No. B316058

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION THREE

CALIFORNIA FAIR PLAN ASSOCIATION,

Appellant,

v.

RICARDO LARA, IN HIS OFFICIAL CAPACITY AS THE INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,

Respondent.

On Appeal from the Superior Court for
the County of Los Angeles
Hon. Mary H. Strobel
Case No. 19STCP05434

APPLICATION OF UNITED POLICYHOLDERS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF RESPONDENT

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

Pursuant to California Rule of Court 8.200(c), United Policyholders ("UP") respectfully applies for this Court's permission to file the accompanying *amicus curiae* brief in support of Respondent, California Insurance Commissioner Ricardo Lara.

STATEMENT OF INTEREST OF *AMICUS CURIAE* UNITED POLICYHOLDERS

Founded in 1991, UP is a highly respected 501(c)(3) non-profit organization based in California that educates, assists and is a voice for the interests of insurance policyholders with a special focus on disaster preparedness and recovery. In support of its mission, UP routinely informs the public, governmental agencies, legislators, and the courts on consumer concerns related to insurance policy sales, claim, coverage and marketplace matters.

Grants, donations, and volunteers support UP's work in three program areas: *Roadmap to Recovery*—free insurance and decision-making guidance, tools, and resources provided to people, businesses and communities in the aftermath of wildfires, floods, earthquakes, hurricanes and isolated catastrophes; *Roadmap to* Preparedness—an outreach and education program that helps renters, home and small business owners take specific steps to protect their assets and build financial safety nets for disaster resiliency; and *Advocacy & Action*—UP's work to promote fair sales and claim practices and policy and legal outcomes that uphold policyholders' reasonable expectations of coverage and the principle of indemnification that underlies our insurance system.

Starting with the 1991 Oakland/Berkeley firestorm and continuing through other catastrophic wildfires in 2003, 2007, 2009, 2017, 2018 and 2020, the 1994 Northridge Earthquake, mudslides and landslides, flooding events and catastrophes of all shapes and sizes, California property owners have been relying on United Policyholders for information and help navigating the process of documenting and valuing losses and negotiating full and fair insurance claim settlements.

Public officials, the California Department of Insurance, California Earthquake Authority, insurance professionals, academics, and journalists throughout the U.S. routinely seek UP's input. UP serves on the Federal Advisory Committee on Insurance, which briefs the Federal Insurance Office and, in turn, the U.S. Treasury Department. UP's Executive Director has been an official consumer representative to the National Association of Insurance Commissioners since 2009. In these roles, UP is a conduit for information on insurance policy language, sales and claim handling practices that are defeating consumers' reasonable expectations of coverage and preventing loss indemnification.

Since 1991, UP has filed numerous *amicus* briefs in federal and state appellate courts across the country. The United States Supreme Court, the California Supreme Court, and other state supreme courts have cited UP's amicus briefs in their opinions.

See, e.g., *Humana Inc. v. Forsyth* (1999) 525 U.S. 299, 314 (favorably citing UP's amicus brief); *Pitzer Coll. v. Indian Harbor Ins. Co.* (2019) 8 Cal.5th 93, 104-105 (favorably citing UP's amicus brief); *Ass'n of Cal. Ins. Cos. v. Jones* (2017) 2 Cal.5th 376, 382-383 (favorably citing UP studies).[1]

UP continues its mission of supporting policyholders through its *amicus* efforts here in support of Appellants.

UP'S *AMICUS CURIAE* BRIEF WILL ASSIST THIS COURT

Ensuring that property insurance remains affordable and available to Californians remains a high priority for UP, our partners and the consumers we serve, and we have a strong interest in the Fair Plan's strength and integrity. Insurance is woven into the fabric of the U.S. economy through mortgage-related mandatory purchase requirements and personal and business risk management and financial resiliency best practices.

