Case No. 84986

In the Supreme Court of Nevada

STARR SURPLUS LINES INSURANCE CO.,
Petitioner,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK et al.,
Respondents,

and

JGB VEGAS RETAIL LESSEE, LLC,
Real Party in Interest.

ON PETITION FOR A WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, PROHIBITION
EIGHTH JUDICIAL DISTRICT COURT CASE NO. A-20-816628-B

BRIEF FOR THE RESTAURANT LAW CENTER, BLOOMIN' BRANDS, INC., TREASURE ISLAND, LLC, AND CIRCUS CIRCUS LV, LP, AS *AMICI CURIAE* IN SUPPORT OF JGB VEGAS RETAIL LESSEE, LLC, AND DENIAL OF THE PETITION

MICHAEL S. LEVINE*
LORELIE S. MASTERS
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037
Tel: (202) 955-1851
mlevine@HuntonAK.com
lmasters@HuntonAK.com

RENEE M. FINCH
MESSNER REEVES LLP
8945 West Russell Road, Suite 300
Las Vegas, NV 89148
Tel: (702) 363-5100
rfinch@messner.com

**Pro Hac Vice Motion to be Filed*

CHRISTOPHER J. CUNIO
NICHOLAS D. STELLAKIS
HUNTON ANDREWS KURTH LLP
60 State Street, Suite 2400
Boston, MA 02109
Tel: (617) 648-2747
nstellakis@HuntonAK.com

Attorneys for Amici Curiae, Restaurant Law Center, Bloomin' Brands, Inc., Treasure Island, LLC, and Circus Circus LV, LP

COUNSEL PRESS · (800) 3-APPEAL PRINTED ON RECYCLED PAPER

NRAP 26.1 DISCLOSURE STATEMENT

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.

The Restaurant Law Center is an independent public-policy organization. No publicly held company owns any stock in Restaurant Law Center.

Bloomin' Brands, Inc., is a Delaware corporation with a principal place of business in Florida. Bloomin' Brands, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

Treasure Island, LLC, is wholly owned by Ruffin Acquisition, LLC which is wholly owned by Phillip G. Ruffin Nevada Gaming Trust. No publicly held corporation owns 10% or more of any of these entities.

Circus Circus LV, LP, is wholly owned by Phillip G. Ruffin Nevada Gaming Trust. No publicly held corporation owns 10% or more of either of these entities.

The following law firms have appeared or are expected to appear for the Restaurant Law Center, Bloomin' Brands, Inc., Treasure Island, LLC, and Circus Circus LV, LP: Hunton Andrews Kurth LLP and Messner Reeves LLP.

/s/ Renee Finch
Renee Finch
Messner Reeves LLP
8945 W. Russell Road, Suite 300
Las Vegas, NV 89148
(702) 363-5100
rfinch@messner.com

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IDENTITY AND INTEREST OF AMICI CURIAE AND SOURCE OF AUTHORITY TO FILE

The Restaurant Law Center is a public-policy organization affiliated with the National Restaurant Association, the world's largest foodservice trade association. The industry comprises more than one million restaurants and other foodservice outlets that represent a broad and diverse group of owners and operators. The industry employs more than 15 million people and is the nation's second-largest private-sector employer. The Law Center regularly provides courts with the industry's perspective on legal issues in cases that may have industry-wide implications.

Bloomin' Brands, Inc. ("BBI") owns and operates casual-dining restaurants under four founder-inspired brands: Outback Steakhouse, Carrabba's Italian Grill, Bonefish Grill, and Flemings Prime Steakhouse & Wine Bar. BBI's operations, including its restaurants in Nevada, employ 93,000 people.

Treasure Island, LLC, and Circus Circus LV, LP, operate destination casinos in Las Vegas that draw 13,000 daily visitors employ thousands.

