

No. S277893

**IN THE  
SUPREME COURT  
OF THE  
STATE OF CALIFORNIA**

—  
ANOTHER PLANET ENTERTAINMENT, LLC,

*Petitioner,*

v.

VIGILANT INSURANCE COMPANY,

*Respondent.*

—  
FOLLOWING CERTIFICATION ORDER BY THE  
U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT  
CASE No. 21-16093  
—

**SUPPLEMENTAL BRIEF OF RESPONDENT**

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Pursuant to California Rule of Court 8.520(d), respondent Vigilant Insurance Company (“Vigilant”) submits this supplemental brief to inform the court of relevant new decisions that were rendered after the filing of Vigilant’s brief on the merits.

### **ARGUMENT**

Since the filing of Vigilant’s merits brief, the already-overwhelming consensus of decisions rejecting the arguments advanced by petitioner Another Planet Entertainment, LLC (“AP”) has only grown larger. Vigilant’s Consolidated Answer to Briefs of *Amicus Curiae* discusses two of the noteworthy new decisions, each of which rejected COVID-19-related business interruption coverage claims materially indistinguishable from those asserted by AP: *Starr Surplus Lines Insurance Co. v. JGB Vegas Retail Lessee, LLC*, 535 P.3d 254 (Nev. 2023), and *Endeavor Operating Co. v. HDI Global Insurance Co.*, 96 Cal. App. 5th 420 (2023) [review granted December 13, 2023 (S282533)]. See Vigilant *Amicus Curiae* Answer Br. at 9-11, 14 n.2, 20-22, 28, 36-37, 39, 50-51. Since then, two more state high court decisions have joined the chorus: the decisions of the New York Court of Appeals in *Consolidated Restaurant Operations, Inc. v. Westport Insurance Corp.*, -- N.E.3d--, 2024 WL 628047 (N.Y. Feb. 15, 2024), and the Supreme Court of New Jersey in *AC Ocean Walk, LLC v. American Guarantee & Liability Insurance Co.*, -- A.3d --, 2024 WL 252794 (N.J. Jan. 24, 2024). With those decisions, eleven state high courts have now held that commercial property policies that provide coverage for “direct

physical loss or damage” to property do not apply to business interruption losses stemming from the COVID-19 pandemic.

*Consolidated Restaurant Operations* effectively synthesizes the case law and explains the error in each of the key arguments AP and its amici have pressed before this Court. In particular:

- The decision holds that allegations that COVID-19 “virus droplets stay on surfaces, compromise the physical integrity of the structures they permeate, and render them unusable” do not establish a “material alteration” of property, as required for coverage. 2024 WL 628047, at \*3, \*7.
- The decision holds that the term “direct physical loss” “requires an actual, complete dispossession” of property, rejecting the policyholder’s theory that the phrase includes “impaired functionality” or a “partial or complete loss of use for a limited period of time.” *Id.* at \*4.

According to *Consolidated Restaurant Operations*, AP’s reading would impermissibly “collapse coverage for ‘direct physical loss’ into coverage for ‘loss of use.’” *Id.*

- The decision recognizes that policy language contemplating the “repair” and “replace[ment]” of property confirms that coverage is triggered only by “physical damage to” the insured property (requiring repair) or its “complete and persistent dispossession” (requiring replacement), rather than mere “loss of use of it” (where neither repair nor replacement would occur). *Id.* The decision further reasons that pandemic-era

preventive measures such as enhanced cleaning protocols and the installation of plexiglass barriers did not constitute repair, rebuilding, or replacement within the meaning of commercial property policies. *Id.* at \*6.

- The decision rejects the policyholder’s argument that coverage for virus-related losses must exist merely because such losses are not expressly excluded, observing that the absence of an exclusion “does not confer coverage.” *Id.* at \*4 n.3.
- The decision joins countless others in holding that COVID-19-related losses are not analogous to losses incurred when an external physical force makes a property wholly uninhabitable, as in cases like *Western Fire Insurance Co. v. First Presbyterian Church*, 437 P.2d 52 (1968), and similar decisions. 2024 WL 628047, at \*5. In contrast to those cases, *Consolidated Restaurant Operations* explains, the presence of COVID-19 virus at an insured property involves “neither persistent contamination nor total uninhabitability.” *Id.*

The Supreme Court of New Jersey’s decision in *AC Ocean Walk* is similarly exemplary of the reasoning that compels rejection of AP’s coverage claims. *AC Ocean Walk* holds that allegations based on “the actual and/or threatened presence of Coronavirus particles” on insured premises do not adequately plead “direct physical loss or damage” to property because they do not allege that property underwent a “distinct, demonstrable, and physical alteration,” was “destroyed,” or was rendered “unusable

or uninhabitable.” 2024 WL 252794, at \*10-11 (quotation omitted). The court emphasized policy provisions contemplating the repair or replacement of property, *id.* at \*10, and rejected the policyholder’s reliance on uninhabitability/total loss case law, including decisions under New Jersey law such as *Port Authority of New York & New Jersey v. Affiliated FM Insurance Co.*, 311 F.3d 226 (3d Cir. 2002), *see* 2024 WL 252794, at \*9-10.

As for the only two recent decisions that do find potential coverage for COVID-19-related losses, neither is persuasive. The decision in *JRK Property Holdings, Inc. v. Colony Insurance Co.*, 96 Cal. App. 5th 1 (2023) [review granted December 20, 2023 (S282657)], was issued by the same panel that decided *Marina Pacific Hotel & Suites, LLC v. Fireman’s Fund Insurance Co.*, 81 Cal. App. 5th 96 (2022), and *Shusha, Inc. v. Century-National Insurance Co.*, 87 Cal. App. 5th 250 (2022) [review granted April 19, 2023 (S278614)], and thus merely reasserts the same flawed reasoning of those cases, *see* Respondent’s Br. 39-41 (explaining errors in *Marina Pacific/Shusha* approach).

The Sixth District’s decision in *San Jose Sharks, LLC v. Superior Ct. of Santa Clara County*, 98 Cal. App. 5th 158 (2023) [petition for review filed January 30, 2024 (S283638)], likewise merely reiterates the flawed *Marina Pacific* approach without proffering any explanation for declining to follow the better-reasoned decision in *United Talent Agency v. Vigilant Insurance Co.*, 77 Cal. App. 5th 821 (2022).

The Second District’s opinion in *Endeavor* is a much more persuasive California Court of Appeal decision. *Endeavor*

exhaustively analyzes the disagreement between *United Talent Agency* and *Marina Pacific/Shusha* and ultimately comes down on the former's side. According to *Endeavor*, "the ephemeral presence of a virus on the surface of property does not alter or cause a physical change in the condition of the property." 96 Cal. App. 5th at 441 (quotation omitted). Further, *Endeavor* recognizes that while *Marina Pacific/Shusha* rely heavily on "the general principle requiring *factual* allegations to be accepted as true at the demurrer stage," they ignore the decisive point: even accepted as true, the "allegations do not, as a matter of law, meet the applicable definition triggering coverage." *Id.* at 442.

### CONCLUSION

For the reasons explained above, the decisions rendered after the filing of Vigilant's merits brief confirm that this Court should answer the certified question in the negative by holding that the COVID-19 virus does not cause "direct physical loss or damage" to property for property insurance purposes as a matter of law.



Dated: February 23, 2024

Respectfully submitted,  
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Counsel of Record hereby certifies that pursuant to Rule 8.520(d) of the California Rules of Court, the enclosed brief was produced using 13-point Century Schoolbook type and contains 1,078 words (including footnotes) as counted by Microsoft Word.

Dated: February 23, 2024

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