United Policyholders monitors and publishes educational materials about the California Fair Plan ("FAIR Plan") and periodically hosts recorded educational programs about FAIR Plan products and claim processes that feature FAIR Plan representatives. United Policyholders routinely conducts surveys and hosts multiple channels through which consumers communicate information and concerns about property insurance matters, including the FAIR Plan. UP closely monitors FAIR Plan products and the insurance marketplace generally, and maintains partnerships and collaborative relationships with

[1] A list of *amicus curiae* briefs filed by UP can be found at https://www.uphelp.org/resources/amicus-briefs.

stakeholders, agencies, associations and professionals who routinely interface with the FAIR Plan. UP stays current on favorable and unfavorable developments that impact consumers and constantly seeks solutions for the latter.

While the overall profitability and solvency of the insurance marketplace is of course important, as the Supreme Court has noted, the dominant purpose of insurance is "to indemnify the insured in case of loss." *Ins. Co. of N. Am. v. Elec. Purification Co.* (1967) 67 Cal.2d 679, 689 (citation omitted); *see also* American Law Institute (2019) Restatement of the Law of Liability Ins. § 2, Reporters' Note c ("insurance policies are read to effect the policy's dominant purpose of indemnity").

But the loss indemnification and financial safety net purpose of insurance can only be effectuated where consumers have access to purchase adequate protection. The FAIR Plan is extremely important to California home and business owners, localities and the state, the lending sector and our state's overall economy. It should be a model program that Californians can rely on and that other states can look to as an example of a government-supported insurer of last resort that sells basic coverage and is solvent and fair in its sales and claim practices.

UP's proposed *amicus* brief will assist this Court by highlighting why the Commissioner's orders at dispute in this appeal should be upheld.

RULE 8.200(c)(3) DISCLOSURE

Consistent with California Rule of Court 8.200(c)(3), UP states that no party or any counsel for any party authored this amicus brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of this brief. No other person or entity made a monetary contribution to fund the preparation or submission of the brief other than the *amicus curiae* and its counsel.

CONCLUSION

UP respectfully asks the Court to grant this application and permit UP to file the accompanying *amicus curiae* brief.

DATE: January 5, 2023 Respectfully submitted,

UNITED POLICYHOLDERS

By: */s/ Richard Oatis*
Richard B. Oatis

Attorney for Amicus Curiae
United Policyholders

No. B316058

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[PROPOSED] *AMICUS CURIAE* BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF RESPONDENT

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INTRODUCTION AND SUMMARY OF ARGUMENT

The California State legislature long ago established Appellant California FAIR Plan ("FAIR Pan") as a last resort option to fill availability gaps that periodically arise in the private insurance marketplace. It is a vital backstop for individuals and businesses when they can't find an option in the competitive home insurance marketplace. The FAIR Plan facilitates home ownership and sales and allows people to meet their mortgage obligations and protect their assets. It provides an essential safety net for homeowners without burdening taxpayers at large. During property insurance availability crises such as the one the state is currently navigating—it is invaluable to California's economy.

The purpose of the FAIR Plan under California Insurance Code § 10090 are:

(a) To assure stability in the property insurance market for property located in the state of California.

(b) To assure the availability of basic property insurance as defined by this chapter.

(c) To encourage maximum use, in obtaining basic property insurance, of the normal insurance market provided by admitted insurers and licensed surplus line brokers.

The FAIR Plain's "recipe" spreads property damage risk across all licensed and admitted insurers doing business in the state of California. It is an equitable way of requiring California licensed and admitted insurers to take a modest amount of risk they would not otherwise underwrite, but only in proportion to their overall voluntary market share. In comparison to other state-run insurers of last resort such as in Texas and Florida, California's Fair Plan's rates are actuarially sound and there has been a minimum of legislative involvement in their operations. In many ways, its structure is a model for effective risk spreading and sharing.

Because of its important and unique position, the FAIR Plan must be held to the highest standards of service and consumer protection and continue to evolve with the changing times to fulfill its mission of financially protecting real property assets and promptly and fairly indemnifying its customers in the event of a loss.

Drought and extreme heat associated with climate change has increased wildfire risk in "Wildland Urban Interface" and brush areas, and insurance companies have reacted by dropping long time customers and declining new business in those regions. This has made it very hard for home and business owners outside urban areas to keep their assets affordably or fully insured and comply with lender requirements. More and more Californians have had to turn to the FAIR Plan in recent years to procure coverage.

