Case No. 84986

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,	District Court Case No. A-20-816628-B
and	
JGB VEGAS RETAIL LESSEE, LLC, Real Party in Interest.	

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

BRIEF OF *AMICUS CURIAE* BOYD GAMING CORPORATION IN SUPPORT OF REAL PARTY IN INTEREST JGB VEGAS RETAIL LESSEE, LLC

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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.

Boyd Gaming Corp. does not have a parent corporation, and no publicly-held corporation owns 10% or more of its stock.

The law firms that have appeared for Boyd Gaming Corp. in this case or are expected to appear in this Court are Covington & Burling LLP and Brownstein Hyatt Farber Schreck, LLP.

DATED this 30th day of Setpember, 2022.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

/s/ Frank M. Flansburg III

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IDENTITY OF *AMICUS CURIAE*, ITS INTERESTS IN THE CASE, AND THE SOURCE OF ITS AUTHORITY TO FILE

Amicus curiae Boyd Gaming Corporation is one of the largest casino entertainment companies in the United States and the owner of eleven gaming entertainment properties in Nevada alone.

Like Real Party in Interest JGB Vegas Retail Lessee, LLC ("JGB"), Boyd Gaming has suffered substantial economic losses due to the COVID-19 pandemic, for which its "all risks" property insurers have denied coverage, and has sued its insurers for coverage in the District Court of Clark County, Nevada. In this writ proceeding, the Court may decide to address 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 legal precedent established in this case will bind all of the lower state courts. *Amicus* thus has a direct and substantial interest in the outcome of this writ proceeding.

Boyd Gaming is submitting an accompanying motion for leave to file this brief under NRAP 29(a).

SUMMARY OF ARGUMENT

This Brief addresses two principal subjects.

First, it highlights that Petitioner Starr Surplus Lines Insurance Company ("Starr") improperly relies throughout its petition on "facts" neither in the record nor the proper subject of judicial notice and which therefore should be disregarded.

Second, it responds to misleading statements made by American Property Casualty Insurance Association ("APCIA") in the brief it filed on August 4, 2022. APCIA's prognostications regarding the economic consequences for the insurance industry if the Supreme Court denies this writ petition are incorrect and in any event have no bearing on the breach of contract issue presented in this litigation.

ARGUMENT

I. NON-RECORD "FACTS" CANNOT SUPPORT STARR'S WRIT.

Starr's first and second "issues presented" purport to address "[w]hether the District Court erroneously determined that whether COVID-19 causes ... 'direct physical loss or damage' .... [or] 'damage to or destruction of property ... is an issue of fact.'" (Writ Pet. at 1.) Actually, as JGB's Answer explains, the District Court adopted *Starr's* interpretation of the phrase "direct physical loss or damage" for the sake of argument and found the existence of a genuine issue of material fact as to whether such loss or damage occurred from the substantial evidence that JGB placed in the record.

Unable to rebut JGB's evidence—that would merely create a fact dispute and thus would provide an alternative ground to deny Starr's summary judgment

motion—Starr's Petition effectively asks the Court to venture *outside of the record* and instead adopt factual assertions and conclusory statements drawn from other judicial opinions. But those opinions cite each other—or cite nothing at all. Section I.A below gives examples of those assertions, along with their faulty (or nonexistent) bases. Section I.B explains why the Court's review of this petition should be confined to the record and should not extend to Starr's non-record factual recitals.

A. Starr's Petition Does Not Rest Upon Facts in the Record.

1. *"COVID-19 is a disease, caused by a virus, which poses a risk to people, but does not physically alter property."*[1]

Starr cites *Circus LV, LP v. AIG Specialty Insurance Co.*, a federal trial court decision, for this proposition, but *Circus Circus* does not say this. At most, it critiques the "paucity" of the complaint's allegations (which differ from JGB's robust factual and expert submissions on summary judgment) and cites other courts' legal conclusions about the policy language's meaning. 525 F.Supp.3d at 1276.

2. *"'[T]he virus harms human beings, not property.'"*[2]

Starr cites a federal district court's decision in *Wellness Eatery La Jolla LLC v. Hanover Ins. Group*, 517 F.Supp.3d 1096, 1106 (S.D. Cal. 2021), for this mantra. *Wellness Eatery* in turn relied on two other trial court opinions, neither of which

1 Pet. for Writ at 6-7 (citing *Circus Circus LV, LP v. AIG Specialty Ins. Co.*, 525 F.Supp.3d 1269, 1276 (D. Nev. 2021)).