The physical loss, damage, and destruction to the property of Law Centers' members and the other amici, caused by SARS-CoV-2 and the COVID-19 pandemic, has been unprecedented. Law Center's members and the other amici sustained significant business-interruption losses because of this physical loss, damage, and destruction. Like many businesses, they purchased insurance that affords coverage in these circumstances and, when its insurers failed to pay for any losses, brought suit. BBI's suit is pending in Nevada District Court. Bloomin' Brands, Inc. v. Ace Am. Ins. Co., No. A-21-830204-B (Clark Cnty. Feb. 26, 2021), and is listed in the Petition for Writ of Mandamus.

They submit this brief, together with a motion for leave to file same, because of its significance to the restaurant and entertainment industry in Nevada.

SUMMARY OF ARGUMENT

When it was first published in 1995, the definition of "physical loss or damage" in Couch on Insurance 3d was not the majority rule. It was not the rule anywhere. That formulation, requiring a "distinct, demonstrable, physical alteration of the property," was written in error, as the principal author of that treatise has all but confessed. The

majority rule confirmed the policyholder's right to recovery when a dangerous substance rendered property unfit for its insured use. For years, the wayward Couch formulation largely lay dormant, rejected by the vast majority of courts following the wide body of precedent that has existed for 60 years. Under that precedent, coverage exists for physical loss and damage caused by gasoline fumes, asbestos fibers, lead-paint dust, E. coli, cat urine odor, harmless but unapproved pesticide on oats, ammonia gas, wildfire smoke, oil fumes, and carbon monoxide, among other agents.

But just as an emergent virus can cause great damage, so, too, can a spurious formulation. The ill-conceived and largely rejected Couch 3d formulation received new life during the COVID-19 pandemic. At the urging of the insurance industry, courts cited that treatise and its false assertion that it stated the majority rule. Then courts cited each other. Then Couch cited the courts that cited each other and those that cited the treatise directly, thus completing the circle of reasoning. The result was that the "standard" that Couch 3d invented, unsupported by case law, became widely applied simply because courts assumed that Couch

must be correct when it demonstrably was not. The error perpetuated itself.

This Court can distinguish itself from these others because of the new scholarship that has revealed the Couch error. There is no sound reason that the Couch 3d formulation for physical loss or damage—requiring distinct, demonstrable, physical alteration of property—should overturn 60 years of precedent. That precedent holds that dangerous yet unseen substances actually present on-site can cause physical loss or damage when they render property unfit for its ordinary, insured use. So here.

Even if the Couch formulation were to apply, the effects of COVID-19 and the pandemic satisfy it. This is borne out by the scientific evidence. Starr Surplus Lines Insurance Co. ("Starr") asks this Court to broadly decide what COVID-19 can and cannot do, binding not just this case but the others cited in its petition (n.1). This Court's decision should be based on science. As a matter of scientific fact, COVID-19 causes distinct, demonstrable, physical alteration of property, whether that is the applicable standard or not.

ARGUMENT

The petition for mandamus that Starr filed should be denied for at least two reasons. First, Starr advocates a definition of "physical loss or damage" that was wrong from its inception. Couch 3d's "distinct, demonstrable, physical alteration" formulation is contradicted by 60 years of precedent. Second, even if the Couch formulation were correct and applicable, the effects of COVID-19 on property more than satisfy it. JGB Vegas Retail Lessee, LLC ("JGB") should have the opportunity to prove its claims with evidence.

I. The Couch Formulation Was and Is Wrong.

This Court should not propagate a mistake by adopting the formulation first articulated by Couch 3d in 1995. 10A Plitt et al., Couch on Insurance 3d §148:46 (June 2022 update).

