IN THE SUPREME COURT OF THE STATE 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.	**Case No.: 84986** Eighth Judicial District Court Case No.: A-20-816628-B

REAL PARTY IN INTEREST'S RESPONSE TO PETITIONER'S MOTION TO STAY

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N.R.A.P. 26.1 DISCLOSURE

Pursuant to N.R.A.P. 26.1, the undersigned counsel of record certifies that there are no persons or entities as described in N.R.A.P. 26.1(a) that must be disclosed.

Dated this 22nd day of July, 2022.

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Real Party in Interest ("JGB") hereby opposes Petitioner Starr Surplus Lines Insurance Co.'s ("Starr") Motion to Stay (the "Motion" or "Mot.").

I. INTRODUCTION

Starr attempts to characterize this case as one warranting *extraordinary* writ relief that should permit Starr to avoid the standard Nevada appellate procedure, but that is not the case. No factors warrant a stay or writ relief from the Supreme Court. Rather, this is an insurance coverage dispute, and Starr is simply dissatisfied that the District Court held that Starr did not carry its burden in arguing the presence of COVID-19 on property can never cause physical loss or damage to property as a matter of law, which remains, among others, an issue of fact to be tried. *See* **Ex. 1** (the "SJ Order") at 2-3. But nothing in Nevada law prevented the District Court's ruling, so Starr instead misconstrues it, asserting a new, significant legal issue now warrants this Court's attention—*i.e.*, that the District Court erred by holding "interpretation" of an insurance policy "is a matter of fact," contrary to this Court's precedent that coverage must be decided as a matter of law. But neither contention is true: the District Court did not hold that policy interpretation is a matter of fact, and Nevada courts routinely allow juries to consider insurance coverage questions.

As to the elements necessary for a stay, none warrants further case delay. Starr's objective—to successfully deny coverage to JGB—will not be defeated if writ is denied. In fact, Starr has no doubt that it will succeed at trial or, if necessary,

appeal. Starr suffers no harm if this case is tried in the coming months, but JGB suffers harm from further delay of its coverage owed by Starr, and Starr does not show a likelihood of success on the merits of its petition. Absent extraordinary circumstances evincing manifest abuse of discretion, or where, *e.g.*, statutory questions of first impression will impede judicial economy if not resolved prior to final disposition, this Court does not second-guess the trial court. Mandamus is simply not permitted where the District Court has considered the parties' arguments, held a hearing, ruled consistent with applicable law, and exercised its discretion to determine that disputed fact issues remain to be tried—and a later appeal is possible.

Starr's stay request is only so it can pursue what is essentially a motion for reconsideration via its writ petition—a motion that the District Court would have denied had Starr made it because it lacks any sound basis under Nevada law. Nothing prevents Starr from pursuing an appeal following trial and judicial economy supports allowing JGB's case to proceed (trial having been scheduled for August 30) without further delay. Starr's Motion (and writ petition) should, accordingly, be denied.

II. ARGUMENT

A. Supreme Court Intervention Is Not Warranted

Starr's first two arguments do not even address the relevant factors for a stay. *See* N.R.A.P. 8(c) (listing factors). Rather, Starr presents argument about why this Court should take Starr's writ petition, claiming that the District Court committed

serious error by refusing to rule on coverage as a matter of law, and that the Supreme Court's correction of this error will properly and necessarily resolve all other related litigation in Nevada. *See* Mot. at 2-5. Neither contention is true.

First, Starr mischaracterizes the SJ Order, which did not hold that "insurance policy interpretation" on its own is an issue of fact for a jury. Rather, the District Court held that "whether COVID-19, or the virus that causes it, does or does not physically alter property in order to trigger one or more coverages under the Policy is a matter of fact to be determined at trial." SJ Order at 2-3. Thus, Starr is wrong that this case presents a "threshold" legal question warranting Starr writ or a further stay. Starr's contention that the District Court acted in contravention of *Federal Insurance Co. v. Coast Converters, Inc.*, 130 Nev. 960, 339 P.3d 1281 (2014) is also incorrect. In *Coast Converters*, the Court found that the question of which coverage limit and contract provision applied to a claim was improperly submitted to the jury because "in the absence of ambiguity or *other factual complexities*," contract interpretation is a matter of law. *Id.* at 965 (citation omitted; emphasis added).

Here, JGB's breach of contract claim is not limited to the question of which unambiguous contractual provision or limit applies. After assessing the record, the District Court found factual complexities remain concerning whether COVID-19 physically altered JGB's property, which a jury must resolve. The District Court's ruling is actually *consistent* with *Coast Converters*, where the Court found that

certain fact issues remained—*e.g.*, the date of manifestation of injury necessary to trigger coverage—that must be resolved by the jury. *Id.* at 966-68.[1] Tellingly, Starr cites no other Nevada Supreme Court cases that support its contention that a jury cannot resolve questions of coverage and the reason for that is clear: Nevada juries do so all the time. *See, e.g.*, *Tamares Las Vegas Properties, LLC v. Travelers Indem. Co.*, 409 F. Supp. 3d 924, 941 (D. Nev. 2019) (denying insurer summary judgment, in part, and holding that "jury must determine whether [insured]'s waterproofing measures constituted a roof under the policy and thus whether the rain limitation precludes coverage for the storm-caused damage to the Plaza's interior").

