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 (1) SECOND NOTICE OF SUPPLEMENTAL AUTHORITIES IN SUPPORT OF ITS ANSWER TO PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, PROHIBITION, AND (2) RESPONSE TO PETITIONER'S SECOND NOTICE OF SUPPLEMENTAL AUTHORITIES

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Pursuant to NRAP 31(e), Real Party in Interest JGB Vegas Retail Lessee, LLC ("JGB") respectfully submits this Second Notice of Supplemental Authorities to bring to the Court's attention two recent decisions issued after the close of briefing: (1) *Another Planet Entertainment, LLC v. Vigilant Insurance Company*, No. S277893, *certified question granted* (Cal. Mar. 1, 2023); and (2) *C.J. Segerstrom & Sons v. Lexington Insurance Company*, 2023 U.S. Dist. LEXIS 33293 (C.D. Cal. Feb. 27, 2023). JGB also hereby submits its Response to Petitioner Starr Surplus Lines Insurance Co.'s ("Starr") Second Notice of Supplemental Authorities, filed February 17, 2023 ("Second Starr Notice"), as allowed by NRAP 31(e).

I. JGB'S SECOND NOTICE OF SUPPLEMENTAL AUTHORITIES

As set forth in JGB's Answer, the phrase "direct physical loss or damage" in an "all-risks" property insurance policy provides coverage "when a deadly physical substance like SARS-CoV-2/COVID-19 either (1) is present on or around covered property, rendering it partially or wholly unusable, unsafe or unfit for its intended purpose ('physical loss') *or* (2) alters the surfaces or air of covered property ('physical damage')." *See* JGB's Answer at 1, 13-17. In addition, Starr's pollution and contamination exclusion is limited to traditional environmental pollution, which does not include the spread of a virus like SARS-CoV-2. *Id.* at 6, 28-31. Petitioner argues to the contrary, purporting to rely in large part on California caselaw. *See* Starr's Petition at 13-21; Starr's Reply at 24-25, Second Starr Notice at 5. Two

recent decisions provide guidance as to the current state of California law regarding the meaning of "direct physical loss or damage" and the limitations of pollution and contamination exclusions.

A. *Another Planet Entertainment, LLC v. Vigilant Ins. Co.*

On March 1, 2023, the California Supreme Court granted the following certified question from the United States Court of Appeals for the Ninth Circuit regarding a COVID-19 business interruption insurance dispute similar to JGB's:

> Can the actual or potential presence of the COVID-19 virus on an insured's premises constitute 'direct physical loss or damage to property' for purposes of coverage under a commercial property insurance policy?

The Ninth Circuit's request highlighted to the California Supreme Court an existing conflict within the California courts of appeal on this issue and asked the Court to resolve the split of authority. *See Another Planet Ent., LLC v. Vigilant Ins. Co.*, 56 F.4th 730, 733-34 (9th Cir. 2022) (contrasting *Marina Pac. Hotel & Suites, LLC v. Fireman's Fund Ins. Co.*, 296 Cal. Rptr. 3d 777 (Ct. App. 2022), *with United Talent Agency v. Vigilant Ins. Co.*, 293 Cal. Rptr. 3d 65 (Ct. App. 2022)). Thus, the California Supreme Court's decision to grant the certified question demonstrates that the meaning of the phrase "direct physical loss or damage to property" is an open and disputed question under California law.

In contrast, Starr posited in its briefing that California law is settled. *See* Starr Petition at 14, 16 (claiming "the California Court of Appeals [*sic*] confirmed" that

COVID-19 cannot constitute physical loss or damage to property, and that "[i]mperceptible activity at the microscopic level, . . . is the opposite" of physical loss or damage under California law). Starr's Petition cites early COVID-19 coverage decisions out of the Ninth Circuit which had simply assumed that the California Supreme Court would hold SARS-CoV-2/COVID-19 could not cause physical loss or damage as a matter of law.[1] The Ninth Circuit relied on its own decisions which *predicted California law* as its basis to then dismiss COVID-19 insurance coverage cases *under Nevada law*, and refused to seek this Court's guidance regarding the meaning of the phrase "physical loss or damage" in all-risks policies.[2] At least two of these Ninth Circuit decisions purporting to declare Nevada law based on predictions of California law (*Circus Circus* and *Levy Ad*) feature

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[1] Starr relies heavily on California state and federal case law in its briefing, including the *Another Planet* federal district court decision preceding the Ninth Circuit's certified question. *See* Petition at 13-14, 16-17, 19-21, 23-24; Reply at 10, 13-17, 20.

