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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 SUPPLEMENTAL BRIEF

Kirk Pasich, SBN 94242
KPasich@PasichLLP.com
Nathan M. Davis, SBN 287452
NDavis@PasichLLP.com

PASICH LLP
10880 Wilshire Boulevard, Suite 2000
Los Angeles, CA 90024

Telephone: (424) 313-7860
Facsimile: (424) 313-7890

Attorneys for Petitioner
Another Planet Entertainment, LLC

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I. **INTRODUCTION**.

Petitioner Another Planet Entertainment, LLC respectfully submits this supplemental brief pursuant to California Rule of Court 8.520(d).

Since merits briefing closed on July 3, 2023, more courts have rendered decisions on the question of whether the presence of SARS-CoV-2 on and in property constitutes "direct physical loss or damage to property." Those decisions largely favor insurers. We address three here: *AC Ocean Walk, LLC v. American Guarantee & Liability Insurance Co.*, 2024 WL 252794 (N.J. Jan. 24, 2024), *Consolidated Restaurant Operations, Inc. v. Westport Insurance Corp.*, No. 7, 2024 WL 628047 (N.Y. Feb. 15, 2024), and *Starr Surplus Lines Insurance Co. v. Eighth Judicial District Court*, 535 P.3d 254 (Nev. 2023).

Each of these cases interprets "direct physical loss or damage" in all-risk property insurance policies in the context of the COVID-19 pandemic. None should inform this Court's decision on the certified question, however, for the following reasons:

1. *AC* and *Starr* did not give independent meaning to "physical loss" and "physical damage," but this Court requires that meaning be given to each word "over an interpretation that makes part of the writing redundant." *Yahoo Inc. v. Nat'l Union Fire Ins. Co.*, 14 Cal. 5th 58, 69 (2022);

2. *Consolidated* unreasonably narrowed the meaning of "physical loss" solely to "complete dispossession," when the plain meaning is not so

limited and this Court requires that insurance policies be interpreted broadly to afford the greatest possible protection to the insured.[1] *E.g.*, *MacKinnon v. Truck Ins. Exch.*, 31 Cal. 4th 635, 648 (2003);

3. *AC* ignored the insured's express allegations that SARS-CoV-2 caused a "physical change to the property that render[ed] it unusable or uninhabitable"—the exact definition the New Jersey Supreme Court held was required—but California courts construe allegations liberally and protect the reasonable expectations of the insured. Cal. Code Civ. Proc. § 452; *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 822 (1990);

4. *Starr* manufactured an entirely novel concept of physical loss or damage requiring "transformative element[s]" "received" by the property or a peril that "originates in the property," when those terms are nowhere in the policy and its own cited cases recognize physical loss or damage from perils originating miles away. 535 P.3d at 265-66 (ash blown into outdoor theater from off-site wildfires); and

5. Unlike Another Planet, neither insured in *AC* and *Consolidated* alleged its property was uninhabitable or unusable, with or without

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[1] *See, e.g.*, *Coast Rest. Grp., Inc. v. Amguard Ins. Co.*, 90 Cal. App. 5th 332, 340 (2023) ("Webster's Third New International Dictionary (2002) defines . . . 'loss' as[, among others,] 'act or fact of failing to gain, win, obtain or utilize.'").

the presence of SARS-CoV-2 on its property. Different facts compel different results. *See, e.g.*, *Waller v. Truck Ins. Exchange*, 11 Cal. 4th 1, 18 (1995).

These decisions effectively convert all-risk policies *without a virus exclusion* into named-perils policies with an unstated COVID-19 exception, overriding decades of case law and the reasonable expectations of insureds that necessarily followed. California law does not allow such a result, and these decisions should be disregarded.