Second, judicial economy will not be served by an extended stay. Putting aside that the other Nevada cases Starr suggests would be resolved by the Supreme Court taking its writ petition involve other insurers under different insurance policies with different pleadings and different facts, Starr neglects to mention that many such cases have ruled similarly to the District Court here in denying insurers' attempts to evade business interruption coverage as a matter of Nevada law. *See, e.g.*, *Caesars Entm't, Inc. v. ACE Am. Ins. Co.*, Case No. A-21-831477-B (Clark Cty., Nev. May 3, 2022) (denying motion to dismiss); *Boyd Gaming v. Ace Am. Ins. Co.*, Case No.

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[1] Thus, *Coast Converters* does not support Starr's proposal to the Court to interpret the Policy and then remand for resolution of the facts. *See* Mot. at 4-5 n.2.

A-21-834849-B (Clark Cty., Oct. 26, 2021) (denying motions to sever claims and dismiss and/or strike amended complaint); *Nevada Prop. 1 LLC vs. Factory Mut. Ins. Co.*, Case No. A-21-831049-B (Clark Cty., Nev. Sept. 1, 2021) (refusing to dismiss for failure to state a claim, noting "[t]he scientific community has confirmed that SARS-CoV-2 virions and COVID-19 alter the conditions of properties and buildings such that the premises are physically damage[d] and no longer safe and habitable for normal use."). Starr simply disagrees with the outcome of these cases, but no threshold legal issue requires clarification, *i.e.*, that insurance matters present "issues of law for the Court, not a jury, to decide." Mot. at 4.

Indeed, this case is nothing like *Williams v. Eighth Judicial Dist. Court*, 127 Nev. 518, 262 P.3d 360 (2011). *See* Mot. at 3. In *Williams*, the Supreme Court consolidated writ petitions that raised novel issues of first impression on the legal standard for allowing medical causation expert testimony. 127 Nev. at 525. The Supreme Court was concerned with guarding against an "unfair shifting of the burden of proof." *Id.* at 531. In contrast, this is a private contractual dispute where Starr contends (without precedent) that the physical presence of COVID-19 can never result in physical loss or damage to property, and JGB argues that it can. As correctly held by the District Court, that is a disputed fact. *See USAA Cas. Ins. Co. v. Second Judicial Dist. Court*, No. 82075, 498 P.3d 1283, 2021 WL 5410249, at *1 (Nev. Nov. 18, 2021) (unpublished disposition) (writ relief unwarranted in insurer's

challenge of summary judgment denial where issues of fact remained).[2]

B. The Rule 8 Factors Do Not Warrant A Stay Of This Case

Turning to the Rule 8 factors, none weighs in favor of extending the stay. *See* N.R.A.P. 8(c); *Hansen v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 116 Nev. 650, 657, 6 P.3d 982, 986 (2000) (denying motion to stay).

Denying Starr's Motion does not defeat the object of the writ. Starr claims the object of its writ is to have the Court determine that coverage is a legal matter and unavailable to JGB. Mot. at 5. The District Court already heard and rejected this argument from Starr no fewer than three times, including on a motion to dismiss filed two years ago. *See* **Exs. 1-3**. Plus, Starr can still obtain its desired result at trial or on appeal. Avoiding legal expenses for a trial that was already scheduled for this summer—Starr's only actual concern—is an objective unworthy of writ relief.

As this Court has "pointed out, on several occasions, [] the right to appeal is generally an adequate legal remedy that precludes writ relief." *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 224, 88 P.3d 840, 841 (2004) (forum dismissal appropriately reviewed on appeal, not via writ petition); *AeroGrow Int'l, Inc. v. Eighth Judicial Dist. Court*, No. 83835, 2022 WL 2384038, at *1 (Nev. June 30,

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[2] *Torremoro v. Eighth Judicial District Court*, too, is distinguishable. 138 Nev. Adv. Op. 54, __ P.3d __, 2022 WL 2542022, at *2 (2022) (accepting writ to resolve appropriateness of substituting an expert witness after close of discovery).

2022) (unpublished disposition) (denying writ in case scheduled for October 2022 trial; "extraordinary relief is not warranted when the ordinary course of litigation will suffice"); *Asher v. Eighth Judicial Dist. Court*, No. 73891, 133 Nev. 980, 2017 WL 4535293, at *1 (Oct. 10, 2017) (unpublished disposition) (denying writ and stay where appeal from summary judgment denial remained). Starr has not shown why it should be granted such relief or excused from the traditional appellate process.

