IN THE SUPREME COURT OF THE STATE OF NEVADA

STARR SURPLUS LINES ISURANCE 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,

JGB VEGAS RETAIL LESSEE, LLC

Real Party in Interest.

Supreme Court No. 84986
District Court Case No. A-20-816628-B

On Petition for Writ of Mandamus or, in the Alternative, Prohibition

BRIEF OF *AMICUS CURIAE* PANDA RESTAURANT GROUP, INC. IN SUPPORT OF RESPONDENTS AND THE REAL-PARTY-IN-INTEREST AND DENYING THE PETITION

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Panda Restaurant Group, Inc. is not publicly held, has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

The law firms who have appeared for Panda Restaurant Group, Inc. in this case or are expected to appear in this Court are Reed Smith LLP and Kemp Jones LLP.

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

Panda Restaurant Group, Inc. ("Panda") is a global leader in the restaurant industry. Since opening in 1973, Panda has grown to operate over 2,000 restaurants, including nearly 100 in Nevada. Panda employs hundreds of people in Nevada, and welcomes millions of guests into its restaurants annually. To date, Panda remains family owned and operated by its founders, Nevada residents.

The restaurant industry is one of the largest private employers in Nevada, representing over 200,000 jobs and generating over $9.9 billion in sales annually. As an industry leader, in Nevada and nationally, Panda seeks to ensure the interests of the restaurant industry are represented where the Court's decision will have a wide-ranging impact on it. Here, COVID-19 crippled the restaurant industry in Nevada, forcing innumerable restaurants to close their doors, many permanently, and radically reshaping those that remained.

Panda has filed for leave to file this amicus brief.

SUMMARY OF ARGUMENT

Nevada policyholders, such as real-party-in-interest JGB Vegas Retail Lessee, LLC ("JGB"), had a reasonable expectation that "all risk" policies would cover losses arising out of COVID-19, which arose from "direct physical loss or damage," as those terms are ordinarily understood, and that no exclusions would bar coverage for these losses. Nevada policyholders' understanding of those terms and exclusions

are supported by decades of case law. The District Court correctly determined that whether COVID-19 causes "direct physical loss or damage" to property is an issue of fact, and Starr Surplus Lines Insurance Co.'s ("Starr") writ petition should be denied.

ARGUMENT

I. UNDER NEVADA LAW, POLICIES ARE INTERPRETED ACCORDING TO THE OBJECTIVELY REASONABLE EXPECTATIONS OF THE INSURED

Nevada courts interpret insurance policies according to their "plain, ordinary and popular sense" to protect the insured's reasonable expectation of coverage. *Catania v. State Farm Life Ins. Co.*, 95 Nev. 532, 534 (1979). *See also Sullivan v. Dairyland Ins. Co*., 98 Nev. 364, 366 (1982) (interpreting coverage "in keeping with the reasonable expectations of an insured that he will be covered for the insurance he has purchased"); *Nat'l Union Fire Ins. Co. v. Reno's Exec. Air, Inc*., 100 Nev. 360, 365 (1984) (same).

Policy language is analyzed from the perspective of a layperson, "one untrained in law or in the insurance business." *Fourth St. Place v. Travelers Indem. Co.*, 127 Nev. 957, 964 (2011). This rule applies regardless of the "sophistication" of the policyholder. *Las Vegas Metro. Police Dep't v. Coregis Ins. Co*., 127 Nev. 548, 554, n.5 (2011).

Moreover, Nevada courts broadly construe coverage provisions, affording the greatest protection possible for the insured. *Powell v. Liberty Mut. Fire Ins. Co*., 127 Nev. 156, 162 (2011). Exclusions, on the other hand, are read narrowly. *Id.* Ambiguities in a policy are resolved in favor of the policyholder, and against the drafting insurer. *Sullivan*, 98 Nev. at 366. A policy provision is ambiguous where it is reasonably susceptible to more than one interpretation. *Benchmark Ins. Co. v. Sparks*, 127 Nev. 407, 412 (2011). If more than one construction is plausible, the provision will be construed against the insurer with the goal being "to effectuate the reasonable expectations of the insured." *Powell*, 127 Nev. at 162 (internal quotation omitted).