A. No Authority Supported Couch When It Created Its Formulation in 1995.

The Third Edition of Couch added a section titled "Generally; 'Physical' Loss or Damage" in 1995. Lewis, Masters, et al., Couch's "Physical Alteration" Fallacy: Its Origins and Consequences, 56 Tort

Trial & Ins. Prac. L.J. 621, 624 (2021) ("Couch Fallacy Article").[1] It stated, in relevant part:

> The requirement that the loss be "physical," given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.
>
> The opposite result has been reached, allowing coverage based on physical damage despite the lack of physical alteration of the property, on the theory that the uninhabitability of the property was due to the fact that gasoline vapors from adjacent property had infiltrated and saturated the insured building, and the theory that the threatened physical damage to the insured building from a covered peril essentially triggers the insured's obligation to mitigate the impending loss by undertaking some hardship and expense to safeguard the insured premises.

Id. at 625-26.[2] According to Couch, the already-existing majority rule required a "distinct, demonstrable, physical alteration" of property to trigger coverage. The treatise only weakly noted the contrary rule, in the passive and with minimal citation.

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[1] Lorelie Masters, co-author of this brief, co-authored this article.

[2] The Couch Fallacy Article quotes Couch 3d's June 2021 update, which contains no relevant change from the original 1995 printing (omitting footnotes). The text today is identical. Couch 3d, §148:46 (June 2022).

No precedent, existing in 1995, supported the existence of a "distinct, demonstrable, physical alteration" standard, much less that it was the majority rule. Couch 3d invented the formulation "out of whole cloth." Couch Fallacy Article at 626. In contrast, there was ample precedent in 1995 supporting what Couch called the "opposite result." For example, almost thirty years earlier in Western Fire Insurance Co. v. First Presbyterian Church, 437 P.2d 52, 54 (Colo. 1968), the Colorado Supreme Court found coverage when gasoline from a fuel station sent gasoline vapors into a church, rendering the church "uninhabitable" and "making the use of the building dangerous." And in Farmers Insurance Co. of Oregon v. Trutanich, 858 P.2d 1332, 1335 (Or. Ct. App. 1993), the court held that there was physical loss or damage to a house pervaded by methamphetamine odors. This precedent had ample company. See Couch Fallacy Article at 624-25 & nn.10-14.

At the time Couch 3d inserted its new section, the majority rule permitted recovery when a dangerous substance rendered the property unfit for its intended use even without any "physical" alteration to that property at all. Couch was wrong to frame the preexisting majority

standard as the minority rule. It was even more wrong to frame as the majority rule a never-applied formulation.

B. From 1995 to 2020, Couch 3d Continued to Diverge from Decisional Law, and It Ignored the Growing Body of Cases Rejecting Its Formulation.

From the moment it invented its new formulation in 1995, Couch 3d continued to diverge from reality, as that reality was reflected in court decisions. In case after case, courts ruled in favor of policyholders without requiring any "physical alteration," recognizing that physical loss or damage can occur if a dangerous substance renders insured property unfit for use. They did so in a wide variety of contexts: Motorists Mut. Ins. Co. v. Hardinger, 131 F. App'x 823, 826-27 (3d Cir. 2005) (unpublished) (E. coli in well); Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co., 2016 WL 3267247, *2 (D. Or. June 7, 2016), vacated on parties' request (wildfire smoke); Gregory Packaging, Inc. v. Travelers Prop. Cas. Co., 2014 WL 6675934, *7 (D.N.J. Nov. 25, 2014) (ammonia); Mellin v. N. Sec. Ins. Co., 115 A.3d 799, 805 (N.H. 2015) (cat urine odor); Widder v. La. Citizens Prop. Ins. Corp., 82 So. 3d 294, 296 (La. App. 2011) (lead-paint dust); Gen. Mills, Inc. v. Gold Medal Ins. Co., 622 N.W.2d 147, 150 (Minn. Ct. App. 2001)

