No. S277893

In the Supreme Court of the State of California

ANOTHER PLANET ENTERTAINMENT, LLC

Petitioner,

v.

VIGILANT INSURANCE COMPANY

Respondent.

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

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER ANOTHER PLANET ENTERTAINMENT, LLC, BY SANTA YNEZ BAND OF CHUMASH MISSION INDIANS OF THE SANTA YNEZ RESERVATION OF CALIFORNIA; PROPOSED BRIEF

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TABLE OF CONTENTS

INTRODUCTION 3

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF..... 4

Interests Of Proposed Amici Curiae 4

How The Proposed *Amicus Curiae* Brief Will Assist The Court 6

INTRODUCTION 9

ARGUMENT.....12

I. The Santa Ynez Chumash Decision Properly Recognized that SARS Co-V2 Can Be a Cause of Property Damage For Business Interruption Purposes 12

II. The Santa Ynez Chumash Presented Competent Evidence Supporting SARS Co-V2 as a Source of Physical Loss or Damage To Property 17

CONCLUSION.....21

CERTIFICATE OF COMPLIANCE.....23

PROOF OF SERVICE 24

TABLE OF AUTHORITIES

Cases

Brown Jug, Inc. v. Cincinnati Ins. Co.
(6th Cir. 2022) 27 F.4th 398 ..... 13, 14

Harris v. Thomas Dee Eng'g Co.
(2021) 68 Cal. App. 5th 594 20

Hughes v. Potomac Ins. Co.
199 Cal. App. 2d 239 (1962) 18

Inns-By-The-Sea v. California Mut. Ins. Co.
(2021) 71 Cal. App. 5th 688 ..... 10, 15

Los Angeles Lakers, Inc. v. Federal Ins. Co.
(C.D. Cal. 2022) 591 F.Supp.3d 672 ..... 13, 14

Marina Pacific Hotel & Suites, LLC v. Fireman's Fund Insurance Co.
(2022) 81 Cal.App.5th 96 ..... 10, 12, 13, 14, 16, 21, 22

Santa Ynez Chumash Band of Mission Indians v. Lexington Insurance Co.
(2023) 90 Cal.App.5th 1064 ..... 5, 6, 9, 10, 11, 13, 14, 15, 16, 21, 22

Shusha, Inc. v. Century-National Insurance Company
(2022) 87 Cal.App.5th 250 ..... 15, 22

Simon Marketing, Inc. v. Gulf Ins. Co.
(2007) 149 Cal.App.4th 616 13

United Talent Agency v. Vigilant Ins. Co.
(2022) 77 Cal.App.5th 821 ..... 13, 14, 15, 16, 21

Statutes

Cal. Rules of Court 8.520 ..... *8*

APPLICATION FOR LEAVE TO FILE

AMICUS CURIAE BRIEF

Proposed *amici* respectfully request leave to file the accompanying *amicus curiae* brief in support of Petitioner Another Planet Entertainment, LLC.

No party to this action or counsel to any party has provided any form of support with regard to the authorship, preparation, or filing of this brief. No person or entity, including any party or party's counsel, made a monetary contribution with the intent to fund the preparation or submission of this brief.

Interests of Proposed Amici Curiae

The Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation of California (hereinafter "Santa Ynez Chumash") are a federally-recognized Indian tribe which operates businesses on and off tribal lands, including a casino and resort on the tribal reservation in Santa Ynez, California. The casino and resort is a major contributor to the economy of the Santa Ynez Valley and employs thousands of area residents. Like innumerable other California businesses, the Santa Ynez Chumash businesses were heavily impacted by the COVID-19 pandemic. In March, 2020, after

tribal and casino/resort officials developed the understanding that the COVID-19 virus had arrived and was present on casino/resort property, ordered the casino/resort closed and remedial measures undertaken. The casino/resort remained closed through June, 2020.

The Santa Ynez Chumash were a policyholder under an insurance policy issued by an AIG affiliate, Lexington Insurance Company, which like the policy at issue in this case, provided business interruption and other coverages premised on "direct physical loss or damage" to property. Like the Petitioner in this case, the policy issued to the Santa Ynez Chumash did not contain an exclusion for losses due to virus. Lexington Insurance Company nevertheless denied coverage for the Santa Ynez Chumash's losses, and a lawsuit was filed.

