Supreme Court Case 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

PETITIONER ANOTHER PLANET ENTERTAINMENT'S RESPONSE TO BRIEFS SUBMITTED BY AMICI CURIAE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Petitioner Another Planet LLC submits this consolidated response to the briefs of amici curiae submitted in this case, pursuant to California Rule of Court 8.520(f)(7).

Of the eleven briefs submitted, eight support Another Planet's claim for insurance coverage for business interruption losses sustained during the COVID-19 Pandemic (even though two of those eight briefs were submitted in support of neither petitioner nor respondent). The other three, submitted by insurers and industry associations in support of respondent Vigilant Insurance Company (the "Insurer Amici"), are untethered from any facts, overstate or mischaracterize jurisprudence and litigation in easily disprovable ways, and ultimately ask this Court to find in Vigilant's favor just because that is how most other courts have ruled on the issue presented in the question certified by the United States Court of Appeals for the Ninth Circuit.

Unlike the Insurer Amici, the eight briefs submitted on behalf of physicians and scientists, sports organizations, retail, restaurants, and resort and entertainment venues (the "Non-Insurer Amici") embody the reason why amicus briefs can be so

valuable: they paint a fuller picture of the issues before the Court than that which two litigants can merely outline within the confines of their own briefs.

The Non-Insurer Amici ably describe the science that either has not been presented to or has been disregarded by most courts. The science shows that SARS-CoV-2 does not behave as Vigilant asks the Court to assume it does. When the exhaled virus attaches to surfaces or infiltrates airspaces, those surfaces and airspaces remain dangerous vectors for long periods of time and across great distances, even when hospital-grade cleaning and filtration is used. Vigilant's minimizing of SARS-CoV-2's physicality and persistence, despite attempts to remove it with household cleaning products, is simplistic and not supported by any scientific evidence. And Vigilant and the Insurer Amici minimize the reality that even if SARS-CoV-2 could be readily neutralized by the passage of time or cleaning, it is continually reintroduced into interior airspace as infected (but often non-symptomatic or pre-symptomatic) people enter—meaning that it is the effectiveness of cleaning, not the presence of the virus, that is temporary.

The Non-Insurer Amici also present a wealth of history regarding the development of commercial property insurance,

especially in the years surrounding the issuance of the Insurance Services Office's ("ISO") standard exclusion for viruses and bacteria for commercial property policies. When insurers had to pay out during the 2002-04 SARS epidemic, the industry took notice and reacted, specifically because its policies responded to the presence of SARS-CoV-1.

The Non-Insurer Amici also dispel the notion that "direct physical loss or damage" only happens when there is a "permanent" "physical alteration of property." Because the insurance policy that Vigilant sold to Another Planet (the "Policy") excludes "air" from its definition of "property," the necessary inference is that "air" can suffer "direct physical loss or damage"; otherwise, there would be no need for that exclusion. Moreover, Non-Insurer Amici point out that Vigilant's Policy also promises coverage for "direct physical loss or damage to" "information that is in electronic form." Clearly, the Policy contemplates coverage for far more than what Vigilant would have the Court believe.

Additionally, the Non-Insurer Amici detail how a mistake in a well-regarded treatise snowballed into a reshaping of what it means to suffer a "direct physical loss" when insurers seized on that mistake to avoid paying Pandemic-related claims.

Finally, the Non-Insurer Amici compellingly take on insurers' arguments that answering the Ninth Circuit's question in the affirmative would create ruinous liability for the insurance industry. Not only is the Court not the venue to take up this policy-driven argument (were it even relevant to the Ninth Circuit's question), but the Non-Insurer Amici explain why insurers do not actually face the threats that they trumpet.

In short, the Non-Insurer Amici support and expand on Another Planet's arguments in multiple important ways. The Insurer Amici largely just restate Vigilant's arguments that have no grounding in the facts, science, decades of case law, insurance policy drafting history, or California's laws of insurance policy interpretation.

RESPONSES

I. California Medical Association

Amicus California Medical Association ("CMA") submitted its brief in support of neither party, but it is crucial to understanding why dismissing insureds' cases on the pleadings is improper—and it devastates Vigilant's arguments.

The centerpiece of the Ninth Circuit's certified question is one of fact: How does SARS-CoV-2 interact with property? That is

the threshold to answering the ultimate legal question: Can that interaction constitute "direct physical loss or damage to property?" CMA's brief lays out the evidence that answers the threshold question.

The crux of Vigilant's argument is that because SARS-CoV-2 "is easily removed" or "temporary" it cannot cause covered loss or damage. A.B. at 27-41. CMA cautions that these arguments "are contrary to scientific fact." CMA Br. at 2. Thus, decisions rooted in this theory are giving credence to, and perpetuating, falsehoods. That is precisely the injustice that pleading standards, evidentiary rules, and trials are designed to prevent.

Specifically, CMA points out that studies have shown that even hospital staff using hospital-grade disinfectants cannot render property completely free from SARS-CoV-2. *Id.* at 2-3. The Centers for Disease Control agree that "there is little evidence to suggest that routine use of disinfectants can prevent the transmission of Coronavirus from fomites." *Id.* at 3.