Starr has not demonstrated irreparable injury if the stay is not extended. Starr next argues it will suffer irreparable harm if the stay is not extended because it will have to pay its lawyers should trial proceed. Mot. at 6. However, as this Court recognized in *Hansen*, "[s]uch litigation expenses, while potentially substantial, are neither irreparable nor serious." *Id.*, 116 Nev. at 658 (citing *Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985) ("'[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough'" to show irreparable harm)). And although Starr contends that "the district court will spend a significant amount of judicial time and public resources" (Mot. at 6), the District Court's stated view is that only a temporary 21-day stay is warranted (*see* **Ex. 4**), *i.e.*, that trial should proceed with minimal delay.

JGB will suffer irreparable injury from an extended stay. Starr next claims that JGB will not suffer injury from extending the stay since other yet-to-be-tried cases have been pending for more time. *See* Mot. at 6-7. But this Motion is far from

the first time Starr has sought to avoid the District Court's rulings against it and delay trial. After multiple denials of Starr's motions for dismissal, to stay discovery, to move trial, and for summary judgment, *and also* allowances of Starr's requests to extend discovery, JGB's day in court was drawing near with no reason to delay. Without any word to JGB or the District Court and pretrial deadlines two weeks away, Starr filed a motion to stay with the District Court and waited until the Friday night before the Monday hearing to file its writ petition, to ensure it would not be denied before the hearing. JGB, in turn, has been vigorously pursuing its day in court and will only suffer prejudice from further delay. *See Aspen Fin. Servs. v. Dist. Ct.*, 128 Nev. Adv. Op. 57, 289 P.3d 201, 208-09 (2012) (delay from a stay may "duly frustrate a plaintiff's ability to put on an effective case"; as time elapses, "witnesses become unavailable, [and] memories [] and dates fade") (citation omitted).

Starr's writ is unlikely to succeed on the merits. Finally, Starr contends that a further stay is appropriate based on the merits of its petition, asserting that "[n]early all courts . . . have concluded there is no coverage because the virus does not cause 'direct physical loss or damage' in this circumstance." Mot. at 7 (citing *Circus Circus LV LP v. AIG Specialty Ins. Co.*, No. 21-15367, 2022 WL 1125663 (9th Cir. Apr. 15, 2022)). But in denying Starr summary judgment, the District Court heard, and was unpersuaded by, this argument, which Starr based on federal decisions in other jurisdictions (because all Nevada state court decisions were contrary). That

included consideration of *Circus*, which did not involve similar circumstances to here, *i.e.*, alleged losses due to COVID-19's *presence* on insured property, but rather losses the court held were from closure orders alone. 2022 WL 1125663, at *1.

Moreover, the Ninth Circuit in *Circus* relied on a California Court of Appeals decision recently distinguished by another California appellate court that reversed a demurrer for the insurer and held a court may *not* disregard allegations of physical loss and damage due to COVID-19 based on a "general belief" that routine cleaning is sufficient to restore property to its "safe-for-use condition." *Marina Pac. Hotel & Suites, LLC v. Fireman's Fund Ins. Co.*, No. B316501, 2022 WL 2711886, at *10 (Cal. Ct. App. July 13, 2022).[3] The *Marina* court held that COVID-19 coverage questions may not be resolved as a matter of law at the outset of a case, and that courts must "wait[] to actually receive evidence to determine whether the [] factual allegations can be proved," including at trial. *Id.* at *1, 11. The same is true in Nevada and that is precisely what the District Court held here.

Starr's added contentions that a case only needs to present "a substantial case on the merits when a serious legal question is involved," or that the Court need not resolve the petition to grant the stay (Mot. at 7-8), are either nonsensical or irrelevant.

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[3] *Marina* distinguished the insured's claim (like JGB's) from the "loss of use" claim in *Inns-by-the Sea v. California Mutual Insurance Co.*, 71 Cal. App. 5th 688 (Ct. App. 2021), noting there was no claim in *Inns* that the "presence of the virus on the insured premises caused physical damage to covered property." *Id.* at *9.

As the Court in *Walker v. Second Judicial Dist. Court*, explained:

> [M]andamus is available only where "the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias or ill will. Were we to issue traditional mandamus to "correct" any and every lower court decision, we would substitute our judgment for the district court's, subverting its "right to decide according to its own view of the facts and law of a case which is still pending before it[.]"

136 Nev. 678, 680-81, 476 P.3d 1194, 1196-97 (2020) (citations omitted). Starr has not shown such extraordinary relief is warranted. Rather, Starr's writ merely seeks an interlocutory appeal based on the same arguments and case law that the District Court already considered in holding that fact issues remain. *See USAA Cas. Ins. Co.*, 2021 WL 5410249, at *1; *NOLM, LLC v. Cty. of Clark*, 120 Nev. 736, 739, 100 P.3d 658, 660 (2004) (Supreme Court leaves fact finding to discretion of district court).[4] Starr has not shown its writ petition is likely to succeed.[5]

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[4] Starr cites a D.C. Circuit case to support extending the stay even if its petition ultimately fails. *See* Mot. at 8. Nevada law is clear that mandamus relief is unavailable absent a true miscarriage of justice. *See Walters v. Eighth Judicial Dist. Court*, 127 Nev. 723, 727, 263 P.3d 231, 233-34 (Oct. 13, 2011) (refusing writ).

