

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

**PETITIONER'S APPENDIX
VOLUME 8
PAGES 1285-1386**

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I hereby certify that on this 8th day of July 2022, the foregoing **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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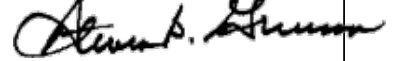
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**DISTRICT COURT
CLARK COUNTY, NEVADA**

JGB VEGAS RETAIL LESSEE, LLC,

Plaintiff,

v.

STARR SURPLUS LINES INSURANCE
COMPANY,

Defendants.

CASE NO.: A-20-816628-B
DEPT. NO.: XIII

**STARR SURPLUS LINES
INSURANCE COMPANY'S REPLY
IN SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT**

Hearing Date: April 18, 2022
Hearing Time: 9:00 a.m.

Defendant Starr Surplus Lines Insurance Company ("Starr"), by and through its counsel of record hereby submits this Reply in support of its Motion for Summary Judgment. This Reply is based on the papers and pleadings on file herein, the following memorandum of points and authorities, the exhibits attached hereto, and any oral argument the Court chooses to consider at the time of hearing.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The time has finally come for this Court to thoroughly examine JGB's claims, compare it to the evidence, including the clear and unambiguous policy language, and determine, once and for all that JGB's insurance claim is not covered under its Policy as a matter of law. The Court must also examine JGB's extra-contractual claims and determine that they are unsupportable as a matter of law as well. Starr is confident that when the Court applies the law to the facts before it, it will

1 grant Starr's Motion for Summary Judgment, ending this Action that never should have been
2 commenced in the first place.

3 In reviewing the papers and pleadings, Starr invites the Court to do two things. First, the
4 Court should consider the evidence and factual record for itself rather than relying on the arguments
5 of counsel. Starr is confident that the record speaks for itself. Second, and relatedly, Starr
6 respectfully submits that JGB's contentions and arguments must be taken with a grain of salt. For
7 example, JGB continues to disingenuously rely on its self-crafted Order denying the Motion to
8 Dismiss as artificial "law of the case" as it pertains to the applicability of the exclusion in the Policy.
9 Opp. at 25-26. As the Court is well aware, not only did it not make any substantive rulings as to
10 the applicability of any exclusion, but it would not have been permitted to do so in determining a
11 Motion to Dismiss under Rule 12(b)(5) even if the Court was so inclined. The Court has made it
12 clear that it made no substantive rulings in denying the Motion to Dismiss without prejudice, paving
13 the way for Starr to file the instant motion at the appropriate time.¹ Again, all the more reason why
14 the Court needs to pay close attention to the record in this case and the abundance of similar rulings
15 in Nevada, and elsewhere, in determining the instant Motion.

16 The key question is whether JGB's claim (whether as initially stated in April 2020 or as it
17 has evolved post-litigation) involved "direct physical loss or damage" to JGB's property which
18 caused its alleged ensuing economic losses. As has been decided by the overwhelming majority of
19 Courts around the country, the answer is "no." Loss of use of the property because of the
20 governmental closure orders is not "direct physical loss or damage" of the property, itself. Loss of
21 customers due to fear of the virus is not "direct physical loss or damage" of the property itself. The
22 mere presence of the virus, which is harmful to people, but does not alter the composition of the
23 property, is not "direct physical loss or damage" of the property itself. Even if this *could be* direct
24 physical loss of the property, JGB has presented no evidence that any of its economic losses are
25

26 ¹ For example, *please see* the Minute Order Denying the Motion to Dismiss without Prejudice, the
27 Minute Order (and Order) Denying the Motion to Alter/Amend the Order, and the Order denying
28 JGB's Motion for Protective Order. The Court has been abundantly clear that no substantive issues
have been decided up to this point.

1 tied specifically to the known presence of the virus on its property. The bottom line is that while
2 there is no dispute that JGB has lost rental income since March 2020, that lost rental income was
3 never caused by “direct physical loss or damage” to JGB’s property.

4 The facts and the law is clear. Business Interruption policies, like JGB’s Policy, do not
5 provide coverage for *either* the COVID virus or the related closure orders, because neither is “direct
6 physical loss or damage” within the meaning of these policies. *Baker v. Oregon Mut. Ins. Co.*, No.
7 21-15716, 2022 WL 807592, at *1 (9th Cir. Mar. 16, 2022). The Court has everything it needs to
8 perform its substantive analysis and determine that there are no material facts that are genuinely
9 disputed, and that Starr is entitled to judgment as a matter of law. Accordingly, Starr respectfully
10 requests that the Court grant its Motion for Summary Judgment.

11 **II. PERTINENT FACTS**

12 **A. Undisputed Material Facts²**

13 Here are the material facts for the resolution of the Motion:

- 14 • JGB had a Property Insurance Policy from Starr, which was in effect when the
15 COVID-19 Pandemic began. Motion, Ex. A.
- 16 • The Policy, itself, dictates what is or is not covered and what is or is not
17 excluded. *Id.*
- 18 • The Policy does not simply cover “all risks,” but rather “all risks **of direct**
19 **physical loss or damage**” to JGB’s insured property “except as hereinafter
20 excluded or limited.” *Id.* at Property Coverage Form; General Conditions, at 1
(emphasis added).

21 ² JGB’s facts section includes innumerable immaterial information, including expert information
22 about the spreadability of the virus, the fact that it can exist on surfaces, the fact that it is harmful
23 to humans, and the fact that the virus likely existed on JGB’s property. Respectfully, Starr asks “so
24 what?” Even accepting all of these immaterial facts as true because the virus does not physically
25 alter or change the property, itself, the mere presence of the virus does not qualify as “direct
26 physical loss or damage” to the property, these facts are immaterial to the resolution of this Motion.
27 Further, even if the mere presence of the virus could trigger coverage (and avoid exclusion), JGB
28 has not provided any fact to support that any of its lost business was due to the alleged “direct
physical loss or damage” to its property, rather than low traffic due to the general fear of the virus
and the pandemic, which is undisputedly not “direct physical loss or damage” to the property. Starr
did not omit details, as JGB contents to hide relevant facts. *See* Opp. at 8:19-20. On the contrary,
Starr focused only on the facts that are material to the legal issues before the Court in this Motion.

- The Policy also provides coverage under its Civil Authority provision and its Ingress/Egress provisions separate and apart from its “all risks of direct physical loss or damage” provision. *Id.* at Property Coverage Form, Business Interruption Section, ¶7 and Ingress/Egress Endorsement (Endorsement No. 14).
- These two additional coverages have a 14-day sublimit, meaning that if triggered, the insured would be entitled to no more than 14-days of coverage thereunder. *Id.* at Property Coverage Form; Declarations, at 3.
- The Policy excludes coverage for any and all loss arising out of Contamination as well as the actual or threatened release of Pollutants at an insured location. *Id.* at Property Coverage Form General Conditions, Additional Exclusions (¶7(b)).
- The Policy defines Pollutants and Contaminants to expressly include “virus[es],” without limitation as to the types of “virus[es]” to be included. *Id.*, at Property Coverage Form General Conditions, Definitions (¶13(T)).
- COVID-19 and/or SARS CoV-2³ is a virus. *Opp.*, at 27:8-9.
- On or about March 20, 2020, the Governor’s Order closing non-essential businesses went into effect. *Motion*, Ex. C.
- At, or shortly before that time the majority of the tenants within the Grand Bazaar Shops closed their businesses. *Motion*, Ex. F; *Motion*, Ex. E, at 36:7-11.
- The Governor’s Order was designed to limit the future spread of the virus, state-wide. There is no direct link between any specific infection (let alone one within one mile of the Grand Bazaar Shops) and the Order. *Motion*, Ex. C.
- Some businesses remained open throughout the entirety of the closure order. Customers who desired to patronize those businesses that remained open were not prevented from doing so. *Motion*, Ex. F, at 1.
- On May 5, 2020, the State of Nevada allowed retail businesses to reopen. Restaurants were already allowed to be open for particular services. Customers who desired to patronize the open businesses were not prevented from doing so. *Motion*, Ex. D.
- On June 4, 2020, the State of Nevada permitted casinos to reopen. JGB invited its tenants, who had not already done so to do the same. Customers who desired to patronize the open businesses were not prevented from doing so. *Motion*, Ex. E, at 132:17-21.
- Since that day, the Grand Bazaar shops, as a whole has remained open. Customers who desired to patronize the businesses were not prevented from doing so. *Id.* at 52:7-17.

³ For the purposes of this Motion, Starr will refer to both as simply “COVID-19” or the “Virus.”

- Individual tenants may have closed their businesses on a temporary basis following anecdotal instances of a COVID-19 infection. The Grand Bazaar Shops did not close as a result of any of these anecdotal instances. Customers who desired to patronize the open businesses were not prevented from doing so. *Id.* at 126:5-13; 131:3-7.
- COVID-19 remains a public health risk to this day. Nonetheless, the Grand Bazaar Shops, as a whole, have remained open since June 2020. Customers who desire to patronize the businesses are not prevented from doing so. *See, e.g., Risk Levels*, GLOBALEPIDEMICS, available at <https://globalepidemics.org/key-metrics-for-covid-suppression/> (last visited, April 11, 2022).
- COVID-19 does not physically alter or damage property. COVID-19 is harmful to people, not objects. *See Circus Circus LV, LP v. AIG Specialty Ins. Co.*, 525 F. Supp. 3d 1269, 1276 (D. Nev. 2021) (finding that despite allegations that “objects and surfaces” were “contaminated by COVID-19” the insured still failed to allege a physical alteration of its property).

B. Complete Timeline of Claim Handling⁴

April 17, 2020	JGB Made its Claim, via Counsel to Starr “under the aforementioned shutdowns, closures, and other directives.” ⁵	Motion, Ex. G
April 22, 2020	JGB Provided additional information, via Counsel to Sedgwick	Motion, Ex. H
April 27, 2020	Sedgwick (on behalf of Starr) sent its first Reservation of Rights letter to JGB, along with 18 RFIs	Motion, Ex. I
May 13, 2020	JGB, via Counsel, responded to the 18 RFIs. As explained in the Motion, many responses contradicted others.	Motion, Ex. J
May 26, 2020	Sedgwick (on behalf of Starr) sent its second Reservation of Rights letter to JGB. This letter contained more detailed descriptions and analysis of the potentially applicable policy provisions. This letter, contrary to JGB’s continued insistence, did not deny the claim. Instead, it contained three additional RFIs which would be reviewed on a without prejudice basis.	Motion, Ex. L
June 16, 2020	Less than two months after making its claim, and with the investigation ongoing, JGB filed its premature Complaint, commencing this action.	Complaint
July 27, 2020	Sedgwick (on behalf of Starr) in continuance of performing its obligations to investigate JGB’s claim followed up with JGB and inquired as to the outstanding RFIs	Attached hereto as <i>Reply Exhibit A</i>

⁴ This timeline adds additional communications which were not included in Starr’s Motion because they are not relevant to the coverage issues before the Court. However, due to JGB’s ridiculous conspiracy theories about delaying the determination to affect the litigation, it is important that the Court see the full picture of JGB’s impediment to allowing the investigation to be completed.

⁵ While JGB incorrectly asserts otherwise in its Opposition (p. 11:13-14), Starr invites the Court to read the correspondence, which speaks for itself.

July 27, 2020	JGB (via local counsel) instructed Sedgwick to contact Marc Ladd, JGB's New York Counsel, and to coordinate responses with Starr's defense counsel, effectively refusing to cooperate with Starr/Sedgwick directly.	<i>Id.</i>
Sept. 14, 2020	Pursuant to JGB's instructions, Starr's Defense Counsel wrote to Mr. Ladd and asked for responses to the outstanding RFIs. Defense Counsel further reminded Mr. Ladd of JGB's obligation to cooperate with the investigation under the Policy	Opp., Ex. 27
Sept. 28, 2020	Mr. Ladd responded and refused to respond to the outstanding RFIs in violation of JGB's obligation to cooperate. Mr. Ladd attempted to justify JGB's lack of cooperation with non-Nevada caselaw that applies where an insurer had already denied a claim, despite the fact that Starr had not denied JGB's claim.	Attached hereto as <i>Reply Exhibit B</i>
Oct. 15, 2020	Defense Counsel replied, again seeking JGB's responses to the outstanding RFIs. Counsel reminded Mr. Ladd that much as an insurer's duty to the insured does not terminate merely because litigation is commenced, neither does the insured's responsibilities.	Attached hereto as <i>Reply Exhibit C</i>
Oct. 22, 2020	Mr. Ladd, after needless blustering, finally provided responses to the outstanding RFIs.	Motion, Ex. L.
Nov. 5, 2020	With responses to the outstanding RFIs allowing Starr to complete its investigation, Starr denied JGB's claim because the responses did not trigger any coverage.	Motion, Ex. M.

III. LAW AND ARGUMENT

A. JGB's Reliance on the Gossamer Threads of Whimsy Cannot Survive Summary Judgment

Summary judgment is appropriate where there is no "genuine dispute as to any material fact and . . . the movant is entitled to judgment as a matter of law." NRCP 56(a). General allegations and conclusory statements do not create genuine issues of fact. *Wood v. Safeway, Inc.*, 121 P.3d 1026, 1030-31 (Nev. 2005). A non-moving party cannot rely "on the gossamer threads of whimsy, speculation and conjecture" to defeat a motion for summary judgment. *Id.* at 1030. An opposing party is not entitled to have the motion for summary judgment denied on the mere hope that at trial he will be able to discredit the movant's evidence; he must be able to point out to the court something indicating the existence of a triable issue of fact and is required to set forth specific facts showing that there is a genuine issue for trial. *Hickman v. Meadow Wood Reno*, 617 P.2d 871 (Nev. 1980). "The word 'genuine' has moral overtones; it does not mean a fabricated issue." *Aldabe v. Adams*, 402 P.2d 34 (Nev. 1965), *overruled on other grounds by Siragusa v. Brown*, 971 P.2d 801 (Nev. 1996). "At least some significant probative evidence must be produced." *Allen v. United*

1 *States*, 964 F. Supp. 2d 1239, 1252 (D. Nev. 2013) (internal quotations omitted). The substantive
2 law determines which facts are material, and only legitimate disputes over facts that might affect
3 the outcome of the suit under the governing law will properly preclude the entry of summary
4 judgment. *Childs v. Selznick*, 281 P.3d 1161 (Nev. 2009) (citing *Wood*, 121 P.3d at 1031).

5 **B. JGB Continues to Misunderstand What Is Required To Trigger Coverage**
6 **Under its Policy**

7 In Nevada, “insurance policies [are] treated like other contracts, and thus, legal principles
8 applicable to contracts generally are applicable to insurance policies.” *Century Sur. Co. v. Andrew*,
9 432 P.3d 180, 183 (Nev. 2018). The parties’ intent, and therefore the contract’s meaning is found,
10 if possible, solely in the contract’s written provisions. *Sands Aviation, LLC v. AIS-Int’l, Ltd.*, 437
11 P.3d 1052 (Nev. 2019). The court applies the plain, ordinary, and popular sense of contract terms
12 as understood by a layperson and not as they might be analyzed by one trained in law or insurance.
13 *Siggelkow v. Phoenix Ins. Co.*, 846 P.2d 303, 304 (Nev. 1993). Where the policy provisions are
14 unambiguous, the court will enforce the policy as written, giving the words their plain and ordinary
15 meaning. *Fed. Ins. Co. v. Coast Converters, Inc.*, 339 P.3d 1281, 1285 (Nev. 2014). Courts may
16 not rewrite a policy or force a strained construction to interpret a policy against the insurer. *Ins.*
17 *Grp. v. Stonik ex rel. Stonik*, 867 P.2d 389, 391 (Nev. 1994).

18 JGB, and only JGB, bears the burden of proving that the claim is covered under the Policy’s
19 insuring agreement. *Lucini-Parish Ins. v. Buck*, 836 P.2d 627, 629 (Nev. 1992) (“A party who
20 seeks to recover on an insurance policy has the burden of establishing any condition precedent to
21 coverage”); *see also Zurich Am. Ins. Co. v. Ironshore Specialty Ins. Co.*, 964 F.3d 804, 810 (9th
22 Cir. 2020) (applying Nevada law). In Nevada, “[t]he interpretation of an insurance policy presents
23 a legal question.” *Powell v. Liberty Mut. Fire Ins. Co.*, 252 P.3d 668, 672 (Nev. 2011).

24 As such, the meaning of any term or phrase in the Policy, such as “direct physical loss or
25 damage,” or the word “virus,”⁶ is a matter of law for this Court to determine.