(unapproved, but safe, pesticide); Matzner v. Seaco Ins. Co., 1998 WL 566658, *4 (Mass. Super. Aug. 12, 1998) (carbon-monoxide); Sentinel Mgmt. Co. v. N.H. Ins. Co., 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (asbestos fibers on carpets); Arbeiter v. Cambridge Mut. Fire Ins. Co., 1996 WL 1250616, *2 (Mass. Super. Mar. 15, 1996) (oil fumes); see Essex v. BloomSouth Flooring Corp., 562 F.3d 399, 406 (1st Cir. 2009) (unpleasant odor in home); TRAVCO Ins. Co. v. Ward, 715 F. Supp. 2d 699, 709 (E.D. Va. 2010), aff'd, 504 F. App'x. 251 (4th Cir. 2013) ("toxic gases" released by defective drywall). Couch ignored this precedent.

Couch 3d's principal author took a contrary position in articles now almost a decade old. In 2013, Steven Plitt, surveyed the case law: "The modern trend signals that courts are not looking for physical alteration, but for loss of use. This is the trend of where the law is going." Plitt, Direct Physical Loss in All-Risk Policies: The Modern Trend Does Not Require Specific Physical Damage, Alteration, CLAIMS J. (Apr. 15, 2013).[3] In a different article, he reiterated that

[3] https://amp.claimsjournal.com/magazines/ideaexchange/2013/04/15/226666.htm

"physical loss" does not require destruction of property but extends to "economic losses":

> All-Risk policies provide coverage for physical loss, but don't define this phrase. It is well recognized by courts that physical loss exists without destruction to tangible property. Indeed, serious impairment of a building's function caused by unwanted chemical compounds may render the property useless. Although there is case law on both sides of the issue of whether resulting diminished value constitutes physical loss, the case law contrary to a finding of coverage has not taken into consideration the breadth of coverage provided by All-Risk policies. Under all risk insurance, the physical loss extends to economic losses proximately caused by an insured peril.

Plitt, All-Risk Coverage for Stigma Claims Involving Real Property, 35 No. 9 Ins. Litig. Rep. 253 (June 5, 2013); DiMugno, Plitt, et al., Catastrophe Claims: Insurance Coverage for Natural and Man-Made Disasters, §8:6 (2014 updated Nov. 2021) ("[i]t is difficult to distill a general rule" from the relevant cases). These statements, never reflected in the Couch 3d treatise, all but concede that the contrary statements in the current version of that treatise are wrong. Neither Plitt nor any other author of the Couch treatise has ever publicly explained this enormous discrepancy.

The insurance industry took note of the decisional law before the pandemic. Factory Mutual leveraged the actual majority rule to its

advantage when it sought to avoid coverage for mold and mold spores at a laboratory. FM argued that physical loss or damage exists when a dangerous substance renders property unfit for its intended use. Motion in Limine at 3, Factory Mut. Ins. Co. v. Fed. Ins. Co., 2017 U.S. Dist. Ct. Motions Lexis 176347 (D.N.M. Nov. 19, 2019).[4]

> It is undisputed that the mold infestation destroyed the aseptic environment and rendered Room 152 unfit for its intended use—manufacturing injectable pharmaceutical products. Numerous courts have concluded that loss of functionality or reliability under similar circumstances constitutes physical loss or damage.

Id. at 3 (citing W. Fire., Gregory Packaging, Port Auth., BloomSouth, and TRAVCO, supra.).

At least two other major insurance treatises gave a full analysis of the case law, noting the pre-COVID-19 majority rule. "[W]hen an insurance policy refers to physical loss of or damage to 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." 3 Windt, Insurance Claims & Disputes §11:41

[4] https://3inbm04c0p4j2h1w132uyb5e-wpengine.netdna-ssl.com/wp-content/uploads/2021/02/fm_v._federal.pdf. FM successfully negotiated a settlement in that case, so its motion was never ruled on.

(6th ed. Mar. 2022). This treatise cites the extensive, pre-COVID-19 authority that Couch ignores. See also Kalis et al., Policyholder's Guide to the Law of Insurance Coverage §13.04 (Aspen L. & Bus. Supp. 1999).