[2] *See Circus Circus LV, LP v. AIG Specialty Ins. Co.*, 2022 WL 1125663, at *2 & n.2 (9th Cir. Apr. 15, 2022) (citing *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885 (9th Cir. 2021) (predicting California law) to reject coverage under Nevada law and "deny[ing] Circus Circus's request that we certify two questions to the Nevada Supreme Court as unnecessary"); *Levy Ad Group, Inc. v. Fed. Ins. Co.*, 2022 WL 816927, at *1 (9th Cir. Mar. 17, 2022) (citing *Mudpie* and opining "there is no reason to think a Nevada court would interpret the contract language differently").

prominently in Starr's Petition.[3] The Ninth Circuit has now acknowledged that its earlier predictions regarding California law may have been premature or misplaced.

B. *C.J. Segerstrom & Sons v. Lexington Ins. Co.*

C.J. Segerstrom stands for the legal proposition that pollution and contamination exclusions like Starr's are limited to traditional environmental pollution, which does not include a "COVID-19 outbreak." 2023 U.S. Dist. LEXIS 33293, at *14-25 (analyzing and applying the California Supreme Court's decision in *MacKinnon v. Truck Ins. Exch.*, 73 P.3d 1205 (Cal. 2003)). *MacKinnon* aligns with this Court's decision in *Century Surety Company v. Casino West, Inc.*, 130 Nev. 395, 329 P.3d 614 (2014), which held that pollution and contamination exclusions like Starr's are overbroad and must be limited to traditional environmental pollution to avoid absurd results. *Compare MacKinnon*, 73 P.3d at 1213-18 (analyzing the terms, purpose, history, and application of the pollution and contamination exclusion and limiting to traditional environmental pollution to align with policyholders' reasonable expectations), *with Casino W.*, 130 Nev. at 399-401, 329 P.3d at 616-18 (same).

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[3] *See* Petition at 13, 20, 22 (relying principally on *Levy Ad* and *Circus Circus* as pronouncements of Nevada law); Reply at 18-19, 27 (same). Starr also relies on *Project Lion LLC v. Badger Mut. Ins. Co.*, 2021 WL 2389885, at *2 (D. Nev. May 19, 2021), which in turn relies on the Ninth Circuit's pronouncement of California law in *Mudpie* and other California federal district courts as its basis to interpret Nevada law. *See* Petition at 13, 19-20.

C.J. Segerstrom also distinguished myriad decisions—including *AECOM v. Zurich Am. Ins. Co.*, 2021 WL 6425546 (C.D. Cal. Dec. 1, 2021), *aff'd*, 2023 WL 1281675 (9th Cir. Jan. 31, 2023), which Starr cites in its Second Notice[4]—for failure to "contend with *MacKinnon*'s holding that even a substance that is enumerated within the definition of a 'pollutant' may not reasonably be excluded because of the history and purpose of that exclusion." 2023 U.S. Dist. LEXIS 33293, at *26. That criticism applies to nearly every case Starr cites as support for application of its pollution and contamination exclusion. *See* Reply at 24-27.

The exclusion at issue in *C.J. Segerstrom* is virtually identical in relevant part to Starr's pollution and contamination exclusion (excluding coverage for "release, discharge, dispersal, migration or seepage of POLLUTANTS" and defining "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, . . . 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"). Like JGB, the plaintiff in *C.J. Segerstrom* argued controlling supreme court precedent limited application

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[4] *See* Second Starr Notice at 5.

of the pollution and contamination exclusion to traditional environmental pollution. *See* 2023 U.S. Dist. LEXIS 33293, at *15-19. Further, the defendant insurer in *C.J. Segerstrom* advanced virtually identical arguments to what Starr does here, and even relies on some of the same citations. *See id.* at *13-14, *26-28. Thus, like *C.J. Segerstrom*, JGB respectfully submits that this Court should hold Starr's pollution and contamination exclusion is limited to traditional environmental pollution events, which does not include the spread of a virus like SARS-CoV-2.