II. NEW AUTHORITIES

A. *AC OCEAN WALK*

The New Jersey Supreme Court decided *AC* on January 24, 2024. *AC* violates California law by not giving independent meaning to the distinct terms "physical loss" and "physical damage." 2024 WL 252794, at *9-10 (defining "direct physical loss" as "the destruction of the property *or a physical change to the property that renders it unusable or uninhabitable*" and "direct physical damage" as "requir[ing] a physical change to the property" "that renders the property useless or uninhabitable" (emphasis added)).[2]

Even taking *AC*'s definition at face value, *AC* supports a finding of coverage for Another Planet. "Physical change to the property that renders it

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[2] *AC* also stated that "direct physical damage" denotes "a distinct, demonstrable, and physical alteration" of property, but summarized that description as "requir[ing] a physical change to the property," exactly as it did for "direct physical loss." *Id.* at *10.

unusable or uninhabitable" is *exactly* what Another Planet alleges. *See, e.g.*, O.B. at 49 ("Thus, SARS-CoV-2 causes physical damage and physical loss by, among other things, physically permeating, attaching to, binding to, corrupting, destroying, distorting, and altering property, and by rendering it unusable, unfit for its intended function, dangerous, and unsafe.") (summarizing allegations and supporting evidence provided in the Complaint and included in the record, detailed at O.B. 41–48). Thus, *AC* is no obstacle here.

Furthermore, the New Jersey Supreme Court inexplicably ignored the insured's express allegations that the presence of SARS-CoV-2 caused a physical change to its property that rendered it unusable or uninhabitable. 2024 WL 252794, at *6; *but see AC Ocean Walk, LLC v. Am. Guar. & Liab. Ins. Co.*, 2021 WL 6091224, at *3 (N.J. Super. L. Dec. 22, 2021). The court's restrictive interpretation conflicts with the broad all-risk coverage grant and deprives the insured of its reasonable coverage expectations. *See, e.g.*, *AIU*, 51 Cal. 3d at 822 (courts interpret insurance coverage clauses broadly, protecting the reasonable expectations of the insured).[3]

B. *CONSOLIDATED*

The New York Court of Appeals decided *Consolidated* on February 15, 2024. *Consolidated* defined "physical loss" as requiring "actual, complete

[3] The property in *AC* also remained partially open for "limited operations" and was not rendered uninhabitable or unusable. 2024 WL 252794, at *11. Another Planet's operations and venues ceased completely, justifying a different result.

dispossession." 2024 WL 628047, at *4. But California courts reject this restrictive definition, and *Consolidated* provides no justification for why this would be the *only* reasonable meaning.[4]

Consolidated acknowledged that noxious fumes, odors, and gases can cause physical loss or damage where they essentially "eliminate[] the function of the building." *Id.* at *5.[5] The insured failed to meet this standard because, according to the court, it did not allege a "complete shutdown" of its property or that its property was "contaminated to the point of uninhabitability, as opposed to prudent economic decisions in light of lost 'foot-traffic.'" *Id.* at *6. By contrast, uninhabitability and complete shutdown of property due to the presence of SARS-CoV-2 is exactly what Another Planet alleges, not mere "prudent economic decisions" to close. *See, e.g.*, O.B. at 41–63. Thus, *Consolidated* is not instructive as to Another Planet's facts.

Consolidated justified its decision in part on the incorrect belief that "no appellate court" has allowed an insurance coverage claim to proceed past dismissal under similar policy terms alleging SARS-CoV-2 physically altered its

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[4] *Coast*, 90 Cal. App. 5th at 342 (physical loss does not require "complete dispossession"—an "inability to use property in a particular way" is sufficient); *see also Huntington Ingalls Indus., Inc. v. Ace Am. Ins. Co.*, 287 A.3d 515, 530 (2022) (deprivation of property need not be "complete"—partial inability to use property for its purpose is enough).

[5] *Consolidated* rejected many of the noxious substance and gas cases for "provid[ing] insufficient detail," but did not say what more it wanted. *Id.* at *5 & n.4 (citing cases concerning gasoline fumes, unpleasant odors, ammonia, and asbestos).

property and rendered it unusable for its intended purpose. *Id.* at *6, *7. As this Court knows, several California Courts of Appeal have held that insureds properly allege SARS-CoV-2 and government orders cause physical loss or damage to property. *See, e.g.*, *Shusha*, 87 Cal. App. 5th at 250 (allegations that SARS-CoV-2 "adheres to, attaches to and alters . . . property" are sufficient to plead physical loss or damage to covered property); *Marina Pacific Hotel & Suites, LLC v. Fireman's Fund Ins. Co.*, 81 Cal. App. 5th 96, 108–09 (2022) (same); *Coast*, 90 Cal. App. 5th 332 (government orders are sufficient to constitute physical loss or damage, but affirming dismissal because of absolute virus exclusion).[6] *Consolidated*'s myopic justification is out of touch with California law and should be ignored.