C. Couch 3d Today Completes Its Circular Reasoning, Supporting Its New Formulation with Cases that Did Not Exist When It Created the Formulation and that Rely on Couch as Authority for that Formulation.

Circular reasoning is the legal equivalent of a parlor trick. It works like this: Step one is to assert, authoritatively, a principle for which there is no basis. Step two is to get others to repeat that fictional principle. Step three is to cite the repeaters from step two as authority for the principle announced in step one. Couch 3d §148:46 is no better than this.

Couch has recently added citations to support its "distinct, demonstrable, physical alteration" formulation. Each of these new decisions is from after 2001. Couch 3d §148:46 (June 2022) at nn.4-6. Couch is still unable to cite a single decision predating 1995 that actually supports its invented formulation. Instead, it has begun to add citations to decisions relating to coverage for loss and damage from COVID-19. Id. In this way, every decision that Couch cites that actually

does support the "distinct, demonstrable, physical alteration" position relies, ultimately, on Couch 3d itself as authority for that rule, whether by citing Couch directly or by relying on authority that traces back to Couch. No court has independently created a "distinct, demonstrable, physical alteration" rule. All roads lead back to Couch.

Outside the COVID-19 context, courts continue to apply the actual majority rule, that events and conditions external to the insured property rendering that property unfit for its intended use trigger coverage even without alteration of the property.[5]

D. This Court Should Not Follow the "Herd."

Antithetical to judicial independence is "herding," which occurs when a court simply goes along with a perceived consensus rather than decide an issue of first impression independently. Daughtety & Reinganum, Stampede to Judgment: Persuasive Influence and Herding Behavior by Courts, 1 Am. L. & Econ. Rev. 158, 160 (1999); In re Atlas

[5] E.g., Crisco v. Foremost Ins. Co., 505 F. Supp. 3d 993, 999 (N.D. Cal. 2020) (coverage for loss of use of mobile homes not altered but unusable because of loss of sewage, electricity, water, gas service); James W. Fowler Co. v. QBE Ins. Corp., 474 F. Supp. 3d 1149, 1153-54 (D. Or. 2020) (coverage triggered by inability to access undamaged underground machine).

IT Exp. Corp., 761 F.3d 177, 182 (1st Cir. 2014). The danger is, as here, "the 'herd' can be wrong." JDS Constr. Group v. Cont' Cas. Co., 2021 WL 8775920, *3 (Ill. Cir. Ct. Oct. 25, 2021).

Today, there is but shallow support for the Couch 3d formulation in decisional law. What exists is largely a creature of the COVID-19 era. Many COVID-19 business-interruption coverage decisions are never more than one or two degrees from Couch 3d, either citing §148:46 directly or citing authority that took the formulation from that section. To this day, Couch itself articulates no intellectual justification for its formulation. Couch 3d §148:46 is not a statute; deference to its formulation is not justified.

Instead of following Couch's ipse dixit, the Court should adhere to the wide body of precedent that has existed for more than half a century: property suffers physical loss or damage when a dangerous substance renders that property unfit for its insured use.

II. Scientific Evidence Shows that COVID-19 Causes "Distinct, Demonstrable, Physical" Alteration of Property.

The scientific record puts the lie to Starr's bald assertion that COVID-19 "cannot possibly" cause physical loss or damage. PA0154. As

a factual (and scientific) matter, COVID-19 can cause and has caused physical loss or damage. A jury can find that the physical loss or damage that COVID-19 causes fits comfortably within the Couch 3d formulation: COVID-19 causes distinct, demonstrable, physical alteration of property.

That is the evidence, but Starr eschews evidence. Derides it in fact, responding to facts with the pejorative, "so what?" PA1287 n.2. Nowhere can a party exalt itself to victory by fiat, not even here.