[5] JGB is aware that American Property Casualty Insurance Association recently submitted legal argument in the form of a Motion for Leave to file an Amicus Curiae Brief in support of Starr's petition. If the Court decides to allow Starr's writ petition and invites a response from JGB and amicus curie briefs pursuant to N.R.A.P 21, JGB will, accordingly, respond.

III. CONCLUSION

For the foregoing reasons, Starr's Motion (and writ petition) should be denied.

Dated this 22nd day of July, 2022.

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CERTIFICATE OF SERVICE

I certify that on July 22, 2022, I submitted the foregoing REAL PARTY IN INTEREST'S RESPONSE TO PETITIONER'S MOTION TO STAY for filing via the Court's eFlex electronic filing system. Electronic notification will be sent to the following:

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EXHIBIT 1

EXHIBIT 1

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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.

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

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

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

- JGB made its claim on April 17, 2020 and provided additional information to Starr (via Sedgwick) on April 22, 2020.
- Sedgwick responded and issued requests for information on April 27, 2020.
- JGB answered these requests on May 13, 2020.
- Sedgwick sent a reservation of rights letter to JGB, along with three more requests for information on May 26, 2020.
- JGB commenced this lawsuit on June 16, 2020.
- Sedgwick continued to seek responses to the outstanding requests for information in July 2020.
- JGB directed Sedgwick to have Starr's defense counsel follow up with 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.

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- 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

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

Respectfully submitted by:

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[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).

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District 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:

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EXHIBIT 2

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Attorneys for Plaintiff
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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.: XIII

ORDER DENYING DEFENDANT STARR SURPLUS LINES INSURANCE COMPANY'S MOTION TO DISMISS COMPLAINT WITHOUT PREJUDICE

ORDER DENYING MOTION TO DISMISS

On June 16, 2020, Plaintiff JGB Vegas Retail Lessee, LLC ("Plaintiff" or "JGB") filed its Complaint against Defendant Starr Surplus Lines Insurance Company ("Defendant" or "Starr") asserting four causes of action arising from its insurance claim for coverage under Policy No. SLSTPTY11245819 issued by Starr to JGB (the "Policy"). JGB alleged causes of action for: (1) Breach of Contract; (2) Declaratory Judgment; (3) Violations of the Nevada Unfair Claims Practices Act, N.R.S. 686A.310; and (4) Breach of the Covenant of Good Faith and Fair Dealing.[1] On September 16, 2020, Starr moved to dismiss the entire Complaint with prejudice ("Motion to Dismiss"). JGB filed its opposition to the Motion to Dismiss on October 14, 2020, and Starr filed a Reply in support of the Motion ("Reply") on November 4, 2020. Pursuant to its Minute Order on November 9, 2020, the Court vacated the scheduled hearing due to the continuing coronavirus situation and deemed the matter submitted on the briefs and under advisement as of November 12, 2020. The Court, having reviewed the pleadings and the parties' filings related to the Motion to Dismiss (excluding the supplemental filings of Plaintiff on October 26 and November 10, 2020, which have not been reviewed or considered by the Court), rules as follows.[2]

The Court first rejects the argument in Starr's Motion to Dismiss that the Policy designates New York as the sole and exclusive venue to resolve any and all disputes arising out of the Policy, and therefore, that Nevada is not the proper forum to adjudicate this action. As Starr contends, the Policy form "General Conditions" provides that "[a]ny suit, action, or proceeding against the COMPANY [*i.e.* Starr] must be brought solely and exclusively in a New York state court or a federal district court sitting within the State of New York." Policy, Property Coverage, General Conditions, § 12(e). However, at Endorsement #27, the Policy also includes a "Service of Process Clause Endorsement," which provides, in part, that:

[1] On July 23, 2020, Starr removed this action to the United States District Court for the District of Nevada, on the basis of diversity of citizenship. On September 1, 2020, the United States District Court entered the parties' stipulation and order to remand the action to this Court based on a lack of complete diversity between the parties.

[2] The Court provides no opinion regarding which state's law is applicable in denying Starr's Motion to Dismiss.

> In the event of failure of the Insurer to pay any amount claimed to be due hereunder, the Insurer, at the request of the Insured, will submit to the jurisdiction of a court of competent jurisdiction within the United States. Nothing in this condition constitutes or should be understood to constitute a waiver of the Insurer's rights to commence an action in any court of competent jurisdiction in the United States, to remove an action to a United States District Court, or to seek transfer of a case to another court as permitted by the laws of the United States or any state in the United States. It is further agreed . . . that [for] any suit instituted against the Insurer upon this policy, the Insurer will abide by the final decision of such court or of any appellate court in the event of an appeal.