A judge of the Superior Court for the County of Santa Barbara entered summary judgment in favor of the insurer, holding that SARS-Co-V-2, the virus that causes COVID-19, does not cause property damage as a matter of law, despite expert testimony to the contrary. That decision was appealed to the Second District Court of Appeal, which acknowledged that the SARS-Co-V-2 could be a source of property damage, but nonetheless weighed the evidence and found the

Santa Ynez Chumash had not proved property damage. *Santa Ynez Chumash Band of Mission Indians v. Lexington Insurance Co.* (2023) 90 Cal.App.5th 1064. The Second District's decision will be referred to as the "*Santa Ynez Chumash* Decision".

This Court has granted the Santa Ynez Chumash's Petition for Review (Case No. S280353), but as requested in that Petition, the Court has deferred action on that case pending its decision in the present matter on the question of whether the virus that causes COVID-19 can cause "physical loss or damage".

How the Proposed *Amicus Curiae* Brief Will Assist the Court

The certified question on this appeal 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?"

The present case was decided at the trial court level on a F.R.C.P. Rule 12 Motion to Dismiss. As *Another Planet's* briefing has pointed out, the federal district court judge felt that the answer to the question "seems unknowable".

Both parties here cited to the *Santa Ynez Chumash* Decision, which was issued while they were briefing this case. The proposed

amicus brief is intended to discuss the *Santa Ynez Chumash* Decision in greater detail.

This brief will help Court in two ways. First, the Second District in the *Santa Ynez Chumash* Decision has already answered the certified question in the affirmative. The Second District conducted a comprehensive review of the California case law preceding it (including the Ninth Circuit order referring the present matter to this Court), and concluded that, indeed, the virus causing COVID-19 can be a cause of property damage under a commercial property damage insurance policy.

Second, discussion of the *Santa Ynez Chumash* Decision is helpful because the case presents a well-developed body of admissible evidence which supports the conclusion that COVID-19 can, in fact, cause property damage. Unlike virtually every other COVID-19 business interruption case decided at the pleading stage, the *Santa Ynez Chumash* litigation came to the Second District following a trial court's grant of summary judgment, in which both parties submitted expert witness testimony.

It is that distinction which renders the *Santa Ynez Chumash* Decision unique amongst the COVID-19 business interruption cases.

In almost every instance, the issue of whether the virus could cause property damage was determined not through examination of scientific evidence, but by the opinions of judges who more often than not, simply relied on the opinions of other judges and insurance counsel (as in this case). In those cases the policyholders, like Another Planet Entertainment, LLC, were denied the opportunity to present evidence to support their claims.

The Santa Ynez Chumash, however, presented competent, admissible evidence and testimony which scientifically demonstrates that Petitioner here is correct on the certified question. This Court will benefit from an examination of the Second District case, where scientific testimony supported the COVID-19 virus as a source of physical loss or damage to property. This Court can and should consider that evidence in answering the certified question[1].

[1] To the extent this application and proposed *amicus curiae* brief are filed past the date by which such applications must be submitted under *Cal. Rules of Court 8.520*, the Santa Ynez Chumash submit that good cause exists for the Chief Justice to allow a later filing under subsection (f)(2). Good cause exists, first, based on the very recent grant of review of the *Santa Ynez Chumash* Decision (Case No. S280353) on July 12, 2023. Second, the certified question at issue in this matter is also an issue in the *Santa Ynez Chumash* litigation and would be discussed in the parties' briefings, except that such briefing is deferred pending the outcome of this case. Because this case directly impacts the scope, and perhaps the very viability, of the Santa Ynez Chumash case, this *amicus curiae* brief may be the only opportunity this litigant has to present its arguments on the certified question to this Court. Finally, given that the Santa Ynez Chumash decision was not issued by the Second District until well into the briefing of this matter, good cause exists to allow an *amicus curiae* brief which discusses that decision.

INTRODUCTION

> "We do not take issue with recent California decisions holding that business plaintiffs may be able to show that the COVID-19 virus caused damage to their property so as to fall within the property damage provisions of a business insurance policy." *Santa Ynez Chumash Band of Mission Indians v. Lexington Insurance Co.* (2023) 90 Cal.App.5th 1064, 1072

In this single sentence, the *Santa Ynez Chumash* decision provided its answer to a question that has bedeviled courts in California and nationwide – whether SARS-Co-V-2, the virus that causes COVID-19, can cause "physical loss or damage to property" under a commercial property insurance policy.

