

Case No. _____

In the Supreme Court of Nevada

STARR SURPLUS LINES INSURANCE CO.,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT
of the State of Nevada, in and for the
County of Clark; and THE HONORABLE
MARK DENTON, District Judge,
Respondents,

and

JGB VEGAS RETAIL LESSEE, LLC,
Real Party in Interest.

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District Court Case No.
A-20-816628-B

**PETITION FOR WRIT OF MANDAMUS
OR, IN THE ALTERNATIVE, PROHIBITION**

With Supporting Points and Authorities

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PETITION

1. This petition raises an issue raised in thousands of lawsuits throughout the country seeking property insurance coverage for economic losses caused by COVID-19 and the related governmental restrictions. Courts have overwhelmingly rejected such claims where, like here, the policy language ties coverage to “direct physical loss or damage” to property.

2. Petitioner Starr Surplus Lines Insurance Company (“Starr”) issued a commercial property insurance policy to JGB Vegas Retail Lessee, LLC (“JGB”).

3. JGB alleges that it suffered economic loss during the COVID-19 pandemic. JGB sued Starr in the district court to obtain a determination that such coverages apply and that it was entitled to benefits. *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Insurance Company*, Eighth Judicial District Court Case No. A-20-816628-B.

4. JGB seeks coverage under the policy’s time element coverage, which covers the actual loss of income due to “direct physical loss or damage” of JGB’s property. The vast majority of courts to have considered this issue, including those applying Nevada law, have held

that “direct physical loss or damage” to property requires a tangible, physical alteration of the property, itself, which in turn causes the economic loss. As with the majority of cases nationwide, JGB’s property was not tangibly, physically altered.

5. JGB also seeks coverage under the policy’s civil authority provision which among other requirements discussed herein, only triggers if the governmental act preceding the economic loss was the direct result of “damage to or destruction of” property near JGB’s insured property. The majority of courts, including those applying Nevada law, have explained this type of provision applies when destruction or damage to nearby property causes government authorities to prohibit access to the insured’s property, and COVID-19 does not destroy or damage property.

5. Finally, JGB contends that the policy’s Pollution and Contamination exclusion, which by definition clearly and unambiguously include any virus somehow does not include this virus. The courts that have considered similar exclusions (including virus in the definition) have all enforced the exclusion as to this virus.

6. Starr moved for summary judgment on JGB's complaint. 1 PA 141-172. After full briefing and oral argument, the district court granted Starr's motion in part (as to JGB's extracontractual claims) but denied Starr's motion in part as to the contractual coverage claims. 8 PA 1332-1362; 1373-1378. The district court's denial was based on erroneous determination that the issues were of a factual nature rather than issues of law to be determined by the Court. *Id.* at 1374-1376. The district court erred in denying Starr's motion for summary judgment, essentially ignoring the mountains of legal authority applying Nevada law, as well as the cases nationwide.

Starr petitions this Court for a writ of mandamus or in the alternative, prohibition, essentially reversing the district court's denial of summary judgment and directing the district court to grant Starr's motion for summary judgment in its entirety.

VERIFICATION

I, Daniel F. Polsenberg declare:

1. I am an attorney with the law firm LEWIS ROCA ROTHGERBER CHRISTIE LLP, counsel for Petitioner Starr, and duly licensed to practice law in the State of Nevada.

2. I verify that I have read the foregoing PETITION FOR WRIT OF MANDAMUS and that the same is true to my own knowledge, except for those matters stated on information and belief, and as to those matters, I believe them to be true. I declare under penalty of perjury that the foregoing is true and correct.

EXECUTED this 8th day of July 2022

/s/ Daniel F. Polsenberg

Daniel F. Polsenberg

NRAP 26.1 DISCLOSURE STATEMENT

Starr Surplus Lines Insurance Company is a wholly-owned subsidiary of Starr Indemnity & Liability Company, which itself is a subsidiary of Starr Insurance Group, Inc., which itself is a wholly owned subsidiary of Starr Insurance Holdings, Inc., which itself is a wholly-owned subsidiary of Starr International Company, Inc. There is no publicly traded company that owns 10% or more of Defendant's stock.

DATED: July 8, 2022

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ROUTING STATEMENT

This petition raises important and timely issues of first impression in Nevada’s State Courts regarding whether COVID-19, the virus that causes it, or Governor Sisolak’s related Orders constitute “direct physical loss or damage” to property to trigger coverage under a commercial property insurance policy. If so, this case also presents the issue whether coverage is nonetheless prevented by a policy exclusion for economic loss caused by a “virus.”

Similar issues are presented in a number of cases in Nevada Courts¹, so the Supreme Court could effectuate judicial economy now by deciding the legal question that will determine these cases, rather than having them go through trials when there are no genuine issues of material fact.

¹ See, e.g., *Nakash Showcase II LLC v. Federal Insurance Company* (EJDC Case No. A-21-829284-B); *Boyd Gaming v. Ace American Insurance Company* (EJDC Case No. A-21-834849-B); *Bloomin’ Brands, Inc. v. ACE American Insurance Company* (EJDC Case No. A-21-830204-B); *Caesars Entertainment, Inc. v. ACE American Insurance Company* (EJDC Case No. A-21-831477-B); *Nevada Property 1 LLC v. Factory Mutual Insurance Company* (EJDC Case No. A-21-831049-B); and *Panda Restaurant Group v. Lexington Insurance Company* (EJDC Case No. A-22-849969-B). These examples are not exhaustive and do not include similar cases in Nevada’s other judicial districts.