II. EXPECTATION OF COVERAGE FOR COVID-19 RELATED LOSSES IS REASONABLE BASED ON ORDINARY DEFINITIONS.

JGB alleged physical loss and physical damage within the ordinary definitions of those terms.[1] JGB alleged that because of the presence of COVID-19 at or near the Grand Bazaar Shops and 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

[1] Where an insurance policy refers to "physical loss of [] property, . . . the 'loss of property' requirement can be satisfied by any 'detriment,' and a 'detriment' can be present without there having been a physical alteration of the object." Allan D. Windt, INSURANCE CLAIMS & DISPUTES: REPRESENTATION OF INSURANCE COMPANIES AND INSUREDS § 11:41 (6th ed. 2021).

operations. Complaint at ¶¶ 26-28. JGB was, thus, physically deprived of the use of the Grand Bazaar Shops for their intended purposes. JGB has also alleged 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.* at ¶¶ 7, 26. This has prevented JGB from safely using its property without significant repairs and remediation. These allegations equate to both physical loss of (*i.e.*, the inability to use property) and physical damage to the insured property (*i.e.*, physical harm to the functionality or use of property). Accordingly, JGB had a reasonable expectation that its "all risk" policy would cover losses arising out of COVID-19 based on the ordinary meaning of the term "direct physical loss of or damage to."

III. EXPECTATION OF COVERAGE FOR COVID-19 RELATED LOSSES IS REASONABLE BASED ON DECADES OF CASE LAW.

It was objectively reasonable for JGB to expect coverage given the long and open history of case law, well known to insurance companies and brokers advising policyholders, finding that "physical loss or damage" can occur under certain unusual circumstances, such as when property becomes unsafe to inhabit or is temporarily damaged. Whereas the insurance industry now seeks to confine "physical loss or damage" to situations where property is permanently altered, the actual state of the law at the inception of the pandemic shows that insurers, brokers,

and industry experts knew that courts had established the meaning of this language to include situations rendering property unfit or unsafe for its intended use.[2]

A. The Status of the Law in March 2020: Events Rendering Property Unsafe or Unfit for Its Intended Use Caused "Loss" or "Damage".

As of March 2020, when the COVID-19 pandemic struck the United States and consequent orders of Civil Authority started to affect businesses, there had been about forty-eight cases addressing the issue of whether unusual circumstances – *i.e.*, circumstances other than a fire, a tornado or a collapse – caused "direct physical loss or damage to" covered property. Of those cases, the strong majority found coverage.

1. Property Insurance Protects Against Events that Render Property Unsafe to Inhabit or Use Regardless of Whether it Has Been Altered.

As an initial matter, courts have found that physical loss or damage occurs to property when it is too unsafe to inhabit, without requiring" physical alteration." For instance, in *Hughes v. Potomac Insurance Co.*, the court found that a policyholder's home, which became perched on the edge of a cliff after a sudden landslide, was damaged because it became unsafe to live in and thus useless to the owners, even

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[2] *See, e.g.*, Steven Plitt, *Direct Physical Loss in All-Risk Policies: The Modern Trend Does Not Require Specific Physical Damage, Alteration*, Claims Journal (Apr. 15, 2013) (citing multiple cases described in this brief, noting that "[t]he modern trend signals that courts are not looking for physical alteration, but for loss of use.").

though the home was otherwise undamaged.[3] 18 Cal. Rptr. 650 (Cal. App. 1962). Courts have also found that physical loss or damage occurred where a policyholder's home was threatened by falling rocks but not yet impacted,[4] and where a building adjacent to the policyholder's leased space collapsed, but there was no physical alteration of the policyholder's own property.[5]