The *Consolidated* court strained to arrive at its outcome, creating (and not resolving) some intellectual dissonance. For example, the court recognized that noxious particles in airspaces and on surfaces resulting from the September 11, 2001, terrorist attacks amounted to "direct physical damage" to property but did not reconcile how those particles somehow merited coverage while SARS-CoV-2 particles did not. 2024 WL 628047, at *5. Similarly, the court acknowledged that

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[6] The Court of Appeal continues to issue irreconcilable decisions on the same question of pandemic-caused physical loss or damage, providing strong evidence of ambiguity. *Compare, e.g.*, *San Jose Sharks, LLC v. Superior Court*, 98 Cal. App. 5th 158, 168-70 (2023) (agreeing with *Shusha* and *Marina Pacific*), *review filed* (Jan. 30, 2024), *with Endeavor Operating Co., LLC v. HDI Glob. Ins. Co.*, 96 Cal. App. 5th 420, 441 (2023) (finding no potential for coverage), *review granted* (Dec. 13, 2023).

courts considering the presence of asbestos within airspaces found "direct physical loss," but in setting those decisions aside did not discuss why SARS-CoV-2 should be treated differently. *Id.*

Additionally, the *Consolidated* court departed from maxims that this Court has long espoused. For example, the court admitted that it was not "generously constru[ing] the complaint," *id.* at *6, but California law requires liberal construction of allegations with the benefit of reasonable factual inferences inuring to the pleader. Cal. Code Civ. Proc. § 452; *Schifando v. City of Los Angeles*, 31 Cal. 4th 1074, 1081 (2003). Additionally, the *Consolidated* court used selective dictionary definitions to import concepts of "permanence" and "complete dispossession" into "direct physical loss or damage," regardless of other reasonable interpretations of that undefined term. 2024 WL 628047, at *3-*4; *see contra Huntington*, 287 A.3d at 529 (examining broader definitions and ruling in favor of the insured); *Inns-by-the-Sea v. Cal. Mut. Ins. Co.*, 71 Cal. App. 5th 688, 705 n.18 (2021) ("the dictionary definition of 'loss' could encompass the mere loss of use of real property"). This Court has explicitly warned against such interpretive measures. *E.g.*, *MacKinnon*, 31 Cal. 4th at 649 ("a court properly refusing to make a fortress out of the dictionary must attempt to put itself in the position of a layperson and understand how he or she might reasonably interpret the [policy] language" (cleaned up)).

Finally, California law provides special features that did not come into play in the *Consolidated* decision. Chief among them is that California permits the

consideration of extrinsic evidence to expose a latent ambiguity within an insurance policy in a court's endeavor to ascertain the parties' intent. Cal. Civ. Code § 1647; *Dore v. Arnold Worldwide, Inc.*, 39 Cal. 4th 384, 391 (2006); *Pacific Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 37 (1968). Entirely absent from *Consolidated* is any mention of the insurer's extrajudicial statements regarding the threat that a pandemic posed to insurers' financial positions, as well as the existence and genesis of the Insurance Services Office's standardized exclusion for losses caused by viruses and bacteria for commercial property insurance policies. *See* O.B. at 31-39.

C. *STARR*

The Nevada Supreme Court decided *Starr* on September 14, 2023. Following *Starr* would require (1) violating California's rule that the distinct terms "physical loss" and "physical damage" must be given independent meaning; and (2) eviscerating broad all-risk coverage by adopting a definition of physical loss or damage requiring covered perils to "originate in" the property.