These issues are of significant statewide public importance beyond just the underlying litigation. NRAP 17(a)(11)&(12). This matter also originated in business court. NRAP 17(a)(9).

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ISSUES PRESENTED

1. Whether the District Court erroneously determined that whether COVID-19 and/or the related orders causes “direct physical loss or damage” to property is an issue of fact.

2. Whether the District Court erroneously determined that whether COVID-19 causes “damage to or destruction of property” in order to potentially trigger coverage under ingress/egress or civil authority is an issue of fact.

3. Whether the District Court committed error in failing to determine that the policy’s Pollution and Contamination exclusion, which includes “virus” excludes coverage for this virus.

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Policy

Starr issued Policy No. SLSTPTY11245819 to JGB. 2 PA 180. The policy period was from December 15, 2019 to December 15, 2020. *Id.*

1. Coverage Generally and Business Interruption Coverage

The Policy insures generally as follows:

1. **COVERAGE:** **PERILS INSURED AGAINST:**

This POLICY covers the property insured hereunder against all risks of **direct physical loss or damage to covered property** while at INSURED LOCATIONS occurring during the Term of this POLICY, except as hereinafter excluded or limited.

Id. at 192 (emphasis added).

The policy's business interruption coverage insures as follows:

1. Interest and Property Insured:

This COMPANY agrees to insure subject to all the terms, conditions, limitations, exclusions and stipulations of this POLICY:

Loss directly resulting from necessary interruption of the Insured's NORMAL business operations **caused by direct physical loss or damage** to real or personal property covered herein, ... and arising from a peril insured against hereunder and occurring during the term of this POLICY; all while located at INSURED LOCATIONS.

...

2. ACTUAL LOSS SUSTAINED:

In the event of **direct physical loss or damage to covered property by a peril insured against**, this COMPANY shall be liable for the ACTUAL LOSS SUSTAINED by the Insured resulting directly from the necessary interruption of business, but not exceeding the reduction in GROSS EARNINGS less charges and expenses which do not necessarily continue during the interruption of business. **Loss under this Section shall be subject to the PERIOD OF INDEMNITY.**²

² The Policy defines "PERIOD OF INDEMNITY" as follows:

Id. at 209 (emphasis added).

2. *Additional “Time Element Coverages” and Civil Authority Coverage*

The policy defines “Time Element” as follows:

Z. TIME ELEMENT

The term “TIME ELEMENT” shall be defined as the actual loss sustained due to the necessary interruption of the Insured’s NORMAL business operations including but not limited to, loss described in the BUSINESS INTERRUPTION SECTION, if attached, and the following TIME ELEMENT extensions, if endorsed hereon: .Contingent Business Interruption, Contingent Extra Expense, Extra Expense, Ingress/Egress, Leasehold Interest, Rental Value, Off Premises Power Business Interruption, but this definition shall not otherwise expand or modify the coverage, if any, provided by this POLICY or its Endorsements.

R. The term “PERIOD OF INDEMNITY” shall mean the period of time that:

- (a) Begins with the date of direct physical loss or damage by any of the perils covered herein ...; and
- (b) Ends on the date when the damaged or destroyed property at the INSURED LOCATION should be repaired, rebuilt or replaced with the exercise of due diligence and dispatch. ...

Id. at 207.

One such “Time Element” coverage is Ingress/Egress Coverage, which covers as follows:

INGRESS/EGRESS ENDORSEMENT

Subject to all terms, conditions, exclusions, limitations and stipulations of the POLICY to which this Endorsement is attached, not in conflict herewith, this POLICY is extended to cover the ACTUAL LOSS SUSTAINED during the period of time, starting at the time of physical damage, **not exceeding the number of days shown under TIME LIMITS specified in the Declarations**, when as a direct result of loss or damage by a peril insured against to property of a type insured against within one (1) mile of an INSURED LOCATION, ingress to or egress from the premises insured is impaired irrespective of whether the premises or property insured shall have been damaged.

...

Id. at 236 (bold in original, underline added for emphasis).

The policy also provides civil or military authority coverage under which, the insured must establish more than the mere existence of a civil authority order. The coverage provides:

7. Interruption by Civil or Military Authority:

This POLICY is extended to include, starting at the time of physical loss or damage, the actual loss sustained by the Insured, resulting directly from an interruption of business as covered hereunder, during the length of time, not exceeding the number of days shown under TIME LIMITS stated in the Declarations, when, as a **direct**

result of damage to or destruction of property within one (1) statute mile of an INSURED LOCATION by the peril(s) insured against, access to such described premises is specifically prohibited by order of civil or military authority.

Id. at 210 (emphasis added).

3. ***The Pollution and Contamination Exclusion***

The policy contains the following pollution and contamination exclusion:

7. ADDITIONAL EXCLUSIONS:

...

b. Pollution and Contamination Exclusion Clause:

This POLICY does not insure against loss or damage caused by or resulting from any of the following regardless of any cause or event contributing concurrently or in any other sequence to the loss:

1. contamination;
2. the actual or threatened release, discharge, dispersal, migration or seepage of POLLUTANTS at an INSURED LOCATION during the Term of this POLICY unless the release, discharge, dispersal, migration, or seepage is caused by fire, lightning, leakage from fire protective equipment, explosion, aircraft, vehicles, smoke, riot, civil commotion or vandalism. This POLICY does not insure off-premises cleanup costs arising from any cause and the

coverage afforded by this clause shall not be construed otherwise.