While the bare bones property damage coverage that a FAIR Plan policy provides has helped many thousands of wildfire victims repair and rebuild, Californians need more than bare bones—they need the basic, adequate level of protection that a standard homeowners policy provides.

The enhanced coverages ordered by Respondent Ricardo Lara in his official capacity as the California Insurance

Commissioner ("Commissioner"), will enable FAIR Plan policies to be a much more effective safety net and resiliency tool for Californians in regions throughout the state. Further, the Commissioner's order will prevent the complications and extra expense that property owners are encountering due to having to purchase multiple policy contracts with differing wording and effective dates.

STANDARD OF REVIEW

In this case, as the petitioner below, it is the FAIR Plan's "burden to establish that the agency's decision was arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair." *American Coatings Assn. v. South Coast Air Quality Management Dist.* (2012) 54 Cal.4th 446, 460.

On appeal, this Court applies "the substantial evidence test to the trial court's factual findings." *Klajic v. Castaic Lake Water Agency* (2001) 90 Cal.App.4th 987, 995–996. Importantly, "foundational matters of fact are conclusive on appeal if supported by substantial evidence." *Id.* (citing *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1169-1170).

Regarding legal question, appellate courts exercise independent judgment. *Kreeft v. City of Oakland* (1998) 68 Cal.App.4th 46, 53; *Saathoff v. City of San Diego* (1995) 35 Cal.App.4th 697, 700.

ARGUMENT

I. A More Comprehensive FAIR Plan Insurance Policy Makes Economic and Practical Sense

A. Liability and Basic Property Damage Protection Is A Fundamental Part Of Standard Homeowner Insurance Coverage

A central question in this appeal is whether the liability component of a standard homeowner's insurance policy counts as "basic property insurance" as defined by Section 10091(c). The parties devote significant portions of their briefs to Section 10091(c)'s definition of the term,[2] the rules of statutory construction, the legislative history of the statute, the FAIR Plan's decades-long offer of liability coverage in the insurance policies it sells to businessowners, the amount of deference owed to the Commissioner's interpretation, and other relevant considerations.

Though UP agrees with and supports the Commissioner's arguments, this brief does not rehash them. Rather, it makes an additional point based on UP's long history of working with and advising homeowners on how to protect their assets and build financial safety nets:

Regardless of how the term "basic property insurance" is defined under Section 10091(c), liability coverage is in practice considered one of the basic and standard coverages that individual homeowners are invariably advised to acquire when

[2] Section 10091(c) defines "basic property insurance" in relevant part as "insurance against direct loss to real or tangible personal property . . . and such other insurance coverages as may be added with respect to such property . . . by the commissioner."

purchasing insurance for their home. Insurance and finance professionals do not consider liability coverage to be a special heightened protection for idiosyncratic or especially risk-averse people. And in line with standard professional guidance, the vast majority of homeowners desire premises liability coverage.

For example, an easy-to-read and consumer-facing UP flyer notes that while the "California FAIR Plan offers basic *fire* protection" (emphasis added) that an additional "difference in conditions policy" is needed to "plug in the gaps in the FAIR Plan policy" to return a typical homeowner to the coverage they initially possessed. *See Dropped by you home Insurer? Steps to take in California,* available at https://uphelp.org/wp-content/uploads/2020/09/2020-DROPPED-CA-Dropped-by-your-Insurer.png. In other words, the flyer advises homeowners of the need to purchase a separate difference in conditions policy to achieve the basic level of protection that the vast majority of homeowners expect and require: Protection against damage from common events such as wind-driven rain, accidental pipe breaks, overflowing toilets and lawsuits, *and* wildfires.