26
27 ⁶ Incredibly, JGB attempts to dispute the meaning of the word “virus,” despite having no
28 knowledge, whatsoever as to what subset of “viruses” would or could fit its unreasonably narrow
definition. *See discussion infra.*

1 ***1. JGB’s Property Did Not Suffer “Direct Physical Loss or Damage” as the***
2 ***Phrase is Interpreted Under Nevada Law***

3 Under Nevada law, “direct physical loss or damage” requires that there be some sort of
4 structural or physical change to a property, actually altering its functionality or use. *WP6 Rest.*
5 *Mgmt. Grp. LLC, v. Zurich Am. Ins. Co.*, No. 2:20-CV-1506-KJD-NJK, 2022 WL 980248, at *3-4
6 (D. Nev. Mar. 31, 2022).⁷ Moreover, despite JGB’s incorrect contention to the contrary,
7 California’s courts, from which Nevada courts take guidance, have long held that “direct physical
8 loss or damage” requires a “distinct, demonstrable, physical alteration” or “detectable physical
9 change” to the insured property. *Inns-by-the-Sea v. California Mut. Ins. Co.*, 71 Cal. App. 5th 688,
10 706, 286 Cal. Rptr. 3d 576, 591 (2021), review denied (Mar. 9, 2022).⁸ Mere economic impact is
11 not enough unless there has been a physical alteration to the property (not its patrons). *Id.*

12 The presence of COVID-19 does not physically alter property. COVID-19 is invisible,
13 odorless, and ephemeral. JGB contends, and for the purposes of the Motion, Starr does not dispute
14 that COVID-19 is a substance that, not unlike visible substances such as water or milk, can exist
15 on a surface. However, nothing in JGB’s evidence or expert opinion supports any conclusion that
16 COVID-19 physically alters the surface it sits upon. As such, the mere presence of COVID-19 on
17 particular surfaces does not equate to physical loss or damage to property as a matter of law. This
18 is the only outcome consistent with “common sense.” *Bank of the W. v. Superior Ct.*, 833 P.2d
19 545, 560 (Cal.1992); *see also Gov’t Emps. Ins. Co. v. Superior Ct.*, 93 Cal. Rptr. 2d 820, 825 (Cal.
20 Ct. App. 2000) (“[T]he court does not leave its common sense at the door.”). JGB omits from its
21 opposition that its own expert agrees that the virus that causes COVID-19 lives in the air or on
22

23 ⁷ *See also Levy Ad Grp., Inc. v. Chubb Corp.*, 519 F. Supp. 3d 832, 836 (D. Nev. 2021), *aff’d sub*
24 *nom. Levy Ad Grp., Inc. v. Fed. Ins. Co.*, No. 21-15413, 2022 WL 816927 (9th Cir. Mar. 17, 2022)
25 (citing *Fed. Ins. Co. v. Coast Converters*, 339 P.3d 1281, 1283 (Nev. 2014) and *Farmers Home*
26 *Mut. Ins. Co. v. Fiscus*, 725 P.2d 234, 236 (Nev. 1986)); *Circus Circus*, 525 F. Supp. 3d at 1275
(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)

27 ⁸ California appellate courts often guide Nevada’s, particularly in insurance cases. *See, e.g., Fourth*
28 *St. Place v. Travelers Indem.*, 270 P.3d 1235, 1244 (Nev. 2011) (“We agree with the reasoning set
forth by our sister state of California in our adoption of this [efficient proximate cause] doctrine.”).

1 surfaces only temporarily and dissipates on its own without any intervention. *See, e.g., Opp., Ex.*
2 7, at 22 (acknowledging that the virus dies over time); *Opp., Ex. 5*, at 8 (acknowledging the same).
3 Again, “[t]he danger caused by the virus is to people, not to the building.” *Tom’s Urban Master*
4 *LLC v. Fed. Ins. Co.*, No. 20-cv-03407-PAB-SKC, 2022 WL 974654, at *5 (D. Colo. Mar. 31,
5 2022);⁹ *see also Circus Circus*, 525 F. Supp. 3d at 1276.

6 JGB does not dispute that the vast majority of courts hold that the presence of COVID-19
7 is not “physical loss or damage,” including under Nevada law. Instead, JGB just desires that this
8 Court ignore the majority in hopes of a contrary ruling.¹⁰ *Opp.* at 21.

9 Since Starr’s Motion, yet another Court from the District of Nevada has addressed this issue.
10 *See WP6*, 2022 WL 980248, at *3-4. “‘Direct physical loss of or damage’ to property requires ‘a
11 physical change in the condition or a permanent dispossession of the property.’” *Id.* at *3 (quoting
12 *Circus Circus*, 525 F. Supp. 3d at 1276 and citing *Protégé Rest. Partners LLC v. Sentinel Ins. Co.,*
13 *Ltd.*, No. 20-cv-03674, 2021 WL 428653, *4 (N.D. Cal. Feb. 8, 2021)). Citing Nevada’s reliance
14 on California decisions, the *WP6* Court held that “direct physical loss” requires a “‘distinct,
15 demonstrable, physical alteration of the property’ or a ‘physical change in the condition of the
16 property.’” *Id.* at *4 (quoting *Circus Circus*, 525 F. Supp. 3d at 1275 and citing *MRI Healthcare*
17 *Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 771 (2010)). *WP6*, much
18 like JGB’s entire case, involved “conclusory allegations that the presence of COVID-19 particles:
19 renders items of physical property unsafe and premises unsafe” but fails to explain how, if at all
20 there has been “tangible, physical alteration of any property.” *Id.* For that reason, *WP6*’s
21 complaint, much like the complaints in all of the other cited cases from the District of Nevada,
22 failed to withstand scrutiny under the federal pleading standard.¹¹ *Id.*

23
24 ⁹ Notably, one such “building” discussed in *Tom’s Urban* is located on the Las Vegas Strip, less
than a mile from the Grand Bazaar Shops. 2022 WL 974654, at *1.

25 ¹⁰ JGB also hopes that the Court will ignore the rulings from the District of Nevada, applying
26 Nevada law, because of JGB’s conclusory assertions that each of those Courts misconstrued
Nevada law. *Opp.* at 2:7; 16:12.

27 ¹¹ While it is possible that that *WP6*’s and other complaints would have survived Nevada’s liberal
28 pleading standard under NRCP 12(b)(5), at this stage, that liberal pleading standard no longer
applies, and the Court must consider the merits of the claims.

Turning to the thus far unanimous federal appellate decisions, JGB attempts to distinguish some (not all) of them but failed to provide any contrary federal appellate decision of its own. Opp. at 19. The obvious reason is that no federal appellate court has produced the absurd result that JGB is hoping for in this case. JGB has further provided no reason for this Court to produce such an absurd result now.

Starr respectfully submits that there is no good cause for this Court to deviate from the Nevada cases decided thus far or the ever-growing “avalanche” of authority, including unanimous federal appellate authority nationwide. The mere presence of COVID-19 is not “direct physical loss or damage” to JGB’s property as a matter of law. As such, whether, how much, and how often COVID-19 was actually present on JGB’s premises are not material facts for the determination of this Motion. Accordingly, there is no genuine dispute as to any material facts, and Starr is entitled to judgment as a matter of law.¹²

2. JGB’s Position Regarding the Period of Indemnity Necessitates the Absurd Result that the Period of Indemnity Never Ends Because COVID-19 Will Never Be Fully Eradicated

The Policy requires that any loss payable is subject to the “Period of Indemnity,” which is the period between the time where “direct physical loss or damage” to JGB’s property occurs and when the “damaged or destroyed property at the ‘insured location’ should be repaired, rebuilt or replaced with the exercise of due diligence and dispatch.” Motion, Ex. A, at Property Coverage Form; Business Interruption Section, at 1-2 (¶¶2); Property Coverage Form General Conditions, at ¶13(R). JGB contends that it has incurred a Period of Indemnity because its “repairs” include the constant and continuing cleaning to prevent (or limit) infection. Opp. at 21-22. This position must fail for at least two reasons. First, cleaning to prevent future infection is not remedial, but

¹² JGB did not dispute Starr’s point that mere “Loss of Use” does not constitute “direct physical loss or damage,” and has conceded that Starr’s point is correct. EDCR 2.20(e) (“Failure of the opposing party to serve and file written opposition may be construed as an admission that the motion and/or joinder is meritorious and a consent to granting the same.”). Unlike the District of Nevada’s equivalent rule (LR 7-2(d)), the EDCR does not carve out an exception for Motions for Summary Judgment. Nonetheless, “loss of use” of property is not the same as “loss of property.” WP6, 2022 WL 980248, at *7 (citing *Collin v. American Empire Ins. Co.*, 21 Cal. App. 4th 787, 816 (Cal. App. Ct. 1994)).

1 preventative. This goes to the very dictionary definition of “repair” as cited in Starr’s Motion (and
2 miscited in JGB’s Opposition). *See* Definition of “Repair” Merriam-Webster Online Dictionary,
3 available at <https://www.merriam-webster.com/dictionary/repair>, (last visited Apr. 11, 2022) (“to
4 restore by replacing a part or putting together what is torn or broken; fix”). “Direct physical loss
5 or damage” is not something that can be remediated by mere cleaning. *See Tralom, Inc. v. Beazley*
6 *USA Servs., Inc.*, No. 2:20-cv-08344-JFW-RAOX, 2020 WL 8620224, at *5 (C.D. Cal. Dec. 29,
7 2020); *see also* *Uncork & Create LLC v. Cincinnati Ins. Co.*, No. 2:20-cv-00401, 2020 WL
8 6436948, at *5 (S.D.W. Va. Nov. 2, 2020) (holding that the actual presence of the COVID-19 virus
9 on property would not be sufficient to trigger coverage for physical loss or damage because the
10 virus can be eliminated from surfaces with routine cleaning). JGB can call it whatever it wants,
11 however; because there has been no alteration of its property to be put back to normal, there has
12 been no repair of its property.

13 Assuming for the sake of argument that JGB’s preventative measures can constitute a
14 “repair,” when, exactly is the “period of indemnity” supposed to end? It sounds like JGB’s position
15 is that as long as COVID-19 exists, the “period of indemnity” continues. However, COVID-19 is
16 not something that will likely ever be fully eradicated, but will be a disease requiring continual
17 preventative care, such as enhanced cleaning protocols and continual vaccination boosters. Thus,
18 under JGB’s ridiculous definition of “repair” and “period of indemnity,” its claimed period of
19 indemnity will likely never end.

20 JGB’s properties have been reopened for years now. While it contends that *some* tenants
21 opened later than others, it does not change the fact that the Grand Bazaar Shops as a whole has
22 been open for business since June 2020. Any “loss” of revenues after that point was not, as a matter
23 of fact and law, due to COVID-19 on the property (remembering that the policy requires “direct
24 physical loss or damage to” JGB’s property) but has been part of a global pandemic in which
25 customers and tourists have been visiting non-essential businesses in lower numbers than before
26 the pandemic began. In short, JGB is claiming coverage not for “direct physical loss or damage”
27 to its property as the result of COVID-19, but for customer apathy as the result of fear of COVID-
28 19. The Policy does not cover economic loss brought on by customer apathy.

1 JGB has not incurred a “period of indemnity” because it has not required “repairs,” to
2 reopen the shops. The Grand Bazaar Shops reopened when the Governor and Caesars said the
3 Grand Bazaar Shops could reopen. Potential customers’ individual decisions not to visit does not
4 change any of this.¹³ Accordingly, there is no genuine dispute as to any material facts, and Starr is
5 entitled to judgment as a matter of law.

6 **3. JGB Continues to Misunderstand What is Required to Trigger Either Civil**
7 **Authority Coverage or Ingress/Egress Coverage**

8 JGB’s claimed losses do not trigger its Civil Authority Coverage. JGB continues to hang
9 its hat on its generalized, conclusory allegations (unsupported by any admissible evidence) that its
10 neighbors allegedly had COVID-19 on their premises. Opp. at 23-24. However, JGB’s argument
11 is fatally flawed for a number of reasons. First, JGB incorrectly assumes that the presence of the
12 virus triggers coverage. Second, Civil Authority coverage cannot be triggered by mere physical
13 loss, but only by “damage or destruction of property.” Motion, Ex. A, at Property Coverage Form
14 Business Interruption Section, ¶7. Even if JGB was correct about these two, it has not and cannot
15 show that the Orders were the direct result of any such “damage or destruction” because the Orders
16 were preventative measures to protect the entire state from infection, and wholly unrelated to JGB’s
17 property or any other property within one mile. Finally, access to JGB’s property must be
18 prohibited (not merely limited) to trigger this coverage.

19 **a. No Damage to or Destruction of Property Within One Mile**

20 JGB has not produced any evidence of damage to or destruction of property within one mile
21 of its location. JGB failed to cite to a single case in its Opposition regarding the triggering of Civil
22 Authority coverage based on the presence of the virus nearby. See Opp. at 24-26 JGB’s entire
23 section on Civil Authority coverage is devoid of legal authority, save its unpersuasive attempt to
24 distinguish one of Starr’s cases. JGB’s lack of authority to support its position is enough to
25 disregard their opposition and grant judgment in favor of Starr on this point. *Edwards v. Emperor’s*
26 *Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (the Court need not

27 ¹³ Even if it could, JGB has offered no evidence to prove why any potential customer chose not to
28 visit Las Vegas generally or the Grand Bazaar Shops specifically, nor could it.

1 consider claims that are not cogently argued or supported by relevant authority). While JGB is
2 correct that Starr does not dispute (for the purpose of this Motion) that the virus likely existed on
3 premises near JGB's property, that does not change the fact that said properties were neither
4 damaged nor destroyed. For this reason alone, Civil Authority coverage is not triggered.

5 *b. The Orders Did Not Prohibit Access to the Insured Premises*

6 JGB ignores the fact that people were able to continue to access the Grand Bazaar shops at
7 all times, demonstrated by the fact that some businesses continued to operate and that others were
8 permitted to access their shops to retrieve supplies. Motion, Ex. B., at 83:18-84:8. The ability to
9 access the property, alone, defeats Civil Authority coverage. *See Levy Ad*, 519 F. Supp. 3d at 837
10 (analyzing the very same Order). The Order did not actually prohibit "access" to JGB's premises,
11 but instead it, at most, merely regulated some business operations. Because to trigger coverage the
12 government must, *inter alia*, have "prohibited [p]laintiffs from accessing their premises" coverage
13 cannot be triggered because JGB was never prevented from accessing its premises. *WP6*, 2022 WL
14 980248, at *5 (quoting *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, 487 F.Supp.3d 937, 944–
15 45 (S.D. Cal. 2020).

16 Similarly, because neither Ingress to nor Egress from was prevented (for the same reasons),
17 Ingress/Egress coverage cannot have been triggered. At most, JGB contends that customers did
18 not show up because they were afraid of the virus being "everywhere," not necessarily specific to
19 JGB's property. This does not change the fact that those who wanted to visit the Grand Bazaar
20 Shops, even in April and May 2020, could have visited the premises, meaning ingress and egress
21 was never prevented. JGB cannot dispute this, so instead it would prefer the Court ignore what
22 "ingress," "egress," or "access" actually mean to artificially create coverage where none exists.
23 Starr respectfully submits that the Court should not check its common sense at the door and give
24 these contractual terms their ordinary, common meanings, as it is required to do under the law.

25 *c. The Orders Were Not Issued As the Direct Result of Damage to or*
26 *Destruction of Property Within One Mile*

27 JGB failed to address this third point in its opposition, so the Court should deem that a
28 confession that Starr's point is meritorious. EDCR 2.20(e). JGB points to not a single Order that

1 references any particular instance of COVID-19 anywhere near the Grand Bazaar Shops. There is
2 an obvious reason for this omission. No such reference exists because no Order was specific to any
3 location. The Orders were “prophylactic” in nature, issued statewide, and “were issued to curb
4 further person-to-person transmission of the virus that causes COVID-19.” *WP6*, 2022 WL
5 980248, at *6. The Orders were not issued to remediate any past damage (again even assuming
6 incorrectly that the presence of the virus is either “damage” or “destruction” to property).

7 The applicability of Civil Authority coverage has been unanimously determined under
8 Nevada law by every court that was asked to consider it while not being limited by Nevada’s
9 12(b)(5) liberal pleading standard. *See, e.g., Levy Ad Grp., Inc. v. Fed. Ins. Co.*, No. 21-15413,
10 2022 WL 816927, at *1 (9th Cir. Mar. 17, 2022); *Levy Ad*, 519 F. Supp. 3d at 837. Governor
11 Sisolak’s Order(s) do not trigger Civil Authority coverage as a matter of Nevada law. *Id.*

12 JGB contends that the Order considered the presence of the virus to be damage to property.
13 *Opp.* at 12:4. This contention has been thoroughly rejected as to the term “damage” as used in
14 insurance policies. *WP6*, 2022 WL 980248, at *5. As the *WP6* Court put it, “The Governor’s order
15 did not result form [sic] damage to another property, but presumed that **every** commercial property,
16 including *WP6*s, was damaged.” *Id.* (emphasis in original). Just as the *WP6* Court “has no doubt
17 that the Nevada Supreme Court would come to the same conclusion as the Ninth Circuit Court of
18 Appeals, the District of Nevada and California District Courts,” neither should this Court, now that
19 it may analyze the terms of the Policy without deferring to JGB’s pleadings. When it does, the
20 Court will see that there is no genuine dispute as to any material fact, and Starr is entitled to
21 judgment as a matter of law as it pertains to Civil Authority coverage.¹⁴

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25 ¹⁴ JGB does not dispute that *if* Civil Authority and/or Ingress/Egress coverage can apply (which
26 they cannot), then the 14-day sublimit applies. Instead JGB disingenuously contends that there is
27 a question of fact as to the number of “occurrences.” *Opp.*, at 24, n.31. There is no dispute that
28 these coverages require an Order or act of the government, and that only one such Order (or act)
instructed some of JGB’s tenants to close. Thus, to the extent that either of these coverages can
apply (which again they cannot), the 14 days must begin on the date the Order went into effect and
end 14 days later.

1 **4. *The Pollutants and Contaminants Exclusion Precludes Coverage.***

2 *i. JGB Continues to Deliberately Misrepresent the Procedural History*
3 *of this Matter*

4 As has become common place throughout this litigation, JGB disingenuously misrepresents
5 not only the scope of the Court’s ruling on Starr’s Motion to Dismiss under NRCP 12(b)(5), but
6 the procedural history of this matter. When the Court determined, without a hearing, that JGB’s
7 Complaint was sufficiently plead under NRCP 12(b)(5), it issued the following ruling via Minute
8 Order:

9 HAVING reviewed and considered the parties’ filings ... deemed submitted and
10 under advisement as of November 12, 2020 pursuant to the Minute Order of
11 November 9, 2020, and being fully advised in the premises, and ... determining that
12 Plaintiff’s Complaint withstands Defendant’s NRCP 12(b)(5) ..., the Court DENIES
such Motion in its entirety **without prejudice to further development of**
Defendant’s claim contentions by way of NRCP 56 or otherwise.