Id. at 197. The Policy defines “POLLUTANT or CONTAMINANTS” as follows:

T. POLLUTANT or CONTAMINANTS

The term “POLLUTANTS” or “CONTAMINANTS” **shall mean any** solid, liquid, gaseous or thermal irritant or CONTAMINANT **including, but not limited to,** smoke, vapor, soot, fumes, acids, alkalis, chemicals, **virus**, waste, (waste includes materials to be recycled, reconditioned or reclaimed) or hazardous substances as listed in the Federal WATER Pollution Control Act, Clean Air Act, Resource Conservation and Recovery Act of 1976, and Toxic Substances Control Act, or as designated by the U.S. Environmental Protection Agency.

Id. at 206 (emphasis added).³

B. **The COVID-19 Pandemic and the Governor’s Orders**

The COVID-19 pandemic, and the related government orders caused businesses all over the nation limit their business activity. COVID-19 is a disease, caused by a virus, which poses a risk to people,

³ Notably, while this definition specifically includes “virus,” it does not provide any limitation, whatsoever, as to the type of “virus,” and when read as a whole applies to “any ... virus.”

but does not physically alter property. *Circus Circus LV, LP v. AIG Specialty Ins. Co.*, 525 F. Supp. 3d 1269, 1276 (D. Nev. 2021).

On March 17, 2020, Governor Sisolak announced that he would order a state-wide closure of casinos, restaurants, bars, and other non-essential businesses, and three days later he signed such an order. 2 PA 280-282. The order restricted restaurants from providing dine-in services but allowed restaurants to continue to provide delivery and take-out. *Id.*

On May 5, 2020, Governor Sisolak permitted retail establishments to reopen under certain conditions. *Id.* at 284-290. Specifically, retail establishments, such as those who rent space at JGB's property, were allowed by the government to reopen so long as they operated at 50% capacity or less. *Id.* at 287.

C. JGB's Business and Its Alleged Economic Loss

JGB “operates and owns commercial real estate” (the Grand Bazaar Shops) consisting of “a large, open-air mall with over thirty-five restaurants and shops, located on the Strip at the entrance of Bally's Hotel & Casino Las Vegas.” 1 PA 002. Most customers access the

premises by foot. 3 PA 376. The shops do not have a general entrance that can be physically locked down to prevent access. *Id.* at 436.

On March 17, 2020, JGB informed its tenants that, under the Governor's order, the Grand Bazaar Shops would be closing at noon on March 18, 2020. *Id.* at 499. JGB is unaware of any known instances of COVID-19 on its premises prior to the closure order. *Id.* at 383. The shops "were required by the declaration to close down." *Id.* at 438. However, access to JGB's premises was not prohibited as some of JGB's restaurant tenants were permitted to remain open to provide delivery, drive-through, pick-up, or curbside service. *Id.* at 498. Even tenants who did close were still able to access their own stores. *Id.* at 384.

The Grand Bazaar Shops reopened on June 4, 2020, and it has remained open for business ever since. *Id.* at 462. Since June 4, 2020, there have been individual incidents of potential COVID-19 infections within specific tenant spaces. *See, e.g., id.* at 461-462. While these individual instances of COVID-19 infection may have caused those individual units to temporarily close, the Grand Bazaar Shops, as a whole, remained open. *Id.* at 442.

JGB also claims that it has been performing ongoing “repair” of its premises due to the COVID-19 Pandemic. *Id.* at 394. However, by “repair,” JGB means that it has taken prospective, preventative measures, such as installing sanitizer stations, social distancing signage, and plexiglass; and/or that it has cleaned its premises. *Id.*

Due to its alleged ongoing economic loss, JGB filed a claim with Starr on April 17, 2020. 2 PA 323-324. While the claim was being investigated, and with requests for information outstanding, JGB filed suit against Starr on June 6, 2020. 1 PA 1-20. Following JGB’s delayed cooperation, Starr denied JGB’s claim on November 5, 2020. 2 PA 352-357.

Following discovery, Starr moved for summary judgment on the entirety of JGB’s Complaint. 1 PA 141-172. After full briefing and oral argument, the District Court granted Starr’s Motion in part (as to JGB’s extracontractual claims) and denied Starr’s Motion in part (as to the contractual claims). 8 PA 1332-1362; 1373-1378. The District Court’s denial was based on erroneous determination that the issues were of a factual nature rather than issues of law to be determined by the Court. *Id.* at 1374-1376.

II. STATEMENT OF REASONS WHY THE WRIT SHOULD ISSUE

“A writ of mandamus is available to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion.” NRS 34.160; *Int’l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). This Court has discretion to entertain a writ petition on its merits and issue a writ of mandamus or prohibition. *Okada v. Eighth Judicial Dist. Court*, 134 Nev. 6, 8, 408 P.3d 566, 569 (2018).