In the same vein, UP-hosted webinars and other informational resources for consumers feature finance and insurance guidance professionals strongly recommending that individual homeowners purchase a separate difference in conditions policy when their fire protection is secured through the FAIR Plan. *See, Keeping Your Home Protected When Insurance*

Options Are Limited and Expensive, October 27, 2022 webinar at 56'47"-57'45", available at https://youtu.be/FrXlV-JBR-w.[3]

At bottom, homeowners in California need coverage that protects them from the most common and severe risks to their homes and financial security—this includes fire, water damage, and importantly, premises liability. These are basic insurance protections, and homeowners should not have to purchase a separate difference in conditions policy to have them. While the insurance industry focuses on a narrow and cramped interpretation of the "basic property coverage" language in the statute, it is clear from the actual decisions of California homeowners that the vast majority consider it essential that their basic residential coverage includes protection for liabilities

[3] Expert panel discussion regarding the need to supplement a FAIR Plan homeowner policy with difference in conditions policy:

John Wheatley (Vice President of Insurance, RCU Insurance Services): "You put the DIC together with the FAIR Plan [and] it makes [] basically kind of a bare minimum homeowner's package."

. . .

Amy Bach (Executive Director, United Policyholders): "So, do you pretty much recommend to anybody who has no option but the FAIR plan that they also get a DIC? Is that sort of normal or no?"

John Wheatley: "Period."

Amy Bach: "Absolutely? – OK. Phil, I see you nodding your head the same?"

Phil Irwin (President, Gold Insurance Solutions): "100%."

arising from injury or loss to third parties that occurs on the property.

Perhaps liability exposures were discounted at the inception of the FAIR Plan when the program was rolled out to serve primarily inner-city homeowners, many unfairly redlined, who were grateful to receive even the most limited of coverage in the 1960s. But regardless of that somber history, today, the FAIR Plan should provide all the major components of a standard homeowner policy in order to be considered to provide "basic" home insurance coverage.

B. Numerous Homeowners Across California Struggle to Obtain Adequate Insurance

The rapidly growing difference in conditions market is creating confusion, inefficiencies, coverage gaps, and additional expenses and brokers fees that result from placing two insurance policies instead of one. The Commissioner's order requiring the FAIR Plan to offer a more extensive package homeowner policy, if upheld, will help fix issues created by the difference in conditions market and will benefit Californians.

It is important to understand that the theoretical possibility of purchasing a difference in conditions policy does not guarantee that every California homeowner with a FAIR Plan policy will be able to easily secure the standard home coverage they need. While difference in conditions policies may not have restrictions based on fire/wildfire risk, they still may have other underwriting restrictions in place such as for previous losses, prior water damage, age of the home, condition of plumbing/electrical/roof components, rental occupancy, landscape hazards, and a host of other concerns common. These complications inevitably result in certain homeowners with less coverage than desired.

In addition, the administrative friction associated with purchasing multiple homeowner insurance policies often leads to homeowners failing to secure appropriate coverage even when they attempt to do so. The cumulative extent to which significant property losses are not covered by insurance is referred to as the "protection gap," and is increasingly being studied by academics and policymakers concerned about the societal and economic implications of widespread underinsurance. *See* Jay M. Feinman, *The Protection Gap in Homeowners Insurance: An Introduction*, Rutgers Center for Risk and Responsibility (2019); Kenneth S. Klein, *Minding the Protection Gap: Resolving Unintended, Pervasive, Profound Homeowner Underinsurance*, 25 Ct. Ins. L. J. 35, 60-80 (2018-19).

While the protection gap impacts policyholder across the state, it is particularly pronounced for FAIR Plan recipients, who tend to be vulnerable, both geographically and economically. That FAIR Plan policyholders are more vulnerable than average is unsurprising given that the FAIR Plan is California's "insurer of last resort . . . statutorily mandated to make available basic property insurance to any 'persons having an interest in real or tangible personal property who, after diligent effort . . . are unable to procure such insurance." *St. Cyr et al. v. California FAIR Plan Assn.* (2014) 223 Cal.App.4th 786, 793.