Policy, Endt. 27. The Service of Process Clause Endorsement continues, that "pursuant to any statute of any state, territory, or district of the United States," Starr "designates the Superintendent, Commissioner or Director of Insurance, or other officer specified for that purpose in the statute" as its agent for service of process. *Id.* The Court finds that there is a conflict between these two provisions and, as an endorsement, the Service of Process Clause Endorsement governs over the forum selection clause in the Policy's form. *See Tri-Union Seafoods, LLC v. Starr Surplus Lines Ins. Co.*, 88 F. Supp. 3d 1156, 1162-65 (S.D. Cal. 2015) (holding that the Service of Suit Endorsement "changed the original insurance agreement" that contained a forum selection clause and "unambiguously permits Plaintiff to bring suit in a forum of its choosing."); *Wayne Cnty. Airport Auth. v. Allianz Glob. Risks U.S. Ins. Co.*, No. 11-15472, 2012 WL 3134074, at *3 (E.D. Mich. Aug. 1, 2012) ("[Insurers] seek dismissal and enforcement of the forum selection clause that was bargained away. The [insurers] are not entitled to enforce the forum selection clause in the policy over that in the endorsement."). Moreover, Starr has failed to show that Nevada is an inconvenient forum to justify dismissal. *See* N.R.S. 13.050(2)(c); *Provincial Gov't of Marinduque v. Placer Dome, Inc.*, 131 Nev. 296, 300-07, 350 P.3d 392, 396-400 (2015). Accordingly, this action is properly within the jurisdiction of this Court, and Starr's Motion to Dismiss on forum is denied.

The Court next analyzes Starr's arguments for dismissal under NRCP 12(b)(5). When a court considers a motion to dismiss under NRCP 12(b)(5), the "court will recognize all factual allegations in [the] complaint as true and draw all inferences in its favor." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). "A complaint need only set forth sufficient facts to demonstrate the necessary elements of a claim for relief so that the defending party has adequate notice of the nature of the claim and relief sought." *W. States Constr., Inc. v. Michoff*, 108

Nev. 931, 936, 840 P.2d 1220, 1223 (1992). Thus, the complaint "should be dismissed only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672.

On the first cause of action, JGB states a ~~valid~~ claim for relief for breach of the Policy. The Policy's initial coverage grant provides that it "covers the property insured hereunder against all risks of direct physical loss or damage to covered property while at INSURED LOCATIONS occurring during the Term of this POLICY, except as hereinafter excluded or limited." Policy, Property Coverage, General Conditions, § 1; *see* Compl. ¶¶ 30-32. The Policy also provides certain "TIME ELEMENT" coverages for business interruption losses; the main section provides coverage for "[l]oss directly resulting from necessary interruption of the Insured's NORMAL business operations caused by direct physical loss or damage to real or personal property covered herein[.]" Policy, Business Interruption, § 1; *see* Compl. ¶¶ 33-40. Also included in the TIME ELEMENT COVERAGE is "Interruption by Civil or Military Authority."[3]

JGB's Complaint alleges the physical presence and known facts about the coronavirus, including that it spreads through infected droplets that "are physical objects that attach to and cause harm to other objects" based on its ability to "survive on surfaces" and then infect other people. Compl. ¶¶ 16-20. JGB also alleges that by March 11, 2020, COVID-19 was present at the Mirage casino, within one mile from JGB's Grand Bazaar Shops. *Id.* ¶ 21. JGB alleges that based on these facts and the location and characteristics of the Grand Bazaar Shops, that it was "highly likely that the novel coronavirus that causes COVID-19 has been present on the premises of the Grand Bazaar Shops, thus damaging the property JGB had leased to its tenants." *Id.* ¶ 26; *see also id.* ¶ 7. The Complaint also states that because the presence of COVID-19 at or near the Grand Bazaar Shops and

[3] The coverage part for "Interruption by Civil or Military Authority" provides that:

> This POLICY is extended to include, starting at the time of physical loss or damage, the actual loss sustained by the Insured, resulting directly from an interruption of business as covered hereunder, during the length of time, not exceeding the number of days shown under TIME LIMITS stated in the Declarations, when, as a direct result of damage to or destruction of property within one (1) statute mile of an INSURED LOCATION by the peril(s) insured against, access to such described premises is specifically prohibited by order of civil or military authority.

Policy, Business Interruption, § 7.

Governor Sisolak's March 20, 2020 Order restricting and prohibiting access to non-essential business, the Grand Bazaar Shops were forced to close and the few restaurants that remained open were severely limited in their operations, resulting in significant losses. *Id.* ¶¶ 26-28.