Extraordinary relief is appropriate where doing so is in the interests of judicial economy and either there is no factual dispute and summary judgment is clear or where the issue is one of first impression that may be dispositive of the case. *PetSmart, Inc. v. Eighth Judicial Dist. Court*, 137 Nev., Adv. Op. 75, 499 P.3d 1182, 1186 (2021). A compelling reason for the Court to exercise its discretion to consider the writ petition on the merits is where “there is a great potential for the district courts to inconsistently interpret legal issues.” *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1302, 148 P.3d 790, 792 (2006). Writ relief is also appropriate where the legal issues are of first impression and of fundamental public importance. *Williams v. Eighth*

Judicial Dist. Court, 127 Nev. 518, 525, 262 P.3d 360, 365 (2011) (resolving issues raised in various endoscopy cases before trial). The courts intervention here is appropriate, just as in *Williams*, to provide guidance on critical issues raised in the various cases being litigated over the issue.⁴

This Petition meets the required criteria. There are no factual disputes regarding the issues presented in this Petition, only legal questions. The District Court acted contrary to the plethora of authority holding as a matter of law that neither COVID-19 nor the government orders relating to COVID-19 cause “direct physical loss or damage” to property in order to trigger coverage under business interruption policies like JGB’s Starr Policy. Further, this legal issue is an important issue of law that needs clarification in Nevada’s courts. The specific issue of whether COVID-19 or the related Orders specifically constitute “direct physical loss or damage” is an issue of first impression under Nevada law as interpreted by Nevada’s State Courts and is of fundamental public importance due to the number of pending cases as well as the undeniable

⁴ See note 1, *supra*, for partial list of cases pending just in the Eighth District.

fact that businesses worldwide, including those in Nevada experienced the economic effects of the COVID-19 pandemic. And it is beyond debate that, if successful, this petition will end future litigation in this case, and it will likely serve as precedent to end the similar pending cases as well. As such, the interests of judicial economy favor consideration of the petition on its merits.⁵

III. STANDARDS OF REVIEW

This Court reviews a district court ruling on summary judgment de novo. *PetSmart*, 137 Nev., Adv. Op. 75, 499 P.3d at 1186. *see also* NRCP 56(c). The legal issues before the court solely relate to contractual interpretation, which this Court also reviews de novo. *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161, 252 P.3d 668, 672 (2011).

⁵ There is precedent for a state's appellate courts to review the denial of an insurer's dispositive motion in this context. *See Colectivo Coffee Roasters, Inc. v. Soc'y Ins.*, 974 N.W.2d 442 (Wisc. 2022) (reversing denial of insurer's motion to dismiss policyholder's COVID-19 business interruption suit).

IV. ARGUMENT

A. Neither COVID-19 nor Governmental Orders Constitute “Direct Physical Loss or Damage”

“[D]irect physical loss or damage” requires that there be some sort of structural or physical change to a property, actually altering its functionality or use. *Levy Ad Grp., Inc. v. Chubb Corp.*, 519 F. Supp. 3d 832, 836 (D. Nev. 2021), *aff’d sub nom Levy Ad Grp., Inc. v. Fed. Ins. Co.*, No. 21-15413, 2022 WL 816927 (9th Cir. Mar. 17, 2022) (citing *Fed. Ins. Co. v. Coast Converters*, 339 P.3d 1281, 1283 (Nev. 2014) and *Farmers Home Mut. Ins. Co. v. Fiscus*, 725 P.2d 234, 236 (Nev. 1986)); *Circus LV, LP v. AIG Specialty Ins. Co.*, 525 F. Supp. 3d 1269, 1275 (D. Nev. 2021), *aff’d*, No. 21-15367, 2022 WL 1125663 (9th Cir. Apr. 15, 2022) (same); *Project Lion LLC v. Badger Mut. Ins. Co.*, No. 2:20-cv-00768-JAD-VCF, 2021 WL 2389885, at *2 (D. Nev. May 19, 2021) (same).

California’s courts have long held that “direct physical loss or damage” requires a “distinct, demonstrable, physical alteration” or “detectable physical change” to the insured property. *See, e.g., Inns by*

the Sea v. Cal. Mut. Ins. Co., 286 Cal. Rptr. 3d 576, 591 (Cal. App. 2021).⁶

A detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property is not physical loss or damage. *Ward Gen. Servs., Inc. v. Emp’rs Fire Ins. Co.*, 7 Cal. Rptr. 3d 844, 851 (Cal. Ct. App. 2003).

1. *The Presence of COVID-19 is not “Direct Physical Loss or Damage.”*

The presence of COVID-19 does not physically alter property. While COVID-19 may (or may not) have been present does not equate to physical loss or damage to property. Imperceptible activity at the microscopic level, like that which occurs with COVID-19, is the opposite of a “distinct, demonstrable, physical alteration of the property.” *Simon Mktg. Inc. v. Gulf Ins. Co.*, 57 Cal. Rptr.3d 49, 53 (Cal. Ct. App. 2007).

Plaintiff’s position on “physical loss or damage” renders the qualifier “physical” meaningless and would mean that property open to the general public is being “damaged” at virtually all times. *Cosmetic Laser, Inc. v. Twin City Fire Ins. Co.*, No. 3:20-cv-00638, 2021 WL

⁶ California appellate courts often guide Nevada’s courts, particularly in insurance cases. *See, e.g., Fourth St. Place v. Travelers Indem. Co.*, 127 Nev. 957, 971, 270 P.3d 1235, 1244 (2011).