13 November 18, 2020, Minute Order Denying Starr’s Motion to Dismiss Without Prejudice. The
14 Court directed JGB’s counsel to prepare the formal order. *Id.* Seeing a golden opportunity, JGB’s
15 counsel crafted its own self-serving Order including numerous factual findings that this Court never
16 made, including one such finding that the Court could not have made, even if it so desired. JGB’s
17 wrote itself a conclusive finding that the exclusion did not apply as a matter of law **despite** the fact
18 that the Court could not make any determinations, other than whether the Complaint meets the
19 liberal pleading standard **and** the fact that the Court specifically denied Starr’s motion “without
20 prejudice to further development of Defendant’s claim contentions by way of NRCP 56...”

21 JGB’s actions were so egregious and disingenuous, that Starr was forced to file a Motion to
22 Amend or Alter Order or in the Alternative Grant Relief from Order.” While the Court denied this
23 Motion as well, the Court clarified its ruling on the Motion to Dismiss that is noted “that reference
24 to and elaboration of Plaintiff’s allegations in the subject Order do not constitute ultimate findings
25 and conclusions of the Court, but are intended only to demonstrate the underlying bases of the
26 claims in surviving Defendant’s NRCP 12(b)(5) Motion under the applicable standard.” January
27 27, 2021, Minute Order Denying Starr’s Motion to Alter or Amend Order, etc. Thus, while the
28 Court did not enter an altered or amended order, it made it abundantly clear for all who chose to

1 read and abide by the Court's ruling that no substantive issues had been determined, only that JGB's
2 Complaint satisfied Nevada's liberal pleading standard. JGB admitted as much when it drafted the
3 corresponding Order by writing:

4 Reference to and elaboration of JGB's allegations in the November 30 Order do not
5 constitute ultimate findings and conclusions of the Court, but are intended only to
6 demonstrate the underlying bases of the claims in surviving Defendant's NRCP
7 12(b)(5) Motion under the applicable standard.

8 Formal Order Denying Starr's Motion to Alter or Amend Order, etc., at 3:6-9. The Court further
9 solidified the fact that no substantive matters had been decided in its Order Denying JGB's Motion
10 for Protective Order and Granting Starr's Countermotion to Extend Discovery Dates. The Order
11 stated:

12 To be clear, **the Court has not yet made any binding rulings as to** whether JGB's
13 tenants' allegedly limited business operations due to either the Emergency
14 Proclamations or the actual presence of COVID-19 on premises triggers any
15 coverage or **avoids all exclusion**, and it need not so determine for the purposes of
16 this Order.

17 *Id.* at 5, n.1 (emphasis added). As such, JGB's entire argument pertaining to "law of the case" is
18 as disingenuous as its attempt to create its own ruling in the first place.¹⁵

19 ii. *Now that the Court May, For the First Time Determine the*
20 *Applicability of the Exclusion on its Merits, The Only Reasonable*
21 *Interpretation is that "Virus" means "Virus" and the Exclusion*
22 *Applies*

23 JGB certainly performs quite a bit of mental gymnastics to try to gaslight the Court into
24 believing that "virus" means anything less than "virus." Opp. at 27-29. If fact, while JGB's *counsel*
25 attempts to artificially limit "virus" to those what are "industrial" in the hopes that the Court will
26 buy a reasonable expectations argument, JGB, itself has no idea what, if any viruses could ever fit
27

28

15 This would not be the last time that JGB attempted to game the system and create its own ruling. If the Court recalls, when JGB was asked to submit an Order Denying Starr's Motion to Enforce the Policy's Choice of Law Motion and Granting its Countermotion to Apply Nevada Law, JGB attempted to re-write the Court's functional ruling before submitting it to the Court. Starr noticed this and submitted a competing Order with the Court's functional ruling intact. The Court entered Starr's competing Order.

1 within this artificial definition, demonstrating that JGB’s “expectations” are anything but
2 reasonable.¹⁶ Motion, Ex. B, at 71:16-73:3.

3 JGB also predictably relies on *Century Surety Company v. Casino West, Inc.*, 329 P.3d 614,
4 616 (Nev. 2014), for the premise that all potential contaminants or irritants explicitly named in the
5 Policy only trigger the exclusion under particular circumstances, despite no such limitation existing
6 in the exclusion or the applicable definition. Opp. at 28. This position fails for a number of reasons.
7 First, the *Century Surety* opinion has already been distinguished in the context of COVID-19. See
8 *Circus Circus*, 525 F. Supp. 3d, at 1278. While JGB contends without support that the distinction
9 between types of policies makes no difference, the District of Nevada disagrees. *Id.* (“But that
10 decision, which imposed broad coverage for a third-party policy that limited liability for traditional
11 pollutants, is of limited help here because I must interpret a first-person policy broadly limiting
12 liability for health-harming contaminants and environmental pollutants.”). Instead, the *Circus*
13 *Circus* court did what this Court should do, namely analyze the specific words in the policy and
14 determine whether COVID-19 falls within them. *Id.*

15 *Century Surety* is further distinguishable because its exclusion involved only “pollutants”
16 not also “contaminants.” 329 P.3d at 615. The policy there defined “pollutant” as “any solid,
17 liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids,
18 alkalis, chemicals, and waste.” *Id.* at 616. Notably, this definition included neither “virus” nor
19 “carbon monoxide,” which was the particular irritant at issue in that case. *Id.* This means that the
20 Nevada Supreme Court did not have the opportunity to determine that a particular “pollutant”
21 identified in the policy’s definition somehow does not fit that very definition. However, that is
22 exactly what JGB is asking this Court to do.

23
24 ¹⁶ JGB also, predictably, clings to a contention that because the industry’s more common “virus
25 exclusion” is not present, then viruses are not truly excluded. Opp. at 26. Of course, this contention
26 is ridiculous. The Policy does not contain some other “virus exclusion” because viruses are already
27 excluded. *Tom’s Urban*, 2022 WL 974654, at *7; see also *Kim-Chee, LLC v. Phila. Indem. Ins.*
28 *Co.*, 535 F. Supp. 3d 152, 162-63 (finding that because the policy was unambiguous, the absence
of a “virus exclusion” did not alter the unambiguous language); *Promotional Headwear Int’l v.*
Cincinnati Ins. Co., 504 F. Supp. 3d 1191, 1201 n. 61 (D. Kan. 2020) (“The fact that Defendant
chose not to include a virus exclusion in the Policy does not render it ambiguous.”).

1 JGB does not dispute that the definition of “POLLUTANT” and “CONTAMINANT”
2 clearly, and unambiguously includes “virus.” Nor could it. JGB does not dispute that COVID-19
3 (or SARS-CoV-2) is a “virus.” Nor could it. Instead JGB’s hopes rest on the Court being convinced
4 to take a journey outside the realm of words’ ordinary meanings, but instead to focus on all of the
5 other words, except “virus.” Opp. at 28. Respectfully, that is absurd.

6 JGB asks the Court to ignore the multitude of cases Starr presented in its Motion that
7 examine this very exclusion, or strikingly similar exclusions, and instead focus on a single New
8 Jersey State case. *AC Ocean Walk, LLC v. American Guarantee and Liability Ins. Co.*, No. ATL-
9 L-0703-21, 2021 WL 6091224, at *3 (N.J. Super. L. Dec. 22, 2021). *AC Ocean Walk* is unhelpful
10 here because it, like this Court’s prior ruling, was made in the context of denying a Motion to
11 Dismiss based on a State Court’s liberal pleading standard. *Id.* at *2. (“Rule 4:6-2(e), requires the
12 complaint be searched in depth **with liberality** to determine if a cause of action can be gleaned
13 even from an obscure statement, particularly if further discovery will be taken. Every reasonable
14 inference is consequently accorded a plaintiff and **the motion should be granted only in rare**
15 **instances** and ordinarily without prejudice.”) (emphasis added).¹⁷ Respectfully, the Court must
16 employ a more rigid standard at this stage of the proceedings under Rule 56. While the gossamer
17 threads of whimsy may have been enough to survive dismissal under Rule 12(b)(5), they are not
18 enough to survive summary judgment under Rule 56.

19 With no coverage triggered and with no reasonable interpretation¹⁸ of the exclusion
20 precluding its applicability, there is simply no coverage for JGB’s claim as a matter of law. No
21 factual disputes can change this; thus, any factual dispute is immaterial. For this reason, Starr is
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23

24 ¹⁷ Notably, *AC Ocean Walk*, relied on this Court’s 12(b)(5) ruling to reach its conclusion under
25 New Jersey’s similar liberal standard. *Id.* at *9 (misspelling both “JGB” as “JDG” and “Clark
County” as “Clarke County”).

26 ¹⁸ “The fact that a lawyer is able to make an argument as to the proper construction of any given
27 language does not make the language ambiguous. The legal profession is widely reputed to be
28 capable of noting some ambiguity between black and white.” *Transamerica Ins. Group v. State
Farm Mut. Auto. Ins. Co.*, 492 F. Supp. 283, 287 (D. Nev. 1980).

entitled to judgment as a matter of law as to JGB's causes of action for Breach of Contract and Declaratory Relief.¹⁹

C. **Because JGB's Statutory Claim is Specifically Premised on Starr's Alleged Incorrect Interpretation of the Policy, it Must Also Fail as a Matter of Law**

While JGB is correct that not all of NRS 686A.310 requires a knowingly false interpretation of the applicable (or inapplicable) coverages, JGB's specific claims under the statute (as alleged in its Complaint) do. *See WP6*, 2022 WL 980248, at *7 (dismissing the insured's NRS 686A.310 cause of action because the specific subsections at issue involved "refus[al] without proper cause to compensate" the insured). JGB continues to claim that Starr misrepresented the terms of the Policy, the same way it throws out the term "misconstrues" in its Opposition. (p. 29:16). What JGB is able to show, at most, is a disagreement as to the terms. As much as JGB has established that it does not like the plain meaning of words (*see* "repair," "ingress," "egress," or even "virus"), "misrepresent" requires that the entity gives a "false or misleading representation of [a term] usually with **an intent to deceive or be unfair.**" *See* Definition of "Misrepresent" Merriam-Webster Online Dictionary, available at <https://www.merriam-webster.com/dictionary/misrepresent>, (last visited Apr. 11, 2022). Under this plain, ordinary, and common-sense meaning, JGB must prove more than that Starr was wrong (which it was not), but that Starr knew it was wrong and continued anyway with an intent to deceive or cheat JGB.

Knowing it cannot possibly demonstrate what is necessary to support its alleged violations of the statute, JGB redirects its focus for a weak allegation that Starr delayed its determination. Opp. at 29:20-21. While this particular contention is not before the Court, because it is not part of JGB's Complaint and is therefore not part of this case, it is also wholly incorrect. JGB repeatedly cites to the May 2020 Sedgwick ROR letter as a "denial," while ignoring the fact that it contained additional requests for information ("RFIs") and a promise to review the responses without prejudice. Motion, Ex. K, at 11. JGB refused to respond to these RFIs, instead prematurely commencing litigation and then directing Starr to request the information through counsel. *See*

¹⁹ JGB failed to oppose Starr's request for summary Judgment as to its Declaratory Relief claim, thus JGB has conceded its merit. EDCR 2.20(e).

1 *Reply Exhibit A*. When Starr’s litigation counsel requested the information, JGB’s counsel
2 continued to refuse to provide it. *Opp.*, Ex. 27; *Reply Exhibit B*. Only after Starr’s counsel
3 reminded JGB’s counsel of its obligations to prosecute its claim in good faith was a response given.
4 *See Motion*, Ex. L; *see also, Reply Exhibit C*. Within 14 days of the receipt of the answers to the
5 RFIs, Starr formally denied the claim. Any coincidental timing around the Motion to Dismiss was
6 nothing more than a result of JGB’s decision to commence premature litigation. Had JGB
7 responded the RFIs in May or June 2020, there is no doubt that the claim would have been denied
8 in June or July 2020. Starr could not deny the claim while the RFIs remained outstanding on the
9 off-chance that something in the responses could have actually triggered coverage. In hindsight, it
10 is obvious that the responses failed to do so.

11 JGB’s weak attempt to distinguish the *Tao* ruling also relies on their change in direction to
12 allegations that are not part of its Complaint. For that reason, the Court should simply disregard
13 them. Based on the portions of the statute that JGB actually alleged Starr violated, it still has to
14 prove that Starr knew its coverage position was incorrect and withheld coverage anyway. *Tao Grp.*
15 *Holdings, LLC v. Emp’rs Ins. Co. of Wausau*, No. 2:21-cv-00382-GMN-NJK, 2022 WL 705926,
16 at *12 (D. Nev. Mar. 8, 2022). Again, there is simply no evidence to support such a position, even
17 remotely.

18 Turning to specific contentions that are found its Complaint, JGB contends that Starr
19 misrepresented that there is no mention of the Order(s) having been issued because of physical loss
20 or damage. *Opp.* at 30:14-16. Starr was correct. JGB’s position requires that the Court apply its
21 incorrect definition of “direct physical loss or damage” to include the mere presence of COVID-19
22 on surfaces, despite no structural alteration to those surfaces. *Id.* at 30:16-18. As established in the
23 Motion, in this Reply, and by almost every court to address the issue, JGB’s definition is simply
24 incorrect. However, even if JGB is somehow correct (which it is not), then this would only establish
25 that Starr (and again the vast majority of courts) are incorrect, not that Starr intentionally lied about
26 coverage to deceive JGB. Mere mistake is not misrepresentation.

27 JGB also claims that the May 26 letter misrepresented that time element coverage required
28 physical prevention to the property. *Opp.*, at 30:18-20 (misciting Motion, Ex. K, at 10). In the

1 letter, it is clear that the question of lack of physical access to the property was not related to Time
2 Element coverage as a whole, but specifically to the Ingress/Egress coverage. Motion, Ex. K, at 9.
3 Starr (via Sedgwick) was correct to ask this question, because Ingress/Egress coverage requires that
4 “ingress to or egress from the premises insured is impaired.” *Id.* We now know that this did not
5 occur as the premises remained open, even during the pendency of the Closure Order. However, it
6 was not until JGB’s counsel decided to finally provide responses to the RFIs that Starr knew for
7 sure that neither ingress to nor egress from the Grand Bazaar shops was ever impaired.²⁰

8 JGB’s entire statutory argument is nothing more than a red herring to distract the Court
9 from the simple fact that it has no evidence to support the claims that it actually made. Any of its
10 remaining contentions are simply immaterial. Thus, with no genuine issue as to any material fact,
11 Starr is entitled to judgment as a matter of law as it pertains to JGB’s statutory claim. Accordingly,
12 Starr respectfully requests that the Court enter summary judgment in its favor.

13 **D. JGB Presented No Evidence To Support its Breach of the Covenant of Good**
14 **Faith and Fair Dealing Claim**

15 An insurer breaches the duty of good faith when it refuses “without proper cause to
16 compensate its insured for a loss covered by the policy.” *United States Fidelity & Guaranty Co. v.*
17 *Peterson*, 540 P.2d 1070, 1071 (Nev. 1975). “Primary to establishing a prima facie case of bad
18 faith refusal to pay an insurance claim is proof that the insurer was required to pay the insurance
19 claim.” *WP6*, 2022 WL 980248, at *7 (citing *Powers v. United Servs. Auto. Ass’n*, 962 P.2d 596,
20 604 (Nev. 1998); *see also Pioneer Chlor Alkali Co., Inc. v. Nat’l Union Fire Ins. Co.*, 863 F. Supp.
21 1237, 1244 (D. Nev. 1994); *see also Schumacher v. State Farm Fire & Cas. Co.*, 467 F. Supp. 2d
22 1090, 1095 (D. Nev. 2006). An alleged failure to investigate, if accurate, might *support* a bad faith
23 refusal to pay, but there must still be proof that there was an obligation to pay. *Id.* (citing *Pioneer*
24 *Chlor*, 863 F. Supp. at 1249).

25 _____
26 ²⁰ JGB attempted to distinguish Starr’s authority regarding applicability of the NAC. Opp. at 31.
27 However, it failed because the *Thorpe* case, as acknowledged in JGB’s Opposition, allowed
28 common law bad faith claims to survive against insurers, not allegations of NAC violations.
Further, JGB presented no authority to support its right to bring a claim under the NAC, therefore
the Court should disregard any contention that it has such a right. *Edwards*, 130 P.3d at 1288 n.38.

1 Starr re-cites the above because JGB attempted to distinguish this binding authority with an
2 outlier federal case that, frankly, does not apply here. *Dogra v. Liberty Mut. Fire Ins. Co.*, No.
3 2:14-cv-01841-GMN-GWF, 2017 WL 4158607, at *5 (D. Nev. Sept. 19, 2017). The *Dogra* Court
4 first acknowledged the general rule that without an actual breach of the contract, there can be no
5 bad faith. *Id.* It then distinguishes its case, in a way that does not apply here, because the insurer
6 in that case withheld benefits that “were undisputedly covered.” *Id.* Here, JGB’s claims are not
7 covered.