The Court finds that JGB's Complaint sufficiently alleges losses stemming from the direct physical loss and/or damage to property from COVID-19 to trigger Starr's obligations under the property and TIME ELEMENT coverage provisions in the Policy, including coverage for general business interruption and Interruption by Civil or Military Authority. *See, e.g.*, *Studio 417, Inc. v. Cincinnati Ins. Co*., No. 20-cv-03127, 2020 WL 4692385, at *2, *4 (W.D. Mo. Aug. 12, 2020) (complaint alleged direct physical loss, because it alleged that the virus "is a physical substance," which "live[s] on" and is "active on inert physical surfaces," and that "it is likely that customers, employees, and/or other visitors to the insured properties were infected with COVID-19 and thereby infected the insured properties with the virus" and "the presence of COVID-19 'renders physical property in their vicinity unsafe and unusable'").[4]

Starr also moves to dismiss JGB's claim for breach of contract (and related claims) on the basis that any loss or damage suffered by JGB is nonetheless excluded by the Policy's "Pollution and Contamination Exclusion." Motion to Dismiss at 24-26; Reply at 24-27. The Pollution and Contamination Exclusion provides:

> b. Pollution and Contamination Clause:
>
> > This POLICY does not insure against loss or damage caused by or resulting from any of the following regardless of any cause or event contributing concurrently or in any other sequence to the loss:
>
> 1. contamination;
> 2. the actual or threatened release, discharge, dispersal, migration or seepage of POLLUTANTS at an INSURED LOCATION during the Term of this POLICY unless the release, discharge, dispersal, migration, or seepage is caused by fire, lightning, leakage from fire protective equipment, explosion, aircraft, vehicles, smoke, riot, civil commotion or vandalism. This POLICY does not insure off premises cleanup costs arising from any cause and the coverage afforded by this clause shall not be construed otherwise.

[4] *See also Optical Servs. USA/JCI v. Franklin Mut. Ins. Co*., No. BER-L-3681-20, 2020 WL 5806576 (N.J. Super. L. Aug. 13, 2020); *Blue Springs Dental Care, LLC v. Owners Ins. Co*., No. 20-cv-00383, 2020 WL 5637963 (W.D. Mo. Sept. 21, 2020).

Policy, Property Coverage, General Conditions, § 7(b). The Policy does not define "contamination," but defines "POLLUTANT or CONTAMINANTS" as:

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

Policy, Property Coverage, General Conditions, § 13(T).

Starr contends that the Pollution and Contamination Exclusion clearly and unambiguously applies on its face to exclude JGB's claims. Reply at 24-25. As the insurer, Starr bears the burden to prove any clause excludes coverage. *See Nat'l Auto. & Cas. Ins. Co. v. Havas*, 75 Nev. 301, 303, 339 P.2d 767, 768 (1959). "[I]f an insurer wishes to exclude coverage by virtue of an exclusion in its policy, it must (1) write the exclusion in obvious and unambiguous language in the policy, (2) establish that the interpretation excluding covering under the exclusion is the only interpretation that could fairly be made, and (3) establish that the exclusion clearly applies to this particular case." *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 164, 252 P.3d 668, 674 (2011) (citing *Alamia v. Nationwide Mut. Fire Ins. Co.*, 495 F. Supp. 2d 362, 367 (S.D.N.Y. 2007)); *see also Belt Painting Corp. v. TIG Ins. Co*., 100 N.Y.2d 377, 383 (2003) (stating "policy exclusions are given a strict and narrow construction"). Starr has not shown that it is unreasonable to interpret the Pollution and Contamination Exclusion to apply only to instances of traditional environmental and industrial pollution and contamination that is not at issue here,[5] where JGB's losses are alleged to be the result of a naturally-occurring, communicable disease. This is the case, even though the Exclusion contains the word "virus." *See, e.g.*, *Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co.*, No. 6:20-cv-1174, 2020 WL 5939172, at *4 (M.D. Fla. Sept. 24, 2020) ("Denying coverage for losses stemming from COVID-19, however, does not logically align with the grouping of the virus exclusion with other pollutants such that the Policy necessarily anticipated and intended to deny coverage for these

[5] *See, e.g.*, *Century Surety Co. v. Casino W., Inc.*, 130 Nev. 395, 398-401, 329 P.3d 614, 616-18 (2014); *Belt Painting*, 100 N.Y.2d at 383-88.

kinds of business losses."). Accordingly, the Court finds that the Pollution and Contamination Exclusion does not apply to exclude JGB's claims.

On the second cause of action for declaratory relief, for the reasons stated above (*supra* at 2-5), the Court finds that JGB's Complaint sufficiently alleges facts to state a claim upon which relief can be granted for declaratory relief under Nevada law. *See* N.R.S. 30.010 *et seq*. Accordingly, Starr's Motion to Dismiss this cause of action is denied.

On the third cause of action, an insurer violates the Unfair Claims Practices Act for, *inter alia*, "[m]isrepresenting to insureds or claimants pertinent facts or insurance policy provisions relating to any coverage at issue" or "[f]ailing to effectuate prompt, fair and equitable settlements of claims in which liability of the insurer has become reasonably clear." N.R.S. 686A.310(1)(a) & (e). Regarding the fourth cause of action, "an implied covenant of good faith and fair dealing [is] in every contract." *Pemberton v. Farmers Ins. Exch.*, 109 Nev. 789, 792-93, 858 P.2d 380, 382 (1993). "[W]ith respect to the covenant of good faith and fair dealing . . . '[w]hen one party performs a contract in a manner that is unfaithful to the purpose of the contract and the justified expectations of the other party are thus denied, damages may be awarded against the party who does not act in good faith.'" *Perry v. Jordan*, 111 Nev. 943, 948, 900 P.2d 335, 338 (1995) (citing *Hilton Hotels v. Butch Lewis Prods.*, 107 Nev. 226, 234, 808 P.2d 919, 923 (1991)); *see also Pemberton*, 109 Nev. at 793, 858 P.2d at 382 ("An insurer fails to act in good faith when it refuses 'without proper cause' to compensate the insured for a loss covered by the policy."); *D.K. Prop., Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA.*, 92 N.Y.S.3d 231, 232-34 (App. Div. 1st Dep't 2019).