Given that low-income individuals are more likely to live in neighborhoods that face higher environmental risks, it stands to reason that the CFP policyholders are less able to afford a difference in condition policy on top of their CFP policy. *See* Alex Fredman, *Regulators Should Identify and Mitigate Climate Risks in the Insurance Industry*, Center for American Progress, available at https://www.americanprogress.org/article/regulators-should-identify-and-mitigate-climate-risks-in-the-insurance-industry/ citing *Re: FIO Insurance Sector and Climate-Related Financial Risk,* Public Citizen, November 15, 2021, available at *https://www.regulations.gov/comment/TREAS-DO-2021-0014-0016*.

Shopping in the competitive insurance market for coverage for a home in a wildfire risk area has become a grueling and confusing process.

Through UP's "Roadmap to Preparedness" program work aimed at increasing disaster preparedness and resiliency in vulnerable communities throughout California, UP staff frequently interact with home and business owners who are struggling to find and afford property insurance. In just the past half-year, UP staff participated in public events and town halls across wildfire risk areas including Shaver Lake (June 25, 2022), Fresno (July 18, 2022), Wonder Valley (September 26, 2022) and Oakhurst (September 27, 2022). UP's website contains various pages and vides regarding disaster preparedness and, specifically, the process for acquiring insurance after being dropped by one's home insurer. *See Dropped by your home*

Insurer? Where to go for help in California, available at https://uphelp.org/buying-tips/dropped-by-your-insurer-where-to-go-for-help-in-california/; *The lowdown from UP on the California FAIR Plan, the last resort option for insuring your home*, available at https://uphelp.org/buying-tips/the-lowdown-from-up-on-the-california-fair-plan-the-last-resort-option-for-insuring-your-home/; *How to Shop When You've Been Dropped: Buying Home Insurance in Crisis Conditions*, available at https://uphelp.org/events/how-to-shop-when-youve-been-dropped/.

At these in-person and online events, UP routinely provides shopping guidance and information on available options, including the FAIR Plan. Many homeowners are initially unaware of what the FAIR Plan is, and many others invariable become confused about the difference between FAIR Plan policies and those available in the private market, not to mention the need to purchase a separate difference in conditions policy to supplement the minimum protections provided by the FAIR Plan. Though UP does its best to educate policyholders, it is only able to reach people who attend public events or proactively visit UP's website. And even among that subset of consumers, UP is aware of numerous individuals who are on the FAIR Plan and lack difference in conditions supplemental insurance due to lack of awareness, misunderstanding of what is covered by the FAIR Plan, or inability to pay for a second difference in conditions policy.

Since 2017 UP has been conducting surveys of Californians who have been dropped by their home insurer and are having trouble finding replacement protection, let alone at an affordable price. *See* Dropped by your home Insurer? Where to go for help in California, available at *https://uphelp.org/buying-tips/dropped-by-your-insurer-where-to-go-for-help-in-california/*.

These surveys elicit data on annual home insurance premiums as well as availability. In 2022, UP received 570 survey responses from homeowners who had been non-renewed by their insurance company. Of these people, over 80% reported being dropped because of wildfire risk, a condition entirely outside the control of the homeowner. And over 90% of respondents reported that their insurance company gave them no specific improvements to make in order to keep their policy. Unsurprisingly, out of a scale to measure the difficulty of finding replacement coverage, from 1 to 100 (with 100 being the hardest) survey respondents reported an average of 81. California homeowners who have been dropped are struggling to keep their real property assets insured and protected.

Ultimately, of those who found replacement coverage, roughly 38% ended up in the FAIR Plan, 25% reported still shopping for insurance at the time of taking the survey, over % reported no longer being able to afford home insurance or choosing to self-insure, and roughly 33% reported finding another insurance company. Importantly, of those who ended up on the FAIR Plan, over 25% reported not purchasing a separate difference in conditions policy.

Even sophisticated consumers struggle to understand the options available to them. For example, on UP's "ask an expert" online forum, one highly viewed question regards the differences between insuring a home through a combination of a differences in conditions and a FAIR Plan policy or a whole policy from a non-admitted carrier. *See Non-admitted carrier in California vs California Fair Plan*, available at https://uphelp.org/ask-an-expert/?qs=fair+plan and https://uphelp.org/ask-an-expert/question/non-admitted-carrier-in-california-vs-california-fair-plan/.