Courts nationwide have struggled with this issue since the early days of the pandemic. In those early days, when virtually nothing was known about SARS-Co-V-2 or COVID-19, judges were forced to answer this question without evidence or scientific input, based on nothing but the imperfect pleadings of policyholders and representations of insurance counsel. Almost universally, judges relied on what they were told by insurance counsel and opined, without evidence, that the virus could not be the cause of "physical

loss or damage to property". Soon, these opinions became an orthodoxy, and SARS-Co-V-2's exclusion as a source of property damage became dogma.

California courts have taken a different approach. This state's appellate judges have rejected application of supposed "common sense" and evidence-free argument on the question, in favor of allowing policyholders to develop and present evidence in support of their claims. *Marina Pacific Hotel & Suites, LLC v. Fireman's Fund Insurance Co.* (2022) 81 Cal.App.5th 96. Indeed, such a conclusion is mandated by the rules of civil procedure, specifically because California requires disputed issues of fact to be resolved by the evidence.

Marina Pacific is not the only case that has taken such an approach. Even courts that have ruled against policyholders have rejected the temptation to hold that SARS-Co-V-2 can never be a cause of property damage. *Inns-by-the-Sea v. California Mut. Ins. Co.* (2021), 71 Cal. App. 5th 688.

Subsequent to these decisions, this Court may now benefit from the Second District's recent opinion in *Santa Ynez Chumash Band of Mission Indians v. Lexington Insurance Co.* (2023) 90 Cal.App.5th

1064 (the "*Santa Ynez Chumash* Decision"). The *Santa Ynez Chumash* Decision examined the relevant California case law, including federal decisions and even the present matter, to answer the certified question simply and clearly, as it did in the above-quoted excerpt.

The *Santa Ynez Chumash* Decision is unique among the COVID-19 property damage cases because it was not determined, like the other cases, on demurrer or motion to dismiss. The Santa Ynez Chumash presented substantial, competent, and persuasive expert testimony which demonstrated that, in fact, the SARS-Co-V-2 virus physically alters matter with which it comes into contact, and thus is a cause of "physical loss or damage" to property. This evidence demonstrated that the arguments put forward by policyholders, including that of the Petitioner herein on the certified question, are not merely theoretical – they are scientifically supported.

In the *Santa Ynez Chumash* litigation, the trial court entirely ignored that evidence, opting, as urged by the insurer defendant, to go along with the prior "common sense" decisions of judges who had no such evidence before them. The Second District, while critically acknowledging that SARS-Co-V-2 can cause property damage,

unfortunately adopted a test for the sufficiency of such evidence that is inconsistent with the procedural rules governing summary judgment, ignoring the warnings of *Marina Pacific* that judges are not free to ignore such rules. That is why the *Santa Ynez Chumash* Decision is now before this Court[2]. Nevertheless, the *Santa Ynez Chumash* Decision properly answered the now-certified question, and it did so with a body of evidence before it.

For that reason, the proper outcome in this case is that this Court determine that the virus causing COVID-19 can be a source of "physical loss or damage" to property.

ARGUMENT

I. The Santa Ynez Chumash Decision Properly Recognized that SARS Co-V-2 Can Be a Cause of Property Damage For Business Interruption Purposes.

The *Santa Ynez Chumash* Decision did not arrive lightly at its conclusion that SARS-Co-V-2 could cause "physical loss or damage". On the contrary, this holding comes at the conclusion of a comprehensive review of California case law on the topic. The Second District's reasoning was consistent with that of the Petitioner in this case, and highlights why this Court should rule in the

[2] Case No. S280353. That matter is stayed pending the outcome of this case and the Court's resolution of the certified question.

Petitioner's favor on the certified question.

The analysis begins with a simple premise. " [T]he threshold requirement for recovery under a contract of property insurance is that the insured property has sustained physical loss or damage. Physical damage may include physical alteration." *Santa Ynez Chumash, supra*, 90 Cal.App.5th at 1064 (internal quotations omitted), citing *Simon Marketing, Inc. v. Gulf Ins. Co*. (2007) 149 Cal.App.4th 616, 623.