3569110, at *10 (D. Conn. Aug. 11, 2021) (finding that COVID-19 respiratory droplets structurally change physical property and its surface would “render[] every sneeze, cough or even exhale a ‘structural change’” and ‘cannot be right’”). The virus lives in the air or on surfaces only temporarily and dissipates on its own without any intervention. It can be removed faster through routine cleaning. *See e.g., Nguyen v. Travelers Cas. Ins. Co. of Am.*, No. 20-CV-00597, 2021 WL 2184878, at *10 (W.D. Wash. May 28, 2021). In short, “the virus **harms human beings, not property.**” *Wellness Eatery La Jolla LLC v. Hanover Ins. Grp.*, 517 F. Supp. 3d 1096, 1106 (S.D. Cal. 2021) (emphasis added).

COVID-19 does not constitute “direct physical loss or damage,” under Nevada law. The *Circus Circus* Court concluded that the infection of casino employees with COVID-19 did not constitute “physical loss or damage” to the casino under Nevada law. 525 F. Supp. 3d at 1275-76. The court first noted that “any alleged surface-contamination is ephemeral—the virus is only detectable on surfaces for ‘up to three days.’” *Id.* at 1276. The court reasoned that the “paucity of these allegations is hardly sufficient to show the type of distinct, demonstrable,

physical alteration or change in the condition of the property needed to show ‘direct physical loss or damage.’” *Id.*

Other courts have reached the same conclusion. For example, the California Court of Appeals confirmed that coverages for “physical loss or damage” require a showing of “a distinct, demonstrable, physical alteration of the property” and that this showing is not met, in the COVID-19 context, through allegations, identical to those here, that (i) a policyholder lost earnings as a result of the COVID-19 pandemic; (ii) the virus was at its premises; and (iii) the presence of the virus has the alleged propensity to render insured premises more dangerous. *Inns by the Sea*, 286 Cal. Rptr. 3d at 591-93. This observation applies to JGB’s allegations and theory of its claim here: The “property did not change. The world around it did. And for the property to be usable again, no repair or change can be made to the property—the world must change Put simply, [p]laintiff seeks to recover economic losses caused by something physical—not physical losses.” *Id.* at 590 (internal quotations omitted); *see also Pappy’s Barber Shops, Inc. v. Farmers Grp., Inc.*, 491 F. Supp. 3d 738, 740 (S.D. Cal. 2020) (“Even assuming the truth of these allegations, the presence of the virus itself, or of individuals infected

[with] the virus, at Plaintiffs’ business premises or elsewhere do not constitute direct physical loss[] of or damage to property.”); *Tralom, Inc. v. Beazley USA Servs., Inc.*, No. 2:20-CV-08344-JFW-RAOx, 2020 WL 8620224, at *5 (C.D. Cal. Dec. 29, 2020) (concluding as a matter of law that “there is no physical loss of or damage to property where the virus can be eliminated by cleaning the surface of property.”); *Protégé Rest. Partners LLC v. Sentinel Ins. Co., Ltd.*, 517 F. Supp. 3d 981, 988 (N.D. Cal. 2021) (“[e]ven if Plaintiff had known of a specific instance of COVID-19 particles inside of its business, evidence of such would still not qualify as a ‘physical change.’”).

Additionally, the state and federal appellate courts that have addressed the issue thus far have nearly unanimously concluded that the presence of COVID-19 does not cause physical loss or damage. *See, e.g., Kim-Chee LLC v. Phila. Indem. Ins. Co.*, No. 21-1082-cv, 2022 WL 258569, at *2 (2d Cir. Jan. 28, 2022) (“the virus’s inability to physically alter or persistently contaminate property differentiates it from radiation, chemical dust, gas, asbestos, and other contaminants whose presence could trigger coverage under Kim-Chee’s policy.”); *Uncork & Create LLC v. Cincinnati Ins. Co.*, 27 F.4th 926, 932 (4th Cir. 2022) (“Any

alternative meaning of the terms ‘physical loss’ or ‘physical damage’ that does not require a material alteration to the property would render meaningless this pre-condition to coverage for business income loss.”); *Gilreath Fam. & Cosm. Dentistry, Inc. v. Cincinnati Ins. Co.*, No. 21-11046, 2021 WL 3870697, at *2 (11th Cir. Aug. 31, 2021) (“[Even in] an enclosed space where viral particles tend to linger, and where patients and staff must interact with each other in close quarters[,]” the court “do[es] not see how the presence of [viral] particles would cause physical damage or loss to the property.”). The virus’ “impact on physical property is inconsequential . . . it may be wiped off surfaces using ordinary cleaning materials, and it disintegrates on its own in a matter of days.” *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327, 335 (7th Cir. 2021); *see also Santo’s Italian Cafe LLC v. Acuity Ins. Co.*, 15 F.4th 398, 402 (6th Cir. 2021); *Oral Surgeons, P.C. v. Cincinnati Ins. Co.*, 2 F.4th 1141, 1144 (8th Cir. 2021). The “avalanche of authority” holds that COVID-19 does not qualify as “physical loss or damage” as a matter of law. *J. Kleinhaus & Sons, LLC v. Valley Forge Ins. Co.*, No. 21 Civ. 2202 (JPC), 2021 WL 5909978, at *1 (S.D.N.Y. Dec. 14, 2021).