Indeed, Vigilant's arguments that SARS-CoV-2 causes no damage because its presence is only temporary, A.B. at 27-36, does not meaningfully distinguish the virus from other perils specifically addressed in the Policy that uncontestably can cause

"direct physical loss or damage to property." Floods recede. Nuclear radiation decays, as do pollutants. Mold dries and dies. Nevertheless, while these perils exist, they make property dangerous and cause covered loss and damage. SARS-CoV-2 does the same. *See* Reply Br. at 36. ("The argument's flaw is that it rests on a matter of degree, rather than analyzing what 'physical damage' means.").

CMA also describes how SARS-CoV-2 behaves and spreads within airspaces, *id.* at 3-5, "impair[ing] the habitability of those premises and render[ing] them dangerous" because of "infectious persons entering and reentering the premises." *Id.* at 6.

With respect to the parties' positions, in its Answering Brief, Vigilant argued that its Policy's definition of "property" excludes "'*air*, either inside or outside of a structure.'" A.B. at 35.[1] CMA's brief makes explicit what is implied in the Vigilant Policy's purported exclusion of air from its definition of property: airspaces can suffer "direct physical loss or damage." It necessarily follows, therefore, that the Policy contemplates losses caused by agents that are merely transitory, and not "permanent" "structural

[1] "A.B." refers to Vigilant's Answering Brief.

alterations" to physical property. If not, then there would be no reason to exclude "air" from the definition of "property." *See, e.g.*, *American Fam. Mut. Ins. Co. v. Am. Girl, Inc.*, 673 N.W.2d 65, 78 (Wis. 2004) ("Why would [an insurer] exclude [a type of damage] if the damage could never be considered [covered] in the first place?"). At least this interpretation is reasonable and, thus, should be given effect. *Montrose Chem. Corp. v. Admiral Ins. Co.*, 10 Cal. 4th 645, 666 (1995).

CMA also underscores Another Planet's argument that vaccines eventually helped to make property that was dangerously damaged and unfit for use for most of 2020 and the beginning of 2021 once again safer for people to use and enjoy—not because SARS-CoV-2 ceased to physically alter the airspaces and surfaces with which it interacts, but because the virus became less dangerous to public health. CMA Br. at 7-9; Reply Br. at 36-39.[2]

Finally, CMA explains why the "wall" of precedent that Vigilant urges this court to blindly follow should not be given credence: because those cases were decided "without the benefit of expert testimony and a scientific record." CMA Br. at 6-7.

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[2] "Reply Br." refers to Another Planet's Reply Brief.

CMA's brief is the elephant in the room that all cases resolved on the pleadings ignored. Contrary to those wrongly-decided cases, there are facts—well-grounded in science—that show that SARS-CoV-2 causes "direct physical loss [and] damage to property."

At the very least, CMA makes one thing abundantly clear: COVID-19 is a highly complex phenomenon that was unknown to the world just three years ago, and that is still the subject of intense scientific study. There is no such thing as "common sense" when it comes to how SARS-CoV-2 behaves. Courts should not elevate what they think they know over meaningful scientific research and evidence. The core of both science and justice is the search for truth. In the context of COVID-19 insurance coverage cases, courts cannot achieve justice without science.

II. American Property Casualty Insurance Association & National Association of Mutual Insurance Companies

A. Insurers Knew There Could Be a Flood. Some Elected Not to Build Levees in Their Policies.

Amici American Property Casualty Insurance Association ("APCIA") and National Association of Mutual Insurance Companies ("NAMIC") (together, the "Associations") present a

"floodgates" argument that holds no water.[3] Specifically, they argue that if this Court answers the Ninth Circuit's question in the affirmative, a "substantial detrimental impact" on the insurance marketplace would follow. Ass'ns Br. at 5. APCIA claims that California businesses suffered between $9.1 billion and $33.7 billion per month during the early months of the COVID-19 Pandemic, and that if insureds' losses were covered, the industry would face "substantial insolvency risks." *Id.* at 5-6.

First, this has nothing to do with the Ninth Circuit's certified question. The Associations ask the Court to rule in Vigilant's favor as a sort of protective judicial legislation, limiting the insurance industry's liability, regardless of the promises that insurers made while collecting hundreds of billions of dollars in premiums annually. *See id.* at 1 (NAMIC's members collect $357 billion in annual premiums); *see also* CPK Br. at 47-51 (this argument is best left to the Legislature and regulators).[4]

Second, insurers like Vigilant have long known the risks that a pandemic would pose to their bottom lines. That is why for

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[3] Citations to APCIA and NAMIC's brief use "Ass'ns Br."

[4] "CPK Br." refers to the brief of amici California Pizza Kitchen, et al.

years, in disclosures to investors and the Securities and Exchange Commission, they listed pandemics among the catastrophic risks that could result in outsized financial losses. *See* O.B. at 31-35; Reply Br. at 13-14.[5]

Third, the insurance industry has already figured out a way to limit insurers' liability for pandemic-related losses: the ISO standard exclusion for viruses and bacteria for first-party property policies. *See* O.B. at 35-39; Reply Br. at 18-20. Since its release in 2006, in the wake of the 2002-04 SARS epidemic, insurers have been able to add an exclusion to their policies that (arguably) would protect them from having to pay out in the event of a pandemic. As discussed in amicus California Pizza Kitchen's brief, the insurance industry on the whole realized that contagious viruses could give rise to large covered claims, and that is precisely why ISO issued its exclusion. CPK Br. at 23-29. APCIA's Senior Vice President Robert Gordon even acknowledged as much in public statements. *See id.*, Ex. 2.