2 Pet. for Writ at 15 (citing *Wellness Eatery La Jolla LLC v. Hanover Ins. Grp*., 517 F.Supp.3d 1096, 1106 (S.D. Cal. 2021)).

cited to any reliable source. *See id.* (citing *Uncork & Create LLC v. Cincinnati Ins. Co.*, 498 F.Supp.3d 878, 884 (S.D.W. Va. 2020); *Kevin Barry Fine Art Assocs. v. Sentinel Ins. Co.*, 513 F.Supp.3d 1163, 1171 (N.D. Cal. 2021)). Indeed, in November 2020 the *Uncork & Create* court made several dubious factual assumptions regarding the nature of SARS-CoV-2—a virus whose very existence had been documented for less than 12 months—based expressly on what the judge described as "common sense." *Uncork & Create LLC*, 498 F.Supp.3d at 883-84 (as cited in *Kevin Barry*, 513 F.Supp.3d at 1171). There is no scientific or other factual basis for this assertion.

3. *"The virus lives in the air or on surfaces only temporarily and dissipates on its own without any intervention*."[3]

Starr provides no citation at all for this assertion.

4. *"[The coronavirus] can be removed faster through routine cleaning."*[4]

Here Starr cites to a Western District of Washington decision, yet the only reference to cleaning in it is a quote from a court in Alabama ("A virus can simply be wiped off the surface with disinfectant"), which in turn provided no support for its inaccurate statement. *See Woolworth LLC v. Cincinnati Ins. Co.*, 535 F.Supp.3d 1149, 1154 (N.D. Ala. 2021).

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3 Pet. for Writ at 15 (no citation provided) .

4 Pet. for Writ at 15 (citing *Nguyen v. Travelers Cas. Ins. Co. of Am.*, No. 20-CV-00597, 2021 WL 2184878, at *10 (W.D. Wash. May 28, 2021)).

5. *"[A]ny alleged surface-contamination is ephemeral—the virus is only detectable on surfaces for 'up to three days.'"*[5]

Again Starr cites *Circus Circus* for support: this time the court opined that the virus's ability to persist on surfaces for three days, as alleged in the policyholder's complaint, meant it was "ephemeral," notwithstanding the policyholder's allegation two paragraphs later that the persistence of the virus in aerosols and on surfaces meant such surfaces could infect individuals that came into contact with them. Complaint, *Circus Circus LV, LP v. AIG Specialty Ins. Co.*, No. 20-cv-01240 (D. Nev. July 2, 2020), ECF No. 1, ¶ 28. Moreover, *Circus Circus* was decided on a motion to dismiss, whereas here JGB developed a detailed factual record, including expert testimony that the coronavirus remains in the air and on property for days, and that it was constantly being reintroduced in JGB's properties—the opposite of "ephemeral." *See* JGB Answer to Pet. at 11-12 (describing expert testimony) .

6. *"The virus' 'impact on physical property is inconsequential .... it may be wiped off surfaces using ordinary cleaning materials, and it disintegrates on its own in a matter of days.'"*[6]

Starr's support for this factual assertion is yet another federal case that cites no source whatsoever for its conclusion. *See Sandy Point Dental, P.C.*, 20 F.4th at 335. Worse, this statement has now been cited for its truth in numerous other federal

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5 Pet. for Writ at 15 (citing *Circus Circus*, 525 F. Supp. 3d at 1275-76).

6 Pet. for Writ at 18 (citing *Sandy Point Dental, P.C. v. Cincinnati Ins. Co.*, 20 F.4th 327, 335 (7th Cir. 2021)).

decisions, as if it were uncontroverted fact. *See, e.g., Valley Lo Club Ass'n, Inc. v. Cincinnati Ins. Co.*, No. 20-CV-04790, 2022 WL 2712534, at *4 (N.D. Ill. July 5, 2022); *Classy Glass, Inc. v. Cincinnati Ins. Co.*, No. 21-CV-221, 2022 WL 539120, at *3 (W.D. Wis. Feb. 23, 2022); *Carilion Clinic v. Am. Guarantee & Liab. Ins. Co.*, 583 F.Supp.3d 715, 723 (W.D. Va. 2022). Starr apparently assumes this Court will "follow the herd." *JDS Constr. Group, LLC v. Continental Cas. Co.*, 2020 CH 5678, 2021 WL 8775920, at *3, (Cir. Ct., Ill., Oct. 25, 2021) ("Judges are not sheep, and I do not decide a case by counting noses. Further, the 'herd' can be wrong.").