II. RESPONSE TO SECOND STARR NOTICE

The Second Starr Notice advises the Court of six out-of-state rulings—five concerning the phrase "direct physical loss or damage" under Connecticut and Oklahoma law, and one concerning a pollution and contamination exclusion (albeit with language different from Starr's exclusion) under California law.[5]

Like nearly all of the cases Starr cited in its briefing, four of the five physical loss or damage citations were orders-only cases—*i.e.*, the policyholders failed to allege that SARS-CoV-2 was present on and rendered insured property unusable for

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[5] *Connecticut Dermatology Grp., PC v. Twin City Fire Ins. Co.*, 288 A.3d 187 (Conn. 2023); *Hartford Fire Ins. Co. v. Moda, LLC*, 288 A.3d 206 (Conn. 2023); *ITT Inc. v. Factory Mutual Insurance Co.*, 2023 WL 1126772 (2d Cir. Jan. 31, 2023); *Muscogee (Creek) Nation v. Lexington Ins. Co.*, 523 P.3d 1110 (Okla. 2023); *Choctaw Nation of Oklahoma v. Lexington Ins. Co.*, 2023 WL 355832 (Okla. Jan. 23, 2023); *AECOM v. Zurich Am. Ins. Co.*, 2023 WL 1281675 (9th Cir. Jan. 31, 2023).

its intended purpose, or that SARS-CoV-2 physically altered and damaged insured property.[6] *See* Answer at 25-26 (explaining the same defect in nearly all of Starr's cited cases). Thus, these citations should not be instructive here. And, contrary to the Second Starr Notice, the Connecticut Supreme Court held that direct physical loss occurs where the "physical presence" of "harmful substances or bacteria" renders property and buildings "nonfunctional or inherently dangerous to persons who enter[] them," "*even though there was no alteration to the property itself.*" *Connecticut Dermatology*, 288 A.3d at 201-03 (emphasis added).[7]

The fifth citation, purporting to apply Connecticut law, ignored the Connecticut Supreme Court's holding that physical alteration of property is *not* required for direct physical loss, and declared the policyholder's allegations that SARS-CoV-2 physically altered its property inadequate without additional allegations that it repaired or replaced property. *ITT*, 2023 WL 1126772, at *2. In contrast, JGB presented ample, unrebutted fact and expert testimony showing it

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[6] *See Connecticut Dermatology*, 288 A.3d at 189-91; *Moda*, 288 A.3d at 209-11; *Muscogee (Creek) Nation*, 523 P.3d 1110, at ¶¶ 2-3; *Choctaw Nation*, 2023 WL 355832, at *1.

[7] *Connecticut Dermatology* and *Moda* rejected plaintiffs' claims because they failed to allege "their properties were actually contaminated by the coronavirus or that they closed their businesses during the pandemic because the actual presence of the virus." *Connecticut Dermatology*, 288 A.3d at 203; *Moda*, 288 A.3d at 211 (similar).

undertook extensive physical remediation efforts and repairs to restore property to its pre-COVID state. *See* Answer at 11-12, 24-25.

Starr's sixth and final citation, *AECOM*—an unpublished, nonprecedential memorandum decision by the Ninth Circuit applying California law—concerns the pollution and contamination exclusion. As discussed *supra*, the policyholder in *AECOM* did *not* raise to the Ninth Circuit's attention, as JGB does in this Court, that pollution and contamination exclusions like Starr's are fatally overbroad and limited to traditional environmental pollution events. 2023 WL 1281675, at *1-2; JGB Answer at 28-29 (citing *Casino W.*, 130 Nev. at 400-01, 329 P.3d at 617-18). Thus, *AECOM* did not address controlling California Supreme Court precedent on that issue, which is in lockstep with this Court's analysis and holding in *Casino West*.[8]

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[8] *See MacKinnon*, 73 P.3d at 1213-18 (limiting pollution and contamination exclusion with terms identical to Starr's to traditional environmental pollution, even though substance at issue (pesticide) fit within exclusion's broad definition of pollutant); *Casino W.*, 130 Nev. at 399-401, 329 P.3d at 616-18 (similarly limiting pollution and contamination exclusion even though carbon monoxide fit within exclusion's broad definition of pollutant).

JGB respectfully submits that this Court adhere to long-standing principles of Nevada law and define the phrase "physical loss or damage" in favor of coverage and thereby uphold JGB's reasonable expectations.

Dated this 13th day of March, 2023.

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CERTIFICATE OF SERVICE

I certify that on March 13, 2023, I submitted the foregoing "Real Party In Interest's Second Notice of Supplemental Authorities and Response to Petitioner's Second Notice of Supplemental Authorities" for filing via the Court's eflex electronic filing system. Electronic notification will be sent to the following:

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I further certify that I served a copy of this document by emailing a true and correct copy thereof, as follows:

The Honorable Mark Denton
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Respondent

By: */s/ Susan G. Davis*