Amici are not privy to the evidence in this case, which has been submitted under seal. They therefore rely on the evidence in the public record from other cases.[6]

COVID-19 and SARS-CoV-2 cause distinct, demonstrable, and negative physical alterations to indoor air and surfaces where those particles are found. Specifically, once an individual infected with

[6] The evidence cited herein is appended to amici's request for judicial notice, a request submitted in an abundance of caution."[I]t is not unusual for an amicus curiae brief to include factual material that is outside the record." Puentes v. Wells Fargo Home Mortgage, Inc., 72 Cal. Rptr. 3d 903, 911 (2008) (citation and quotation marks omitted).

COVID-19 is on-site shedding infectious particles into the air, every cubic meter of air around that individual and further away contains infectious viral particles. RJN008-RJN009. Those airborne virions settle on surfaces, adhering to them through gravitational and electrostatic forces. RJN002.

These alterations are distinct, demonstrable, and physical. The infectious viral particles have physical properties and are tangible (though microscopic). RJN026-RJN035. The resulting impact and change is demonstrable and palpable—now the indoor air and surfaces contain infectious viral particles (before they did not) and these media become transmission mechanisms for the potentially deadly disease (before they were not). RJN016-RJN017; RJN003-RJN007.

The impact, change, and damage from COVID-19 and SARS-CoV-2 is unlike that of ordinary household dust and other viruses, even the influenza virus. Dust is inert and can be addressed with a feather duster. RJN020-RJN021; RJN024-RJN025; RJN039-RJN054. COVID-19 is far more contagious and exponentially more deadly than other viruses, such as influenza, and until recently there was no vaccine. RJN018-RJN019; RJN022-RJN025; RJN037-RJN038. In this way,

COVID-19 and SARS-CoV-2 can materially impact, change, and damage property, while the flu, other viruses, and household dust do not. Id.

COVID-19 and SARS-CoV-2 cannot be removed with routine cleaning of surfaces. It is physically impossible to remove all infectious particles. RJN035-RJN037; RJN010-RJN014; RJN063-RJN066. A surface is contaminated immediately after wipe-down as additional infectious particles settle from the air and are reintroduced to the property by reasonable efforts to continue operations and mitigate resulting loss. Id. Air, of course, cannot be wiped down. The constant spreading of the viral particles and their reintroduction results in ongoing, constant, physical alteration of insured property. Id.

This is just the type of evidence that the Vermont Supreme Court just cited as sufficient to allege a distinct, demonstrable, physical change to property and, therefore, a claim within the scope of business-interruption coverage. Huntington Ingalls Indus., Inc. v. Ace Am. Ins. Co., 2022 VT 45 (2022). The court (which rejected the Couch formulation as to physical loss) stressed that as judges and not virologists, it was not in a position to verify the scientific accuracy of

such allegations. *Id*. ¶46. It was, the court noted, critically important to allow the policyholder to develop the scientific evidence needed to sustain the claim because the validity of a claim should be explored in light of a full evidentiary record: "This concern is paramount for cases involving novel legal theories such as the one before us, where developing the factual basis to support a theory for coverage under a complicated insurance policy requires scientific evidence on a relatively recent and evolving phenomenon." *Id*. ¶45.

This scientific evidence is persuasive. A Texas jury just found that Baylor College of Medicine suffered physical loss or damage from on-site infectious particles. Carballo, "Baylor College of Medicine Wins $48.5 Million in Lawsuit Alleging COVID Caused Property Damage," Houston Chronicle (Sept. 2, 2022).[7] The jury heard evidence that COVID-19 and SARS-CoV-2 cause physical loss or damage by "altering the physical properties of the air and surfaces inside [the policyholder's] buildings and limiting or halting their use." RJN081. See Niczky & Levine, State

[7] https://www.houstonchronicle.com/business/article/Baylor-wins-48-5-million-in-lawsuit-alleging-17414072.php?cmpid=gsa-chron-result.

