No. S278481

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JOHN'S GRILL, INC., et al.,

Plaintiffs - Appellants - Respondents,

v.

THE HARTFORD FINANCIAL SERVICES GROUP, INC., et al.,

Defendants - Appellees - Petitioners.

After a Decision by the Court of Appeal
First Appellate District, Division Four
Case No. A162709

RESPONDENTS' SUPPLEMENTAL BRIEF

Nanci E. Nishimura (SBN 152621)
nnishimura@cpmlegal.com
Brian Danitz (SBN 247403)
bdanitz@cpmlegal.com
*Andrew F. Kirtley (SBN 328023)
akirtley@cpmlegal.com
COTCHETT, PITRE & MCCARTHY, LLP
San Francisco Airport Office Center
840 Malcolm Road, Suite 200
Burlingame, CA 94010
Telephone: (650) 697-6000
Fax: (650) 697-0577

Attorneys for Plaintiffs and Appellants John's Grill, Inc., and John Konstin

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Introduction

Pursuant to California Rule of Court 8.520(d), respondents John's Grill, Inc. and John Konstin (collectively, "John's Grill") file this supplemental brief regarding new authority from the Fourth District Court of Appeal in *Brooklyn Restaurants, Inc. v. Sentinel Insurance Company, Ltd.* (Mar. 20, 2024) 319 Cal.Rptr.3d 572 [100 Cal.App.5th 1036], *certified for publication* (Mar. 25, 2024), *petition for review filed* (May 6, 2024, No. S284887) ("*Brooklyn*"). *Brooklyn* is the first published decision by a California Court of Appeal to discuss at length the decision below in *John's Grill, Inc. v. Hartford Financial Services Group, Inc.* (2022) 86 Cal.App.5th 1195. Both cases are Covid-19 coverage disputes arising under the same "Limited Fungi, Bacteria or Virus Coverage" endorsement issued by Hartford affiliate Sentinel Insurance Company, Ltd. ("Sentinel"), which in both cases has advanced largely the same legal arguments through the same counsel. It is therefore no surprise that the *John's Grill* decision featured prominently in the *Brooklyn* parties' arguments and in the Fourt District's decision.

The result in *Brooklyn* was a unanimous opinion that broadly agrees with the decision in *John's Grill*, which is repeatedly cited with approval. As explained below, *Brooklyn* fully endorses *John's Grill*'s core holdings (1) that the Limited Virus Coverage's special definition of "loss or damage" as "including the cost of removal of … virus" plainly covers cleaning costs, and (2) that Sentinel, to overcome insureds' well-pleaded arguments that the Limited Virus Coverage's "specified cause of loss" requirement renders the promised coverage illusory, needs to offer courts

more than the "oddball scenarios" and "unsubstantiated speculation" it has provided in this litigation about when the Limited Virus Coverage might conceivably cover a loss. In reaching these holdings, *Brooklyn* frequently agrees with the reasoning in *John's Grill*, and likewise rejects many of the same arguments that Sentinel has made in this litigation.

In its petition for review, Sentinel argued that the decision below was at odds with "every other court" to have considered the same questions under its Limited Virus Coverage, and that it adopted an "unprecedented" understanding of the illusory coverage doctrine in California and around the country. In litigating the appeal in *Brooklyn*, Sentinel had the opportunity to put those same arguments to a new panel of three justices. The result was another unanimous opinion rejecting Sentinel's arguments. *Brooklyn* broadly confirms the correctness of the *John's Grill* decision. This Court should affirm.

Procedural History

Briefing closed in this matter when the parties filed their responses to the amici curiae briefs on January 22, 2024. Two months later, on March 20, 2024, the Fourth District Court of Appeal issued its unanimous decision in *Brooklyn*, authored by Presiding Justice Huffman, and concurred in by Justices Dato and Castillo. 319 Cal.Rptr.3d 572 [100 Cal.App.5th 1036]. On March 25, 2024, the *Brooklyn* panel issued an order certifying its decision for publication. On May 6, 2024, Sentinel filed a petition for review. *See Brooklyn Restaurants, Inc. v. Sentinel Ins. Co., Ltd.*, No. S284887. Pursuant to California Rule of Court 8.250(d), this supplemental

brief regarding the recent decision in *Brooklyn* is being filed at least 10 days before oral argument in this case, which is set for May 21, 2024.

