusions reached in *Marina Pacific* and affirm the logic and reasoning of *United Talent*.

DATED: August 2, 2023

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ Raul L. Martinez
Raul L. Martinez
Attorneys for Amicus Curiae,
CALIFORNIA FAIR PLAN ASSOCIATION

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.204(c)(1))

I am informed by the clerical staff who prepared this brief on the computer that the text of this brief consists of 4,412 words as counted by the Microsoft Word 365 Word-Processing Program used to generate the brief.

DATED: August 2, 2023

LEWIS BRISBOIS BISGAARD & SMITH LLP

By /s/ *Raul L. Martinez*
Raul L. Martinez
Attorneys for Amicus Curiae,
CALIFORNIA FAIR PLAN ASSOCIATION

CALIFORNIA STATE COURT PROOF OF SERVICE

Case:*Another Planet, etc. v. Vigilant Insurance Company*
Supreme Court Case No. S277893
Ninth Circuit Case No. 21-16093

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 633 West 5th Street, Suite 4000, Los Angeles, California 90071.

On August 2, 2023, I served the following document described as **APPLICATION BY CALIFORNIA FAIR PLAN ASSOCIATION TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT VIGILANT INSURANCE COMPANY; PROPOSED BRIEF** on all interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

[X] (BY TrueFiling) The document was filed and served via the Court's electronic filing system, TrueFiling (excluding those not registered, who were served by mail, if applicable).

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on August 2, 2023, at Los Angeles, California.

/s/ *Laura E. Martinez*
LAURA E. MARTINEZ

SERVICE LIST

Case:*Another Planet, etc. v. Vigilant Insurance Company*
Supreme Court Case No. S277893
Ninth Circuit Case No. 21-16093

Kirk Pasich, Esq. Nathan M. Davis, Esq. Kayla M. Robinson, Esq. **PASICH LLP** 10880 Wilshire Blvd., Suite 2000 Los Angeles, CA 90024 Tel. No.: (424) 313-7860 Fax No.: (424) 313-7890 Email: NDavis@PasichLLP.com KRobinson@PasichLLP.com	*Attorneys for Petitioner* ANOTHER PLANET ENTERTAINMENT, LLC
Susan K. Sullivan, Esq. Douglas J. Collodel, Esq. Gretchen S. Carner, Esq. Brett C. Safford, Esq. **CLYDE & CO US LLP** 355 S. Grand Avenue, Suite 1400 Los Angeles, CA 90071 Tel. No.: (213) 358-7600 Fax No.: (213) 385-7650 Email: susan.sullivan@clydeco.us douglas.collodel@clydeco.us gretchen.carner@clydeco.us brett.safford@clydeco.us	Attorneys for Respondent VIGILANT INSURANCE COMPANY
Jonathan D. Hacker, Esq. (pro hac vice) Jenya Godina, Esq. (pro hac vice) **O'MELVENY & MYERS LLP** 1625 Eye St., NW Washington, DC 20006 Tel. No.: (202) 383-5300 Fax No.: (202) 383-5414 Email: jhacker@omm.com jgodina@omm.com	Attorneys for Respondent VIGILANT INSURANCE COMPANY

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Case Number: **S277893**
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Douglas Collodel Clyde & Co US LLP 112797	douglas.collodel@clydeco.us	e-Serve	8/2/2023 5:39:47 PM
Jonathan Hacker O'Melveny & Myers LLP 456553	jhacker@omm.com	e-Serve	8/2/2023 5:39:47 PM
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Nicolas Pappas Reed Smith, LLP 316665	NPappas@reedsmith.com	e-Serve	8/2/2023 5:39:47 PM
Jenya Godina O'Melveny & Myers LLP 5705157	jgodina@omm.com	e-Serve	8/2/2023 5:39:47 PM
Scott DeVries Hunton Andrews Kurth LLP 2166205	sdevries@huntonak.com	e-Serve	8/2/2023 5:39:47 PM
Travis Pantin University of Connecticut School of Law 5519293	travis.pantin@uconn.edu	e-Serve	8/2/2023 5:39:47 PM
Kirk Pasich Pasich LLP 94242	kpasich@pasichllp.com	e-Serve	8/2/2023 5:39:47 PM
Lisa Law	llaw@pasichllp.com	e-	8/2/2023

Pasich LLP		Serve	5:39:47 PM
Yosef Itkin Hunton Andrews Kurth 287470	yitkin@huntonak.com	e-Serve	8/2/2023 5:39:47 PM
Nathan Davis Pasich LLP 287452	ndavis@pasichllp.com	e-Serve	8/2/2023 5:39:47 PM
Kayla Robinson Pasich LLP 322061	krobinson@pasichllp.com	e-Serve	8/2/2023 5:39:47 PM
Mark D. Plevin Crowell & Moring LLP 146278	mplevin@crowell.com	e-Serve	8/2/2023 5:39:47 PM
John Hazelwood Cohen Ziffer Frenchman & McKenna LLP 5785712	jhazelwood@cohenziffer.com	e-Serve	8/2/2023 5:39:47 PM
Ryan Anderson Guttilla Murphy Anderson 224816	randerson@gamlaw.com	e-Serve	8/2/2023 5:39:47 PM
Carol Romo Crowell & Moring LLP	cromo@crowell.com	e-Serve	8/2/2023 5:39:47 PM
Robert Wallan Pillsbury Winthrop Shaw Pittman LLP 126480	robert.wallan@pillsburylaw.com	e-Serve	8/2/2023 5:39:47 PM
Juanita Fernandez Pasich LLP	jfernandez@pasichllp.com	e-Serve	8/2/2023 5:39:47 PM
Brook Roberts Latham & Watkins LLP 214794	brook.roberts@lw.com	e-Serve	8/2/2023 5:39:47 PM
Rani Gupta Covington & Burling LLP 296346	rgupta@cov.com	e-Serve	8/2/2023 5:39:47 PM
Raul Martinez Lewis Brisbois Bisgaard & Smith LLP 82465	Raul.Martinez@lewisbrisbois.com	e-Serve	8/2/2023 5:39:47 PM
Laura Martinez	Laura.Martinez@lewisbrisbois.com	e-Serve	8/2/2023 5:39:47 PM
Elise Klein 111712	Elise.Klein@lewisbrisbois.com	e-Serve	8/2/2023 5:39:47 PM

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8/2/2023

Date

/s/Laura Martinez

Signature

Martinez, Raul (82465)

Last Name, First Name (PNum)

Lewis Brisbois Bisgaard & Smith LLP

Law Firm