The decision not to include the exclusion—all the while acknowledging a pandemic could seriously affect their financial

[5] "O.B." refers to Another Planet's Opening Brief.

positions—was a business decision. The Associations' discussion of risk spreading, Ass'ns Br. at 5-8, elides several important points. Events that cause ultra-high losses like a pandemic generally occur with ultra-low frequency. Whether insurer risk pools are structured to absorb *any* risk depends on the balance of frequency (likelihood), severity, and price. Not all insurers make the same decisions or choose to take on the same risks. As amicus San Manuel points out, in recent years, some 83% of commercial property insurance policies contained virus exclusions. San Manuel Br. at 20.

At the end of the day, insureds like Another Planet bought and paid for first-party insurance against "all risks" that did not exclude losses caused by viruses.

Fourth, even though SARS-CoV-2 remains circulating throughout the country, physically altering the airspaces and surfaces with which viral particles interact, the Associations' concerns that insurers could be subject to unending liability are not grounded in the law, insurance policies, or reality. Ass'ns Br. at 8-9. Insurance is only available for covered *losses*. If a business can use its property reasonably safely—which is largely the case now because of vaccines and less deadly dominant SARS-CoV-2

strains—and does not suffer economic loss, then insurance coverage simply does not come into play. Just as homeowners do not turn to insurers when a child overturns a cup of water, the presence of SARS-CoV-2 does not presently give rise to the level of damage and loss that it once did. *See* Reply Br. at 36-38.

The problem the Associations bemoan is of their members' own making. They could have sold policies containing virus exclusions, but some of them (like Vigilant) did not. Of course there will be a flood of insurance claims when the large groups of insureds suffer catastrophes, whether those catastrophes be weather events, earthquakes, fires, flood, the widespread presence of asbestos in buildings, pollution, or pandemics. It is not the Court's job to protect the insurance industry from risks its members voluntarily assume and for which they charge substantial premiums. If certain insurers made bad business decisions in their pursuit of premiums and profits (such as not using a standard-form virus exclusion), courts should not re-make their deals. If insurance is the proverbial shelter from the storm, then insurers should be at the vanguard. The insurance industry sold policies assuming "all risks" of loss (unless excluded), including from pandemics, and they profited handsomely in good times. Now that the worst has materialized, they have done

everything in their power to avoid their obligations. Indeed, insurance behemoths are exultant in trumpeting their profits while their insureds go out of business. *See* Reply Br. at 15-16 (Chubb Ltd.'s 2020 Annual Report touting record profits and enhanced fiscal strength).

B. Couch Misstated the Law of "Direct Physical Loss."

Another Planet's briefs explain why Steven Plitt, *et al.*, *Couch on Insurance*, chapter 10A, section 148:46 (3d ed. 2010), misstated the law when that section was first published in 1999, incorrectly asserting that the dominant position was that "direct physical loss" required "a distinct, demonstrable, physical alteration of the property." O.B. at 71-75; Reply Br. at 47-48. Amicus United Policyholders' briefing on this issue and the materials cited in support provide irrefutable documentation that *Couch* misstated the law. UP Br. at 43-48.[6]

The Associations seek to prop up *Couch* though a sleight-of-hand argument, designed to make *Couch*'s incorrect pronouncement of the law seem more entrenched in American jurisprudence than it actually is. Ass'ns Br. at 14-16. Although it

[6] "UP Br." refers to the brief of amicus United Policyholders.

is true that more than 269 decisions have deployed the language "distinct, demonstrable, physical alteration of the property,"[7] what the Associations neglect to point out is that *only 26* predate the first COVID-19 Pandemic property insurance decision to use that language.[8] Thus, more than 90% of the decisions depending on *Couch*'s incorrect formulation of the law issued during the Pandemic.

Indeed, it appears that the Associations could find just one decision since August 2020 using *Couch*'s formulation that did *not* involve insurance for Pandemic-related losses: *NMA Investments LLC v. Fidelity & Guarantee Insurance Co.*, 627 F. Supp. 993 (D. Minn. 2022). That case involved business interruption coverage for government closure orders issued to address civil unrest in the wake of George Floyd's murder. *Id.* at 995. That insurance policy provided coverage only if the civil authority orders were issued "as a result of the damage" to nearby property. *Id.* at 996. The insureds argued that the "damage" to nearby property was created

[7] A Westlaw search of this phrase across all United States jurisdictions returned 274 hits on October 2, 2023.

[8] *Diesel Barbershop, LLC v. State Farm Lloyds*, 479 F. Supp. 3d 353 (W.D. Tex. Aug. 13, 2020).

by concrete and human barriers erected to protect businesses in Minneapolis from rioters and looting. *Id.* at 997. The court declined to find coverage, holding that barriers do not cause property damage. *Id.* Thus, that case simply stands for the proposition that civil authority coverage requiring damage to nearby property is not triggered when there is no property damage.

As to the 26 decisions issued nationwide discussing "direct, demonstrable, physical alteration of the property" prior to the Pandemic, only three are published California opinions.[9] Thus, far from a "last-ditch attempt to turn the clock back 25 years and rewrite decades of insurance law," Ass'ns Br. at 15, Another Planet's case presents this Court with the opportunity to set California law down the right path again. While *Doyle*, *MRI*, and *Simon* may have been outliers relying on *Couch*'s misstatement of the law in the two decades preceding the COVID-19 Pandemic, insurers' reliance on *Couch* (and *MRI* in particular) is misshaping California law and threatening to abandon decades of sound jurisprudence to the contrary.