Argument

I. *Brooklyn* and *John's Grill* involve substantially similar facts, including similar commercial property policies with identical relevant provisions.

Brooklyn and *John's Grill* are both insurance coverage disputes arising out the Covid-19 pandemic, in which the insureds are urban restaurants that allege in their respective complaints that the Covid-19 coronavirus was present on their insured premises. *See Brooklyn*, 319 Cal.Rptr.3d at 575-76; *John's Grill*, 86 Cal.App.5th at 1202, 1216. In both cases, the insured restaurants seek business interruption and extra expense coverage from the same insurer, Sentinel, under a "substantially similar commercial property policy." *Brooklyn*, 319 Cal.Rptr.3d at 583. In both cases, the policy is a "Spectrum Business Owner's Policy" that contains, in relevant part, what appear to be the same "Special Property Coverage Form" and the same "Limited Fungi, Bacteria or Virus Coverage" endorsement. *See id.* at 575-76; *John's Grill*, 86 Cal.App.5th at 1202-03. The key policy provisions, which are reproduced in both opinions, appear to be identical. *See Brooklyn*, 319 Cal.Rptr.3d at 579-80; *John's Grill*, 86 Cal.App.5th at 1213-14.

Legally, both cases arise in the same procedural posture, as appeals from dismissals at the pleading stage. *Brooklyn*, 319 Cal.Rptr.3d at 575 (MJOP); *John's Grill*, 86 Cal.App.5th at 1201 (demurrer). In addition to the disputed policy provisions being substantially the same, so too are the legal

questions and the arguments advanced by the parties. For example, both cases concern the Limited Virus Coverage's special definition of "loss or damage" as "including the cost of removal of … virus," and whether that language provides coverage for "cleaning." *See Brooklyn*, 319 Cal.Rptr.3d at 575, 581-83 (holding the definition is "reasonably susceptible to that interpretation"); *John's Grill*, 86 Cal.App.5th at 1212, 1215, 1219 (similar). Both cases also ask, since the Limited Virus Coverage endorsement contains both limited virus coverage and a virus exclusion, which of those California insurance law requires be analyzed first in adjudicating a coverage dispute. *See Brooklyn*, 319 Cal.Rptr.3d at 580-81 (the limited coverage); *John's Grill*, 86 Cal.App.5th at 1227-28 (same). And both cases raise several of the same questions about the applicability of California's illusory coverage doctrine to the Limited Virus Coverage's requirement that the virus that causes an insured's alleged loss must itself be "the result of" an "Equipment Breakdown Accident" or "specified cause of loss." *See Brooklyn*, 319 Cal.Rptr.3d at 585-86; *John's Grill*, 86 Cal.App.5th at 1220-28.

II. *Brooklyn* agrees with *John's Grill's* two central holdings and again rejects Sentinel's contrary arguments.

A. *Brooklyn* agrees that the Limited Virus Coverage's definition of "loss or damage" as "including the cost of removal of … virus" provides coverage for cleaning, and that Sentinel's contrary interpretation "borders on nonsensical."

Sentinel's Limited Virus Coverage endorsement defines covered "loss or damage" as, in most relevant part, "including the cost of removal of … virus." *John's Grill* held that this definition "is broad enough to

encompass forms of property 'loss' that do not involve physical alteration of property," and is "capacious enough including [coverage for costs of] cleaning the surfaces of property." 86 Cal.App.5th at 1212, 1215. *Brooklyn* expressly agrees with *John's Grill* on this point. 319 Cal.Rptr.3d at 583; *see also id.* at 575 (agreeing the definition is "reasonably susceptible to th[e] interpretation" that "physical loss includes simply cleaning an area infected by the coronavirus"). In doing so, *Brooklyn* notes that, as a textual matter, the word "include" in the definition "makes 'cost of removal' *part* of the definition of direct physical loss or direct physical damage." *Id.* at 582 (emphasis in original).

Like *John's Grill*, *Brooklyn* rejects Sentinel's convoluted contrary argument, which it also makes to this Court (*see* Op. Br. at 50-58), that the "cost of removal" does not "independently constitute 'loss or damage'" under the Limited Virus Coverage's definition, because that definition contains an implicit "requirement that some additional 'direct physical loss or direct physical damage' must occur before 'cost of removal' can be considered 'loss or damage.'" *Brooklyn*, 319 Cal.Rptr.3d at 582. In the judgment of the *Brooklyn* panel, Sentinel's "argument borders on nonsensical," and simply "is not what the Policy says." *Id.*

B. *Brooklyn* also agrees that Sentinel's "oddball scenarios" and "unsubstantiated speculation" about when its Limited Virus Coverage might conceivably provide coverage cannot defeat its insureds' well-pleaded illusory coverage arguments.