8 Starr correctly denied JGB’s claim. However, in the unlikely event that the Court disagrees,
9 there is no evidence whatsoever that shows that Starr unreasonably denied the claim with
10 knowledge that its actions were unreasonable. JGB relies on the fact that the ultimate denial letter
11 was very similar to the May ROR letter. Opp. at 31:13-17. The truth is that when JGB finally
12 decided to comply with its obligations under the Policy (well after commencing litigation), the
13 responses did not change the analysis. Because the analysis did not change, and the loose-ends
14 were finally tied up, Starr was able to deny the claim.

15 Again, any coincidental timing along with the Motion to Dismiss in this matter was caused
16 by JGB’s decision to file a premature Complaint rather than prosecute its still very much active
17 claim in good faith. Starr did everything in its power to keep its coverage efforts separate and apart
18 from its litigation defense efforts. JGB forced Starr’s hand. JGB’s premature Complaint created
19 deadlines within which a Motion to Dismiss could be filed. JGB’s refusal to cooperate with Starr’s
20 internal and external claim handlers delayed final resolution of its claim. JGB’s insistence that
21 counsel handle the exchange of RFI responses not only further delayed the resolution of the claim
22 but required counsel to simultaneously litigate its Motion to Dismiss and seek information for the
23 coverage efforts. Whether JGB intentionally caused Starr to both defend litigation and continue to
24 investigate the claim simultaneously is unknown, but there can be no doubt that JGB’s actions
25 forced Starr to both at the same time. Again, Starr could not deny JGB’s claim in good faith until
26
27
28

1 its investigation was completed upon the receipt of the grossly untimely RFI responses, in the event
2 that any response could have triggered coverage. It turns out that they did not.²¹

3 **IV. CONCLUSION**

4 JGB's time is up. JGB has wasted Starr's and the Court's time in litigating this lawsuit that
5 has no legal chance of success. The Court hinted as much when it denied the Motion to Dismiss
6 Without Prejudice and invited the filing of this very Motion. Now, for the first time, the Court has
7 the evidence and legal authority it needs to adjudicate these substantive issues of law. In doing so,
8 Starr submits that the Court should not be swayed by JGB's distractions, its recitation of immaterial
9 facts, or its constant attempts to artificially change the Court's rulings. Instead, Starr respectfully
10 submits that the Court use its eyes, its ears, and most importantly, its common sense in adjudicating
11 this Motion.

12 "Direct physical loss or damage" must be both direct and physical. "Loss of use" is not
13 "Loss of property." Civil Authority's 14-day coverage requires 1) "damage or destruction" to
14 nearby property, 2) that the Orders prevent access to the insured property, and 3) that the Orders
15 are issued as a direct result of any such damage or destruction. "Ingress/Egress" coverage requires
16 impairment to "ingress" and/or "egress." "Virus" means "virus." None of this is particularly
17 groundbreaking.

18 Further, Starr asks the Court to consider everything submitted to it, including the exhibits
19 to JGB's Opposition and ask itself:

- 20 1) When, if ever, were the Grand Bazaar Shops actually closed? And why?
21 2) What exactly is the "direct physical loss or damage" to JGB's property (not its
22 loss of potential business earnings)?
23 3) If JGB's narrow definition of "virus" could ever apply, what viruses would fit
24 that definition? In other words, is JGB's alternative definition truly reasonable?
25 4) What exact "misrepresentations," if any, did Starr make in the handling JGB's
claim?

26 ²¹ Finally, JGB makes one more disingenuous contention that all of the back and forth on JGB's
27 failure to respond to the outstanding RFIs occurred after Sedgwick issued the ROR Letter in May
28 2020. Opp. at 30. While factually correct, this is because these RFIs were first made in that very
letter. Motion, Ex. K, at 10-11.

1
2 5) How was Starr's conduct in any way unreasonable when at the present time there
3 is not a single shred of authority in Nevada (state or federal) that supports JGB's
4 claim and where JGB refused to cooperate with the investigation following the
5 filing of its premature complaint?

6 When the Court answers those questions, Starr is confident that the Court will agree that
7 there is no genuine dispute as to any material fact and that Starr is entitled to judgment as a matter
8 of law on each and every cause of action in JGB's Complaint. Accordingly, Starr respectfully
9 requests that the Court grant its Motion for Summary Judgment in its entirety.

10 Dated this 11th day of April 2022.

11 CLYDE & CO US LLP

12 By: /s/ Lee H. Gorlin

13 Amy M. Samberg (NV Bar No. 10212)
14 Lee H. Gorlin (NV Bar No. 13879)
15 7251 W. Lake Mead Blvd., Suite 430
16 Las Vegas, NV 89128

17 *Attorneys for Starr Surplus Lines Insurance*
18 *Company*

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **STARR SURPLUS LINES INSURANCE COMPANY'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT** was served by the method indicated below:

- ☐ **BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document(s).
- ☐ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.
- ☒ **BY ELECTRONIC SERVICE:** submitted to the above-entitled Court for electronic service upon the Court's Service List for the above-referenced case.
- ☐ **BY EMAIL:** by emailing a PDF of the document listed above to the email addresses of the individual(s) listed below.

Dated this 11th day of April 2022

/s/ Gina Brouse
An Employee of Clyde & Co US LLP

Amy M. Samberg (NV Bar No. 10212)
amy.samberg@clydeco.us
Lee H. Gorlin (NV Bar No. 13879)
lee.gorlin@clydeco.us
CLYDE & CO US LLP
7251 W. Lake Mead Blvd., Suite 430
Las Vegas, NV 89128
Telephone: 725-248-2900
Facsimile: 725-248-2907

*Attorneys for Starr Surplus Lines
Insurance Company*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

JGB VEGAS RETAIL LESSEE, LLC,

Plaintiff,

v.

STARR SURPLUS LINES INSURANCE
COMPANY,

Defendants.

CASE NO.: A-20-816628-B
DEPT. NO.: XIII

**DECLARATION OF LEE H. GORLIN
IN SUPPORT OF STARR SURPLUS
LINES INSURANCE COMPANY'S
REPLY IN SUPPORT OF ITS
MOTION FOR SUMMARY
JUDGMENT**

I, Lee H. Gorlin, declare as follows:

1. I am an attorney with the law firm Clyde & Co US LLP and am duly admitted to practice before this Court and the courts of the State of Nevada.

2. I am counsel of record for Starr Surplus Lines Insurance Company ("Starr") in this matter.

3. I submit this declaration in support of Starr's Reply In Support of its Motion for Summary Judgment.

4. These statements are based on my personal knowledge, or on information provided to me by Clyde & Co US LLP attorneys and staff working on this matter.

5. If called, I could competently testify to all matters contained in this declaration.

6. Attached to Starr's Reply in Support of its Motion for Summary Judgment are 3 exhibits, labeled as *Reply Exhibit A* through *C*.

PA 1311

EXHIBIT A

From: [Larson, Serena](#)
To: [Royi Moas](#); [Evan Siegel \(evan@junomp.com\)](#)
Cc: [Adam M. Weg](#); [US-YORK-sladoes](#); [Larson, Serena](#)
Subject: Follow up inquiries- JGB Retail Las Vegas; SRT-0632
Date: Monday, July 27, 2020 7:54:59 AM
Attachments: [image001.jpg](#)

Good Morning:

I am following up to secure answers to these pending inquiries? I note that you did provide Civil Orders for your jurisdiction but did not specifically answer these questions.

Thank you for response.

1) Was access to the loss location prohibited as a result of an order issued as the result of physical loss or damage within one mile of the insured location? If so, please provide a copy of the order and identify the address of the location where the damage occurred, what the damage was, and when it occurred.

2) What physically prevented access to the loss location as stated in your response to question number 1? If it was physical loss or damage, please identify the address of the location where the damage occurred, what the damage was, and when it occurred.

3) Aside from the loss of use and operation of the loss location because of the government orders referred to in response to question 3, is there any other physical loss or damage that occurred? If so, please state the date when the physical loss or damage occurred and describe the nature of the physical loss or damage.

I appreciate your prompt reply.

Kind regards

Serena J. Larson | Sr. Executive General Adjuster
Sedgwick
Riverside, CA
CELL 951.789.9889 | EMAIL serena.larson@sedgwick.com
www.sedgwick.com | Caring counts®
Sedgwick Logo



PJGB002672

PA 1313

From: [Roi Moas](#)
To: [Larson, Serena](#)
Cc: [Adam M. Weg](#); [US-YORK-sladoes](#); [Evan Siegel \(evan@junomp.com\)](#)
Subject: RE: Follow up inquiries- JGB Retail Las Vegas; SRT-0632
Date: Monday, July 27, 2020 11:31:02 AM
Attachments: [image001.jpg](#)

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Serena –

We'll need to direct you to Marc T. Ladd, Esq., who will coordinate through Starr's counsel. Marc's contact for your records is as follows:

Marc T. Ladd | Principal | McKool Smith
One Manhattan West
395 9th Avenue, 50th Floor
New York, NY 10001
Telephone: (212) 402-9406

Thanks,

Roi Moas, Esq.
WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP
3556 E. Russell Road, 2nd Floor
Las Vegas, Nevada 89120-2234
PH: 702-341-5200, Ext. 5103
FAX: 702-341-5300
E-Mail: rmoas@wrslawyers.com
www.wrslawyers.com

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From: Larson, Serena [<mailto:Serena.Larson@Sedgwick.com>]
Sent: Monday, July 27, 2020 7:55 AM
To: Roi Moas; Evan Siegel (evan@junomp.com)
Cc: Adam M. Weg; US-YORK-sladoes; Larson, Serena
Subject: Follow up inquiries- JGB Retail Las Vegas; SRT-0632

CAUTION:EXTERNAL EMAIL

PJGB002673

PA 1314

Good Morning:

I am following up to secure answers to these pending inquiries? I note that you did provide Civil Orders for your jurisdiction but did not specifically answer these questions.

Thank you for response.

1) Was access to the loss location prohibited as a result of an order issued as the result of physical loss or damage within one mile of the insured location? If so, please provide a copy of the order and identify the address of the location where the damage occurred, what the damage was, and when it occurred.

2) What physically prevented access to the loss location as stated in your response to question number 11? If it was physical loss or damage, please identify the address of the location where the damage occurred, what the damage was, and when it occurred.

3) Aside from the loss of use and operation of the loss location because of the government orders referred to in response to question 3, is there any other physical loss or damage that occurred? If so, please state the date when the physical loss or damage occurred and describe the nature of the physical loss or damage.

I appreciate your prompt reply.

Kind regards

Serena J. Larson | Sr. Executive General Adjuster

Sedgwick

Riverside, CA

CELL 951.789.9889 | EMAIL serena.larson@sedgwick.com

www.sedgwick.com | Caring counts®

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Any personal data acquired, processed or shared by us will be lawfully processed in line with applicable data protection legislation. If you have any questions regarding how we process personal data refer to our Privacy Notice <https://www.sedgwick.com/global-privacy-policy>. Any communication including this email and files/attachments transmitted with it are confidential and are intended solely for the use of the individual or entity to whom they are addressed. If this message has been sent to you in error, you must not copy, distribute or disclose of the information it contains and you must notify us immediately (contact is within the privacy policy) and delete the message from your system.

PJGB002674

PA 1315

EXHIBIT B

McKool Smith

Marc T. Ladd
Direct Dial: (212) 402-9406
mladd@McKoolSmith.com

One Manhattan West
395 9th Avenue, 50th Floor
New York, NY 10001-8603

Telephone: (212) 402-9400
Facsimile: (212) 402-9444

September 28, 2020

VIA EMAIL

Amy M. Samberg
Foran Glennon Paladech Ponzi & Rudloff PC
2200 Paseo Verde Parkway
Suite 280
Henderson, NV 89052
asamberg@fgppr.com

RE: Named Insured: JGB Vegas Retail Lessee, LLC (“JGB”)
Policy No.: SLSTPTY11245819 (the “Policy”)
Policy Period: 12/15/19-12/15/20
Claim No.: STP 16932 (the “Claim”)

Dear Amy,

As you are aware, I am acting as counsel for plaintiff JGB in its pursuit of insurance coverage against defendant Starr Surplus Lines Insurance Company (“Starr”) in the lawsuit styled *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Insurance Co.*, No. A-20-816628-B, which is pending in the Nevada state district court, business court division (the “Coverage Lawsuit”). I am writing in response to your letter dated September 14, 2020 in which Starr demands that JGB provide further responses to the information requests in Sedgwick’s July 27, 2020 email, that were in addition to the information already provided by JGB and acknowledged in your letter. Starr’s demand is made under the guise that Starr “is still conducting its investigation into JGB’s claim” and that JGB’s “obligation to cooperate” with Starr’s investigation under the Policy “remains a condition precedent to coverage.”

On September 16, 2020, Starr filed a motion to dismiss (the “Motion”) all of JGB’s claims for coverage in the Coverage Lawsuit on various grounds. In particular, and just by way of example, Starr contended in its Motion that, even if JGB could sufficiently plead facts to support coverage under the grants in the Policy (and Starr contends JGB cannot), “coverage [for the Claim] is nonetheless excluded under the Pollutants and Contaminants Exclusion.” Mot. at 24. Not only that, but Starr requested that the Court dismiss JGB’s Coverage Lawsuit “with prejudice” and deny any request for leave to amend, because JGB “cannot truthfully allege any set of facts” that would ever entitle it to coverage for the Claim. *Id.* at 30. JGB sued Starr in the Coverage Lawsuit because it was clear that Starr did not intend to honor its coverage obligations for the Claim under any circumstances, which Starr’s Motion now confirms.

Starr is not “still investigating” JGB’s Claim for potential coverage; instead, Starr has denied JGB’s Claim for all time. As such, it is well-settled that JGB is under no obligation under

McKool Smith

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PJGB002769

PA 1317

the Policy's requirement for cooperation to provide separate, further responses to the information requests in your letter. *See, e.g., Kienle v. Flack*, 416 F.2d 693, 695 (9th Cir. 1969) ("the general rule is that an insurer is estopped from relying on breaches of the cooperation clause occurring after the insurer has improperly denied coverage under the policy"); *Ass'n of Apartment Owners of Imperial Plaza v. Fireman's Fund Ins. Co.*, 939 F. Supp. 2d 1059, 1065 (D. Haw. 2013) ("when an insurer denies coverage under a policy, the rule used by a majority of states is that an insurer cannot then require an insured to follow a contractual duty to cooperate") (collecting cases). Rather, and in any event, the topics of which your letter requests further responses from JGB already are the subject of the Coverage Lawsuit—and, in particular, are squarely the subject of Starr's Motion—and will be properly and necessarily addressed by JGB's and Starr's arguments therein.

Please do not hesitate to call me with any questions.

Best regards,

/s/ Marc T. Ladd

Marc T. Ladd

cc: Don Springmeyer
Roi Moas
Serena J. Larson
Andrea Stroink
Lee H. Gorlin

EXHIBIT C



October 15, 2020

SENT VIA EMAIL

Marc T. Ladd, Esq.
McKool Smith
One Manhattan West
395 9th Avenue, 50th Floor
New York, NY 10001
mladd@mckoolsmith.com

Re: Named Insured: JGB Vegas Retail Lessee, LLC ("JGB")
Policy No.: SLSTPTY11245819
Policy Period: Dec. 15, 2019 – Dec. 15, 2020

Dear Marc:

I write in response to your letter of September 28, 2020. As you are aware, I wrote to you, at your client's request, to obtain the answers to questions that Starr's independent adjuster has been seeking since July 27, 2020. JGB refused to answer the questions, instead directing Sedgwick to have Starr's counsel coordinate receiving responses through you. As we are following the circuitous route requested by your client, your refusal to provide the requested information is concerning.

To the extent that you rely on non-Nevada case law to continue to interfere with Starr's obligation to investigate JGB's claim, your citations are not well taken. As you admit, those cases apply after an insurer denies a claim. As you are well aware, Starr has not denied JGB's claim — it is attempting to investigate it. As such, these cases do not support your position of non-compliance.

To the extent that you want to use Starr's legal position in defense of the premature lawsuit as an excuse for JGB's continued failure to cooperate with Starr's investigation, please remember that Sedgwick has been seeking this information since July to no avail. Starr's legal position is in response to the Complaint as written and based upon the plain language of the Policy. Starr's position regarding the futility of an amendment to the Complaint is based on the information received from JGB so far. In the event that JGB's responses to Sedgwick's questions could affect the coverage determination, which again has not been made as of this writing, JGB's cooperation is still required.

As an aside, my firm was not retained to do Sedgwick's job and conduct Starr's investigation. Therefore, if you do not want to provide responses pursuant to JGB's instructions, Starr has no problem if JGB resumes direct communication with Sedgwick, allowing both JGB and Starr (via Sedgwick) to fulfil their obligations to each other.

FORAN GLENNON PALANDECH PONZI & RUDLOFF PC

Amy Samberg, Attorney at Law 602.777.6230 asamberg@fgppr.com
2200 Paseo Verde Parkway, Suite 280, Henderson, NV 89052 www.fgppr.com

Chicago ■ Newport Beach ■ San Francisco ■ New York ■ London ■ Denver ■ Las Vegas ■ Phoenix

PJGB002782

Marc T. Ladd, Esq.
October 15, 2020
Page 2

Accordingly, we request that either you, or JGB, provide responses to the requests for information below in furtherance of Starr's continued investigation of the claim as originally requested on July 27, 2020.