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[9] *Doyle v. Fireman's Fund Ins. Co.,* 21 Cal. App. 5th 33 (2018); *MRI Healthcare Ctr. v. State Farm Gen. Ins. Co.*,187 Cal. App. 4th 766, 770 (2010); *Simon Mktg. v. Gulf Ins. Co.*, 149 Cal. App. 4th 616 (2007).

C. Other Arguments Addressed in Prior Briefs.

The Associations' remaining arguments rehash much of Vigilant's prior arguments, so further briefing on those issues is unnecessary. However, two final observations are warranted. First, with respect to the Associations' discussion of the history of property insurance, Ass'ns Br. at 18-23, they neglect to discuss coverages designed to protect business income when the insured's property itself is not damaged, but when other property in close vicinity is damaged, or when the property of "dependent businesses" (those upon whom the insured depends to conduct its own business) is damaged. *See* 3-E.R.-485-88, 569-70. The Associations likely did not discuss this sort of coverage because they do not fit into their narrative that "direct physical loss" of property only occurs when that property is physically altered. There are times when property is not changed but the inability to use it still constitutes a covered loss. *See Huntington Ingalls Indus., Inc. v. Ace Am. Ins. Co.*, 2020 VT 45 ¶ 29, 287 A.3d 515, 523 (Vt. 2022) (direct physical loss can mean "circumstances in which property is not harmed but may not be used for some reason").

Second, with respect to whether SARS-CoV-2 can cause "direct physical loss or damage" to property, the Associations (as

with all the insurers submitting briefs in this case) cite no facts to support their arguments. Ass'ns Br. at 8-12.

Otherwise, the Associations ask this Court to just follow the lead of the majority of cases decided in other jurisdictions because, well, just because. That has never been this Court's ethos, particularly with respect to insurance law.

III. California FAIR Plan Association

A. "Direct Physical Loss or Damage to Property" Is Ambiguous in the Context of COVID-19.

Amicus California FAIR Plan Association ("FAIR") asserts that because no California appellate court has found "direct physical loss or damage to property" ambiguous, that means it is unambiguous, and this Court should disregard insureds' reasonable expectations of coverage. FAIR Br. at 11-14. However, the standard is not whether an appellate court has stated that a term is ambiguous; the standard is whether, under the circumstances of the policy's sale and of the coverage claim, policy language is susceptible to two or more reasonable interpretations. *E.M.M.I. Inc. v. Zurich Am. Ins. Co.*, 32 Cal. 4th 465, 470 (2004); *Bay Cities Paving & Grading, Inc. v. Lawyers' Mut. Ins. Co.*, 5 Cal. 4th 854, 868 (1993).

Another Planet has cited several decisions that explicitly state that "direct physical loss or damage to property" (or permutations thereof) is ambiguous, including in the COVID-19 Pandemic context. O.B. at 26-28. And although there are cases that say that different courts reaching different outcomes on an interpretive issue alone is not sufficient to create ambiguity, it bears pointing out that the Court of Appeal continues to issue irreconcilable opinions on the Ninth Circuit's certified question. This includes in the last two weeks. *Compare JRK Prop. Holdings v. Colony Ins. Co.*, --- Cal. App. 5th ---, Slip Op. at 17 (Oct. 2, 2023) (Second Department, Seventh Division, holding SARS-CoV-2 can cause the requisite loss or damage), *with Endeavor Operating Co. v. HDI Global Ins. Co.*, --- Cal. App. 5th ---, 2023 WL 6155983, at *11 (Sept. 21, 2023) (Second Department, Second Division, holding the opposite).

These decisions are the latest in two lines of cases stemming from *United Talent Agency v. Vigilant Insurance Co.*, 77 Cal. App. 5th 821 (2022) (favoring insurers' arguments) and *Marina Pacific Hotel & Suites, LLC v. Fireman's Fund Insurance Co.*, 81 Cal. App. 5th 96 (2022) (favoring insureds' arguments). In decision after decision in each line, the Justices of the Court of Appeal explain

their reasoning for finding that "direct physical loss or damage to property" means something irreconcilable with what the Justices subscribing to the competing line find. It is these *rationales* that demonstrate that courts are struggling with an ambiguous phrase, not simply that the courts have come out differently when deciding an issue.

FAIR does not argue that the Justices subscribing to the *Marina* line of cases are patently unreasonable, nor can it. Those decisions acknowledge that their reasoning is at odds with most similar cases nationwide and take great pains to explain why they are of a different mind. *See, e.g.*, *Marina*, 81 Cal. App. 5th at 107-12.

Because "direct physical loss or damage to property" is reasonably susceptible to different meanings in the context of the COVID-19 Pandemic, Another Planet described evidence showing that Vigilant knew when it sold the Policy that Another Planet understood the Policy would cover losses sustained in a pandemic of viral disease. Reply Br. at 13-21. If that evidence does not resolve the ambiguity, then Another Planet is entitled to a construction in its favor and against Vigilant, protecting Another

Planet's reasonable expectations of coverage. *Montrose Chem. Corp. v. Superior Ct.*, 9 Cal.5th 215, 230 (2020).