The Complaint alleges that Starr denied the claim, did so unreasonably, and did so with knowledge that denial was unreasonable. Compl. ¶¶ 10, 46, 61. JGB also alleged that Starr misrepresented the facts of the claim by asserting that "there [wa]s no mention of the [Nevada] orders having been issued because of physical loss or damage" and that it did "not appear that the [Nevada] orders in question prohibited access to the insured premises[.]" *Id*. ¶¶ 45-47. Moreover, JGB alleged that Starr misrepresented the scope of the Policy by citing the Pollution and Contamination Exclusion to apply to coverage, and by requiring that JGB be "physical prevent[ed]" from the premises in order to trigger the TIME ELEMENT coverages. *Id.* ¶¶ 48, 49, 52. Finally, JGB

alleged consequential damages from Starr's allegedly unreasonable denial of coverage. *See, e.g.*, *id.* ¶ 83. The Court finds that JGB's Complaint sufficiently alleges facts to state claims upon which relief can be granted for violation of the Nevada Unfair Claims Practices Act and for breach of the implied covenant of good faith and fair dealing.

Lastly, Starr's request to deny Plaintiff leave to amend the Complaint is denied as moot.

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss **IS DENIED IN ITS ENTIRETY** without prejudice.

November 30, 2020.

Respectfully submitted,

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EXHIBIT 3

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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

ORDER DENYING DEFENDANT STARR SURPLUS LINES INSURANCE COMPANY'S MOTION TO AMEND OR ALTER ORDER OR IN THE ALTERNATIVE GRANT RELIEF FROM ORDER

On December 15, 2020, Defendant, Starr Surplus Lines Insurance Company ("Starr") filed its Motion to Amend or Alter Order or in the Alternative Grant Relief from Order ("Motion to Amend") based upon the Court's November 30, 2020 Order Denying Starr's Motion to Dismiss (the "November 30 Order"). Plaintiff, JGB Vegas Retail Lessee, LLC ("JGB") filed its Opposition to the Motion to Amend on December 29, 2020 ("Opposition"), and Starr filed a Reply in Support

of the Motion to Amend on January 12, 2021. Pursuant to its Minute Order of January 13, 2021, the Court vacated the scheduled hearing for January 19, 2021and deemed the matter submitted on the briefs and under advisement. The Court, having reviewed and considered the pleadings and the parties' filings related to the Motion to Amend, and being fully advised in the premises, rules as follows:

Starr moved for relief from the November 30 Order under Nevada Rules of Civil Procedure 60(b) and 52(b). Starr asserted that it was entitled to relief from judgment under Rule 60(b) based on "mistake, inadvertence, surprise, or excusable neglect," by the Court, "fraud . . . , misrepresentation, or misconduct by" JGB, or "any other reason that justifies relief." Motion to Amend at 5-6 (citing NRCP 60(b)(1), (3), (6)). Under Rule 52(b), the grounds for a motion to amend or alter judgment are "correcting manifest errors of law or fact, newly discovered or previously unavailable evidence, the need to prevent manifest injustice, or a change in controlling law." *Terra South Corp. v. Engineered Structures, Inc*., 2016 WL 6834836, at *2 (Nev. Dist. Ct. June 15, 2016) (citing *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 582, 245 P.3d 1190, 1193 (2010)). Starr's Motion to Amend did not identify any newly discovered or previously unavailable evidence, or a change in controlling law, so its request for relief under Rule 52(b) appears to be based on a "manifest error of law or fact" or the need to "prevent manifest injustice."

The Court is unpersuaded by Starr's contentions under Rules 60(b) and 52(b) that the November 30 Order denying Starr's Motion to Dismiss is inconsistent with the showings made by JGB relative to the sustainability of JGB's pleaded claims when applying NRCP 12(b)(5). The Court requested that JGB submit a proposed order "consistent [with denial of the Motion to Dismiss] and with supportive briefing" for its consideration, after first providing the proposed order to Starr to "signif[y] [its] approval/disapproval." The Court reviewed and considered the proposed order, revised it, and entered it on November 30, 2020. The November 30 Order is properly confined to only what findings and rulings were necessary to the disposition of Starr's Motion to Dismiss, and is "without prejudice" as to any other matters not necessarily decided by the Court's denial. November 30 Order at 7. There was no mistake, inadvertence, surprise or neglect by the Court, and no "fraud upon the court" committed by JGB under Rule 60(b).