Again, for your reference, the requests for information for which Starr still seeks responses are:

- 1) Was access to the loss location prohibited as a result of an order issued as the direct result of direct physical loss or damage within one mile of the insured location? If so, please provide a copy of the order;¹ identify the address of the location (within one mile of the insured location) where the damage occurred; what the damage was; and when it occurred.
- 2) What physically prevented access to the loss location as stated in JGB's response to question number 11 (In JGB's May 13, 2020, Letter which answered affirmatively that "ingress or egress to JGB's business was physically prevented, either partially or totally")?² If it was physical loss or damage, please identify the address of the location where the damage occurred; what the damage was; and when it occurred.
- 3) Aside from the claimed loss of use and operation of the loss location because of the government orders referred to in response to question 3 (in JGB's May 13, 2020, Letter), is there any other physical loss or damage that occurred?³ If so, please state the date when the physical loss or damage occurred and describe the nature of the physical loss or damage.

Just as an insurer's duty to its insureds does not terminate merely because the insured commences litigation, neither does the insured's duty to abide by its responsibilities under the Policy. Under the Policy, specifically within the Property Coverage Form General Conditions, JGB has an obligation to cooperate with Starr's investigation, including the securing and giving of evidence. Property Coverage Form General Conditions ¶12(m)(12), [page 11 of 16]. Starr's agreement to insure the insured property is "subject to all the terms [and] conditions ..." of the Policy. Property Coverage Form Property Section, at 1. This claim is still under investigation

¹ We note that Orders have been provided. JGB has not, however provided any further response to the inquiries contained herein.

² For your reference, Question 11 read "Has ingress or egress to your business been physically prevented, either partially or totally"? JGB responded "yes." in its May 13, 2020, Letter, a copy of which is attached hereto for your reference.

³ For your reference, Question 3 read "If you are claiming direct physical loss of or damage to insured property, please explain the nature of that physical loss or damage"? In its May 13, 2020, Letter, JGB responded:

The recent government mandated shutdowns, closures, and other directives have resulted in direct physical loss of the aforementioned real property during said time frame, because the insured, its subtenants, and customers are not allowed to enter, use, and/or operate the premises.

PJGB002783

PA 1321

Marc T. Ladd, Esq.
October 15, 2020
Page 3

and JGB's continued cooperation remains a condition precedent to coverage and full responses to the above questions are required. Please provide full responses to these inquiries to my office, or to Serena Larson as initially requested, within seven (7) days following the date of this letter.

All rights under the Policy and at law continue to be reserved. Please let me know if you have any questions or would like to discuss this matter further.

Very truly yours,

FORAN GLENNON PALANDECH PONZI
& RUDLOFF PC

/s/ Amy M. Samberg

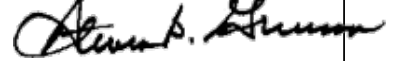
Amy M. Samberg

cc: Serena J. Larson [serena.larson@sedgwick.com]
Andrea Stroink [andrea.stroink@starcompanies.com]

Enclosures: Serena Larson's July 27, 2020, Email
Royi' Moas' July 27, 2020 Email

PJGB002784

PA 1322



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Telephone: 725-248-2900
Facsimile: 725-248-2907

*Attorneys for Starr Surplus Lines
Insurance Company*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

JGB VEGAS RETAIL LESSEE, LLC,

Plaintiff,

v.

STARR SURPLUS LINES INSURANCE
COMPANY,

Defendants.

CASE NO.: A-20-816628-B
DEPT. NO.: XIII

**STARR SURPLUS LINES
INSURANCE NOTICE OF
SUPPLEMENTAL AUTHORITY IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

Defendant Starr Surplus Lines Insurance Company (“Starr”) hereby submits this Notice of Supplemental Authority in support of its Motion for Summary Judgment for the Court’s consideration.

On April 15, 2022,¹ the United States Court of Appeals issued a Memorandum Order in the case entitled *Circus Circus LV, LP v. AIG Specialty Insurance Company*, Case No. 21-15367. A true and correct copy of which is attached hereto as *Exhibit A*.

In this Order, which was decided under Nevada law, the Ninth Circuit affirmed the District of Nevada’s ruling that Circus Circus failed to state a claim under its “all risks” policy for economic losses it sustained during the COVID-19 pandemic. Ex. A, at 2. Notably, Circus Circus alleged

¹ Because this ruling was issued today (April 15th), this Notice of Supplemental Authority could not have been provided any sooner. The timing of this ruling, which was not within Starr’s control should not preclude the Court from giving this ruling, made under Nevada law, its due consideration.

1 that its claimed losses arose not only from Governor Sisolak’s closure order, *but from the presence*
2 *of COVID-19 on its property.* *Id.* at 3. (¶1). The Ninth Circuit held that Circus Circus failed “to
3 allege that it suffered a direct physical loss of its property under the Policy” because its “argument
4 that the presence of the virus rendered its property uninhabitable improperly “collapses coverage
5 for ‘direct physical loss’ into ‘loss of use’ coverage.” *Id.* at 3-4 (quoting *Inns-by-the-Sea v.*
6 *California Mut. Ins. Co.*, 71 Cal. App. 5th 688, 705 (2021), review denied (Mar. 9, 2022)). The
7 Ninth Circuit confirmed that “direct physical loss or damage,” under Nevada law, requires that the
8 loss be due to a “distinct, demonstrable, physical alteration of the property.” *Id.* at 4.

9 The Ninth Circuit further noted that the policy’s period of “interruption,” (not unlike JGB’s
10 Policy’s “period of indemnity”), supports the logic that “direct physical loss or damage” requires a
11 distinct, demonstrable, physical alteration of the property, because of its focus on “repairing,
12 rebuilding, or replacing property,” (much like JGB’s Policy). *Id.* at 4.

13 Finally, the Ninth Circuit made these rulings under Nevada law, rejecting Circus Circus’
14 request to certify the question to the Nevada Supreme Court as unnecessary. *Id.* at 5 n.1. The Court
15 saw “no reason to believe the Nevada Supreme Court would rule differently.” *Id.* at 3. Neither
16 does Starr.

17 Accordingly, Starr respectfully requests that this Court give due consideration to the ruling
18 of the United States Court of Appeals, made under Nevada law as it relates to the case at bar. In
19 doing so, Starr further requests that the Court grant its Motion for Summary Judgment in its entirety.

20 Dated this 15th day of April 2022.

21 CLYDE & CO US LLP

22 By: /s/ Lee H. Gorlin

23 Amy M. Samberg (NV Bar No. 10212)
24 Lee H. Gorlin (NV Bar No. 13879)
25 7251 W. Lake Mead Blvd., Suite 430
26 Las Vegas, NV 89128

27 *Attorneys for Starr Surplus Lines Insurance*
28 *Company*

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **STARR SURPLUS LINES INSURANCE NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** was served by the method indicated below:

- ☐ **BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document(s).
- ☐ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.
- ☒ **BY ELECTRONIC SERVICE:** submitted to the above-entitled Court for electronic service upon the Court's Service List for the above-referenced case.
- ☐ **BY EMAIL:** by emailing a PDF of the document listed above to the email addresses of the individual(s) listed below.

Dated this 15th day of April 2022.

/s/ Gina Brouse
An Employee of Clyde & Co US LLP

EXHIBIT A

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

APR 15 2022

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

CIRCUS CIRCUS LV, LP,

Plaintiff-Appellant,

v.

AIG SPECIALTY INSURANCE
COMPANY,

Defendant-Appellee.

No. 21-15367

D.C. No. 2:20-cv-01240-JAD-NJK

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Jennifer A. Dorsey, District Judge, Presiding

Argued and Submitted March 9, 2022
Phoenix, Arizona

Before: HAWKINS, PAEZ, and WATFORD, Circuit Judges.

Plaintiff Circus Circus, LV, LP (“Circus Circus”), a 2.8 million square-foot casino in Las Vegas, Nevada, appeals the district court’s order dismissing its insurance coverage claims against AIG Specialty Insurance Company (“AIG”). We have jurisdiction under 28 U.S.C. § 1291. We review de novo, *L.A. Lakers, Inc. v. Fed. Ins. Co.*, 869 F.3d 795, 800 (9th Cir. 2017), and we affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Circus Circus seeks coverage under an “all risks” insurance policy (the “Policy”) for economic losses it sustained during the COVID-19 pandemic. The Policy provides coverage against “all risks of direct physical loss or damage to [the] Insured Property [i.e., the entire casino complex] from a Covered Cause of Loss.” The Policy defines the term “Covered Cause of Loss” as a “peril or other type of loss, not otherwise excluded under this policy.”

At 12:01 a.m. on March 18, 2020, “Circus Circus closed its doors” as a result of “COVID-19 and [local Stay at Home] Orders.” Among other matters, Circus Circus alleges that the “Stay at Home Orders have caused and are continuing to cause the necessary partial or total interruption of Circus Circus’s business operations” and that the Orders and physical loss of its property “caused by those Orders has had a devastating effect on [its] business.”

“On March 20, 2020, Circus Circus notified AIG that it had experienced . . . a covered loss as a consequence of the physical loss and damage caused by COVID-19 and the resulting Stay at Home Orders and other civil authority orders.” AIG denied the claim, and this lawsuit ensued.

Because this lawsuit concerns a dispute over the interpretation of an insurance contract, the analysis is governed by Nevada law. If there are no Nevada Supreme Court decisions directly on point, the court “must predict how the highest state court would decide the issue using intermediate appellate court decisions,

decisions from other jurisdictions, statutes, treatises, and restatements as guidance.” *S.D. Myers, Inc. v. City and County of San Francisco*, 253 F.3d 461, 473 (9th Cir. 2001) (citation and internal quotation marks omitted). Where Nevada law is lacking, this court may “look[] to the law of other jurisdictions, particularly California, for guidance.” *Eichacker v. Paul Revere Life Ins. Co.*, 354 F.3d 1142, 1145 (9th Cir. 2004) (citation and internal quotation marks omitted).

1. The district court correctly held that Circus Circus does not plausibly allege that it suffered direct physical damage to its property under the terms of the Policy. Despite Circus Circus’s allegation that the COVID-19 virus was present on its premises, it has not identified any direct physical damage to its property caused by the virus which led to the casino’s closure. Rather, the allegations surrounding Circus Circus’s closure are based on the local Stay at Home Orders. *See Inns-by-the-Sea v. California Mut. Ins. Co.*, 71 Cal. App. 5th 688, 699 (2021), review denied (Mar. 9, 2022). These very allegations were recently rejected by the California Court of Appeal in a factually similar lawsuit. *Id.* at 699-705. As Nevada courts often rely on California law for guidance, there is no reason to believe the Nevada Supreme Court would rule differently. *See Eichacker*, 354 F.3d at 1145.

2. Circus Circus likewise fails to allege that it suffered a direct physical loss of its property under the Policy. Circus Circus’s argument that the presence of the

virus rendered its property uninhabitable improperly “collapses coverage for ‘direct physical loss’ into ‘loss of use’ coverage.” *Inns-by-the-Sea*, 71 Cal. App. 5th at 705. Indeed, this court in *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885 (9th Cir. 2021), rejected an insured’s argument that “direct physical loss” of property merely requires that the property no longer be suitable for its intended purpose. *Id.* at 891. Rather, the loss must be due to a “distinct, demonstrable, physical alteration of the property.” *Id.* (citation omitted).

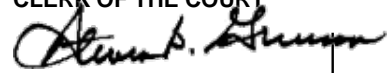
The Policy’s reference to the period of “interruption” further supports the logic that a loss of use requires a “distinct, demonstrable, physical alteration of the property.” The Policy covers actual losses of income sustained by the insured during a “Period of Interruption” which begins at the time of the “direct physical loss or damage” and ends either when: (1) normal operations resume; or (2) when “physically damaged buildings and equipment could be repaired or replaced and made ready for operations under the same or equivalent physical and operating conditions that existed prior to such loss or damage,” whichever is less. “The Policy’s focus on repairing, rebuilding, or replacing property . . . is significant because it implies that the ‘loss’ or ‘damage’ that gives rise to Business Income coverage has a physical nature that can be physically fixed.” *Inns-by-the-Sea*, 71 Cal. App. 5th at 707; *see also Mudpie*, 15 F.4th at 892. Here, although the “Period of Interruption” clause in the Policy is worded slightly different than the clauses in

the policies involved in the above-mentioned cases, the concepts are the same and the same conclusion follows.

Circus Circus also does not allege that it was permanently dispossessed of its property. *Mudpie, Inc.*, 15 F.4th at 892 (reasoning that Mudpie failed to allege a direct loss of its property because “Mudpie’s complaint does not identify a ‘distinct, demonstrable, physical alteration of the property,’ . . . and it does not allege that Mudpie was permanently dispossessed of its property.”).¹

AFFIRMED.

¹ In light of our disposition, we deny Circus Circus’s request that we certify two questions to the Nevada Supreme Court as unnecessary.



RTRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

JGB VEGAS RETAIL LESSEE, LLC,)	
)	
Plaintiff,)	CASE NO. A-20-816628-B
)	DEPT. NO. XIII
vs.)	
)	
STARR SURPLUS LINES INSURANCE)	
COMPANY,)	
)	
Defendant.)	
_____)	

BEFORE THE HONORABLE MARK R. DENTON, DISTRICT COURT JUDGE

MONDAY, APRIL 18, 2022

**RECORDER'S TRANSCRIPT OF PROCEEDINGS:
ALL PENDING MOTIONS**

APPEARANCES:

FOR THE PLAINTIFF: BRADLEY S. SCHRAGER, ESQ.
 MARC T. LADD, ESQ.
 Via Videoconferencing

FOR THE DEFENDANT: AMY SAMBERG, ESQ.
 LEE H. GORLIN, ESQ.

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(Hearing recorded via Bluejeans Videoconference/Audio)

1 LAS VEGAS, CLARK COUNTY, NEVADA, APRIL 18, 2022

2 (Case called at 9:45 a.m.)

3 THE COURT: Page 16, JGB Vegas Retail Lessee, LLC
4 verus Starr Surplus Lines Insurance Company.

5 MS. SAMBERG: Good morning, Your Honor.

6 THE COURT: Good morning.

7 MS. SAMBERG: Amy Samberg on behalf of Starr
8 Surplus Lines Insurance Company, accompanied by Mr. Gorlin.

9 THE COURT: Good morning.

10 MR. SCHRAGER: Good morning, Your Honor, Bradley
11 Schrager of Wolf, Rifkin, local counsel for JGB. And I'm
12 here with Marc Ladd of Cohen Ziffer, and he'll be making our
13 presentation for today.

14 THE COURT: All right. Very well.

15 MR. LADD: Good morning, Your Honor.

16 THE COURT: Good morning.

17 Okay. The first item is Starr Surplus Lines
18 Insurance Company's Motion to File Starr's Motion for Summary
19 Judgment under Seal. I don't believe there's an Opposition
20 to that.

21 MR. LADD: There is not, Your Honor by JGB joined
22 the motion.

23 THE COURT: All right. Cause appearing, there
24 being no opposition, the motion is granted. Please submit a
25 proposed order --

1 MS. SAMBERG: Yes, Your Honor.

2 THE COURT: -- okay, counsel?

3 THE COURT: Then the next one is Star Surplus Lines
4 Insurance Company's Motion for Summary Judgment.

5 MS. SAMBERG: Thank you, Your Honor.

6 May I use the podium?

7 THE COURT: Yes.

8 MS. SAMBERG: So nice to be here live and in
9 person, Your Honor.

10 THE COURT: Right.

11 MS. SAMBERG: After two years, so.

12 THE COURT: Yeah. Hopefully, I'll be able to take
13 this thing down --

14 MS. SAMBERG: We could actually see each other.

15 THE COURT: -- in the not too distant future.

16 MS. SAMBERG: And, Your Honor I don't know if
17 you've had an opportunity to review the extensive briefing on
18 this matter. If you have, then I will try to keep this
19 somewhat brief and just hit the high points.

20 THE COURT: Yeah, that's fine. That's fine.

21 MS. SAMBERG: And then address any questions Your
22 Honor may have --

23 THE COURT: Okay.

24 MS. SAMBERG: -- at -- at least of -- of Starr
25 insofar as -- as Your Honor's aware, this case arises out of

1 a contract of insurance between Plaintiff JGB, which owns the
2 Grand Bazaar Shops on the Las Vegas Strip, and its insurer,
3 Starr. JGB is seeking coverage under -- under its insurance
4 policy for purely economic losses resulting from the
5 pandemic.

6 The question isn't whether JGB actually suffered
7 economic losses. Like most business in Las Vegas, we don't
8 really dispute that they probably did. The question is
9 whether or not those losses are covered under their insurance
10 policy issued by Starr. And, respectfully, there is no
11 coverage for those losses.

12 JGB -- JGB's policy requires that there be direct
13 physical loss or damage. That's the language of the policy.
14 And that the economic losses arise from those direct physical
15 loss or damages to its property.

16 But the overwhelming majority of courts, over 600
17 as of the time we filed our Reply Brief, have held, courts
18 around the country, including here in Nevada, have held that
19 neither the threat of COVID-19, the actual presence of
20 COVID-19 on the premises, or the temporary loss of use of the
21 premises as the result of the closure orders, qualifies as
22 direct physical loss or damage.

23 So while Your Honor is the first Court in Nevada,
24 State Court to consider this substantive issue of contract
25 interpretation concerning coverage for economic losses under

1 a property insurance policy, hundreds, literally hundreds of
2 courts around the country, including the Nevada Federal
3 District Court and the Ninth Circuit Court of Appeals have
4 been doing that for two years.

5 So there is a well-developed body of law. It just
6 so happens that you're the lucky Court that gets to hear this
7 matter first in the State Court.

8 The answer provided by all of those hundreds of
9 other courts considering the issue, has been uniformly the
10 same. Neither COVID-19 nor the closure orders constitute
11 direct physical loss or damage to property.