FAIR goes on to argue, "An ordinary policyholder would not have a reasonable expectation that a virus like Covid-19 would cause property damage," and that Another "Planet does not claim that it relied on any [of Chubb's] public statements (or was even aware of them)." FAIR Br. at 15-16. This is simply incorrect. 3-E.R.-416-17, ¶¶ 114-20 (alleging reliance on Chubb's public statements and other representations).

B. ISO's Exclusion for Losses Caused by Viruses and Bacteria Is Germane to Interpreting the Policy.

With respect to FAIR's discussion regarding ISO's virus exclusion, FAIR Br. at 17-19, most of FAIR's arguments are addressed in Another Planet's prior briefs. Nevertheless, three merit further responses.

First, FAIR argues that ISO's virus exclusion is just a "belt-and-suspenders" approach to make doubly sure there is no coverage for losses caused by viruses. FAIR Br. at 17. This argument runs headlong into the interpretive canon against surplusage. Cal. Civ. Code § 1641 ("The whole of a contract is to be taken together, so as to give effect to every part, if reasonably

practicable, each clause helping to interpret the other."); *AIU Ins. Co. v. Superior Ct.*, 15 Cal. 3d 807, 826-27 (1991) (refusing to interpret policy terms in a manner that would render them redundant).

If, as FAIR argues, it is perfectly clear that "direct physical loss or damage to property" never can be caused by a virus, then ISO's exclusion would be redundant when used in a commercial property insurance policy. Thus, the only reasonable manner to interpret the need for ISO to issue its exclusion is to acknowledge that commercial property insurance policies reasonably can be interpreted to respond in the event of a widespread viral event, necessitating an exclusion to state clearly that such losses are excluded. *See Am. Bldg. Maint. Co. v. Indem. Ins. Co.*, 214 Cal. 608, 613 (1932) ("The very fact that the defendant insurance company thought it necessary to issue a rider in order to eliminate this coverage indicates a belief on its part that loss arising from the [excluded peril] was included in the policy."). Indeed, when it comes to "all risks" insurance policies, the *only* true expression of whether the parties intended that a particular peril would be covered is the presence or absence of an exclusion for that peril.

Second, FAIR mischaracterizes ISO's reasons for issuing the exclusion, arguing that it was really meant to address pathogens like listeria and E.coli contaminating food products. FAIR Br. at 18. Actually, ISO specified concern about "rotavirus, *SARS*, influenza (such as avian flu), legionella and anthrax."[10] Further, ISO issued this exclusion on the heels of the 2002-04 SARS epidemic, and in this context, FAIR's argument rings hollow. *See* CPK Br. at 23-29.

Third, FAIR's statement that "[t]he insurance industry is not monolithic," apparently attempting to argue that some insurers were unaware that their policies could respond to widespread viral events, is unserious. FAIR Br. at 18. In 2003, it was widely reported in insurance trades and other media that Mandarin Oriental hotels recovered $16,000,000 from its property insurers for losses caused by SARS-CoV-1. *See* CPK Br., Ex. 2. That Chubb and Vigilant—or any insurer issuing commercial property policies—somehow missed that news strains credulity.

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[10] ISO Circular, "New Endorsements Filed to Address Exclusion of Loss Due to Virus or Bacteria," (July 6, 2006) (emphasis added), https://www.propertyinsurancecoveragelaw.com/files/2020/03/ISO-Circular-LI-CF-2006-175-Virus.pdf.

C. Other Arguments Addressed in Prior Briefs.

FAIR's other arguments reassert arguments that Vigilant raised in its Answering Brief and to which Another Planet responded. It is not necessary to restate Another Planet's positions as to those arguments here, but one observation is warranted. Vigilant relies heavily on the Ninth Circuit's decision of *Mudpie, Inc. v. Travelers Casualty Insurance Co.*, 15 F.4th 885 (9th Cir. 2021), in insisting that "direct physical loss or damage" requires a "distinct, demonstrable, physical alteration" to property that SARS-CoV-2 cannot create. *E.g.*, A.B. at 41. FAIR does the same. FAIR Br. at 25. The insured in *Mudpie* argued that government closure orders (not SARS-CoV-2's presence) caused its business interruption losses. 15 F.4th at 892. The Ninth Circuit held that the policy's virus exclusion barred coverage *because SARS-CoV-2 was the efficient proximate cause of the loss*, not the closure orders. *Id.* at 894. Thus, insurers use *Mudpie* as both a shield and a sword, ducking liability when insureds allege losses are attributable to closure orders, but then brandishing it when insureds allege that the virus caused losses. Insurers cannot have it both ways. *Mudpie* says SARS-CoV-2 caused businesses to lose money, which is precisely what Another Planet has alleged.

IV. Oregon Mutual Insurance Company

Amicus Oregon Mutual Insurance Company, which has been sued by several of its insured restaurants, supposes that it can "ensure that this Court understands how the pandemic impacted California businesses and how that impact should be considered in addressing the insurance questions raised in this and other pending cases." OM Br. at 5.[11]

It takes a special kind of hubris to proclaim to speak on behalf of its insureds while Oregon Mutual argues against their interests. Oregon Mutual's business is insurance. While Oregon Mutual may be entitled to some credibility were it to describe the Pandemic's impact on its own business, Oregon Mutual swerves out of its lane in purporting to describe how the Pandemic affected the businesses of California's insureds, several of which are amici now.