In sum, none of the above statements is supported by admissible evidence that Starr offered into the record, and some are not supported at all. Instead, every one of the citations that Starr provides for its factual assertions is to federal court opinions or decisions in other states, which in turn appear either to be based upon unsupported pronouncements from yet more courts outside of Nevada or, ultimately, to have been pulled out of thin air.[7] In contrast, JGB supplied the District Court with substantial record evidence, including expert testimony regarding fomite-based transmission, survival of the virus on various surfaces over time, and the ineffectiveness of cleaning protocols in eliminating the coronavirus from surfaces.

[7] The Nevada State Medical Association ("NSMA") yesterday submitted an amicus brief in this case deploring the continued propagation of false information about SARS-CoV-2 and COVID-19 in these "junk science" statements. NSMA Br. at 4.

See, e.g., JGB Answer to Pet. at 11-12 (citing epidemiological expert's testimony at 5 PA 781 ¶ 14 - 5 PA 809 23:13).

Starr's Petition for extraordinary relief thus truly is extraordinary: in the face of JGB's record evidence, Starr demands that this Court enter judgment in its favor on the ground that the coronavirus cannot satisfy Starr's interpretation of "direct physical loss or damage," even though (a) JGB placed extensive evidence showing that the coronavirus *can* cause such physical loss or damage under that interpretation, and (b) Starr's attack on the decision below is based not on the record but on other courts' pseudo-factual recitals. Starr cannot simultaneously proffer unsupported facts and argue that no dispute of material fact exists.

B. Judicial Notice May Not Be Taken of Factual Recitations Outside the Record or in Other Cases.

It was improper for Starr to rely on recitals in federal court and out-of-state decisions as a source of "fact." Appellate review is confined to the record before this Court. *Mack v. Est. of Mack*, 125 Nev. 80, 92, 206 P.3d 98, 106 (2009). Facts recited in other cases are not part of the record. A court can supplement the record by taking judicial notice of facts—which Starr has not sought—but judicial notice does not extend to the truth of a fact recited in a court opinion. *See, e.g.*, *In re Amerco Derivative Litig.*, 127 Nev. 196, 221 n.9, 252 P.3d 681, 699 n.9 (2011) (Nevada courts "will not take judicial notice of facts in a different case."); *Mack*, 125 Nev. at 91, 206 P.3d at 106 ("As a general rule, we will not take judicial notice

of records in another and different case, even though the cases are connected"); *Chapman v. Chapman*, 96 Nev. 290, 293, 607 P.2d 1141, 1143 (1980) (NRS 47.130 does not permit court in guardianship proceeding to take judicial notice of evidence from prior guardianship proceeding with same judge and parties).

Nor can the Court take judicial notice of Starr's "facts" as they are "subject to reasonable dispute." NRS 47.130. When another insurer similarly argued that SARS-CoV-2 could simply be wiped away and thus could not cause "direct physical loss or damage," the California Court of Appeal properly rejected it as a "belief" outside the scope of judicial notice. *See Marina Pac. Hotel & Suites, LLC v. Fireman's Fund Ins. Co.*, 81 Cal. App. 5th 96, 109, 111-12 (2022) ("We are not authorized to disregard [the plaintiffs'] allegations … based on a general belief that surface cleaning may be the only remediation necessary to restore contaminated property to its original, safe-for-use condition."). Even if surfaces could be "wiped" clean and rendered temporarily safe, that would not resolve whether property was damaged in the interim or address the possibility of virus-laden air continuing to circulate through the property. *Id*. As *Marina Pacific* put it, "[W]hat we think we know—beliefs not yet appropriately subject to judicial notice—has never been a proper basis for concluding, as a matter of law, those alleged facts cannot be true…." *Id.* at 98-99. *See also Huntington Ingalls Industries, Inc. v. Ace Am. Ins. Co.*, No. 2021-173, 2022 VT 45, ¶ 44 (Vt. Sept. 23, 2022) (citing *Marina* and noting "we are

inclined to allow experts and evidence to come in to evaluate the validity of insured's novel legal argument before dismissing this case based on a layperson's understanding of the physical and scientific properties of a novel virus").

Starr's position that the Court should disregard the record and engage in unquestioning adherence to the anti-scientific proclamations of other courts runs the risk of decision-making without due process. JGB was not a party to the other proceedings and thus could not offer evidence or cross-examine witnesses in those proceedings. Thus, even if "physical alteration" is a prerequisite for coverage (which, as JGB's Answer explains, is incorrect), the District Court correctly concluded that JGB had presented material facts to show that its property had been physically altered. This is a dispute to resolve at trial, not on summary judgment.