Brooklyn also broadly agrees with *John's Grill*'s rulings on the proper scope and application of the illusory coverage doctrine to the

Limited Virus Coverage's "specified cause of loss" requirement as applied to losses caused by virus. *Compare Brooklyn*, 319 Cal.Rptr.3d at 585-86, *with John's Grill*, 86 Cal.App.5th at 1220-28.

First, *Brooklyn* joins *John's Grill* in rejecting Sentinel's threshold argument that no illusory coverage problem exists because the Limited Virus Coverage endorsement provides non-illusory coverage with respect to other named perils. *Brooklyn* states "the First District persuasively addressed this argument," quoting language from *John's Grill* that Sentinel's argument "flies in the face of the principle that we must give effect to all the words of the Policy," and that insurers cannot issue coverage that "names a specifically covered risk—here virus contamination—and then justify denying coverage for it under all circumstances because some other risk may be covered under the same coverage grant." 319 Cal.Rptr.3d at 585-86 (quoting *John's Grill*, 86 Cal.App.5th at 1222).

Second, *Brooklyn* agrees with *John's Grill* that an insurer seeking to defeat an insured's well-pleaded illusory coverage argument must do more than Sentinel has done here, which is merely to provide "oddball scenarios" and "unsubstantiated speculation" about when its Limited Virus Coverage might conceivably provide coverage. *Id.* at 586. Specifically, *Brooklyn* "concur[s] with the First District" that Sentinel's reliance on a livestock-tornado case, *Curtis O. Griess & Sons, Inc. v. Farm Bur. Ins. Co.* (Neb. 1995) 247 Neb. 526, for the proposition that a virus could be the result of the specified cause of loss "windstorm" presents an "oddball scenario" that

"has little applicability to the instant matter." 319 Cal.Rptr.3d at 586 (noting Brooklyn, like John's Grill, "does not operate a farm" or have "livestock present" at its restaurant, and declining to follow Sentinel's "multiple federal cases" to the contrary). In doing so, *Brooklyn* echoes *John's Grill* reasoning that the commercial context of the insured is important when determining whether California's illusory coverage doctrine applies. *See John's Grill*, 86 Cal.App.5th at 1216, 1223-24 (looking to "the actual business circumstance" that "Sentinel underwrote for *this* insured").

Finally, like *John's Grill*, *Brooklyn* also has little difficulty rejecting Sentinel's "conclusory" assertions "in a single sentence" of its brief (similar to those made to this Court, *see* Op. Br. 43) that the Limited Virus Coverage is also not illusory because a virus might also be the result of the specified causes of loss "water damage," "vandalism" or "civil commotion." 319 Cal.Rptr.3d at 586; *accord John's Grill*, 86 Cal.App.5th at 1222-23, 1224.

Conclusion

The First District's unanimous decision in *John's Grill* was correct in its interpretation of the Limited Virus Coverage's definition of "loss or damage," in its articulation and application of California's illusory coverage doctrine, and in its disposition of the appeal. Now another unanimous panel, this time from the Fourth District, has reached substantially the same conclusions, broadly agreeing with the correctness of the decision in *John's Grill*. In doing so, the *Brooklyn* court joins *John's Grill* in rejecting

Sentinel's overreaching arguments about California's illusory coverage doctrine that, if adopted, would redefine that doctrine virtually out of existence and threaten to usher in a host of abusive and misleading insurer practices.

This Court should join the First and Fourth District, issuing a decision that affirms the decision below and makes clear to lower courts that California's illusory coverage doctrine provides meaningful protection to protect the reasonable expectations of the insured in those rare situations where the relevant policy provisions leave the insured with no realistic prospect of ever being able to obtain promised coverage for a peril that is relevant to their line of business.

Respectfully submitted,

May 11, 2024 **COTCHETT, PITRE & McCARTHY, LLP**

By: */s/ Andrew F. Kirtley*
NANCI E. NISHIMURA
BRIAN DANITZ
ANDREW F. KIRTLEY

Attorneys for Respondents John's Grill, Inc., and John Konstin

CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.520(d)(2), I certify that this Supplemental Brief, including footnotes, contains 1,837 words, as calculated by the Microsoft Word software used to prepare this brief.