On the merits, Oregon Mutual presents its arguments unburdened by *any* citations to facts, just as Vigilant does. Oregon Mutual asks the Court simply to assume as "common sense"

[11] "OM Br." refers to amicus Oregon Mutual's brief.

factual premises that have not been proved—and that Another Planet did not allege—including:

- That essential businesses like grocery stores were "open for thriving business with no apparent impact to those facilities caused by" SARS-CoV-2. OM Br. at 8-9.
- That employees of essential businesses "could go to work and use all of the business facilities and property" during the COVID-19 Pandemic. *Id.* at 9.
- That business losses were "caused by governmental orders," rather than the presence of SARS-CoV-2. *Id.* at 7.

Thus, Oregon Mutual (like Vigilant) asks this Court to just take its word for it, disregarding all the pesky evidence that insureds like Another Planet and other amici indicate entitles them to relief.

Oregon Mutual also dramatically mischaracterizes how COVID-19 insurance coverage litigation has progressed through this State's courts:

> After *Inns[-by-the-Sea v. California Mutual Insurance Co.*, 17 Cal. App. 5th 668 (2021)], courts saw a distinct change in the pleadings, but there was no

> corresponding change in the real-world facts. Plaintiffs attempted to allege some form physical damage, but the causal connection remained completely hypothetical. Restaurants and other businesses could not reasonably allege that their business was specifically impacted and closed because of physical loss and damage.

OM Br. at 10. Insureds, including Another Planet, filed complaints alleging losses caused by SARS-CoV-2's presence well before the Court of Appeal announced *Inns* on November 15, 2021. Another Planet filed its complaint more than a year prior. 4-E.R.-792.[12] Oregon Mutual's effort to paint these allegations as a frivolous attempt to sidestep *Inns*—like the rest of its arguments—lacks any foundation in fact.

Aside from lacking any factual support, Oregon Mutual's next argument is disingenuous: "No plaintiff, including Another Planet, claimed that it closed because it tested and found

[12] *See also, e.g.*, *Shusha, Inc. v. Century-Nat'l Ins. Co.*, 87 Cal. App. 5th 250, 254 (2022) (complaint filed July 7, 2020); *Marina*, 81 Cal. App. 5th at 100 (complaint filed July 21, 2020); *United*, 77 Cal. App. 5th at 825 (complaint filed Nov. 13, 2020).

COVID-19 damage on its property." OM Br. at 14. To what test does Oregon Mutual refer? The Centers for Disease Control do not have any recommendations for testing surfaces or air, even for healthcare and skilled nursing facilities.[13] No such test for property damage caused by SARS-CoV-2 exists. Again, Oregon Mutual's arguments are divorced from facts.

Finally, Oregon Mutual argues that once government closure and stay-at-home "mandates ended, businesses reopened and assertions of COVID-19 related direct physical loss ceased," *id.*, apparently showing that SARS-CoV-2 had nothing to do with that loss. This argument, again, assumes erroneous facts. There was no one moment when the "mandates ended." In March 2020, dozens of local, county, and statewide orders shut down the California economy. As the Los Angeles Times reported:

> As the months went by, the state attempted to reopen in fits and starts as the governor and local officials

[13] *Overview for Testing for SARS-CoV-2 (COVID-19)*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 25, 2023, ed.); https://www.cdc.gov/coronavirus/2019-ncov/hcp/testing-overview.html (*last visited* Oct. 4, 2023).

> grappled with how to revive a collapsed economy despite the virus' persistent spread.
>
> The result was a complex set of guidelines that frequently changed, varied from county to county and created a whipsaw effect where businesses were open one week and sometimes closed within days.
>
> The Times tracked decisions in the state's 58 counties for the entire year, building a database of every change that affected five types of businesses. A typical business owner faced seven rule changes over the course of the year. Multiplied across all of the counties and all five of the business types, public health departments made more than 2,000 rule changes statewide.

Sandhya Kambhampati & Maloy Moore, *California's Dizzying Road to Reopening*, L.A. Times (Apr. 8, 2021), https://www.latimes.com/projects/tracking-california-covid-closures-over-a-year/. Indeed, the federal government's Pandemic state of emergency ended in April 2023.

Closure orders were lifted, and people began participating in the economy again, once SARS-CoV-2's risk to human life had diminished through the introduction of vaccines and through the virus's evolution, in which less deadly strains became dominant.[14] Oregon Mutual confuses correlation for causation; the closure orders eventually were lifted once it was safer for people to occupy and operate property. With growing safety came a greater ability to use property again, even though SARS-CoV-2 undoubtedly remains physically present on, in, and around property.

The remainder of Oregon Mutual's arguments rehash those that Vigilant has made, so Another Planet will refrain from reiterating its responses to them here.

V. Los Angeles Lakers, Inc.

Amicus Lakers proposes that the Court adopt a standard that it characterizes as between the "two extremes" for which Another Planet and Vigilant advocate. Lakers Br. at 12. Indeed, even though Lakers characterizes both sides' positions as extreme,

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[14] *See e.g.*, Kathy Katella, *Omicron, Delta, Alpha, and More: What to Know About the Coronavirus Variants*, Yale Medicine (Sept. 1, 2023), https://www.yalemedicine.org/news/covid-19-variants-of-concern-omicron.

it says, "Amicus takes no position on whether [Another Planet] satisfies the proposed standard." On closer inspection, however, Lakers' proposed standard is consistent with Another Planet's position and wholly irreconcilable with Vigilant's.