II. INSURERS CANNOT AVOID THEIR CONTRACTUAL OBLIGATIONS BY PLEADING "POVERTY."

Much of APCIA's *amicus* brief is devoted to the claim that if insureds recover for COVID-19 losses, the insurance industry will suffer "substantial solvency risks." APCIA Br. at 8-10. The Court should disregard APCIA's "crying wolf."

A. Industry Claims of Impending Doom are Overstated.

In support of its insurance insolvency claim, APCIA sets up a false argument: to "insure broadly against a global pandemic" would "hit all or a substantial majority of insureds at once" and "fundamentally distort the insurance mechanism," APCIA Br. at 8-9, particularly in light of the magnitude of estimated losses suffered by

Nevada businesses with fewer than 250 employees. *Id.* at 9. But no one is asking this Court to "convert Starr's policy retroactively into pandemic insurance," as APCIA suggests. *Id.* at 8. Instead, JGB is merely seeking to enforce the terms of its policy as they are written. *See, e.g.*, JGB Answer to Pet. at 2-5 (focusing on "plain language" in JGB's policy).

Indeed, in providing statistics regarding projected COVID-19 losses, APCIA omits a critical fact: *unlike the policy issued to JGB,* the vast majority of property insurance policies in effect at the outset of the pandemic expressly excluded losses caused by virus.[8] APCIA's loss figures include policies with express virus exclusions, rendering those figures completely unreliable.

Consequently, if this Court denies Starr's writ petition and agrees with JGB's interpretation of "direct physical loss or damage," that will have *no effect* on the vast majority of policyholders, whose policies contain an express virus exclusion. In fact, it would likely affect no policyholders (or insurers), apart from those currently in litigation,[9] because under "suit limitations" provisions typically found in property policies, the ability to sue on a COVID-19 coverage claim would have expired. *See,*

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8 Nat'l Ass'n of Ins. Comm'rs, *Covid-19 Property & Casualty Insurance Business Interruption Data Call* at 2 (June 2020), https://content.naic.org/sites/default/files/inline-files/COVID-19%20BI%20Nat%27l%20Aggregates_2.pdf (83% of policies have standard form "Exclusion Due to Virus or Bacteria" or the equivalent).

9 The Petition specifically identifies six such cases, including Boyd Gaming's. Pet. at vii, n.1.

e.g., *Clark v. Truck Ins. Exch.*, 95 Nev. 544, 545-47, 598 P.2d 628, 628-29 (1979) (enforcing one year suit limitations period in property policy, with period tolled from tender until coverage denial).

APCIA also misleadingly suggests that the insurance industry cannot afford to pay COVID-19 coverage claims because potential monthly COVID-19 losses exceed monthly premiums. *See* APCIA Br. at 9. In fact, the property and casualty insurance sector, which sells property insurance, is enormously profitable, has substantial reserves, and is back-stopped with huge additional reserves in State Guaranty Associations. According to the industry's own overseers, the sector has turned a profit every single year during the past decade.[10] While denying COVID-19 claims en masse in 2020, the sector turned a $60 billion profit.[11]

The insurance industry also has many ways to manage risk, including by increasing insurance premiums.[12] In fact, 2020 brought the biggest wave of premium hikes for property insurance in decades, affecting nearly 90% of

10 *See* Nat'l Ass'n of Ins. Comm'rs, *U.S. Property & Casualty 2020 Full Year Results* at 1, 9 (2021), https://perma.cc/JX94-4PPQ.

11 *Id*.

12 Another method is adding express exclusions to limit their future risk. *See, e.g.*, Alwyn Scott, *Some Insurers Strengthening Virus Exclusion Language in Policies After COVID Cases*, Insurance Journal (Mar. 5, 2021), https://www.insurancejournal.com/news/national/2021/03/05/603965.htm.

policyholders.[13] Meanwhile, the "policyholders' surplus" in the sector (i.e., funds that insurers have on hand in excess of loss reserves) skyrocketed to nearly $1 *trillion*, representing an increase of about $110 billion since the onset of the pandemic.[14] Petitioner Starr's immediate parent, Starr Indemnity & Liability, likewise reported a 160% increase in annual net income in 2020 as compared to 2019, notwithstanding the pandemic,[15] and Starr itself reported a 170% increase in net income between 2020 and 2021.[16] Consequently, even were this Court's ruling to affect more than the cases currently in litigation in this State, insurers today can afford to pay $1 trillion beyond those losses for which they have already reserved.