It is a cardinal rule of this Court that meaning be given to each word in an insurance policy, and to eschew interpretations "that make[] part of the writing redundant." *Yahoo*, 14 Cal. 5th at 69. *Starr* rightly determined that policies providing coverage for all-risk of "direct physical loss or damage" "establish[] two bases for coverage: 'direct physical loss' as well as 'direct physical damage.'" 535 P.3d at 261. In the very next paragraphs, however, *Starr* combined physical loss with physical damage, contending "they are not wholly distinct concepts,"

and that physical loss is merely "a greater degree of harm" than physical damage. *Id.* at 262. Thus, *Starr* reduces the policy to covering all-risk of (1) "direct physical damage," or (2) really bad "direct physical damage." *See id.*

This Court does not allow such redundant interpretation, or truncating coverage under all-risk policies. *Yahoo*, 14 Cal. 5th at 69; *MacKinnon*, 31 Cal. 4th at 648 (insurance policies must be "interpreted broadly so as to afford the greatest possible protection to the insured"). Accordingly, the Fourth Appellate District explained that "where 'loss' and 'damage' are both included in the insuring clause," "loss" is not simply an extreme form of "damage," but "must mean something different from 'damage'" altogether. *Coast*, 90 Cal. App. 5th at 343 ("loss" does not "require[] physical alteration or damage to covered property," whereas "damage" likely does).

In California, an insurer can prevail only if it "establish[es] that its interpretation is the *only* reasonable one" and there is no alternative. *MacKinnon*, 31 Cal. 4th at 655. One reasonable interpretation is that "physical loss" occurs when a physical peril or government order renders property unusable or uninhabitable (temporarily or permanently), and "physical damage" means physical alteration (although such alteration need not be "structural" or "perceptible"). *E.g.*, *Coast,* 90 Cal. App. 5th at 340, 343; *Shusha, Inc. v. Century-Nat'l Ins. Co*., 87 Cal. App. 5th 250, 260 (2022), *review granted* (Apr. 19, 2023). *Starr*, like Vigilant here, fails to explain why this interpretation is unreasonable, or why its preferred interpretation is the *only* reasonable one. *See State Farm Mut.*

Auto. Ins. Co. v. Jacober, 10 Cal. 3d 193, 197 (1973) (courts "have no occasion to determine which of the various proposed interpretations . . . is the 'correct' one," the insured's interpretation need only be reasonable to control).

The Nevada Supreme Court's definition of "direct physical loss or damage" asks "whether the property experienced material or tangible dispossession, destruction, harm, or injury." 535 P.3d at 263. But the court also recognized an "uninhabitability or loss-of-use theory of 'direct physical loss or damage'" satisfied by the "'contaminating' nature of physical forces" including "vapors, bacteria, or other foreign substances [that] render[] the property essentially unusable." *Id.* at 265. JGB's allegations and evidence, like Another Planet's, easily satisfied that definition, so the court had to go further.[7] With each additional step, the court strayed further from precedent and reason.

First, the court determined that the virus "'attach[ing] to' the property" is not the kind of "transformative element" ostensibly needed for physical loss or damage. Nothing in the policy requires "transformation" of property to trigger coverage. And the very cases on which *Starr* relied involved no attachment to or transformation of property whatsoever, yet the court had no difficulty agreeing

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[7] *See id.* at 263, 265 (recognizing "JGB supplied evidence that facially bolsters an uninhabitability or loss-of-use theory of 'direct physical loss or damage,'" and detailing that JGB provided evidence that the virus was present on and "'attache[d] to' the property" and "physically alter[ed] the property"); *cf.* O.B. at 49 (explaining the science showing SARS-CoV-2 "physically permeat[es], attach[es] to, bind[s] to, corrupt[s], destroy[s], distort[s], and alter[s] property, and render[s] it unusable, unfit for its intended function, dangerous, and unsafe.").

with those findings of physical loss or damage. *See* 535 P.3d at 263, 265 (relying on *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co.*, 2016 WL 3267247 (D. Or. June 7, 2016), where smoke in the ambient air from off-site wildfires rendered an outdoor theater "unusable for its intended purpose" of live performances, and the "temporary accumulation of soot and ash on the surface of the open-air theater," was cleaned in minutes each day "using rags and buckets of water").[8]

Second, the court determined that transforming air and surfaces into deadly vectors of disease through physical attachment of SARS-CoV-2 is insufficient because the virus does not harm the property itself, only people. 535 P.3d at 264. This reasoning fails under *Starr's* own cases. "Odors" do not harm property itself—property has no sense of smell. *Contra id.* at 263-64. "[N]oxious gases, asbestos, [and] lead" do not harm property itself—property cannot breathe. *Contra id*. Yet, the court correctly acknowledged that all of these "physical forces" cause physical loss or damage, as courts have recognized for decades. *Id.*; *see also* Amicus Brief of San Manuel Band of Mission Indians at 37–39 (providing additional examples). Impact on people that inhabit property is and has always been a touchstone of the physical loss or damage analysis.

