S278481

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JOHN'S GRILL, INC. *ET AL.*,

Plaintiffs & Appellants,

vs.

THE HARTFORD FINANCIAL SERVICES GROUP, INC. *ET AL.*,

Defendants & Respondent.

Application To File *Amici Curiae* Brief and *Amici Curiae* Brief of French Laundry Partners, LP, DBA The French Laundry; KRM, Inc. DBA Thomas Keller Restaurant Group; and Yountville Food Emporium, LLC DBA Bouchon Bistro; in support of Plaintiffs and Appellants John's Grill, Inc., *et al.*

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APPLICATION TO FILE *AMICI CURIAE* BRIEF

Pursuant to California Rules of Court Rule 8.520, subdivision (f), French Laundry Partners, LP, DBA The French Laundry; KRM, Inc., DBA Thomas Keller Restaurant Group; and Yountville Food Emporium, LLC, DBA Bouchon Bistro (collectively "The French Laundry") request leave to file the *amici curiae* brief submitted herewith. This brief is submitted in support of Petitioners John's Grill and John Konstin (collectively, "John's Grill").

I. Interest of *Amici* and Explanation of How the Proposed Brief Will Assist the Court

Many California policyholders in the food-service industry, including John's Grill and The French Laundry, paid substantial premiums for "all risk" property insurance policies providing Business Income coverage and containing "Limited Virus" coverage. These policyholders had reasonable expectations that, if their operations suffered total or partial suspensions from the presence of a deadly virus, their insurance companies would pay the resulting loss of Business Income, just as those companies would have paid for loss from a partial suspension arising from a kitchen fire.

Now, in a moment of need, their insurers, like Respondent, have denied coverage for Business Income losses arising from

SARS-CoV-2 and COVID-19, despite electing, at the point of sale, to include a "Limited Fungi, Bacteria or Virus Coverage."

In the French Laundry's pandemic-related insurance coverage action, captioned *French Laundry Partners LP v. Hartford Fire Insurance Co.* (9th Cir.) Case No. 21-14927, the United States Court of Appeals for the Ninth Circuit has certified to this Court a virtually identical question to one that is before this Court. *French Laundry Partners, LP v. Hartford Fire Ins. Co.* (9th Cir. 2023) 58 F.4th 1305, 1305. By Order dated May 29, 2023, this Court accepted the certified question for decision in light of this pending appeal and the related appeal in *Another Planet Entertainment, LLC v. Vigilant Insurance Company*, S277893, and deferred action in The French Laundry's certified question pending a decision in this *John's Grill* case. Given those unique circumstances, there is no party like The French Laundry that has as direct and as immediate an interest in this Court's resolution of this appeal than it does since the outcome here will directly impact the determination of its case by this Court and the federal courts overseeing its case.

As such, the French Laundry respectfully requests to file this brief with the Court to provide important information that explains (a) why the Court should hold that an analysis of the Illusory Coverage Doctrine requires consideration of a policyholder's specific business and (b) why courts interpret exceptions to exclusions broadly, just as they interpret grants of

coverage since they both operate to protect the interests of the policyholder against the risks it has transferred to its insurance company pursuant to the terms and conditions of the insurance contract.

As The French Laundry explains in its brief below, consideration of a policyholder's business when analyzing the Illusory Coverage Doctrine would (1) align with California's general contract interpretation rules, (2) be consistent with how California courts have been analyzing the Illusory Coverage Doctrine to date, and (3) align with the approach taken by many other states.

In addition, as explained below, California law is clear that exceptions to exclusions are interpreted the same way that other policy provisions granting coverage are interpreted: broadly in favor of coverage.

The French Laundry here seeks to fulfill the classic role of an *amicus curiae*, supplementing the efforts of the parties and their counsel, and drawing the Court's attention to points that are not addressed by the parties but are at the core to the interests of California policyholders, including The French Laundry. That is an appropriate role for The French Laundry, as an *amicus curiae* often can "focus the court's attention on the broad implications of various possible rulings." (Robert L. Stern, Eugene Greggman & Stephen M. Shapiro, Supreme Court Practice: For Practice in the

Supreme Court of the United States 570-71 (1986), quoting Bruce J. Ennis, Effective Amicus Briefs, 33 Cath. U. L. Rev. 603, 608 (1984).) The French Laundry does that here by providing an in-depth analysis of how the Illusory Coverage Doctrine should be analyzed under California law, and how that relates to approaches other states take to the same or similar issues.

For the foregoing reasons, The French Laundry respectfully requests that the Court accept the attached *amici curiae* brief for filing.

DATED: December 21, 2023

REED SMITH LLP

By /s/ Katherine J. Ellena
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I. SUMMARY OF THE ARGUMENT

The Illusory Coverage Doctrine ("ICD") is rarely invoked and, due to this, case law developing the doctrine is relatively limited. But a review of the law of both California and other states reflects that an analysis of the ICD should include consideration of the facts of the case, including specific facts regarding the policyholder's business.

First, California's general rules of contract interpretation, which apply equally to insurance policies, require that courts interpret contracts "in context," and such "context" includes "the circumstances of that case." (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1265 (*Bank of the West*); see also Civ. Code § 1647.) When underwriting a policy, a carrier will include in its exposure analysis consideration of a policyholder's business, and (as was the case here and for The French Laundry) the policy issued will identify the class and nature of the policyholder's business. Thus, California's contract rules require that analysis of the ICD include consideration of the policyholder's business as it is part of the "circumstances of that case" and the "context" in which the insurance transaction took place.