12 And so while JGB will no doubt try to argue, as
13 they did in their briefing, that this case is somehow unique,
14 and this Court should ignore all that overwhelming authority,
15 that isn't the case.

16 COVID-19 affected the entire world. More locally,
17 it affected the entire State of Nevada and the City of Las
18 Vegas. JGB's property is no more unique than any of the
19 other businesses that have experienced similar economic
20 losses during the pandemic.

21 But that doesn't change the fact that JGB's policy
22 issued by Starr only covers what it covers, and that's
23 economic loss, that is the result of direct physical loss or
24 damage to JGB's property, and it has not suffered any direct
25 physical loss as a matter of law.

1 So for those reasons, Your Honor, we believe that
2 it is appropriate to enter judgment in Starr's favor on the
3 entirety of Plaintiff's Complaint. But if -- so -- and let
4 me address some of the issues that was raised -- that were
5 raised in the briefing.

6 Insofar as the facts, this is a legal issue. It is
7 a matter of law for the Court to decide how this policy is to
8 be interpreted. There are no factual issues.

9 So -- so JGB included a lot of so-called facts in
10 their briefing, trying to muddy the waters, and create a fact
11 issue. Most of those so-called facts are not material to the
12 resolution of the legal issue before you.

13 Here's the material facts. The material facts are
14 there's a policy. JGB had a policy. It was in effect during
15 the COVID pandemic. The policy itself dictates what is and
16 isn't covered and what is and isn't excluded.

17 The policy does not simply cover all risks, as JGB
18 argued in its briefing. What it covers is all risks of
19 direct physical loss or damage to JGB's insured property,
20 except as may be excluded or limited.

21 The policy also includes certain separate time
22 element coverages for civil authority orders and ingress and
23 ingress (sic) -- egress provisions. Those two coverages also
24 require direct physical loss or damage, but not to JGB's own
25 property, but to some other property that caused orders to be

1 issued or for ingress or egress to JGB's property to be
2 affected.

3 The policy, finally, Your Honor, has an exclusion.
4 So even if coverage had been triggered, and I'll explain in a
5 moment why we think that's not the case, there is an
6 exclusion for coverage in this circumstance.

7 The policy has a contamination -- the policy
8 excluded coverage for any and all losses arising out of
9 contamination, as well as actual or threatened release of
10 pollutants at an insured location.

11 It then goes on to define pollutants and
12 contaminants, as used in that exclusion, to expressly include
13 viruses. There is no question COVID-19 is a virus. And it
14 is specifically excluded by operation of the pollutants and
15 contaminants exclusion in the policy.

16 So even if JGB could trigger coverage under the
17 policy in the first instance, and somehow COVID-19 was direct
18 physical loss or damage, it is therefore excluded by the
19 pollutants and contaminants exclusion on the policy.

20 The -- the other material facts relate to the
21 closure orders. The Governor's order closing nonessential
22 businesses went into effect on March 20th of 2020.

23 The undisputed facts in the record are that at or
24 -- shortly before that time, the majority of the tenants
25 within the Grand Bazaar Shops had already closed their

1 businesses.

2 A reading of the Governor's orders make clear that
3 the order was designed to protect -- to limit the future
4 spread of the virus throughout the State. There is no direct
5 link between the Governor's order and any specific infection
6 at any particular location, let alone on JGB's property, or
7 within one mile of JGB's property.

8 Discovery also revealed in this case that some of
9 the businesses at the Grand Bazaar Shops remained open
10 throughout the pandemic on a limited basis. The restaurants
11 were doing carry out service, and the patrons were able to go
12 to those businesses, to the extent services were being
13 provided. In other words, there was nothing restricting
14 anybody from patronizing any open business.

15 On May 5th, 2020, the State of Nevada allowed
16 retail businesses to open. So on that date, any customers
17 who desired to patronize the open businesses were allowed to
18 do so.

19 And then finally, on June 4th of 2020, the State of
20 Nevada allowed the casinos to reopen. And on that date, JGB
21 invited any of its tenants who had not already done so, to
22 now reopen their premises fully, and any customers who wanted
23 to patronize any of the shops at the Grand Bazaar Shops were
24 able to do so. Since that day, the Grand Bazaar Shops have
25 continuously been open.

1 Customers who wanted to utilize -- to patronize those
2 businesses were not prevented to -- from doing so.

3 There is evidence that individual tenants within
4 the Grand Bazaar Shop may had anecdotal instances of COVID-19
5 on their particular premises. In other words, a restaurant
6 may have had an employee who tested positive, so the
7 restaurant was closed for a day or two.

8 But that did not affect the ultimate operation of
9 the Grand Bazaar Shops as a whole. And JGB has not tied any
10 of its alleged economic losses to any particular instance of
11 COVID infection actually on the premises.

12 As held by literally hundreds of courts, including
13 most recently Judge Dorsey on the federal bench here, COVID-
14 19 doesn't alter -- COVID-19 does not physically or alter
15 damage property. COVID-19 is harmful to people.

16 THE COURT: Well, let me ask you a question that
17 was one you were addressing a few minutes ago, the
18 exclusion --

19 MS. SAMBERG: Yes, sir.

20 THE COURT: -- language. And when I was reviewing
21 this, a note -- and this is on page 5 of the motion, okay?
22 It quotes the pollution and contamination exclusion language.
23 And a note I made to myself, it says, "This policy does not
24 insure against loss or damage caused by or resulting from any
25 of the following, regardless of any cause or event

1 contributing concurrently," et cetera.

2 And the note I made to myself is, does this
3 recognize that damage can be caused by contamination? That
4 was my -- that was my question.

5 MS. SAMBERG: I'm not sure that that was the
6 intent. I think the intent of the exclusion is that any and
7 all damage which may be caused by any excluded cause, it's
8 intended to be broadly interpreted.

9 THE COURT: Okay. Okay.

10 I'm sorry. I interrupted you.

11 MS. SAMBERG: No, that's okay. That's what I'm
12 here for --

13 THE COURT: Um-hum.

14 MS. SAMBERG: -- is to answer your questions, Your
15 Honor.

16 I briefly want to address procedural history,
17 because in --

18 THE COURT: Well, I have one other question before
19 you get --

20 MS. SAMBERG: Yes, sir.

21 THE COURT: -- to that. And that has to do with,
22 you know, we're talking about COVID-19 here. But what about
23 situations where there's been a nuclear event?

24 MS. SAMBERG: I think --

25 THE COURT: And things around it aren't really

1 physically damaged, but they're -- they're -- they've got --
2 they're radioactive or whatever, they can't be -- does that
3 constitute damage?

4 MS. SAMBERG: Well, Your Honor that's an
5 interesting hypothetical. I actually think -- don't quote me
6 on this, because I wasn't prepared to look at that. Perhaps
7 Mr. Gorlin can look. I actually believe that there's a
8 specific exclusion in the policy for nuclear events.

9 THE COURT: Okay.

10 MS. SAMBERG: So that -- that event has been
11 anticipated. Typically, most property policies have some of
12 exclusion for -- for exactly what you're -- what you're
13 suggesting.

14 THE COURT: Okay.

15 MS. SAMBERG: In this instance, however, there is a
16 pollution and contamination exclusion and it specifically
17 defines pollutants and contaminants, to include virus. And
18 it doesn't say --

19 THE COURT: Um-hum.

20 MS. SAMBERG: -- what kind of virus. It says, any
21 virus. The word "any" is used in that exclusion.

22 I will tell you, Your Honor and I'll just skip to
23 -- skip ahead. With respect to that particular exclusion,
24 first of all, the exact exclusion in the Starr policy has
25 been addressed by a Federal District Court in Louisiana. So

1 it was an identical exclusion on another Starr policy.

2 That is cited -- it is *Ford of Slidell* and the
3 citation is in our briefing, Your Honor. But that was the
4 identical exclusion and found to be applicable in this
5 instance to fully exclude coverage.

6 I will also tell you that Judge Dorsey in the
7 *Circus Circus* opinion applied a very, very similar exclusion
8 and found that it applied.

9 THE COURT: And apparently, that was recently
10 affirmed, right, by the Ninth Circuit?

11 MS. SAMBERG: Yes. So --

12 THE COURT: Um-h'm.

13 MS. SAMBERG: -- so the -- the affirmation by the
14 Ninth Circuit direct -- specifically addressed the direct
15 physical loss or damage component of the Judge Dorsey
16 opinion. But it also didn't specifically address her
17 discussion and application of the exclusion, leaving that
18 fully intact. In other words, Judge Dorsey has found that a
19 almost identical exclusion as relates to the *Circus Circus*
20 policy is applicable under these circumstances.

21 And -- and the case that JGB relies upon, and also
22 was relied upon by *Circus Circus*, and numerable other
23 insureds, is a Nevada case called *Century Surety*. And that
24 was a Nevada Supreme Court case that discussed the
25 application of carbon monoxide, or an exclusion for carbon

1 monoxide in a third party liability policy, not a first party
2 policy.

3 But more importantly, the issue with that was
4 carbon monoxide was not enumerated among the various types of
5 contaminants that were specifically excluded for. The
6 carrier's argument in that case was, well, it's a
7 contaminate, so it should be included, even though we don't
8 specifically list it.

9 And the Supreme Court said, no, it's not
10 specifically listed, so we're not going to apply that
11 exclusion, you know, for carbon monoxide when you don't
12 mention carbon monoxide, but you do mention all these other
13 things.

14 In this instance, the policy very specifically says
15 virus. Virus means virus. And so that *Century Surety* case
16 was -- was addressed both by Judge Dorsey in her ruling, it
17 was certain discussed at the oral argument on the -- by the
18 Ninth Circuit on the *Circus Circus* case. But they left that
19 part of Judge Dorsey's order intact.

20 It's also been addressed by JGB in this -- in the
21 briefing here.

22 THE COURT: Okay.

23 MS. SAMBERG: May I jump back, Your Honor? There
24 are other questions --

25 THE COURT: Sure.

1 MS. SAMBERG: -- that came to mind --

2 THE COURT: No, that's fine.

3 MS. SAMBERG: -- as you were reading.

4 So JGB, not Starr, has the burden of proof here.
5 They have the burden of establishing coverage under the
6 insuring agreement of their policy. So here the insuring
7 agreement provides direct -- it -- that it -- all risks of
8 direct physical loss or damage, except as hereinafter
9 excluded or limited.

10 And we've already discussed the exclusion. So
11 Starr's position would be that even if coverage were
12 triggered in the first instance, and for the reasons I'll
13 explain, we don't think it has been, it would be excluded
14 because of the pollution and contamination exclusion, which
15 includes virus.

16 Under Nevada law, direct physical loss or damage
17 requires there be some sort of structural or physical change
18 to property actually altering its functionality or use.

19 Nevada law requires there be some sort of -- and
20 this holding, that there be some sort of structural change,
21 has been now held in five separate cases by the Nevada
22 Federal District Court. Two of those, as we just discussed,
23 have now been affirmed by the Ninth Circuit. So those are
24 all listed in the brief.

25 //

1 But as Your Honor noted, most recently the Ninth
2 Circuits are -- Ninth Circuit affirmed *Circus Circus* as of
3 Friday of last week. Previously, they had also affirmed the
4 *Levy Ad* decision, which primarily dealt with the civil
5 authority orders.

6 So while there were other holdings in that case,
7 primarily that was a case that dealt with whether the civil
8 authority orders constitute a direct physical loss or damage,
9 or triggered the civil authority coverage in the policy.
10 That case has also been affirmed by the Ninth Circuit.

11 In addition, Your Honor, there have been several
12 state -- the California State and Federal Court cases that
13 agree that there must be some physical alteration of
14 property. All of those citations are contained in -- in the
15 briefing.

16 Both the Nevada Federal District Courts and the
17 California State and Federal Courts agree that economic loss,
18 as is what is being alleged here, without preceding distinct
19 demonstrable, physical alternation to the property, is not
20 direct physical loss or damage, giving rise to coverage.

21 Those same cases also hold that mere loss of use
22 without alternation of the property is not direct physical
23 loss or damage, according to those very same authorities.
24 In other words, any meaning of direct physical loss or damage
25 that does not require alteration to the property, would

1 render meaningless the requirement that the loss be both
2 direct and physical.

3 JGB, in this case, has failed to produce any
4 evidence that its property suffered any structural or
5 tangible change due to COVID-19. This is because COVID-19
6 does not structurally alter the property. It sits there
7 until it gets cleaned, or it dies naturally. At most, what
8 JGB has shown in this case is the virus might have existed on
9 its premises at some point in time.

10 So even if the mere presence of the virus on the
11 premises could be direct physical loss or damage, which of
12 course we don't think it does, it hasn't tied one cent of its
13 alleged economic loss to any such presence of the virus on
14 the premises.

15 THE COURT: All right. This has all been very well
16 briefed, so if you want to --

17 MS. SAMBERG: Yeah.

18 THE COURT: -- summarize briefly, and then --

19 MS. SAMBERG: The only other point I just want to
20 briefly make, Your Honor, is -- is with respect to at least
21 one of the arguments that was made in the -- JGB's response,
22 and that is somehow Your Honor has already ruled, and that
23 somehow there is law of the case related to the application
24 of the exclusion. Just to refresh Your Honor's recollection,
25 very early on, when this case was filed, very early on, we

1 filed -- Starr filed a Motion to Dismiss under Rule 12(b)(5).
2 Your Honor denied that motion on the grounds that JGB had
3 sufficiently pled its losses were covered.

4 And in doing so, Your Honor was very clear that its
5 ruling was intended to be without prejudice and would -- you
6 would consider all substantive issues under a Rule 56 motion
7 which is what we are here doing today.

8 Despite Your Honor's without prejudice ruling, JGB
9 was given an inch, and it took a mile, and drafted their own
10 order that included within it a ruling by Your Honor in the
11 proposed order that the virus exclusion did not apply as a
12 matter of law.

13 Obviously, on a 12(b)(5) motion, that can't be.
14 Your Honor was merely -- and you did clarify later in our
15 motion to alter or amend that that was not your ultimate
16 ruling. You clarified, yet again, if you recall, Your Honor,
17 there was a Motion for Protective Order that was extensively
18 argued before Your Honor.

19 And at that time, once again, JGB tried to argue
20 that you had previously ruled that the virus exclusion didn't
21 apply. You clarified once again in that motion that you had
22 not made any substantive rulings with respect to any of the
23 issues in this matter.

24 So to the extent JGB intends to argue that somehow
25 this is law of the case, and the virus exclusion doesn't

1 apply based a Motion to Dismiss ruling, that's just
2 procedurally and factually incorrect.

3 THE COURT: Okay.

4 MS. SAMBERG: Any other questions for me --

5 THE COURT: No.

6 MS. SAMBERG: -- Your Honor?

7 THE COURT: No, not at this time.

8 MS. SAMBERG: Thank you, Your Honor.

9 THE COURT: Thank you.

10 All right. Mr. Ladd?

11 MR. LADD: Good morning, Your Honor. [audio
12 drops/distorted].

13 THE CLERK: Mr. Ladd, we can't hear you very well.

14 MR. LADD: I'm sorry. [Audio drops/distorted].

15 THE CLERK: We can't hear you very well. I don't
16 know if you're maybe able to call in. It's like your audio
17 is a little bit mumbled.

18 MR. LADD: Does that work better?

19 THE CLERK: Yes.

20 MR. LADD: Okay. Great. And I -- I apologize,
21 Your Honor, for not being there in person. Hopefully, we
22 could have avoided those ten seconds.

23 Marc Ladd on behalf of the Plaintiff insured, JGB
24 Vegas Retail Lessee. Your Honor, I will probably admit that
25 Your Honor has, you know, a well -- a good understanding of

1 the issue before the Court regarding losses for COVID-19
2 pandemic based on the presence of the virus on the property.
3 And my client losing money as a operator and manager of a --
4 a mall on the Las Vegas Strip where many of its tenants
5 weren't able to pay rent because of the loss of business due
6 to the pandemic.

7 Regarding counsel's points, I think I'll take first
8 the issue regarding the contamination, the pollution
9 contamination exclusion, because I think it's the most easily
10 dealt with.

11 Your Honor, when Starr moved to dismiss this entire
12 case and Your Honor denied that motion in its entirety, it
13 requested JGB put together an order with supportive briefing,
14 and JGB did that.

15 The standards for applications of exclusions are
16 that the exclusion must be unambiguous, the insurer must
17 establish that its reading is the only reasonable
18 interpretation, and the exclusion clearly applies in that
19 case. That's the standard.

20 When the motion was -- was denied, it necessarily
21 held that the exclusion did not apply. Nothing has changed
22 in the facts, from then until now. And I don't think
23 opposing counsel would actually take that position. It's
24 whether or not COVID-19 would come within the confines of
25 this exclusion that talks about solid, liquid, gaseous,

1 smoke, vapor, materials to be recycled, reconditioned, or
2 hazardous substances listed under the Federal Water Pollution
3 Control Act, Clean Air Act, Resource Conservation and
4 Recovery Act.

5 Clearly, this exclusion was not intended to apply
6 to a person-to-person communicable disease. The insurance
7 industry has an exclusion for that, written by Insurance
8 Services Offices. It has been in publication since 2006.

9 What Starr was trying to do is refashion this as a
10 virus exclusion when it clearly applies to environmental and
11 industrial pollution and contamination.

12 Your Honor signed the order. The order was issued,
13 that it didn't apply. Starr -- counsel left out that Starr
14 made a motion to amend or alter the order and replace it with
15 an order that said nothing about the exclusion. Your Honor
16 denied that motion. And then as part of a discovery motion,
17 Starr tried to sneak in as a footnote that the Court had not
18 made any substantive rulings yet.