As a matter of law, the presence of COVID-19 is not “direct physical loss or damage” to JGB’s property.⁷

2. *Loss of Use is not “Direct Physical Loss or Damage”*

Just as the presence of COVID-19 is not physical loss or damage, neither is JGB’s temporary loss of use of its insured properties. Temporary loss of use is simply an economic loss, which is not physical loss or damage. *Ward*, 7 Cal. Rptr. 3d at 851.

Many courts, including those in Nevada, have thus held that loss of use of property because of COVID-19 is not physical loss or damage. For example, the *Levy Ad* court concluded there was no physical loss or damage where the insured alleged that Governor Sisolak’s orders prevented it from conducting business operations. 519 F. Supp. 3d at 836-37. “[E]conomic losses’ caused by COVID-19 closures” “do not trigger policy coverage predicated on direct physical loss or damage.” *Id.* at 837. The temporary closure of premises, in the absence of “the existence of an outside, physical force that has so affected their physical property as to

⁷ That the presence of COVID-19 is not “direct physical loss or damage” is further confirmed by the Policy’s requirement for a period of indemnity, which ends “on the date when the damaged or destroyed property at the INSURED LOCATION should be **repaired, rebuilt or replaced** with the exercise of due diligence and dispatch.” 2 PA 205 (emphasis added).

make it unusable,” cannot qualify as physical “loss” or “damage.” *Project Lion*, 2021 WL 2389885. The Ninth Circuit “agree[s] with the numerous published decisions interpreting nearly identical policy language requiring “direct physical loss or damage” to the insured property according to its plain and ordinary meaning and unanimously concluding coverage does not exist.” *Levy Ad*, 2022 WL 816927, at *1.

The overwhelming majority of courts, including nearly every appellate court that has spoken on the issue, have reached the same conclusion. *See, e.g., Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885, 892 (9th Cir. 2021) (rejecting insured retail store owner’s claim for losses suffered as a result of the COVID-19 pandemic and related government-imposed restrictions was synonymous with “loss of use.”); *10012 Holdings, Inc. v. Sentinel Ins. Co.*, No. 21-80-cv, 2021 WL 6109961, at *4 (2d Cir. Dec. 27, 2021) (holding that “the terms ‘direct physical loss’ and ‘physical damage’ ... do not extend to mere loss of use of a premises, where there has been no physical damage to such premises.”); *Goodwill Indus. of Cent. Okla., Inc. v. Phila. Indem. Ins. Co.*, No. 21-6045, 2021 WL 6048858, at *4 (10th Cir. Dec. 21, 2021) (“Goodwill’s temporary inability to use its property for its intended purpose was not a ‘direct

physical loss.’ To conclude otherwise would ignore the word “physical” and violate the requirement that every part of a policy be given meaning.”); *Uncork & Create*, 27 F. 4th, at 933-34 (same); *Sandy Point*, 20 F.4th at 333-34 (“direct physical loss” does not include loss of use unaccompanied by any physical alteration); *Santo’s Italian Café*, 15 F.4th at 402 (“It pays little heed to these omnipresent words in the policy [i.e., ‘direct physical loss of or damage to property’], if not erases them, to construe them to cover business losses generated by a statewide shut-down order.”); *Oral Surgeons, P.C.*, 2 F.4th at 1145 (same); *Inns By the Sea*, 286 Cal. Rptr. 3d at 593 (insured “has not alleged ‘direct physical loss of’ property based on the fact that it lost the ability to use its physical premises to generate income” by closing following government orders).

B. Neither Civil Authority nor Ingress/Egress Coverage are Triggered as a matter of law.

JGB’s claimed losses do not trigger Civil Authority Coverage either. Civil Authority requires, *inter alia*, that the prohibition of access by a civil authority “must be the **direct** result of damage to or destruction of property” within one mile of the insured’s premises by a peril that the policy insures against. 2 PA 210 (emphasis added). Therefore, to prove Civil Authority coverage under the policy, JGB must prove three

requirements: (i) damage to or destruction of other property within one mile of the Insured Premises; (ii) a civil authority order actually prohibiting access to its property; and (iii) that the order prohibiting access was “the direct result of damage” to property within one mile of the Insured Location. JGB cannot prove any of these required elements.

1. No Damage to or Destruction of Property Within One Mile

JGB has not produced any evidence of damage to or destruction of property within one mile of its location. At most, JGB relied upon hearsay evidence that the Mirage hosted a visitor who tested positive for COVID-19 shortly before the Closure Order. 1 PA 6-7. As established above, an instance of COVID-19 on premises does not constitute “damage to or destruction of property.” Thus, for this reason alone, there is no Civil Authority Coverage for JGB’s losses. *Levy Ad*, 2022 WL 816927, at *1-2; *see also, Cty. of Clark v. Factory Mut. Ins. Co.*, No. 2:02-cv-01258-KJD-RJJ, 2005 WL 6720917, at *5 (D. Nev. Mar. 28, 2005) (an order to ground airplanes in Las Vegas following the September 11th attacks did not trigger civil authority because there was no damage near the Las Vegas airport).