II. Supporting The Commissioners Regulatory Authority Over The California FAIR Plan Is Particularly Important to California

The FAIR Plan is an involuntary association created in 1968 when the California Legislator recognized that insurance companies were reluctant to write "basic property insurance" for homeowners in purportedly high-risk or otherwise uninsurable areas, often as the result of redlining. The FAIR Plan promotes stability in California's insurance marketplace by assuring the availability of coverage.

While the FAIR Plan serves an important role in California by insuring people who have no other option, it unfortunately has a long history of resisting reasonable regulation by the Commissioner, despite that the Commissioner's construction of the controlling statute ought to be accorded great weight and respect. *See, e.g.*, *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12. People forced to use the FAIR Plan as temporary insurance deserve the same basic coverage provided by traditional insurers, but the traditional insurers that run the FAIR Plan appear to not want to the FAIR Plan to be an effective alternative.

Ultimately, the FAIR Plan is a joint underwriting association that is funded and controlled by member insurance companies. While there are four so-called public and interested party members, on the FAIR Plan Governing Committee, only the nine insurance industry members may vote. As such, the FAIR Plan often operates in the interests of its member companies rather than the interests of policyholders. Overall, this structure and operation of the FAIR Plan creates an inherent conflict of interest with the Commissioner and can undermine the Commissioner's ability to effectively regulate the insurance industry and protect consumers. All the more reason why the Commissioner was under Chapter 9 granted "the power to elaborate the meaning of key statutory terms," *American Coatings Assn. v. South Coast Air Quality Management Dist.* (2012) 54 Cal.4th 446, 460, and "fill up the details of the statutory scheme." *Association of California Ins. Companies v. Jones* (2017) 2 Cal.5th 376, 390-391 (internal quotations omitted).

The Commissioner's orders at issue in this appeal are a reasonable response to California's insurance available crisis. Requiring the FAIR Plan to provide a comprehensive option for Californians who have no other option for homeowners insurance is lawful and appropriate.

CONCLUSION

For the foregoing reasons, the trial court's judgment denying in part FAIR Plan's petition for writ of mandate should be affirmed.

DATE: Jan. 5, 2023 Respectfully submitted,

UNITED POLICYHOLDERS

By: <u>*/s/ Richard Oatis*</u>
Richard B. Oatis

Counsel for Amicus Curiae
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CERTIFICATE OF COMPLIANCE

The foregoing Amicus Curiae Brief contains 3,035 words (including footnotes, but excluding the Application, tables, signature block, and this certificate). In preparing this certificate, I have relied on the word count generated by Microsoft Office Word 365. The Brief and Application also conform to the format requirements set forth in California Rule of Court 8.74 (as amended eff. Jan. 1, 2020).

DATE: Jan. 5, 2023 Respectfully submitted,

UNITED POLICYHOLDERS

By: */s/ Richard Oatis*
RICHARD B. OATIS

PROOF OF SERVICE

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action. My business address is 917 Irving Street, Suite 4, San Francisco, CA 94122. On January 5, 2023, I served the following document(s) described as:

APPLICATION OF UNITED POLICYHOLDERS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANTS

[PROPOSED] *AMICUS CURIAE* BRIEF OF UNITED POLICYHOLDERS IN SUPPORT OF APPELLANTS

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[x] (BY TRUEFILING) By filing and serving the foregoing through Truefiling such that the document will be sent electronically to the eservice list on January 5, 2023; and

Clerk of the Court
Mary H. Strobel, Dept. 82
LOS ANGELES COUNTY
SUPERIOR COURT
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Los Angeles, CA 90012

[x] (BY MAIL) By causing the document to be sealed in an envelope addressed to the recipient above, with postage thereon fully prepaid, and placed in the United States mail at San Francisco, CA.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this proof of service is executed at San Francisco, CA on January 5, 2023.

/s/ *Richard Oatis*
Richard B. Oatis