

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

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

**MOTION OF *AMICUS CURIAE* BOYD GAMING CORPORATION FOR
LEAVE TO FILE BRIEF IN SUPPORT OF
REAL PARTY IN INTEREST JGB VEGAS RETAIL LESSEE, LLC**

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Boyd Gaming Corporation (“Boyd Gaming”) moves the Court for an order permitting it to file the accompanying Brief of *Amicus Curiae* in Support of Real Party in Interest JGB Vegas Retail Lessee, LLC (“Brief”). The Brief supplements the Answer filed by Real Party in Interest by bringing to the Court’s attention longstanding precedents that bear directly on factual assertions raised in the Petition and by responding to arguments made in an amicus brief that an insurance industry association filed in support of the Petition. *Amicus*’s support is especially vital here because the issues implicated by this case are far-reaching and of critical importance, as they may affect the insurance recoveries for businesses throughout Nevada.

I. INTEREST OF *AMICUS CURIAE*

Boyd Gaming is one of the largest casino entertainment companies in the United States and the owner of twenty-seven gaming entertainment properties in nine states, including eleven in Nevada. Like JGB Vegas Retail Lessee, LLC (“JGB”), Boyd Gaming has suffered substantial losses due to the COVID-19 pandemic, for which its insurers have denied coverage. Like JGB, Boyd Gaming has sued its property insurers in the District Court of Clark County, Nevada. This writ proceeding may be the first time that this Court weighs in on an issue of great importance to *amicus* and many other Nevada policyholders: whether the COVID-19 virus can cause “direct physical loss or damage” as those words are used in many property policy forms and, if so, whether the District Court was correct in finding

that JGB's evidence was sufficient to show such physical loss or damage. The Court's legal precedent will bind all the District Courts of the State. *Amicus* thus has a direct and substantial interest in the outcome of this writ proceeding.

II. **BOYD GAMING FULFILLS THE CLASSIC ROLE OF *AMICUS CURIAE***

Boyd Gaming seeks to fulfill "the classic role of amicus curiae," namely, "[i] assisting in a case of general public interest, [ii] supplementing the efforts of counsel, and [iii] drawing the court's attention to law that escaped consideration." *Miller-Wohl Co. v. Comm'r of Lab. & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982).

First, "courts frequently welcome amicus briefs from nonparties concerning legal issues that have potential ramifications beyond the parties directly involved." *Safari Club Int'l v. Harris*, 2015 WL 1255491, at *1 (E.D. Cal. Jan. 13, 2015) (quoting *NGV Gaming, Ltd. v. Upstream Point Molate, LLC*, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005)). Such is the case here. This Court's adjudication of the recurring legal issue of whether the perils posed by the coronavirus pandemic could result in a covered loss may bear directly on the prospects of insurance recovery for *amicus*, as well as other pandemic-affected Nevada policyholders.

Similarly, "most courts have granted amicus participation" when, as here, "the amicus has an interest in some other case that may be affected by the decision in the present case[.]" *Duronslet v. Cty. of Los Angeles*, 2017 WL 5643144, at *1 (C.D. Cal. Jan. 23, 2017) (quoting *Cnty. Ass'n for Restoration of Env't (CARE) v.*

DeRuyter Bros. Dairy, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999)) (internal quotations omitted). As noted above, Boyd Gaming has sued its property insurers in the same court presiding over JGB’s action, and for the same purpose: to obtain coverage for losses due to the COVID-19 pandemic. Boyd Gaming’s lawsuit, like the present action, concerns whether an “all risks” property insurance policy can cover physical loss or damage from the COVID-19 virus under Nevada law. A decision by this Court in this writ proceeding could affect the outcome of Boyd Gaming’s lawsuit.

Second, courts routinely allow amicus briefs where *amicus*’s “participation is useful to or otherwise desirable to the court.” *People’s Legislature v. Miller*, No. 2:12-CV-00272-MMD, 2012 WL 3536767, at *5, n.5 (D. Nev. Aug. 15, 2012) (quoting *United States v. Louisiana*, 751 F. Supp. 608, 620 (E.D. La. 1990)). *See Powers v. United Servs. Auto. Ass’n*, 115 Nev. 38, 41, 979 P.2d 1286, 1288 (1999) (“We conclude that the briefs of the amici were of some assistance in reviewing this matter. We therefore grant the motions and joinders to appear as amici, and direct the clerk of the court to file the briefs received from the amici.”). Again, that is precisely the case here. Boyd Gaming’s *amicus* brief explains that the insurers’ citation to “facts” recited in federal court opinions cannot properly be the basis of a motion for summary judgment (or an order vacating a denial of summary judgment); and it responds to the insurance industry’s cries of an existential threat if they must

honor the language of their contracts of insurance and pay COVID-19 coverage claims, made in an *amicus* brief that the American Property Casualty Insurance Association filed (by leave of this Court) in support of the Petition. JGB’s Answer does not directly address these topics at any length, even though they involve important information for the Court to consider when determining whether insurers should be held to the contractual promises they made in their policies.

Finally, there is no downside to granting Boyd Gaming’s motion for leave to file the *amicus* brief. Courts have often held that “it is ‘preferable to err on the side of permitting amicus briefs.’” *Earth Island Inst. v. Nash*, 2019 WL 6790682, at *2 (E.D. Cal. Dec. 12, 2019) (quoting *Duronslet*, 2017 WL 5643144, at *1, and in turn citing *Neonatology Assocs., P.A. v. C.I.R.*, 293 F.3d 128, 133 (3d Cir. 2002)) (brackets and some quotation marks omitted). This is so because, on the one hand, “if the filed amicus brief turns out to be unhelpful, the court can then simply disregard it.” *Id.* (internal quotation marks omitted). “On the other hand, if a good brief is rejected, the Court will be deprived of a resource that might have been of assistance.” *Duronslet*, 2017 WL 5643144, at *1 (brackets omitted).

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For the foregoing reasons, Boyd Gaming respectfully requests leave to file its *amicus curiae* brief in support of JGB and in support of denial of the Petition.

DATED: September 30, 2022,

BROWNSTEIN HYATT FARBER SCHRECK, LLP

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed and served the foregoing **MOTION OF AMICUS CURIAE BOYD GAMING CORPORATION FOR LEAVE TO FILE BRIEF IN SUPPORT OF REAL PARTY IN INTEREST JGB VEGAS RETAIL LESSEE, LLC** with the Clerk of the Court of the Supreme Court of Nevada by using the Court's Electronic Filing System on September 30, 2022.

/s/ Mercedes Mosher
an employee of Brownstein Hyatt Farber Schreck,
LLP