2. *The Order Did Not Prohibit Access to the Insured Premises*

None of the Governor's Orders precluded JGB, its tenants, or customers from accessing JGB's property. Despite the closure order being in effect, some of JGB's tenants remained open throughout the pandemic. 3 PA 384. This necessarily means that people were able to access the property. *See Levy Ad*, 519 F. Supp. 3d at 837. The Order did not actually prohibit "access" to JGB's premises but merely regulated some business operations. For this reason, there is no Civil Authority Coverage for JGB's alleged losses.⁸

3. *The Order Was Not Issued As the Direct Result of Damage to or Destruction of Property Within One Mile*

There is no legitimate evidence that the closure order was issued as "the direct result" of any damage or destruction to any property. The term "direct" means "without intervening persons, conditions, or

⁸ For the same reasons, Ingress/Egress Coverage cannot have been triggered. In its natural meaning, "Ingress" means "the act of entering," and "Egress" means "the action or right of going or coming out." *See* Definitions of "Ingress" and "Egress" Merriam-Webster Online Dictionary, available at <https://www.merriam-webster.com/dictionary/ingress> and <https://www.merriam-webster.com/dictionary/egress> respectively (last visited July 8, 2022).

agencies; immediate.” *See MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779 (2010) (citations omitted). That business interruption may be caused by an order does not make it the “direct result of physical damage.” *Cty. of Clark*, 2005 WL 6720917, at *5. There, the order to ground airplanes was a preventative measure from potential further damage. *Id.* As widespread as the effects of the September 11th attacks were felt nationwide, any physical damage or loss occurred only in those locations struck. *Id.* The “damage [was] too remote in time and place to qualify as direct as required in this case.” *Id.* Put simply, an order designed to ***prevent future harm*** rather than ***remediate past harm*** does not trigger Civil Authority coverage. *Id.*; see also *Dickie Brennan & Co. v. Lexington Insurance Co.*, 636 F.3d 683, 685-86 (5th Cir. 2011).

Governor Sisolak ordered non-essential businesses to close *to protect the health and safety of Nevadans* by preventing people from coming together unnecessarily, where people who have the infection can easily spread it to others. 2 PA 279-282. There is simply no civil authority coverage for losses caused by COVID-19 closure orders issued

to prevent the spread of COVID-19. *Levy Ad*, 519 F. Supp. 3d at 837 (same orders).

C. The Policy Excludes Coverage for Claims That Result from Any Virus

Even if there were arguable coverage, it would be excluded under the Pollutants and Contaminants Exclusion. *See, e.g., Circus Circus*, 525 F. Supp. 3d at 1277; *Ford of Slidell, LLC v. Starr Surplus Lines Ins. Co.*, No. CV 21-858, 2021 WL 5415846, at *10-11 (E.D. La. Nov. 19, 2021). The Pollutants and Contaminants Exclusion provides that the policy does not insure against any loss or damage caused by or resulting from contamination or the actual or threatened release of “pollutants” at an insured location, regardless of any cause or event contributing concurrently or in any other sequence to the loss. 2 PA 197. The Policy explicitly defines “Pollutants” or “Contaminants” to include any virus, without limitation. *Id.* at 206. Since the basis for JGB’s claimed losses is alleged contamination by a virus, namely COVID-19, (or the Orders entered to prevent that virus’ spread), the claim is excluded from coverage as a matter of law.

The District of Nevada enforced a similar exclusion in the COVID-19 context. *Circus Circus*, 525 F. Supp. 3d, at 1277-78. Circus Circus’s

policy excluded coverage for the “release, discharge, escape, or dispersal” of pollutants or contaminants, which are defined to include “any solid, liquid, gaseous, or thermal irritant or contaminant,” “which after its release can cause or threaten damage to human health or welfare,” “including, but not limited to, bacteria, virus, or hazardous substances.” *Id.*

JGB argues that the exclusion is vague ambiguous and that the word “virus” is somehow limited to specific types of viruses, other than COVID-19, despite no such limitation appearing anywhere in the policy. *See, e.g.*, 3 PA 380. The Nevada federal court rejected a similar argument. There, the insured relied on this Court’s ruling in *Century Surety Co. Circus Circus*, 525 F. Supp. 3d at 1278, where the policy’s exclusion did not include “carbon monoxide” as an enumerated pollutant in the definition. *Id.* at 399, 329 P.3d at 616. The *Circus Circus* court easily distinguished *Century Surety* for this and other reasons. 525 F. Supp. 3d at 1278. While Century Surety’s policy did not include “carbon monoxide” in the pertinent definition, JGB’s policy undisputedly and unambiguously includes “virus.” 2 PA 206.

The *Circus Circus* court properly identified the issue, which is the same issue before this Court, as “whether the virus that causes COVID-19 falls within the definition of a ‘virus’ that has been ‘releas[ed]’ ‘dispers[ed],’ or ‘discharg[ed],... .” 525 F. Supp. 3d at 1278. The federal court recognized that the answer is “yes.” *Id.* “[T]he SARS-CoV-2 virus and resulting COVID-19 pandemic falls squarely within the policy’s pollutants-or-contaminants exclusion” and *Circus Circus* cannot “reasonably claim that SARS-CoV-2 is not a virus.” *Id.* An insured cannot reasonably “expect coverage under [its] policy for damages caused by the COVID-19 pandemic.” *Id.*

Another federal court also held that a similar exclusion was enforceable under Nevada law to prevent coverage. *See Monarch Casino & Resort, Inc. v. Affiliated FM Ins. Co.*, No. 20-CV-1470, 2021 WL 4260785, at *3 (D. Colo. Sept. 17, 2021).