COVID Rulings Highlight Errors in Dismissals (Law360 Sept. 29, 2022).[8]

In this way, Starr's blanket statement that COVID-19 and SARS-CoV-2 "cannot possibly" cause physical loss of damage is not just unsupported but scientifically inaccurate. At the very least, the scientific evidence is sufficient for a jury to find that the infectious particles can cause distinct, demonstrable, physical alteration of property. Couch 3d's formulation is wrong, but it is one that policyholders can meet.

Policyholders should be permitted to meet the formulation. Starr's petition grossly overreaches when it asks this Court to decide for all time, the capabilities of a virus that did not exist three years ago.

[8] https://www.law360.com/insurance/articles/1531593/state-covid-insurance-rulings-highlight-errors-in-dismissals. Levine is co-author of this brief.

CONCLUSION

The petition should be denied.

Date: September 30, 2022

Respectfully submitted,

/s/ Renee M. Finch
Renee M. Finch
Messner Reeves LLP
8945 W. Russell Road, Suite 300
Las Vegas, NV 89148
(702) 363-5100
rfinch@messner.com

Michael S. Levine*
Lorelie S. Masters
Hunton Andrews Kurth LLP
2200 Pennsylvania Ave., NW
Washington, DC 20037
(202) 955-1851
lmasters@HuntonAK.com
mlevine@HuntonAK.com

Christopher J. Cunio
Nicholas D. Stellakis
Hunton Andrews Kurth LLP
60 State Street Suite 2400
Boston, MA 02109
(617) 648-2747
nstellakis@HuntonAK.com

Counsel for Amici

*Pro hac vice motion to be filed.

ATTORNEY'S CERTIFICATE

I hereby certify that this Brief of *Amici Curiae* complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the typestyle requirements of NRAP 32(a)(6) because this Brief of *Amici Curiae* has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Century Schoolbook typeface. I further certify that this Brief complies with the type-volume limitation under NRAP 29(e) as it contains 3,499 words.

Finally, I hereby certify that I have read this appellate 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 of 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.

/s/ Renee M. Finch
Renee M. Finch

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that on this 30th day of September 2022, the foregoing Brief for the Restaurant Law Center, Bloomin' Brands, Inc., Treasure Island, LLC, and Circus Circus LV, LP as Amici Curiae In Support of JGB Vegas Retail Lessee, LLC and Denial of the Petition was e-filed with the Clerk of the Supreme Court of the State of Nevada and services were executed to the below counsel via the Court's Electronic Filing System pursuant to NEFCR 9:

Daniel F. Polsenberg, Esq.
Joel D. Henriod, Esq.
Abraham G. Smith, Esq.
LEWIS ROCA ROTHGERBER
3993 Howard Hughes Parkway
Suite 600
Las Vegas, NV 89169

Amy M. Samberg, Esq.
Lee H. Gorlin, Esq.
CLYDE & CO US LLP
7251 W. Lake Mead Blvd.
Suite 430
Las Vegas, NV 89128

Attorneys for Petitioner Starr Surplus Lines Insurance Company

Bradley Schrager, Esq.
WOLF RIFKIN SHAPIRO
SCHULMAN & RABKIN, LLP
3773 Howard Hughes Pkwy
Suite 590 South
Las Vegas, NV 89169
bschrager@wrslawyers.com

Mark T. Ladd, Esq.
COHEN ZIFFER FRENCHMAN
& MCKENNA LLP
1350 Avenue of the Americas
New York, NY 10019
mladd@cohenziffer.com

Attorneys for Real Party in Interest JGB Retail Vegas Lessee, LLC

VIA E-MAIL ONLY:

The Honorable Judge Mark Denton
EIGHTH JUDICIAL DISTRICT COURT DEPARTMENT NO. 13
Regional Justice Center, Courtroom 16D
200 Lewis Avenue
Las Vegas, Nevada 89155
Dept13lc@clarkcountycourts.us
Trial Court Judge