The Second District noted three decisions - one state and two federal - which had previously held a policyholder could successfully assert a covered loss "by showing the COVID-19 virus altered its property and caused physical damage". *Id.*, citing *Marina Pacific, supra*, 81 Cal.App.5th at 101; *Brown Jug, Inc. v. Cincinnati Ins. Co.* (6th Cir. 2022) 27 F.4th 398, 403; *Los Angeles Lakers, Inc. v. Federal Ins. Co.* (C.D. Cal. 2022) 591 F.Supp.3d 672, 677.

Having set the table, *Santa Ynez Chumash* next tackled *United Talent Agency v. Vigilant Ins. Co.* (2022) 77 Cal.App.5th 821, another Second District decision which found COVID-19 could not have caused property damage as a matter of law. *Santa Ynez Chumash* approached that decision through two avenues. First, it noted that

United Talent Agency primarily relied upon naked pronouncements in federal decisions, which it described as persuasive but not binding on California courts. *Santa Ynez Chumash, supra*, 90 Cal.App.5th at 1070. Even then, however, the court noted that federal decisions were not in agreement on this point, citing *Brown Jug* and *L.A. Lakers*. *Id.* at 1071.

Santa Ynez Chumash then addressed the supposed "common sense" belief advanced by the federal courts and *United Talent Agency*, that COVID-19 of course could not cause property damage. *Santa Ynez Chumash* cited *Marina Pacific* approvingly for its proposition that, "[W]hether the virus caused property damage is determined by the evidence presented in each case." *Id.*, citing *Marina Pacific, supra,* 81 Cal.App.5th at 111. Finally, *Santa Ynez Chumash* cited *Marina Pacific* once again, at p. 114, rejecting the "common sense" approach:

> "The *Marina Pacific* court said some federal courts had adopted a 'common sense' theory that "COVID-19 does not physically alter the structure of property. But instead of making such an assumption, the courts should actually receive evidence on that issue." *Id.* (Internal quotations omitted)

Santa Ynez Chumash cited two other California appellate decisions which rejected the reasoning of *United Talent Agency*. In the first decision, *Inns-by-the-Sea v. California Mutual Ins. Co.* (2021) 71 Cal.App.5th 688, the Court of Appeal upheld a demurrer ruling where the policyholder never alleged that the virus was present on its property or caused property damage; its losses being due solely to civil shutdown orders which themselves caused no property damage. In making that ruling, as *Santa Ynez Chumash* noted, *Inns-by-the-Sea* at p. 710 rejected an "across-the-board rule that a virus can *never* give rise to a direct physical loss of or damage to property." *Santa Ynez Chumash, supra*, 90 Cal.App.5th at 1072. *Santa Ynez Chumash* also cited *Shusha, Inc. v. Century-National Insurance Company*, (2022) 87 Cal.App.5th 250, which likewise refuted *United Talent Agency*[3].

Finally, *Santa Ynez Chumash* pointed to the Ninth Circuit's request in this lawsuit for this Court to question "whether the *United Talent Agency* decision is currently consistent with California law." *Id.*

With that case law in hand, and knowing that procedurally, a court on summary judgment can no more substitute its own "common

[3] This Court has granted review of *Shusha, Inc.* (Case No. S278614), but as with *Santa Ynez Chumash,* has deferred that case pending the outcome of the present matter.

sense" for actual evidence than *Marina Pacific* could on demurrer, *Santa Ynez Chumash* gave its conclusion on the certified question: "We do not take issue with recent California decisions holding that business plaintiffs may be able to show that the COVID-19 virus caused damage to their property so as to fall within the property damage provisions of a business insurance policy." *Id.* at 1072.

On this issue, the *Santa Ynez Chumash* Decision is right. Courts are not, on summary judgment or demurrer, permitted to substitute their own opinions for evidence, and any policyholder is thus entitled to have its evidence heard on a well pled complaint. Current California law is clear: the SARS-Co-V-2 virus can be a source of loss or damage to property, just as "chemical dust, gas, asbestos, and other contaminants" "could trigger coverage". *United Talent Agency, supra,* 77 Cal.App.5th at 836[4].