Lakers contends that coverage should be afforded if an insured can prove that SARS-CoV-2 physically infiltrated insured property. *Id.* at 15-24. But Lakers also cites authorities supporting the proposition that a physical alteration is not required for there to be covered "direct physical loss," and that damage or loss need not be permanent to give rise to a covered claim. *Id.* at 20-24. These arguments are indistinguishable from Another Planet's arguments. Lakers even cites many of the same authorities discussed in Another Planet's briefs.

Lakers also points to the ISO virus exclusion as evidence that the insurance industry knew full well that their commercial property insurance policies could respond in the event of a widespread viral event. *Id.* at 24-25.

Lakers diverges from Another Planet's arguments in just two respects. First, Lakers contends that losses arising solely from closure orders should not give rise to covered claims. *Id.* at 26. Another Planet has alleged that it suffered covered damage and

loss because SARS-CoV-2 was physically present in, on, and around covered property, so this issue is not addressed in the parties' briefing. Another Planet takes no position on that issue now. Nevertheless, Lakers argues, "If a party can establish that the COVID-19 virus was present on its premises and that the virus caused a physical alteration to its property, it would satisfy the first element of a claim for 'direct physical loss or damage' to property—namely, that the damage caused by the virus was 'physical.'" *Id.* at 32-33. That is exactly what Another Planet argues.

However, Lakers seems to offer a contradictory position, stating, "Without a showing that the COVID-19 virus actually damaged any property, there is no basis for an insured to reasonably expect coverage for property damage. Mere presence of the virus is therefore not enough." *Id.* at 38. To the extent that Lakers means that there is no coverage if an insured does not incur losses because of the presence of SARS-CoV-2, then this statement seems anodyne. However, if Lakers means that there must be some additional level of proof of damage beyond SARS-CoV-2's presence in, on, and around property, Another Planet disagrees with Lakers, which does not expound on what

such proof might entail.[15] And Lakers ignores the mitigation doctrine, under which the test for coverage is not whether there was actual "physical loss or damage," but whether an insured acted reasonably in the face of what was understood to be threatened "physical loss or damage."

In any event, SARS-CoV-2's presence is enough to entitle insureds to coverage under "all risks" property policies because the virus transforms the physical surfaces and airspaces into disease vectors that render property unsafe and unsuitable for use. On that point, Lakers and Another Planet agree.

VI. Amici Supporting Another Planet

A. San Manuel Band of Mission Indians

Amicus San Manuel provides a compelling analysis of California's law of insurance policy interpretation, especially with respect to "all risks" policies. Another Planet endorses San Manuel's brief in its entirety.

Another Planet responds to emphasize two important points in San Manuel's brief. First, San Manuel highlights that Vigilant's Policy provides coverage for "direct physical loss or damage" to

[15] Of course, Another Planet's claim is at the pleading stage, not the proof stage.

"electronic data." San Manuel Br. at 13. "Electronic data" is defined as "software, data or other information that is in electronic form." 3-E.R.-570. Information in electronic form cannot be considered more "tangible" than a virus that exists in and interacts with the physical world and makes people grievously ill, if not kills them. This directly undercuts Vigilant's argument that "direct physical loss or damage" necessarily involves "permanent" "structural alterations" to property—or at the very least, that SARS-CoV-2 cannot cause such loss or damage.

Second, San Manuel points out that after ISO issued its standard exclusion for losses caused by viruses and bacteria, as many as 83% of commercial property insurance policies sold contained a virus exclusion. San Manuel Br. at 20. Not only does this show that insurers throughout the industry knew that a virus could cause "direct physical loss or damage to property," but they also knew how to at least attempt to limit their liability for such losses when they wanted to—and most did (including Vigilant's sister insurers, *see* O.B. at 37-38).

This fact also undercuts the credibility of Insurer Amici's warnings of the risks of widespread insolvency if the Court were to answer the Ninth Circuit's certified question in the affirmative. If

only 17% percent of commercial property insurance policies lack a virus exclusion, then the risk of purported ruinous liability may be decimated.

B. California Pizza Kitchen

Amicus California Pizza Kitchen, et al., ("CPK") provides a thorough and compelling presentation of the drafting history of commercial property insurance policies and of how the insurance industry adapted as the risk of widespread viral events became more likely. CPK Br. at 18-33. This includes the fact that insurers paid claims arising from SARS-CoV-1 in the 2002-04 SARS epidemic, resulting in ISO's 2006 issuance of the standard exclusion for losses caused by virus and bacteria. *Id.* at 23-33. Another Planet endorses this argument entirely.

CPK also explains why it is the Legislature or another regulating body—and not this Court—that should concern itself with the potential for purportedly ruinous claims when insurance policies respond to a global catastrophe. *Id.* at 37-41. This is consistent with California law and the decisions of this Court. *See, e.g.*, *Powerine Oil Co. v. Superior Ct.*, 37 Cal. 4th 377, 401 (2005) ("We will not rewrite the policies to insert a provision that was omitted."); *Safeco Ins. Co. of Am. v. Robert S.*, 26 Cal. 4th 758, 764

(2001) (courts "are not to insert what [the insurer has] omitted"). Again, Another Planet endorses this argument entirely.