19 Your Honor, this issue has been decided. It's
20 actually been decided by other courts citing Your Honor's
21 order for support, that this type of exclusion, that clearly
22 applies to environmental and industrial pollution
23 contamination, does not apply to COVID.

24 Moving on, Your Honor, to what is the main issue in
25 this case, and that is whether or not Starr can meet its

1 burden on summary judgment of showing the absence of any
2 genuine dispute over any material fact, that as a matter of
3 Nevada law, claims for COVID-19 business interruption are not
4 covered.

5 And, Your Honor, it's clear from the papers that
6 Starr has submitted that it can't carry either of those
7 burdens.

8 Number one, I'll start with the law. Now -- excuse
9 me -- as Your Honor, has pointed out, and as opposing counsel
10 pointed out, there was a recent decision by the Ninth Circuit
11 in the *Circus Circus* matter, as to whether [audio
12 drops/distorted] claims there could be covered under COVID-19
13 business interruption.

14 Now, there were a couple of things said about that
15 case that I just want to point out that were not exactly
16 factually correct. Obviously, as [audio drops/distorted]
17 have discussed, it said nothing about any contamination or
18 pollution exclusion.

19 It also did not say anything about Nevada law
20 requiring structural damage, or structural alteration of
21 property in order for there to be coverage under a property
22 and business interruption policy. The word "structural" does
23 not appear anywhere.

24 And, Your Honor, that follows a trend of the
25 Federal Nevada court cases that my opposing counsel is

1 citing. That would include *Levy Ad Agency*, the *Circus Circus*
2 District Court opinion, and another opinion by Judge Dorsey,
3 all three by Judge Dorsey, called *Project Lion*.

4 Now, there's two points about these cases that I
5 just wanted to make sure, I brought to the Court's attention,
6 and that is, the first, is that when Judge Dorsey pronounced
7 that Nevada law had (indiscernible) claims for property
8 damage as -- involving structural damage, and cited two
9 Nevada Supreme Court cases, neither Nevada Supreme Court case
10 actually stands for that proposition.

11 In fact, in both cases, and they were *Federal*
12 *Insurance versus Coast Converters* and *Farmers Home versus*
13 *Fiscus*, what exactly constituted physical loss or damage to
14 property wasn't even an issue.

15 So what happened was, it was almost a game of
16 telephone where Judge Dorsey kept repeating that
17 pronouncement, as Nevada law, when in fact it was not found
18 in either of the Nevada -- in either of the Nevada decisions
19 that she cited.

20 And the second distinguishing characteristic I want
21 to bring up, and this kind of ties into counsel's mention of
22 the cases that have been decided against policyholders, and
23 why JGB is unique. It's that JGB is unique in this very
24 specific regard.

25 //

1 In *Levy Ad Agency*, as opposing counsel was involved
2 in that matter, it well knows there was no allegation of
3 COVID-19 on the premises. It was purely a case trying to
4 recoup losses based on the closure orders.

5 In *Circus Circus*, while the policyholder made vague
6 references to COVID-19 being on the premises and potentially
7 altering its property, it was clear that the causation for
8 its losses was actually the Governor's orders.

9 And that's actually very clear from the Ninth
10 Circuit's decision, which goes on to repeat at the very
11 beginning that, at 12:01 a.m. on March 18th, 2020, Circus
12 Circus closed its doors.

13 Your Honor, that was plead by Circus Circus in
14 their lawsuit. And with that, Judge Dorsey and the Ninth
15 Circuit took it to mean that there was only direct causation
16 for loss caused by the closure orders.

17 And then third, in *Project Lion*, Your Honor, once
18 courts like yourself were allowing matters to go forward
19 based on allegations of COVID-19 on the premises, Judge
20 Dorsey felt the need to distinguish her decision in *Project*
21 *Lion*. And there, Your Honor, she said that, unlike the cases
22 where they have been gone forward, the courts have allowed
23 these cases to go forward, the insured here affirmatively
24 denied that COVID-19 has entered their properties, damaged
25 their surfaces, or infected their employees. But rather,

1 merely asserted the temporary closure of the premises because
2 of the governmental shutdown order.

3 Your Honor, the same thing is said by *Inns by the*
4 *Sea*, which was cited by the Ninth Circuit in *Circus Circus*,
5 and the same thing was said by the District Court in *Mudpie*,
6 the Ninth Circuit decision of which the Ninth Circuit, in
7 *Circus Circus*, again, cited.

8 The District Court in *Mudpie*, which is a California
9 Federal case, that denied -- that granted the Motion to
10 Dismiss, specifically said that, "Had *Mudpie* alleged the
11 presence of COVID-19 in its store, the Court's conclusion
12 about an intervening physical force would be different."

13 And there, just like Your Honor did with
14 radioactive contaminants, for which there is an exclusion in
15 the policy, Your Honor, the intrusion onto property does not
16 have to be, you know, visible to the naked eye. It does not
17 have to be something that affects the structure, or
18 structurally damages the property in order for there to be
19 physical loss or damage to property. There's nothing under
20 Nevada State Court precedent that says that is the case.

21 In fact, Nevada State Courts have said the
22 opposite. Not only Your Honor, but also Judge Williams in
23 Department 16, in September of last year stated that, The
24 policyholder had sufficiently pled a physical loss or damage
25 to property, because the policyholder pleaded that SARS-CoV-2

1 and COVID-19 alter the conditions of the properties and
2 buildings such that the premises are physically damaged and
3 no longer safe and habitable for normal use.

4 Your Honor, it is exactly that allegation, and
5 exactly the evidence in the record, now that the parties have
6 conducted discovery, that does make JGB different in that
7 regard.

8 And I want to just touch on the -- very briefly,
9 the five instances in the record showing that JGB is -- is
10 different.

11 First of all, JGB has submitted evidence -- expert
12 evidence by way of a leading epidemiologist that COVID-19 can
13 exist and physically attach to property altering the
14 integrity of that property making it unsafe for use. And
15 that essentially has been unrebutted by Starr.

16 Also unrebutted by Starr was that we have expert
17 evidence -- another statistical epidemiologist who opined
18 that given the infection rates in Clark County, and given the
19 typical foot traffic that is in and around the Grand Bazaar
20 Shops, which are managed by JGB, there is a statistical
21 probability that a hundred percent of the time there was
22 someone on or near the premises that had COVID-19, shedding
23 virus particles onto the property.

24 That specific expert opinion was not rebutted by
25 Starr. You will not find any of this expert evidence in

1 Starr's brief.

2 Third, JGB, unlike many of the COVID-19 losses that
3 have been pled by other claimants, has confirmed cases of
4 COVID-19 on its property. Excuse me. As my opposing counsel
5 has admitted, several tenants had confirmed cases of COVID-19
6 on the premises, requiring shutdown, requiring cleaning.

7 Now, those were just the confirmed cases. Those
8 were just the reported cases. We have witness testimony that
9 says that the number of cases that were actually present on
10 the property were dozens more, as far as they knew. And
11 there could have been even more. Those were just the
12 confirmed, reported cases.

13 Your Honor, fourth, and I think my opposing counsel
14 alluded to this briefly, unlike *Circus Circus*, we had tenants
15 on the JGB properties that closed their doors before the
16 Governor's orders were even announced to become effective.

17 And the reasoning they gave was that COVID-19,
18 because of the concern of COVID-19 and because of the concern
19 of employee safety.

20 Also, this is incorrect that opposing counsel said,
21 was that the tenants reopened, all of them, on June 4th and
22 have been opened ever since. Several of the tenants, Your
23 Honor, never reopened. Some closed before the Governor
24 orders, many did not open when they were directed that they
25 could reopen in May, and still, some did not reopen in June.

1 Your Honor, the point about closure orders is not
2 even that necessarily relevant to the general business
3 interruption coverage. JGB's coverage is not measured by who
4 was closed, or who was open. The coverage that JGB is
5 seeking to obtain is business interruption coverage, and
6 that's whenever its normal -- normal operations are
7 interrupted by physical loss or damage on the property.

8 So you have no Nevada law that says COVID-19 cannot
9 constitute physical loss or damage to property, especially no
10 Nevada law requiring it be structural damage.

11 And all that is necessary is for JGB's normal
12 operations to be interrupted. The normal operations were
13 collecting rent, collecting percentage rent from its tenants,
14 that could not pay their bills, because there was no
15 customers on the premises because of COVID-19.

16 Even when the Governor relaxed the restrictions and
17 relaxed the orders, tenants still could not pay their rent to
18 JGB. So obviously, it's not directly tied to the closure
19 orders. But that's what Starr seeks to do in this case in
20 order to fit it into a nice box of other cases that have been
21 dismissed at the Motion to Dismiss state.

22 Here we have conducted fulsome discovery. We have
23 evidence of COVID-19 on the premises and the law allows for
24 this type of physical loss or damage in JGB's case.

25 Your Honor, I want to just touch briefly on some of

1 the additional coverages, including the civil authority
2 coverage. I heard my opposing counsel say that the closure
3 orders did not prohibit access to the shops.

4 Your Honor, I do not understand that argument.
5 They were governmental stay-at-home orders that ordered JGB's
6 customers to stay home and ordered the closing of
7 nonessential businesses. I don't know how much more
8 prohibition on access there could be. And it was all in
9 relationship to COVID-19.

10 Your Honor, my opposing counsel also said that --
11 it said nothing -- it was purely preventative. It wanted to
12 keep people safe. It said nothing about property loss or
13 damage. Your Honor, Governor Sisolak's order specifically
14 said, due to the fact that COVID-19 can remain on properties
15 and cause physical damage or loss, we are keeping these
16 orders intact.

17 Your Honor, unless Your Honor has any further
18 questions, I believe all of our other arguments are fully
19 briefed. We would also ask that there's clearly disputed
20 issues of material fact regarding Starr's good faith conduct
21 in investigating this case.

22 Starr takes the position that merely because it
23 believes its denial was correct, it cannot be liable for bad
24 faith. Your Honor, we've cited in our brief and discovery
25 has shown that there was essentially a, I would say,

1 superficial investigation conducted by Starr in terms of
2 whether or not this would be covered.

3 And it made up its mind immediately this would not
4 be covered and then conducted no further investigation and
5 just waited for the instruction of counsel who instructed to
6 deny after the Motion to Dismiss had been briefed.

7 Unless Your Honor has any further questions, all of
8 our other arguments regarding this are in the briefs and I
9 thank Your Honor for the time.

10 THE COURT: All right. Thank you. I have no
11 questions at this time.

12 And Ms. Samberg, briefly?

13 MS. SAMBERG: Briefly, Your Honor, if I may, a
14 couple of things.

15 First of all, any characterization that -- or any
16 argument that the Nevada courts have not considered virus on
17 the premises cases is just incorrect. Both *Circus Circus*,
18 which was Judge Dorsey's opinion, involved an allegation by
19 Circus Circus that there was virus on the premises.

20 That was a 12(b)(6) motion under the federal
21 standard. But the allegation in the lawsuit was, in part,
22 that their employees on-site for getting sick, and contracted
23 COVID on the -- and they were on the premises. So that was
24 plainly an allegation.

25 The other is WPS, which is cited in the briefing.

1 That's Judge Dawson's opinion. And in WPS's -- I'm reading
2 from the opinion -- "WPS's Amended Complaint contains
3 conclusory allegations that the presence of COVID-19
4 particles render items of physical property unsafe and
5 premises unsafe, but fails to allege any physical alteration
6 to the property itself."

7 So the allegations in WPS was virus on the
8 premises. Judge Dawson found that that does not equate to
9 physical loss or damage.

10 I want to also point out that when counsel was
11 reading to Your Honor from the -- the pollutant and
12 contamination exclusion, he left out one of the most
13 important words. The word he left out is "any". The
14 exclusion says, The term pollutants and contaminants shall
15 mean any solid, liquid, gaseous, or thermal irritant or
16 contaminant, including, but not limited to the following,
17 including virus.

18 So it's any virus. And the word that counsel left
19 out was "any". And that matters in this context, because
20 plainly, COVID-19 is a virus that was intended to be
21 included.

22 I will just submit on the briefing on the -- on the
23 statutory and -- and good faith and fair dealing claims, Your
24 Honor. Thank you.

25 THE COURT: All right. Thank you very much.

1 The matter stands submitted. I'll review it
2 further and issue my ruling as soon as I can, okay?

3 MS. SAMBERG: Thank you, Your Honor.

4 MR. GORLIN: Thank you, Your Honor.

5 THE COURT: Thank you.

6 MR. LADD: Thank you, Your Honor.

7 THE COURT: Thank you.

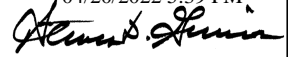
8 (Proceeding concluded at 10:27 a.m.)

9 * * * * *

ATTEST: I hereby certify that I have truly and correctly
transcribed the audio/visual proceedings in the above-
entitled case.

A rectangular box containing a handwritten signature in blue ink that reads "Julie Lord".

VERBATIM DIGITAL REPORTING, LLC


CLERK OF THE COURT

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**DISTRICT COURT
CLARK COUNTY, NEVADA**

JGB VEGAS RETAIL LESSEE, LLC,

Plaintiff,

v.

STARR SURPLUS LINES INSURANCE
COMPANY,

Defendant.

CASE NO.: A-20-816628-B
DEPT. NO.: 13

**ORDER GRANTING STARR
SURPLUS LINES INSURANCE
COMPANY'S MOTION TO FILE
STARR'S MOTION FOR SUMMARY
JUDGMENT UNDER SEAL**

**Hearing Date: April 18, 2022
Hearing Time: 9:00 a.m.**

On March 18, 2022, Defendant Starr Surplus Lines Insurance Company ("Starr") filed its Motion to file Starr's Motion for Summary Judgment Under Seal. On April 1, 2022, Plaintiff JGB Vegas Retail Lessee, LLC ("JGB") filed a notice of non-opposition thereto. This matter coming before the Court on April 18, 2022, and good cause appearing:

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IT IS ORDERED THAT Starr's Motion to file its Motion for Summary Judgment Under Seal is **GRANTED**. Starr's Motion for Summary Judgment shall remain sealed.

IT IS SO ORDERED.

Dated this 20th day of April, 2022

[Signature]

Lt

C0A DB2 7021 ACD7
Mark R. Denton
District Court Judge

Respectfully Submitted by:

Approved as to Form and Content by:

CLYDE & CO LLP

WOLF, RIFKIN, SHAPIRO, SCHULMAN &
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Attorneys for Plaintiff

Gorlin, Lee

From: Jillian Raines <jraines@cohenziffer.com>
Sent: Tuesday, April 19, 2022 4:24 PM
To: Gorlin, Lee; Marc Ladd; Jason Meyers
Cc: Royi Moas; Bradley Schrager; Samberg, Amy
Subject: RE: DRAFT Proposed Order Granting Starr's Motion to file MSJ Under Seal [CC-US2.62440.10266342.FID874513]

Hi Lee,

You have our approval on the proposed order. Thanks.

Best,
Jill



JILLIAN RAINES
(She/Her/Hers)
Partner
D 212.584.1831 / M 585.755.4825
jraines@cohenziffer.com



From: Gorlin, Lee <Lee.Gorlin@clydeco.us>
Sent: Tuesday, April 19, 2022 4:44 PM
To: Marc Ladd <mladd@cohenziffer.com>; Jillian Raines <jraines@cohenziffer.com>; Jason Meyers <jmeyers@cohenziffer.com>
Cc: Royi Moas <rmoas@wrslawyers.com>; Bradley Schrager <BSchrager@wrslawyers.com>; Samberg, Amy <Amy.Samberg@clydeco.us>
Subject: DRAFT Proposed Order Granting Starr's Motion to file MSJ Under Seal [CC-US2.62440.10266342.FID874513]

Good afternoon counsel,

Please see the attached proposed order re: Starr's Motion to Seal. Please let us know if you approve or disapprove the form and content and we will get it submitted.

Thanks!

Lee Gorlin

Associate | Clyde & Co US LLP

Direct Dial: +1 725 248 2884 | **Mobile:** +1 702 300 9476

CLYDE&CO

My pronouns are: he / him / his

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1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

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6 JGB Vegas Retail Lessee, LLC, CASE NO: A-20-816628-B
Plaintiff(s)
7 vs. DEPT. NO. Department 13
8
9 Starr Surplus Lines Insurance
Company, Defendant(s)
10

11 **AUTOMATED CERTIFICATE OF SERVICE**

12
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14 Court. The foregoing Order Granting Motion was served via the court's electronic eFile
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Attorneys for Plaintiff

JGB Vegas Retail Lessee, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

JGB VEGAS RETAIL LESSEE, LLC,

Plaintiff,

vs.

STARR SURPLUS LINES INSURANCE
COMPANY,

Defendant.