[4] The Santa Ynez Chumash, of course, do not disagree with the Second District on that point, and are not challenging it as part of its Petition for Review. Despite finding in favor of the Santa Ynez Chumash on that point, the Second District nonetheless found no coverage because it imposed evidentiary requirements to demonstrate "physical loss or damage" from the COVID-19 virus that are inconsistent with California requirements on summary judgment. It is that portion of the Second District's decision that will be at issue in the *Santa Ynez Chumash* proceeding before this Court.

II. The Santa Ynez Chumash Presented Competent Evidence Supporting SARS-Co-V-2 as a Source of Physical Loss or Damage to Property.

Though the *Santa Ynez Chumash* Decision cited the expert testimony on which amicus based its claim of "physical loss or damage to property", the court did not evaluate their testimony on the certified question (except in a most conclusory manner). *Amicus* takes this opportunity to further highlight that testimony, because it shows that the answer to the certified question is not "unknowable" as the federal district court judge in this case has said, but rather can be answered in the affirmative based on competent, admissible expert testimony.

The Santa Ynez Chumash presented two experts in opposition to the insurer's summary judgment motion in the trial court, both of which were discussed in detail in the appellate briefings. The first expert was a biostatistician/epidemiologist, Dr. Lawrence Mayer. Dr. Mayer, who gave two declarations in the case, evaluated statewide COVID-19 data and evidence concerning the number of persons who would likely have been present, and his calculations confirmed that "it was from a biostatistical standpoint a near certainty, and certainly much more likely than not, that the COVID-19 virus was already

present on Santa Ynez Chumash business properties at the time of closure." Even in the absence of direct evidence such as testing (which was not available in the early days of the pandemic when most businesses were shutting down) or confirmed COVID-19 cases, it is more than possible to determine, through statistical evidence, whether the virus was likely to have been on a policyholder's property.

More presciently to the certified question, Dr. Mayer testified that when the SARS-CoV-2 virus comes into contact with an object or surface on the property, the object or surface becomes a "fomite" which is altered in that, with the viral particles within or upon it, it becomes a source of disease transmission in a manner it was not prior to the alteration. In this manner, the virus causes physical alteration which many courts have said is a prerequisite to a finding of "physical loss or damage"[5].

Dr. Mayer's opinion was supplemented through a declaration of a biochemist, Dr. Ivan Dmochowski. Dr. Dmochowski confirmed that an infected business patron who spends significant time on premises is likely to coat surfaces with active virus. This "virus coating" is

[5] Amicus agrees with Petitioner that under California law, "physical alteration" is not a prerequisite to a covered claim under a property insurance policy that provides coverage, as in the present case (and the case of most policies at issue in COVID-19 business interruption cases), for "physical loss or damage" to property. *Hughes v. Potomac Ins. Co.*, 199 Cal. App. 2d 239 (1962) (covered claim stated when a landslide rendered a structure uninhabitable but did not cause any alteration to the structure itself).

introduced through coughing, sneezing, and transfer of fluids from the mouth and eyes by the hands. He confirmed: The property is physically altered through this coating. Further, and importantly, the physical-chemical alteration caused by virus coating remains, even after the virus is no longer infectious.

Further, Dr. Dmochowski testified that liquid droplets and aerosols containing the virus from infected persons are readily absorbed by porous surfaces, such as cardboard, felt, bedding, towels, drapes, and carpeting. **Such affected surfaces may be permanently altered due to the difficulty of locating and removing the absorbed material**. Accordingly, in the context of a casino-resort, the virus alters not just commonly-thought of surfaces such as sinks, toilets, and door handles, but uncommonly-thought of surfaces like carpets, beds, sheets, blankets, drapes, and towels (or in the case of a casino-resort, felt gaming tables and playing cards). In such instances, the virus is absorbed and alters such surfaces – and such alteration might never be detected, let alone remediated.

Additionally, Dr. Dmochowski testified the virus alters the physical composition of air as well as surfaces. Droplets and aerosols containing the virus are deposited into the air by infected persons.

Due to the massive shedding of viral particles that often occurs, the air quality and physical composition of the air are also greatly compromised. Thus, for as long as the droplets and aerosols are in the air, the physical composition of the air is altered.