Courts also have held that property perceived by the public to be damaged or dangerous has suffered physical loss or damage despite the fact that it is still useable or ultimately determined to be safe. *See, e.g., Shade Foods, Inc. v. Innovative Products Sales & Mktg., Inc.*, 78 Cal. App. 4th 847, 865 (2000) (finding the intermingling of unwanted substances with otherwise undamaged goods, rendered the goods unfit for use, even though the goods themselves were not physically altered); *S. Wallace Edwards & Sons, Inc. v. Cincinnati Ins. Co.*, 353 F.3d 367, 374–75 (4th Cir. 2003) (finding meat exposed to ammonia had suffered property damage as the exposure caused an odor and discoloration that reduced the product's quality "whether or not it may not have been directly injurious to health or adulterated"); *Blaine Richards & Co. v. Marine Indem. Ins. Co.*, 635 F.2d 1051, 1055–56 (2d Cir.

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[3] *Id.* at 655 (emphasis added); *see also Hampton Foods, Inc. v. Aetna Cas. & Sur. Co*., 787 F.2d 349, 352 (8th Cir. 1986) (finding policyholder could claim Business Income coverage where risk of collapse necessitated abandonment of grocery store).

[4] *Murray v. State Farm Fire & Casualty Co*., 509 S.E.2d 1 (W. Va. 1998).

[5] *Manpower Inc. v. Insurance Co. of the State of Pennsylvania*, No. 08C0085, 2009 WL 3738099 (E.D. Wis. Nov. 3, 2009).

1980) (finding coverage for beans, which had been fumigated with an unapproved pesticide, noting "[t]he fact that the beans were not marketable in this state suggests that they were damaged in an important respect," and holding that policyholder could recover for both (1) beans found to be contaminated and (2) beans not contaminated but not accepted by customers); *see also New Market Inv. Corp. v. Fireman's Fund Ins. Co.*, 774 F. Supp. 909, 913 (E.D. Pa. 1991) (disagreeing with insurer that policy covering property damage caused by terrorism limited coverage to "two" poisoned grapes, where all fruit spoiled during "Chilean Grape Crisis" was caused by terroristic threats of cyanide poisoning and related efforts to avoid poisoning).

Accordingly, events – like the presence or suspected presence of COVID-19 – which make it too dangerous to use property as it was designed to be used, cause physical loss or damage to that property, regardless of any physical alteration.

2. Property Insurance Protects Against Temporarily Unsafe Conditions that Render Property Uninhabitable or Unusable.

Even a temporary condition affecting a property's safety or function can cause "physical loss or damage." For example, in *Gregory Packaging, Inc. v. Travelers Property Casualty Co*., the court held that ammonia discharge at a manufacturing plant caused physical loss or damage, since "property can sustain physical loss or

damage without experiencing structural alteration,"[6] and "the ammonia release physically transformed the air . . . so that it contained an unsafe amount of ammonia."[7] No. 2:12-cv-04418, 2014 WL 6675934 (D.N.J. Nov. 25, 2014). Similarly, in *Western Fire Insurance Co. v. First Presbyterian Church*, the court rejected the insurance company's argument that the insured had suffered no direct physical loss where gasoline infiltrated the soil under and around its premises and did not physically alter the insured's building.[8] 437 P.2d 52 (Colo. 1968).

3. Property Insurance Protects Against Property Affected by Actual and Suspected Dangerous Conditions

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6 *Id.* at *5.

7 *Id.* at *6; *see also Travco Ins. Co. v. Ward*, No. 2:10-cv-14, 2010 WL 2222255, at *8-9 (E.D. Va. June 3, 2010) (finding emission of toxic gases in the policyholder's otherwise physically intact house caused direct physical loss, noting the majority of cases nationwide find that "physical damage to the property is not necessary . . . where the building in question has been rendered unusable by physical forces").