APCIA has presented no specific, credible argument as to how paying claims on policies currently in litigation and without virus exclusions would materially impair the insurance industry's profitability, let alone cause mass insolvency.

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13 Matthew Lerner, *Most Policyholders See Rate Hikes Across Multiple Lines*, Business Insurance (Oct. 26, 2020), https://perma.cc/NTC2-WH26.

14 Nat'l Ass'n of Ins. Comm'rs, *U.S. Property & Casualty and Title Insurance Industries – 2021 First Half Results* at 1, 6 (2021), https://content.naic.org/sites/default/files/inline-files/Property-Casualty-and-Title-Insurance-Industries-2021-Mid-Year-Report.pdf.

15 *Compare* Starr Indemnity & Liability Annual Statement 2019 at 4 *with* Starr Indemnity & Liability Annual Statement 2020 at 4, available for download at https://insdata.naic.org/home/companySearch (search "Starr").

16 *Compare* Starr Surplus Lines Insurance Company Annual Statement 2021 at 4 *with* Starr Surplus Lines Insurance Company Annual Statement 2020 at 4, available for download at https://insdata.naic.org/home/companySearch (search "Starr").

B. The Supposed Specter of Insolvency Does Not Relieve Insurers from Their Promises.

In any event, this Court should not render a decision in this writ proceeding based upon fear mongering or hypothetical downstream economic effects. This Court has never held that a party is excused from its contractual promises merely because it now regrets the terms of the deal: "Courts cannot make for the parties better agreements than they themselves have been satisfied to make or rewrite contracts because they operate harshly or inequitably as to one of the parties. … [T]he courts have no right, by a process of interpretation to relieve one of them from disadvantageous terms which he has actually made." *Reno Club v. Young Inv. Co.*, 64 Nev. 312, 324, 182 P.2d 1011, 1016–17 (1947) (quoting 12 Am. Jur. § 228, at 749); *Swarovski Retail Ventures Ltd. v. JGB Vegas Retail Lessee, LLC*, 134 Nev. 1018, 416 P.3d 208 (2018) (citing *Reno Club*, 64 Nev. at 324, 182 P.2d at 1016-17).

COVID-19 is not the first time the insurance industry has argued the sky is falling. In the 1970's to 1990's, the industry tried to avoid its liability insurance obligations by asserting that insurers would be rendered insolvent if they had to cover claims arising from environmental laws such as CERCLA. Insurance industry representatives testified before Congress that the cost of such clean-ups would swamp their total "surplus" and be ruinous. *See* Insurer Liability for Cleanup Costs

of Hazardous Waste Sites, 101st Cong. 2d sess., Serial No. 101-175, at 16-26, 75-76 (Sept. 27, 1990).[17]

In *Aerojet-General Corp. v. Transport Indemnity Co.*, 17 Cal. 4th 38 (1997), the California Supreme Court rejected the same argument that APCIA demands that this Court accept, stating:

> [T]he pertinent policies provide what they provide. [The policyholder] and the insurers were generally free to contract as they pleased. They evidently did so …. We may not rewrite what they themselves wrote. We must certainly resist the temptation to do so here simply in order to adjust for chance—for the benefits it has bestowed on one party without merit and for the burdens it has laid on others without desert.

Id. at 75 (citations omitted). Notably, the prophesied financial collapse never arrived.

Further, narrowing insurers' contracts post-claim to protect their assets from *potential* insolvency—without requiring them to present evidence thereof—would circumvent Nevada's comprehensive statutory scheme for addressing insurer insolvencies, designed to balance the rights of all policyholders and other interested parties. *See* NRS 696B.010 *et seq*.

APCIA also argues that government relief efforts should take the place of bought and paid-for insurance. APCIA Br. at 10. This too is irrelevant and

17 Statements of Michael Frinquelli, Amy Bouska, and John Butler before the Subcommittee on Policy Research and Insurance of the House Committee on Banking, Finance and Urban Affairs.

counterfactual. Even though some businesses may have received temporary relief, that does not excuse Starr from its contractual obligations.

CONCLUSION

Amici Boyd Gaming respectfully urges the Court to deny the Petition and remand the case to the District Court for further proceedings.

DATED: September 30, 2022,

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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 2016 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 3463 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 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: September 30, 2022 */s/ Frank M. Flansburg III*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed and served the foregoing **BRIEF OF *AMICUS CURIAE* BOYD GAMING CORPORATION 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