The coverage requested by the Plaintiff falls squarely within the Contamination Exclusion. Under ... Nevada law, exclusions must be clear, easily understandable, and subject to no other reasonable interpretation. ... The Contamination Exclusion here precludes coverage of “any cost due to contamination.” Contamination is defined to include “the actual or suspected presence of any... virus.” The plain language of the exclusion is clear and unambiguous. No party contests that COVID-19 is a virus. And Plaintiff’s Complaint alleges that its losses were caused by the COVID-

19 pandemic and the government-mandated closures of its properties. Thus, the Plaintiff here seeks coverage for costs due to the actual or suspected presence of a virus. This coverage is excluded under the express terms of the Policy.

Id. (citations omitted).

JGB's arguments were also rejected pertaining to an identical exclusion in another Starr Policy. *See Ford of Slidell*, 2021 WL 5415846, at *10-11. There, the Court considered the insured's contention that the exclusion does not apply because it is "really a Pollution and Contamination Exclusion clause" and not a virus exclusion. *Id.* at *4. The insured further contended that while "the definition for Pollutants and Contaminants includes 'virus,' ... 'contamination' is not a defined term and, thus, cannot be read to exclude coverage." *Id.* The Court rejected these arguments, writing:

Here, the Contamination Clause unambiguously excludes coverage for losses resulting from COVID-19. It provides that "contamination" is precluded from coverage. Because only the term "contaminant," not contamination, is defined by the Policy to include a virus, Plaintiffs attempt to draw stark differences between the terms "contamination" and "contaminant." Nevertheless, contamination is defined by Merriam-Webster as "1. a process of contaminating; a state of being contaminated; 2. Contaminant." The two terms are synonymous, and it appears clear that the policy, in excluding coverage for contamination, intends to thereby exclude contaminants, such as viruses, as well. Moreover, "[t]he fact that an exclusion could have been worded more explicitly

does not necessarily make it ambiguous.” Therefore, Plaintiffs’ attempts to differentiate between “contamination” and “contaminant” are unavailing.

COVID-19 falls directly into the definition of contaminant and is therefore excluded from coverage. Contaminant is defined under the Policy to include a “virus.” The Centers for Disease Control and Prevention (“CDC”) defines COVID-19 as “a disease caused by a virus called SARS-CoV-2.” Therefore, it is clear that COVID-19 falls squarely within the language of the Contamination Clause.

Id. at *10-11.⁹

There can be no genuine dispute that COVID-19 is a virus or that the Policy includes “virus” in its definition of “Pollutant” or

⁹ See also *Northwell Health, Inc. v. Lexington Ins. Co.*, 2021 WL 3139991, at *9 (S.D.N.Y. July 26, 2021) (declining insured’s plea to “rewrite the unambiguous” Pollution and Contamination Exclusion (which includes “virus”) so that it only applied to “environmental or industrial substances”); *APX Operating Co., LLC v. HDI Glob. Ins. Co.*, 2021 WL 5370062, at *7 (Del. Super. Ct. Nov. 18, 2021) (rejecting insured’s argument that Pollution and Contamination Exclusion is limited to “traditional environmental pollution or contamination,” because exclusion expressly includes “virus” and precludes insured’s claim for lost income caused by COVID-19; *Zwillo V, Corp. v. Lexington Ins. Co.*, 504 F. Supp. 3d 1034, 1041 (W.D. Mo. 2020) (rejecting insured’s argument that Pollution and Contamination Exclusion is limited to “traditional environmental and industrial pollution” because exclusion expressly includes “virus” and COVID-19 is a virus); *AC Ocean Walk, LLC v. Am. Guarantee & Liab. Ins. Co.*, No. A-1824-21, 2022 WL 2254864, at *15 (N.J. Super. Ct. App. Div. June 23, 2022) (limiting “virus” in contamination exclusion to only “traditional environmental pollutants” constitutes impermissible re-writing of the contract).

“Contaminant.” JGB cannot escape the applicability of this exclusion as a matter of law. There is no coverage here.

V. CONCLUSION

This Court should enter a writ holding that there is no coverage under this policy and directing the district court to grant Starr summary judgment.

DATED: July 8, 2022

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NRAP 32(a)(9) CERTIFICATE OF COMPLIANCE

We hereby certify that this Petition complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this Petition has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman typeface. We further state that this Petition complies with the type-volume limitation under Amended NRAP Rule 21(d) as it contains **6424** words, as per NRAP 32(a)(7)(C).

Finally, we hereby certify that we have read this **Petition for Writ of Mandamus or, Alternatively, Prohibition**, and to the best of our knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. We further certify that this Petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the Petition regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. We understand that we may be subject to sanctions in the
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event that the accompanying Petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: July 8, 2022

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that on this 8th day of July 2022, the foregoing **PETITION FOR WRIT OF MANDAMUS and APPENDIX IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS, VOLS. I THROUGH VIII (excluding those volumes containing sealed material)**, were e-submitted to the Clerk of the Supreme Court of the State of Nevada and services were executed to the addresses shown below in the manner indicated:

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