Many policyholders have made arguments consistent with this expert testimony. Such policyholders, however, have been denied the opportunity to present and develop these arguments through evidence because so many judges have improperly substituted their "common sense" – that is, substituting their own views and the opinions of prior judges – which California law holds should not be done on demurrer or summary judgment.

Such testimony exists, however. To be sure, the insurance industry will present experts to present contrary opinions (the insurer in the *Santa Ynez Chumash* litigation presented such an expert), but the existence of contrary expert testimony does not mean that a California court can simply disregard one side's evidence in favor of another. *Harris v. Thomas Dee Eng'g Co.* (2021) 68 Cal. App. 5th 594, 606–07 (a trial court is not permitted to completely disregard evidence or refuse to give weight to an opposing party's otherwise admissible expert testimony).

Insurers have nonetheless argued that the virus cannot be a cause of physical loss or damage because the virus remains "active" for only a short period of time, or is remediable through cleaning. *United Talent Agency*, *supra*, 77 Cal.App.5th at 835-836. The fact that the virus may be active only temporarily, or may quickly be remediated by cleaning, does not change the fact, as Dr. Dmochowski testified in the *Santa Ynez Chumash* case, that an alteration has taken place. Moreover, the argument ignores evidence such as that given by Dr. Dmochowski that cleaning may not resolve the presence of the virus in its entirety, and that not all surfaces impacted by the virus are even likely as a practical matter to be detected. Perhaps the best answer to the argument comes from *Marina Pacific*, when it noted that a temporary or repairable alteration is not the same as no alteration at all:

> "Even if there had been evidence subject to proper judicial notice to establish that disinfecting repaired any alleged property damage, it would not resolve whether contaminated property had been damaged in the interim, nor would it alleviate any loss of business income or extra expenses. As the

insureds argue on appeal, the duration of exposure may be relevant to the measure of policy benefits; it does not negate coverage." *Marina Pacific, supra*, 81 Cal.App.5th at 112.

CONCLUSION

There is here a valid and compelling scientific basis to identify the SARS-Co-V-2 virus as a cause of "physical loss or damage" to property. Whether the virus is actually a cause of any policyholder's COVID-19-related losses requires an examination of the evidence specific to that case. But as to the certified question, of whether COVID-19 can cause a covered loss under a property damage insurance policy, this court should find, consistent with *Marina Pacific, Shusha,* and *Santa Ynez Chumash,* that the answer is yes, and the policyholder properly alleging such a loss should have the opportunity to present evidence to support such a loss.

DATE: August 10, 2023

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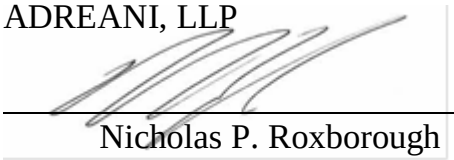

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CERTIFICATE OF COMPLIANCE

I certify that this brief contains 2809 words, excluding the Tables of Contents and Authorities, and the Application. The brief uses Times New Roman 14-point font. In making this word-count certification, I have relied on the Microsoft Word program used to prepare the brief.

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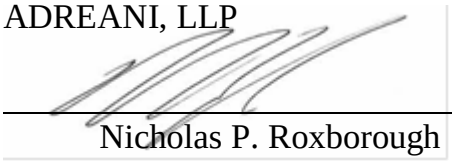

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PROOF OF SERVICE

I am employed in the County of Los Angeles, California. I am over the age of eighteen years and not a party to the within action; my business address is 5900 Canoga Ave, Suite 450, Woodland Hills, California 91367.

On August 10, 2023, I served the following document:

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER ANOTHER PLANET ENTERTAINMENT, LLC, BY SANTA YNEZ BAND OF CHUMASH MISSION INDIANS OF THE SANTA YNEZ RESERVATION OF CALIFORNIA; PROPOSED BRIEF

on the parties, through their attorneys of record, by filing and e-serving via the TrueFiling system.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 10, 2022, in Woodland Hills, California.

/s/ *Vincent S. Gannuscio*
Vincent S. Gannuscio

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **ANOTHER PLANET ENTERTAINMENT v. VIGILANT INSURANCE COMPANY**
Case Number: **S277893**
Lower Court Case Number:

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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

8/10/2023

Date

/s/Vincent Gannuscio

Signature

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