8 *Id.* at 55 (emphasis added); *see also Oregon Shakespeare Festival Association v. Great American Insurance Co*., No. 1:15-cv-01932-CL, 2016 WL 3267247 (D. Or. June 7, 2016) (rejecting insurer's argument that the accumulation of smoke did not require any "structural" "repairs" to the insured premises, and thus there was no Period of Restoration," or that natural dissipation of smoke over time disproves coverage); *Matzner v. Seaco Ins. Co*., No. 96-0498-B, 1998 WL 566658, at *4 (Mass. Super. Aug. 12, 1998) (concluding the phrase "direct physical loss or damage" was ambiguous and that "carbon monoxide contamination constitutes 'direct physical loss of or damage to' property"); *Arbeiter v. Cambridge Mut. Fire Ins. Co*., No. 9400837, 1996 WL 1250616, at *2 (Mass. Super. Mar. 15, 1996) (finding oil fumes present in house constituted physical damage); *Hetrick v. Valley Mut. Ins Co.*, 15 Pa. D. & C. 4th 271, 274 (Pa. Comm. Pl. May 28, 1992) (finding that there would be coverage for loss of use if an outside oil spill made the house uninhabitable).

Dangerous conditions can also constitute "physical loss or damage," and given the points above concerning property deemed too dangerous to use, so can ***suspected*** dangerous conditions.

Courts have reached such holdings where properties were impacted by an array of conditions such as the presence of bacteria,[9] brown recluse spiders,[10]

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[9] *Cooper v. Travelers Indem. Co*., No. C-01-2400, 2002 WL 32775680, at *5 (N.D. Cal. Nov. 4, 2002) (finding potential for coverage due to presence of E. coli bacteria); *see also Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 827 (3d Cir. 2005) (same).

[10] *Cook v. Allstate Ins. Co*., No. 48D02-0611-PL-01156, slip op. at 6-8 (Ind. Super. Ct. Nov. 30, 2007) ("[c]ase law demonstrates that a physical condition that renders property unsuitable for its intended use constitutes a 'direct physical loss' even where some utility remains and, in the case of a building, structural integrity remains").

arsenic,[11] mold,[12] lead[13] and asbestos.[14] These courts focused, for instance, not on any alteration spiders caused property, but on how dangerous things affect the safe use of property.

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[11] *Association of Apartment Owners of Imperial Plaza v. Fireman's Fund Ins. Co*., 939 F. Supp. 2d 1059, 1068 (D. Hawai'i Apr. 9, 2013) (applying Hawai'i law) (finding intrusion of arsenic into roof from leaking water caused "direct physical loss or damage").

[12] *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, No. CV-01-1362-ST, 2002 WL 31495830, at *8-*9 (D. Or. June 18, 2002) (concluding mold damage to house, which caused policyholder to abandon house, could constitute "direct" and "physical" loss); *Columbiaknit, Inc. v. Affiliated FM Ins. Co*., No. 98-434-HU, 1999 WL 619100, at *7-*8 (D. Or. Aug. 4, 1999) (finding "direct physical loss or damage" could be established if the garments at issue increased microbial counts such that an odor or mold or mildew developed); *De Laurentis v. United Servs. Auto. Ass'n*, 162 S.W.3d 714, 722-23 (Tex. App. Mar. 31, 2005) (finding mold damage constituted "physical loss," and defining "loss" to mean "the act of losing or the thing lost; it is not a word of limited, hard and fast meaning and has been synonymous with or equivalent to, 'damage'" and noting "[a] physical loss is simply one that relates to natural or material things").

[13] *Stack Metallurgical Services, Inc. v. Travelers Indemnity Co.*, No. 05-1315, 2007 WL 464715 (D. Or. Feb. 7, 2007) (finding lead contamination that rendered a furnace useless for processing medical devices constituted "direct physical damage").