Case No.: A-20-816628-B

Dept. No.: XIII

**[PROPOSED] ORDER GRANTING
PLAINTIFF'S MOTION TO SEAL**

WHEREAS, Plaintiff JGB Vegas Retail Lessee, LLC ("JGB") has moved under the Nevada Rules for Sealing and Redacting Court Records ("SRCR") for an order permitting Plaintiff JGB to file under seal the following documents: 1) Plaintiff JGB's Opposition to Defendant Starr Surplus

1 Lines Insurance Company's Motion For Summary Judgment (the "Opposition"); and 2) certain
2 exhibits cited in the Opposition and submitted in the Appendix of Exhibits.;

3 NOW, THEREFORE, having considered Plaintiff's JGB's Motion to Seal, the files and
4 records in this Action, and for good cause shown, IT IS HEREBY ORDERED that:

- 5 1. Plaintiff JGB's Motion to Seal is GRANTED;
- 6 2. The documents temporarily filed under seal shall be sealed pursuant to SRCR 3(4)(b)
7 and SRCR 3(4)(h);
- 8 3. The sealing of documents is justified pursuant to SRCR 3(4)(b) in that sealing the
9 documents furthers a protective order entered under NRCP 26(c); and
- 10 4. The sealing of the documents is further justified by a compelling circumstance
11 pursuant to SRCR 3(4)(h) in that the documents contain sensitive information that
12 Plaintiff deems confidential, and Plaintiff's interests in sealing the documents
13 outweigh the public interests in having access to such confidential information at this
14 stage in the litigation. **Dated this 5th day of May, 2022**

15
16 Submitted by:

17 **WOLF, RIFKIN, SHAPIRO,**
18 **SCHULMAN & RABKIN, LLP**

19 /s/ Royi Moas

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26 *Attorneys for Plaintiff JGB Vegas Retail Lessee, LLC*
27
28



0AA D36 6714 940C
Mark R. Denton
District Court Judge

ABG

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

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6 JGB Vegas Retail Lessee, LLC, CASE NO: A-20-816628-B
Plaintiff(s)
7 vs. DEPT. NO. Department 13
8
9 Starr Surplus Lines Insurance
Company, Defendant(s)
10

11 **AUTOMATED CERTIFICATE OF SERVICE**

12
13 This automated certificate of service was generated by the Eighth Judicial District
14 Court. The foregoing Order Granting was served via the court's electronic eFile system to all
recipients registered for e-Service on the above entitled case as listed below:

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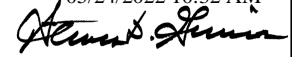
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**DISTRICT COURT
CLARK COUNTY, NEVADA**

JGB VEGAS RETAIL LESSEE, LLC,

Plaintiff,

v.

STARR SURPLUS LINES INSURANCE
COMPANY,

Defendant.

CASE NO.: A-20-816628-B
DEPT. NO.: 13

**ORDER GRANTING IN PART AND
DENYING IN PART STARR
SURPLUS LINES INSURANCE
COMPANY'S MOTION FOR
SUMMARY JUDGMENT**

**Hearing Date: April 18, 2022
Hearing Time: 9:00 a.m.**

On March 18, 2022, Defendant Starr Surplus Lines Insurance Company ("Starr") filed its Motion for Summary Judgment Under Seal,¹ arguing, *inter alia*, 1) that none of the Policy's potential coverages had been triggered by Plaintiff JGB Vegas Retail Lessee, LLC's ("JGB's") insurance claim for losses due to the COVID-19 pandemic; 2) that even if any coverage was triggered, the Policy's Pollutants and Contaminants Exclusion would exclude all coverage; 3) that for these reasons JGB's breach of contract and declaratory relief causes of action must fail; and 4) that JGB's additional causes of action for bad faith and particular violations of the Nevada Unfair Claims Practices Act (NUCPA) must also fail because coverage was not unreasonably denied.

¹ The Court granted Starr's Motion to file its Motion for Summary Judgment under seal at the April 18, 2022 hearing and has already signed an Order reflecting the same on April 20, 2022.

On April 1, 2022, JGB filed its Opposition to Starr’s Motion, also under seal.² JGB argued, *inter alia*, that Starr failed to meet its burden establishing that no genuine dispute as to any material fact existed precluding coverage for JGB’s claims as a matter of law because: 1) the presence of COVID-19 on and around JGB’s insured premises constitutes “direct physical loss or damage” triggering business interruption (Time Element) coverage, including additional Time Element coverages for Civil Authority and Ingress/Egress; and 2) JGB had proven with undisputed evidence that COVID-19 (the disease caused by microscopic SARS-CoV-2 particles) indeed existed on and around its property, and that JGB suffered losses from this undisputed presence. JGB also opposed Starr’s Motion on the basis that the Policy’s Pollutants and Contaminants Exclusion did not unambiguously apply to JGB’s losses, and that, Starr had not shown the absence of any material disputed fact regarding its conduct underpinning JGB’s NUCPA and bad faith claims.

Starr filed its Reply on April 11, 2022, and a Notice of Supplemental Authority, including the Ninth Circuit’s April 15, 2022, ruling in *Circus Circus LV, LP v. AIG Specialty Insurance Company*, on April 15, 2022.

On April 18, 2022, the Court held a hearing on the Motion for Summary Judgment and considered the matter submitted and taken under advisement.

The Court, having now reviewed and considered the pleadings and parties’ filings and argument related to the Motion, rules as follows:

Regarding JGB’s claims for breach of contract and declaratory relief, the Court is not persuaded by Starr’s contentions that there are no genuine factual issues going to the existence of physical alteration damage to property that would preclude coverage as a matter of law both as to JGB’s property (for the direct Time Element Coverage) and nearby property contended by JGB to invoke interruption due to civil authority. *See* NRCP 56(a); *Baiguen v. Harrah’s Las Vegas, LLC*, 426 P.3d 586, 589 (Nev. 2018). The Court is persuaded by JGB’s evidence, including that COVID-19 likely existed on JGB’s property, and that COVID-19 is transmissible to harm people. In fact, Starr did not appear to refute either of these points. However, whether COVID-19, or the virus that

² The Court granted JGB’s unopposed Motion to Seal and entered an Order reflecting the same on May 5, 2022.

1 causes it, does or does not physically alter property in order to trigger one or more coverages under
2 the Policy is a matter of fact to be determined at trial. The Court is persuaded by JGB's contentions,
3 and Starr is not entitled to judgment as a matter of law regarding JGB's claims for breach of contract
4 and declaratory relief. However, in making its ruling regarding coverage, the Court agrees with
5 Starr that the Court has not finally determined the applicability or non-applicability of the Pollutants
6 and Contaminants Exclusion. As such, the Exclusion, and any applicability to JGB's claim for
7 coverage remains genuinely at issue.

8 Turning to JGB's extracontractual claims (violations of NRS 686A.310 and breach of the
9 implied covenant of good faith and fair dealing), given the unprecedented and pervasive novelty of
10 the COVID situation, the Court is unpersuaded by Plaintiff's contentions that there are genuine
11 factual issues going to Defendant's handling of those claims. Thus, even if Starr was ultimately
12 incorrect as to its coverage position and denial, a Starr's conduct was not "unreasonable" in order
13 to satisfy the requirements of these counts. *See e.g. Schumacher v. State Farm Fire & Cas. Co.*,
14 467 F. Supp. 2d 1090, 1095 (D. Nev. 2006) (holding that bad faith requires a denial of a claim
15 without any reasonable basis).

16 The Court is further unpersuaded by JGB's contentions that there are genuine factual issues
17 going to Starr's handling of JGB's claim. The timeline of claim handling is clear.

- 18 • JGB made its claim on April 17, 2020 and provided additional information
19 to Starr (via Sedgwick) on April 22, 2020.
- 20 • Sedgwick responded and issued requests for information on April 27, 2020.
- 21 • JGB answered these requests on May 13, 2020.
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23 requests for information on May 26, 2020.
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- 25 • Sedgwick continued to seek responses to the outstanding requests for
26 information in July 2020.
- 27 • JGB directed Sedgwick to have Starr's defense counsel follow up with
28 JGB's prosecuting counsel for the outstanding information.
- Starr's defense counsel followed up twice with JGB's counsel, on
September 14, 2020, and again on October 15, 2020, to receive responses
to the outstanding requests.
- JGB's counsel declined to provide responses to the outstanding requests on
September 28, 2020, but ultimately provided them on October 22, 2020.

- Starr denied JGB's Claim on November 5, 2020, exactly two weeks after receiving the outstanding responses.

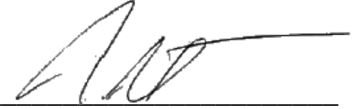
As such, Starr is entitled to judgment as a matter of law in its favor as to JGB's causes of action for violations of NRS 686A.310 and breach of the implied covenant of good faith and fair dealing.³

Accordingly, **IT IS SO ORDERED THAT** Defendant Starr's Motion for Summary Judgment is **GRANTED IN PART** as it pertains to JGB's third and fourth causes of action (for Violations of the Nevada Unfair Claims Practices Act, NRS 686A.310 and Breach of the Covenant of Good Faith and Fair Dealing), as well as JGB's prayer for punitive damages.

IT IS FURTHER ORDERED THAT Defendant Starr's Motion for Summary Judgment is **DENIED IN PART** as it pertains to JGB's first and second causes of action (for Breach of Contract and Declaratory Relief) with both causes of action proceeding, without prejudice, to trial for determination of the genuine issues of material fact discussed herein.

IT IS SO ORDERED.

Dated this 24th day of May, 2022



ABG

Respectfully submitted by:

CLYDE & CO US LLP

By: /s/ Lee H. Gorlin
Amy M. Samberg, Esq.
Lee H. Gorlin, Esq.
7251 West Lake Mead Boulevard, Suite 430
Las Vegas, NV 89128

Attorneys for Defendant

B5B F56 744E F13E
Mark R. Denton
District Court Judge

³ In JGB's Complaint, it alleged punitive damages related to causes of action three and four only. See Complaint, at 17 (§75), 18 (§82), 19. With these two causes of action determined as a matter of law in Starr's favor, the issue of punitive damages is necessarily resolved in Starr's favor as well, and punitive damages will not be available at trial. See NRS 42.005(1) (punitive damages are available only in an action for the "breach of an obligation not arising from contract.") (emphasis added).

1 **CSERV**

2
3 DISTRICT COURT
CLARK COUNTY, NEVADA

4
5
6 JGB Vegas Retail Lessee, LLC, CASE NO: A-20-816628-B
Plaintiff(s)
7 vs. DEPT. NO. Department 13
8
9 Starr Surplus Lines Insurance
Company, Defendant(s)
10

11 **AUTOMATED CERTIFICATE OF SERVICE**

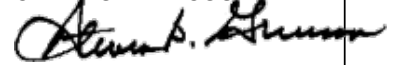
12
13 This automated certificate of service was generated by the Eighth Judicial District
14 Court. The foregoing Order was served via the court's electronic eFile system to all
recipients registered for e-Service on the above entitled case as listed below:

15 Service Date: 5/24/2022

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CLYDE & CO US LLP
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Las Vegas, NV 89128
Telephone: 725-248-2900
Facsimile: 725-248-2907

*Attorneys for Starr Surplus Lines
Insurance Company*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

JGB VEGAS RETAIL LESSEE, LLC,

Plaintiff,

v.

STARR SURPLUS LINES INSURANCE
COMPANY,

Defendant.

CASE NO.: A-20-816628-B
DEPT. NO.: 13

**NOTICE OF ENTRY OF ORDER
GRANTING IN PART AND
DENYING IN PART STARR
SURPLUS LINES INSURANCE
COMPANY'S MOTION FOR
SUMMARY JUDGMENT**

Please take notice that the Order Granting In Part And Denying In Part Starr Surplus Lines Insurance Company's Motion For Summary Judgment was entered on May 24, 2022. A copy of said Order is attached hereto.

Respectfully submitted, this 24th day of May 2022 by:

CLYDE & CO LLP

By: /s/ Lee H. Gorlin

Amy M. Samberg, Esq.

Lee H. Gorlin, Esq.

7251 West Lake Mead Boulevard, Suite 430

Las Vegas, NV 89128

Attorneys for Defendant

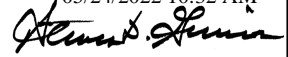
CERTIFICATE OF SERVICE

I certify that a copy of the foregoing **NOTICE OF ENTRY OF ORDER GRANTING IN PART AND DENYING IN PART STARR SURPLUS LINES INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT** was served by the method indicated:

- ☐ **BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m. pursuant to EDCR Rule 7.26(a). A printed transmission record is attached to the file copy of this document(s).
- ☐ **BY U.S. MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Las Vegas, Nevada addressed as set forth below.
- ☒ **BY ELECTRONIC SERVICE:** submitted to the above-entitled Court for electronic service upon the Court's Service List for the above-referenced case.
- ☐ **BY EMAIL:** by emailing a PDF of the document listed above to the email addresses of the individual(s) listed below.

Dated: May 24, 2022

/s/ Gina Brouse
An Employee of Clyde & Co.


CLERK OF THE COURT

ORDR

Amy M. Samberg, NV Bar No. 10212
Lee H. Gorlin, NV Bar No. 13879
CLYDE & CO US LLP
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amy.samberg@clydeco.us
lee.gorlin@clydeco.us

*Attorneys for Starr Surplus Lines
Insurance Company*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

JGB VEGAS RETAIL LESSEE, LLC,

Plaintiff,

v.

STARR SURPLUS LINES INSURANCE
COMPANY,

Defendant.

CASE NO.: A-20-816628-B
DEPT. NO.: 13

**ORDER GRANTING IN PART AND
DENYING IN PART STARR
SURPLUS LINES INSURANCE
COMPANY'S MOTION FOR
SUMMARY JUDGMENT**

**Hearing Date: April 18, 2022
Hearing Time: 9:00 a.m.**

On March 18, 2022, Defendant Starr Surplus Lines Insurance Company ("Starr") filed its Motion for Summary Judgment Under Seal,¹ arguing, *inter alia*, 1) that none of the Policy's potential coverages had been triggered by Plaintiff JGB Vegas Retail Lessee, LLC's ("JGB's") insurance claim for losses due to the COVID-19 pandemic; 2) that even if any coverage was triggered, the Policy's Pollutants and Contaminants Exclusion would exclude all coverage; 3) that for these reasons JGB's breach of contract and declaratory relief causes of action must fail; and 4) that JGB's additional causes of action for bad faith and particular violations of the Nevada Unfair Claims Practices Act (NUCPA) must also fail because coverage was not unreasonably denied.

¹ The Court granted Starr's Motion to file its Motion for Summary Judgment under seal at the April 18, 2022 hearing and has already signed an Order reflecting the same on April 20, 2022.

On April 1, 2022, JGB filed its Opposition to Starr’s Motion, also under seal.² JGB argued, *inter alia*, that Starr failed to meet its burden establishing that no genuine dispute as to any material fact existed precluding coverage for JGB’s claims as a matter of law because: 1) the presence of COVID-19 on and around JGB’s insured premises constitutes “direct physical loss or damage” triggering business interruption (Time Element) coverage, including additional Time Element coverages for Civil Authority and Ingress/Egress; and 2) JGB had proven with undisputed evidence that COVID-19 (the disease caused by microscopic SARS-CoV-2 particles) indeed existed on and around its property, and that JGB suffered losses from this undisputed presence. JGB also opposed Starr’s Motion on the basis that the Policy’s Pollutants and Contaminants Exclusion did not unambiguously apply to JGB’s losses, and that, Starr had not shown the absence of any material disputed fact regarding its conduct underpinning JGB’s NUCPA and bad faith claims.

Starr filed its Reply on April 11, 2022, and a Notice of Supplemental Authority, including the Ninth Circuit’s April 15, 2022, ruling in *Circus Circus LV, LP v. AIG Specialty Insurance Company*, on April 15, 2022.

On April 18, 2022, the Court held a hearing on the Motion for Summary Judgment and considered the matter submitted and taken under advisement.

The Court, having now reviewed and considered the pleadings and parties’ filings and argument related to the Motion, rules as follows:

Regarding JGB’s claims for breach of contract and declaratory relief, the Court is not persuaded by Starr’s contentions that there are no genuine factual issues going to the existence of physical alteration damage to property that would preclude coverage as a matter of law both as to JGB’s property (for the direct Time Element Coverage) and nearby property contended by JGB to invoke interruption due to civil authority. *See* NRCP 56(a); *Baiguen v. Harrah’s Las Vegas, LLC*, 426 P.3d 586, 589 (Nev. 2018). The Court is persuaded by JGB’s evidence, including that COVID-19 likely existed on JGB’s property, and that COVID-19 is transmissible to harm people. In fact, Starr did not appear to refute either of these points. However, whether COVID-19, or the virus that

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10 the COVID situation, the Court is unpersuaded by Plaintiff's contentions that there are genuine
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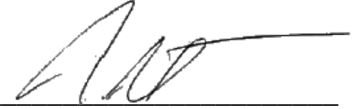
As such, Starr is entitled to judgment as a matter of law in its favor as to JGB's causes of action for violations of NRS 686A.310 and breach of the implied covenant of good faith and fair dealing.³

Accordingly, **IT IS SO ORDERED THAT** Defendant Starr's Motion for Summary Judgment is **GRANTED IN PART** as it pertains to JGB's third and fourth causes of action (for Violations of the Nevada Unfair Claims Practices Act, NRS 686A.310 and Breach of the Covenant of Good Faith and Fair Dealing), as well as JGB's prayer for punitive damages.

IT IS FURTHER ORDERED THAT Defendant Starr's Motion for Summary Judgment is **DENIED IN PART** as it pertains to JGB's first and second causes of action (for Breach of Contract and Declaratory Relief) with both causes of action proceeding, without prejudice, to trial for determination of the genuine issues of material fact discussed herein.

IT IS SO ORDERED.

Dated this 24th day of May, 2022



ABG

Respectfully submitted by:

CLYDE & CO US LLP

By: /s/ Lee H. Gorlin
Amy M. Samberg, Esq.
Lee H. Gorlin, Esq.
7251 West Lake Mead Boulevard, Suite 430
Las Vegas, NV 89128

Attorneys for Defendant

B5B F56 744E F13E
Mark R. Denton
District Court Judge

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