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[8] In *Oregon*, it was "undisputed that the performances were cancelled due to poor air quality and the related health concerns," *not* because of the ash's impact on the property. 2016 WL 3267247, at *3. Indeed, "[t]here were days during the smoky time period that soot or ash landed on the seats in the open-air theater and [the insured] chose not to cancel the performance that evening." *Id*.

Third, the court determined that for the "uninhabitability" or "loss-of-use" standard to apply, the "physical force" must "originate in" the property itself, or there must be a "defect" "inherent to the property." 535 P.3d at 265-66 (citing, among others, *Oregon*, 2016 WL 3267247; *Mellin v. N. Sec. Ins. Co., Inc.*, 115 A.3d 799, 801 (2015)). This is demonstrably incorrect. The airborne smoke that rendered the outdoor theater unusable in *Oregon* blew in from wildfires miles away. 2016 WL 3267247, at *1. The "cat urine odor" that rendered the insured property unusable in *Mellin* came from a separate condominium and entered the insured unit "through an open plumbing chase servicing the kitchen." 115 A.3d at 801. Neither property had any "defect." Yet, the Nevada Supreme Court pointed to both as paradigmatic examples of "loss of use" physical loss or damage.

Nothing in the policy or case law differentiates between the peril's origin or how it came to be on insured property. *Cf.* Starr, 535 P.3d at 265-66. Physical loss or damage occurs when a dangerous or noxious substance renders insured property unusable for its intended purpose, whether blown in by the wind, wafting up a service pipe, or brought onto the property by visitors. *Starr*'s contrived distinctions to exclude coverage for SARS-CoV-2 defy decades of precedent, this Court's interpretive framework, and reason.

III. CONCLUSION.

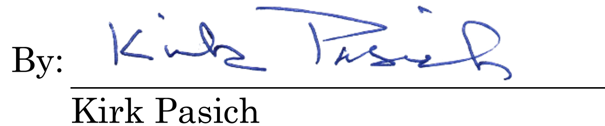
Decades of pre-pandemic case law and this Court's interpretive canons demonstrate that Another Planet, certain amici, and other California insureds who purchased broad all-risk policies *without a virus exclusion* reasonably expected

coverage for physical loss or damage caused by SARS-CoV-2. The unwritten "COVID-19 exception" to all-risk coverage endorsed by other courts is contrary to California law and its insureds' reasonable coverage expectations, and should be rejected by this Court.

Another Planet respectfully requests that the Court answer the certified question in the affirmative and define "direct physical loss or damage" as including situations where a physical substance (1) renders property partially or wholly unusable for its intended purpose ("physical loss"), or (2) alters the surfaces, air, or airspace of covered property ("physical damage").

DATED: February 23, 2024

PASICH LLP

By: 

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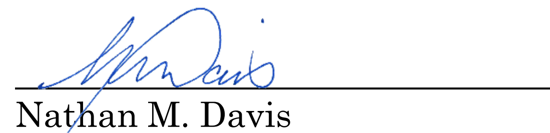

Nathan M. Davis

Attorneys for Petitioner Another Planet Entertainment, LLC

CERTIFICATE OF COMPLIANCE WITH RULE 8.520

I, the undersigned, Kirk Pasich, 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.

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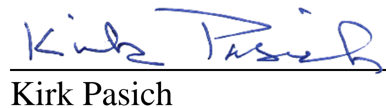