[14] *Yale Univ. v. CIGNA Ins. Co*., 224 F. Supp. 2d 402, 413 (D. Conn. 2002) (finding contamination by asbestos and lead in buildings could constitute "physical loss or damage," citing "the substantial body of case law" holding that "a variety of contaminating conditions . . . constitute 'physical loss or damage to property'"); *Board of Educ. v. International Ins. Co*., 720 N.E.2d 622, 625-26 (Ill. App. 1999) (citing insurance coverage cases finding that incorporation of asbestos into buildings caused "property damage"); *Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co*., 615 N.W.2d 819, 825-26 (Minn. 2000) (holding (1) "even though 'asbestos contamination does not result in tangible injury to the physical structure of the building, a building's function may be seriously impaired or destroyed and the property rendered useless by the presence of contaminants,' thereby satisfying the definition of direct physical loss"; and (2) "[a] principal function of any living

4. Property Insurance Protects Against Conditions and Damage That Can Be Cleaned Up or Repaired.

Contrary to Starr and insurance industry *amici*, conditions that can be easily cleaned also can cause physical loss or damage. Indeed, the insurance company in *Brand Management, Inc. v. Maryland Casualty Co*., where a sushi manufacturer closed for 15 days to disinfect its premises after discovery of listeria, voluntarily paid the Business Income claim during that period. No. 05-cv-02293, 2007 WL 1772063, at *2 (D. Colo. June 18, 2007). Additionally, courts have found that physical loss or damage occurred where noxious particles were found in the air of the policyholder's premises after the attacks of September 11, 2001,[15] and where a policyholder's property was affected by odor from an illegal methamphetamine lab.[16]

Both federal and state courts around the country have arrived at the conclusion that physical loss or damage to property can occur when the property becomes too unsafe to inhabit or when property is temporarily damaged, requiring repair. In fact, the Vermont Supreme Court recently came to this same conclusion, finding

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space [is] to provide a safe environment for the occupants" and that if a property "presents a health hazard to the tenants, its function is seriously impaired").

15 *Schlamm Stone & Dolan, LLP v. Seneca Insurance Co*., No. 603009/2002, 2005 WL 600021 (N.Y. Supr. Ct. Mar. 16, 2005).

16 *Farmers Insurance Co. v. Trutanich*, 858 P.2d 1332 (Ore. App. 1993).

allegations of COVID-19 on premises, and the necessary "steps" to "redress these physical alterations," adequately state a claim for physical loss or damage under an all-risk policy. *Huntington Ingalls Industries, Inc. v. Ace American Ins. Co.*, 2022 VT 45 (Vt. Super. Ct. Sept. 23, 2022).[17]

Given this history of case law, JGB was objectively reasonable to expect coverage for the losses it suffered due to the COVID-19 pandemic and the government shutdown orders.

Having failed to define "direct physical loss or damage" according to the interpretation it proffers, Starr must honor its broad promise of coverage. "[I]nsurer[s] cannot, by failing to define the terms . . . insist upon a narrow, restrictive interpretation of the coverage provided." *Dahl-Eimers v. Mutual of Omaha Life Ins. Co.*, 986 F.2d 1379, 1382 (11th Cir. 1993). The Supreme Court should not be in the business of rescuing insurers who – after 60 years of consistent precedent – regret their choice to sell broadly worded policies.

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[17] *Compare to Marina Pacific Hotel, LLC, et al. v. Fireman's Fund Ins. Co.*, 81 Cal. App. 5th 95 (2022) (refusing to disregard insureds' allegations that disinfecting objects does not repair or remediate the actual physical alteration to property caused by COVID-19).

IV. EXPECTATION OF COVERAGE FOR COVID-19 RELATED LOSSES IS REASONABLE BASED ON PRECEDENT CONFINING CONTAMINATION AND SIMILAR EXCLUSIONS SOLELY TO TRADTIIONAL FORMS OF ENVIRONMENTAL POLLUTION

It was also reasonable for JGB to expect coverage given the history of case law limiting exclusions targeting "pollutants," "contaminants," or "contamination" to traditional environmental pollution.