The remainder of CPK's arguments mirror what Another Planet has advanced in its briefs, so Another Planet declines to reassert those again here.

C. United Policyholders

Amicus United Policyholders' ("UP") brief is important for several reasons, chief among them (i) the irrefutable analysis of *Couch*'s misstatement of the law, UP Br. at 43-48, and (ii) the elucidation that insurers' plaints of potentially crippling liability are "cr[ying] wolf" despite sitting on record earnings and giant reserves. *Id.* at 50-53.

Additionally, UP cites still more compelling evidence showing that insurers like Vigilant knew when they promised coverage to their insureds that their policies could respond in a pandemic, and explicitly reaffirmed as much even after COVID-19 began ravaging their insureds' businesses. *Id.* at 27-29.

The remainder of UP's brief is consistent with Another Planet's arguments in prior briefing.

D. Santa Ynez Band of Chumash Indians

Amici Santa Ynez Chumash present a cogent analysis of California cases and rules regarding pleadings and evidence. Another Planet responds to their brief with respect to the declaration of their expert, Dr. Ivan Dmochowski, who opined that SARS-CoV-2 physically alters airspaces when infected persons exhale live virus. SYC Br. at 19-20.[16]

In its Answering Brief, Vigilant argued that its Policy's definition of "property" excludes "'*air*, either inside or outside of a structure.'" A.B. at 35. Dr. Dmochowski's opinion, like amicus CMA's brief, makes explicit what is implied in the Vigilant Policy's purported exclusion of air from its definition of property: airspaces can suffer "direct physical loss or damage." "Permanent" "structural alterations" are not the only form of such loss or damage. And, Vigilant and the Insurer Amici conflate "air" and "airspace," something the law does not do. It is the presence of SARS-CoV-2 in interiors (e.g., airspace) that, like the presence of asbestos fibers in interiors, makes property dangerous, interfering with its use and habitability. Whether "air" is physically damaged

[16] "SYC Br." refers to the brief of amici Santa Ynez Chumash.

(which insurers dispute) misses the point—it is the physical presence of SARS-CoV-2 inside a building that constitutes damage, just as courts have recognized for decades. *See, e.g., Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 90 (1996) ("courts have held that contamination of buildings and their contents from released fibers constitutes a physical injury and, hence, property damage covered under the terms of the insurance policies").

E. Ross Stores, Inc.

Amicus Ross' brief is consistent in every way with Another Planet's arguments. Of particular importance is Ross' compelling analysis of Pandemic-era cases that have favored the arguments presented by the insurance industry. Ross Br. at 43-59. Ross adeptly explains why the "wall" of case law that Vigilant urges this Court to build upon is composed of decisions that are either irrelevant to the Ninth Circuit's certified question or contravene established California insurance law. Another Planet endorses this analysis entirely.

F. Major League Baseball and National Hockey League

Amici Major League Baseball and National Hockey League (together, the "Big Leagues") present arguments that generally align with Another Planet's. Like the Big Leagues, Another Planet's business relies on venues where people gather to enjoy live entertainment. During the COVID-19 Pandemic, this type of business was hit particularly hard.

On the merits, Another Planet largely agrees with the Big League's points and authorities. However, Another Planet does not agree that cases like *Sandy Point Dental, P.C. v. Cincinnati Insurance Co.*, 20 F.4th 327 (7th Cir. 2021), or *Brown Jug, Inc. v. Cincinnati Insurance Co.*, 27 F.4th 398 (6th Cir. 2022), were correctly decided. *See* Big Leagues Br. at 13. Business interruption insurance is supposed to provide coverage when property is impaired for its intended use, not completely unusable. *See* O.B. at 65-66 & n.44.

The remainder of the Big Leagues' arguments generally mirror those that Another Planet has made in merits briefing, so Another Planet declines to reassert those arguments here.

CONCLUSION

While the Insurer Amici do not add anything new to demonstrate why Vigilant should prevail in this case, the Non-Insurer Amici's briefs roundly support and expand on the reasons why the Court should answer the Ninth Circuit's certified question in the affirmative.

DATED: October 5, 2023

PASICH LLP

By: _____
Kirk Pasich

_____
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Attorneys for Petitioner Another Planet Entertainment, LLC

CERTIFICATE OF COMPLIANCE WITH RULE 8.520

I, the undersigned, Nathan M. Davis, declare that:

1. I am an attorney licensed to practice in all courts of the state of California and a partner at the law firm of Pasich LLP, attorneys of record for petitioner Another Planet Entertainment, LLC.

2. This certificate of compliance is submitted in accordance with rule 8.520 of the California Rules of Court.

3. This brief was produced with a computer. It is proportionately spaced in 13-point Century Schoolbook typeface. The brief contains 7,106 words.

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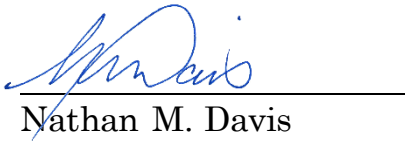
Executed at Santa Monica, California, on October 5, 2023.



Nathan M. Davis

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10/5/2023

Date

/s/Nathan Davis

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