May 11, 2024 **COTCHETT, PITRE & McCARTHY, LLP**

By: */s/ Andrew F. Kirtley*
ANDREW F. KIRTLEY

Attorneys for Respondents John's Grill, Inc., and John Konstin

CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of California, over the age of 18 years, and not a party to this action. My business address is the Law Offices of Cotchett, Pitre & McCarthy, LLP, San Francisco Airport Office Center, 840 Malcolm Road, Suite 200, Burlingame, California, 94010. On May 11, 2024, I served the following document(s):

RESPONDENTS' SUPPLEMENTAL BRIEF

on the interested parties in this action as follows:

Anna-Rose Mathieson
COMPLEX APPELLATE LITIGATION GROUP LLP
96 Jessie Street
San Francisco, CA 94105
annarose.mathieson@calg.com

Melanie Gold
COMPLEX APPELLATE LITIGATION GROUP LLP
600 West Broadway, Suite 700
San Diego, CA 92101
melanie.gold@calg.com

Tadhg Dooley
Jonathan M. Freiman
WIGGIN & DANA LLP
265 Church Street, One Century Tower
New Haven, CT 06510
tdooley@wiggin.com
jfreiman@wiggin.com

Evan Bianchi (Pro Hac Vice)
WIGGIN & DANA LLP
437 Madison Avenue, 35th Floor
New York, NY 10022
ebianchi@wiggin.com

Anthony J. Anscombe
STEPTOE LLP
One Market Street, Steuart Tower
10th Floor, Suite 1070

San Francisco, CA 94105
aanscombe@steptoe.com

Sarah Gordon
STEPTOE LLP
1330 Connecticut Avenue, NW
Washington, DC, DC 20036
sgordon@steptoe.com

Counsel for Petitioners The Hartford Financial Services Group, Inc., and Sentinel Insurance Company, Ltd.

Katherine J. Ellena
REED SMITH LLP
355 South Grand Avenue, Suite 2900
Los Angeles, CA 90071
kellena@reedsmith.com

John N. Ellison
REED SMITH LLP
Three Logan Square, Suite 3100
Philadelphia, PA 19103
jellison@reedsmith.com

Counsel for Amici Curiae *French Laundry Partners, LP; KRM, Inc.; and Yountville Food Emporium, LLC*

Mark D. Plevin
CROWELL & MORING LLP
Three Embarcadero Center
San Francisco, CA 94111
mplevin@crowell.com

Counsel for Amicus Curiae *American Property Casualty Insurance Association*

Office of the Clerk
California Court of Appeal
First Appellate District, Division Four
350 McAllister Street
San Francisco, CA 94102

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San Francisco, CA 94102

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/s/ Jeanine Toomey
JEANINE TOOMEY

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S278481**
Lower Court Case Number: **A162709**

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Katherine Ellena Reed Smith, LLP 324160	kellena@reedsmith.com	e-Serve	5/11/2024 11:12:03 PM
Jonathan Freiman Wiggin and Dana LLP 418928	jfreiman@wiggin.com	e-Serve	5/11/2024 11:12:03 PM
Rani Gupta Covington & Burling LLP 296346	rgupta@cov.com	e-Serve	5/11/2024 11:12:03 PM
Mark Plevin Crowell & Moring 146278	mplevin@crowell.com	e-Serve	5/11/2024 11:12:03 PM
Andrew Kirtley Cotchett, Pitre & McCarthy, LLP 328023	akirtley@cpmlegal.com	e-Serve	5/11/2024 11:12:03 PM
Melanie Gold 116613	melanie.gold@calg.com	e-Serve	5/11/2024 11:12:03 PM
Evan Bianchi	ebianchi@wiggin.com	e-Serve	5/11/2024 11:12:03 PM

5578315			
Sarah Gordon	sgordon@steptoe.com	e-Serve	5/11/2024 11:12:03 PM
John N. Ellisson	jellison@reedsmith.com	e-Serve	5/11/2024 11:12:03 PM

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5/11/2024

Date

/s/Andrew Kirtley

Signature

Kirtley, Andrew (328023)

Last Name, First Name (PNum)

Cotchett, Pitre & McCarthy, LLP

Law Firm