In *Century v. Casino West,* for example, this Court reviewed an exclusion relating to pollutants, which had a virtually limitless definition of pollutants, such that essentially any physical substance would qualify whether reasonably associated with "pollution" or not. 130 Nev. 395, 400 (2014) (finding "the definition of a pollutant is broad enough that it could be read to include items such as soap, shampoo, . . . insofar as these items are capable of reasonably being classified as contaminants or irritants"). Such a broad application would lead to "absurd" "results" and be "contrary to any reasonable policyholder's expectations" of coverage. *Id*. Accordingly, this Court limited the exclusion to "traditional environmental pollution," and cautioned insurers that "[t]o demonstrate that the absolute pollution exclusion applies to nontraditional indoor pollutants, an insurer

must plainly state that the exclusion is not limited to traditional environmental pollution." *Id*. at 401. Other courts throughout the country have found similarly.[18]

As a literal application of the Pollution and Contamination Exclusion would destroy a policyholder's reasonable expectations of coverage, the list of substances that make up the JGB Policy's definition of pollutants and contaminants must be read in accordance with the plain meaning of the terms "pollution" and "contamination" to ensure a reasonable construction of the exclusion. Thus, the Contamination Exclusion's generic reference to "virus" must be read to refer only to events in which the presence of virus would reasonably occur by means of environmental pollution—*e.g.*, when a wastewater treatment plant or a medical facility releases virus wastes into the environment through careless disposal practices. Such a narrow reading of the Pollution and Contamination Exclusion is consistent with common sense and policyholders' reasonable expectations, while also upholding Nevada requirements that policy exclusions be given a narrow reading.

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[18] *See MacKinnon v. Truck Insurance Exchange*, 31 Cal. 4th 635 (2003) (California law); *Cont'l Cas. Co. v. Rapid-Am. Corp.*, 80 N.Y.2d 640, 654 (N.Y. 1993) (New York law); *Am. States Ins. Co. v. Koloms*, 177 Ill. 2d 473, 489 (1997) (Illinois law); *Kent Farms, Inc. v. Zurich Ins. Co.*, 140 Wash. 2d 396, 402 (2000) (en banc) (Washington law).

JGB was reasonable to expect coverage for its pandemic-related losses, not only because of longstanding case law finding that physical loss or damage to property can occur without physical alteration, but also because of case law finding that exclusions such as the one at issue here are limited to traditional environmental pollution. Therefore, Starr's writ petition should be denied.

V. CONCLUSION

For all of the above reasons, the Court should consider the actual state of the law on whether unusual conditions can cause "direct physical loss or damage to" to property, as well as whether the Contamination Exclusion is limited to traditional environmental pollution, and should deny Starr's writ petition.

Dated: September 30, 2022

Respectfully submitted,

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NRAP 32(A)(9) CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief of *Amicus Curiae* complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this Brief of Amicus Curiae has been prepared in a proportionally spaced typeface using Microsoft Word 365 ProPlus in 14-point Times New Roman typeface. I further certify that this Brief complies with the type-volume limitation under NRAP 29(e) as it contains 3501 words.

Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page

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and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 30th day of September, 2022.

Respectfully submitted,

KEMP JONES, LLP

/s/Don Springmeyer

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CERTIFICATE OF SERVICE

I certify that on the 30th day of September, 2022, I caused to be served via the Nevada Supreme Court's e-filing system and pursuant to NRAP 25(b) and NEFCR 9, and electronically filed the foregoing **BRIEF OF *AMICUS CURIAE* PANDA RESTAURANT GROUP, INC. IN SUPPORT OF RESPONDENTS AND THE REAL-PARTY-IN-INTEREST AND DENYING THE PETITION** with the Clerk of the Court for the Nevada Supreme Court by using the Nevada Supreme Court's E-filing system (Eflex). Participants in the case who are registered Eflex users will be served by the Eflex system.

/s/Ali Lott
An employee of Kemp Jones, LLP