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Lorelie Masters Hunton Andrews Kurth LLP	lmasters@huntonak.com	e-Serve	2/23/2024 5:38:21 PM
Jonathan Hacker O'Melveny & Myers LLP 456553	jhacker@omm.com	e-Serve	2/23/2024 5:38:21 PM
Andrew Collier Pacific Law Partners, LLP 232647	acollier@plawp.com	e-Serve	2/23/2024 5:38:21 PM
Opinions Clerk United States Court of Appeals for the Ninth Circuit	Clerk_opinions@ca9.uscourts.gov	e-Serve	2/23/2024 5:38:21 PM
Shari Covington California Medical Association 312078	scovington@cmadocs.org	e-Serve	2/23/2024 5:38:21 PM
Michael Levine Hunton Andrews Kurth LLP	mlevine@huntonak.com	e-Serve	2/23/2024 5:38:21 PM
Katherine Ellena Reed Smith, LLP 324160	kellena@reedsmith.com	e-Serve	2/23/2024 5:38:21 PM
Nicolas Pappas Reed Smith, LLP 316665	NPappas@reedsmith.com	e-Serve	2/23/2024 5:38:21 PM
Jenya Godina O'Melveny & Myers LLP 5705157	jgodina@omm.com	e-Serve	2/23/2024 5:38:21 PM
John Ellison	jellison@reedsmith.com	e-	2/23/2024

Reed Smith, LLP		Serve	5:38:21 PM
Scott Devries Hunton Andrews Kurth LLP 2166205	sdevries@huntonak.com	e-Serve	2/23/2024 5:38:21 PM
Kyle Casazza 254061	kcasazza@proskauer.com	e-Serve	2/23/2024 5:38:21 PM
Travis Pantin University of Connecticut School of Law 5519293	travis.pantin@uconn.edu	e-Serve	2/23/2024 5:38:21 PM
Kirk Pasich Pasich LLP 94242	kpasich@pasichllp.com	e-Serve	2/23/2024 5:38:21 PM
Clarke Holland Pacific Law Partners, LLP 76805	cholland@plawp.com	e-Serve	2/23/2024 5:38:21 PM
Thomas Martecchini Covington & Burling LLP 321515	tmartecchini@cov.com	e-Serve	2/23/2024 5:38:21 PM
Lisa Law Pasich LLP	llaw@pasichllp.com	e-Serve	2/23/2024 5:38:21 PM
Yosef Itkin Hunton Andrews Kurth 287470	yitkin@huntonak.com	e-Serve	2/23/2024 5:38:21 PM
Nathan Davis Pasich LLP 287452	ndavis@pasichllp.com	e-Serve	2/23/2024 5:38:21 PM
Raul Martinez Lewis, Brisbois Bisgaard & Smith LLP 82465	Raul.Martinez@lewisbrisbois.com	e-Serve	2/23/2024 5:38:21 PM
David Goodwin Covington & Burling LLP 104469	dgoodwin@cov.com	e-Serve	2/23/2024 5:38:21 PM
Laura Martinez Lewis Brisbois Bisgaard & Smith LLP	Laura.Martinez@lewisbrisbois.com	e-Serve	2/23/2024 5:38:21 PM
Mark Plevin Crowell & Moring 146278	mplevin@crowell.com	e-Serve	2/23/2024 5:38:21 PM
Vincent Gannuscio Roxborough, Pomerance, Nye & Adreani, LLP 207396	vsg@rpnalaw.com	e-Serve	2/23/2024 5:38:21 PM
John Hazelwood Cohen Ziffer Frenchman & McKenna LLP 5785712	jhazelwood@cohenziffer.com	e-Serve	2/23/2024 5:38:21 PM
Ryan Anderson Guttilla Murphy Anderson 224816	randerson@gamlaw.com	e-Serve	2/23/2024 5:38:21 PM
Carol Romo Crowell & Moring LLP	cromo@crowell.com	e-Serve	2/23/2024 5:38:21 PM
Robert Wallan	robert.wallan@pillsburylaw.com	e-	2/23/2024

Pillsbury Winthrop Shaw Pittman LLP 126480		Serve	5:38:21 PM
Christina Kroll Proskauer Rose LLP 323026	ckroll@proskauer.com	e-Serve	2/23/2024 5:38:21 PM
Juanita Fernandez Pasich LLP	jfernandez@pasichllp.com	e-Serve	2/23/2024 5:38:21 PM
Brook Roberts Latham & Watkins LLP 214794	brook.roberts@lw.com	e-Serve	2/23/2024 5:38:21 PM
Rani Gupta Covington & Burling LLP 296346	rgupta@cov.com	e-Serve	2/23/2024 5:38:21 PM

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

2/23/2024
Date

/s/Kirk Pasich
Signature

Pasich, Kirk (94242)
Last Name, First Name (PNum)

Pasich LLP
Law Firm