Moreover, the Court's November 30 Order did not commit any "manifest error of law or fact" or "manifest injustice," and there are no grounds to amend, alter or vacate the Order.

The Court was also clear when entering the November 30 Order that the ultimate ruling of whether JGB's claims are entitled to any of the underlying Policy coverages would not be addressed on Starr's Motion to Dismiss when it crossed out the word "valid" from the description of JGB's alleged breach of contract claim. November 30 Order at 3. Reference to and elaboration of JGB's allegations in the November 30 Order do not constitute ultimate findings and conclusions of the Court, but are intended only to demonstrate the underlying bases of the claims in surviving Defendant's NRCP 12(b)(5) Motion under the applicable standard.

IT IS THEREFORE ORDERED that Defendant's Motion to Amend or Alter Order, or in the Alternative Grant Relief from Order is hereby Denied.

DATED this 10th day of February, 2021.

DISTRICT COURT JUDGE

Respectfully submitted,

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Moreover, the Court's November 30 Order did not commit any "manifest error of law or fact" or "manifest injustice," and there are no grounds to amend, alter or vacate the Order.

The Court was also clear when entering the November 30 Order that the ultimate ruling of whether JGB's claims are entitled to any of the underlying Policy coverages would not be addressed on Starr's Motion to Dismiss when it crossed out the word "valid" from the description of JGB's alleged breach of contract claim. November 30 Order at 3. Reference to and elaboration of JGB's allegations in the November 30 Order do not constitute ultimate findings and conclusions of the Court, but are intended only to demonstrate the underlying bases of the claims in surviving Defendant's NRCP 12(b)(5) Motion under the applicable standard.

IT IS THEREFORE ORDERED that Defendant's Motion to Amend or Alter Order, or in the Alternative Grant Relief from Order is hereby Denied.

See previous page for Judge Denton's Signature

February 10, 2021.

Respectfully submitted,

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EXHIBIT 4

EXHIBIT 4

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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 **NOTICE OF ENTRY OF ORDER GRANTING MOTION FOR STAY OF CASE ON ORDER SHORTENING TIME**

TO: ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that the Order Granting Motion For Stay Of Case On Order

Shortening Time was signed by the Judge and filed with the Eighth Judicial District Court on July 18, 2022, a true and correct copy of which is attached hereto.

DATED: July 18, 2022

WOLF, RIFKIN, SHAPIRO,
SCHULMAN & RABKIN, LLP

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July, 2022, a true and correct copy of **NOTICE OF ENTRY OF ORDER GRANTING MOTION FOR STAY OF CASE ON ORDER SHORTENING TIME** was served by electronically filing with the Clerk of the Court using the Odyssey eFileNV system and serving all parties with an email-address on record, pursuant to Administrative Order 14-2 and Rule 9 of the N.E.F.C.R.

By */s/ Melissa Shield*
Melissa Shield, an Employee of
WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

EXHIBIT 1

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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 **ORDER GRANTING MOTION FOR STAY OF CASE ON ORDER SHORTENING TIME** **Hearing Date: July 11, 2022** **Hearing Time: 9:00 a.m.**

On June 20, 2022, Defendant Starr Surplus Lines Insurance Company ("Starr") filed its Motion for Stay of Case on Order Shortening Time ("Motion") so that the proceedings herein would be stayed pending the Nevada Supreme Court's review of Starr's Petition for a Writ of Mandamus or in the alternative, Prohibition ("Writ Petition") Plaintiff JGB Vegas Retail Lessee, LLC filed its Opposition on July 5, 2022. Starr filed its Reply on July 7, 2022.

Trial in this matter is presently set for the August 30, 2022 trial stack, with pre-trial deadlines running from that date. At present time, Motions-in-Limine are due on July 15th, Pretrial Conference is scheduled for August 8th, and Calendar Call is scheduled for August 22nd.

After considering the parties' papers and the oral argument of counsel at the time of hearing, the Court finds that Pursuant to Nev. R. App. P. 8(a)(1), a temporary stay of all currently scheduled dates and deadlines for 21 days is warranted. During that time, Starr may seek a further stay from the Supreme Court pursuant to Nev. R. App. P. 8(a)(2).

Accordingly, **IT IS SO ORDERED THAT** Defendant Starr's Motion for Stay of Case on Order Shortening Time is **GRANTED** on a temporary basis**.** This action, including all previously scheduled dates and deadlines are hereby stayed for 21 days from July 11, 2022.

Dated this 18th day of July, 2022

IT IS SO ORDERED.

ABG
AFA CEC 4AE7 2DB7
Mark R. Denton
District Court Judge

WOLF, RIFKIN, SHAPIRO, SCHULMAN & RABKIN, LLP

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DISTRICT COURT
CLARK COUNTY, NEVADA

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

AUTOMATED CERTIFICATE OF SERVICE

This automated certificate of service was generated by the Eighth Judicial District Court. The foregoing Order Granting Motion 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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