Second, multiple California courts have already—both explicitly and implicitly—considered a policyholder's business

when analyzing whether a policy provided only illusory coverage. (See Sec. II.A.2 *infra*)

Third, The French Laundry has collected cases demonstrating that other states acknowledge that analysis of the ICD can (and should) include consideration of a policyholder's business. (See Sec. II.A.3 *infra*) This establishes that, if this Court holds that the ICD requires consideration of a policyholder's business, California courts will not be an outlier among other states. But if the Court were to adopt Hartford's proposed approach of ignoring the policyholder's circumstances, California policyholders would be given less protection than policyholders elsewhere.

Separate from the questions facing this Court regarding the ICD, The French Laundry also submits this *amici* brief to explain that another relevant principle of California law is well settled: exceptions to exclusions are interpreted broadly in favor of coverage. This is because such exceptions operate and have the same effect as provisions that grant coverage. And since coverage grants are interpreted broadly in favor of coverage, so too are exceptions to exclusions.

II. ARGUMENT

A. For Three Reasons, the Court Should Consider the Specifics of a Policyholder's Business When Analyzing the Illusory Coverage Doctrine

This Court should find that a court's analysis of the ICC must include consideration of the particulars of a policyholder's business for one or more of three reasons.

First, California's general rules of contract interpretation, which apply to interpretation of insurance policies, require that courts apply contract language *to the facts of the particular case*. Under this general rule, courts should consider an insured's business as part of the analysis.

Second, California courts analyzing the ICD implicitly acknowledge that the facts of the case, including the details of the policyholder's specific business, are included in the ICD analysis.

Third, a holding by this Court that the ICD analysis should include consideration of an insured's business would treat California businesses consistently with other jurisdictions so California law would not be an outlier as many other states also apply this approach to the ICD analysis.

1. Under General Rules of Contract Interpretation, Courts Must Consider a Policyholder's Business When Interpreting the Policy

This Court has explained California's general contract interpretation rules and their application to insurance policies many times. In *Palmer v. Truck Insurance Exchange*, this Court summarized these rules as follows:

> "Interpretation of an insurance policy is a question of law." (*Waller* v. *Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18 [].) "While insurance contracts have special features, they are still contracts to which the ordinary rules of contractual interpretation apply." (*Bank of the West*[, *supra*, 2 Cal.4th at p. 1264].) Thus, "the mutual intention of the parties at the time the contract is formed governs interpretation." (*AIU Ins. Co.* v. *Superior Court* (1990) 51 Cal.3d 807, 821 [].) If possible, we infer this intent solely from the written provisions of the insurance policy. (See *id.* at p. 822.) If the policy language "is clear and explicit, it governs." (*Bank of the West*, *supra*, 2 Cal. 4th at p. 1264.)
>
> When interpreting a policy provision, we must give its terms their "'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage.'" (*AIU Ins.*, *supra*, 51 Cal. 3d at p. 822, quoting Civ. Code, § 1644.) We must also interpret these terms "in context" (*Bank of the West*, *supra*, 2 Cal.4th at p. 1265), and give effect "to every part" of the policy with "each clause helping to interpret the other." (Civ. Code, § 1641; see also *Holz Rubber Co., Inc.* v. *American Star Ins. Co.* (1975) 14 Cal. 3d 45, 56.)

(*Palmer v. Truck Ins. Exch.* (1999) 21 Cal.4th 1109, 1115 (*Palmer*); see also *Yahoo Inc. v. Nat'l Union Fire Ins. Co.* (2022) 14 Cal.5th 58, 67 [relying on this passage from *Palmer* for policy interpretation rules].)

Additionally, the Civil Code provides direction regarding contract interpretation. Under Civil Code section 1643, "[a] contract must receive such an interpretation as will make it lawful, *operative*, definite, reasonable, and *capable of being carried into effect*, if it can be done without violating the intention of the parties." (italics added.) And under Civil Code section 1647, "[a] contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates."

Pursuant to these general rules of contract interpretation, courts analyzing the ICD should consider the particular facts of a case, including the specific nature and exposures of a policyholder's business.

As this Court has recognized time and again, courts "must [] interpret [policy] terms 'in context.'" (*Palmer*, *supra*, 21 Cal.4th at p. 1115, quoting *Bank of the West*, *supra*, 2 Cal.4th at p. 1265.) The "context" to be considered is not only the policy "as a whole," but also "the circumstances of that case." (*Bank of the West*, *supra*, 2 Cal.4th at p. 1265; see also Civ. Code § 1647.)

Therefore, the "context" of a coverage dispute would include not only the language of the policy as a whole, but also "the circumstances of th[e] case." Generally, insurance policies will in some way identify the nature and type of business of the policyholder, and will tailor coverage for the policyholder's class of business. For John's Grill's policy, the declarations page included a "Description of Business" as being "Restaurant – Fine Dining." (2AA/279) And as to The French Laundry, its policy with Hartford included "Specialized Property Insurance Coverage for Restaurants." Thus, the context of the policy in this case—as in most cases—includes the context that the coverage of the policy was designed to protect against the risks that a restaurant business faces.

That policies will identify the policyholder's business makes sense when considering the purpose and process of obtaining insurance. Generally, a policyholder will seek out the type of insurance it believes it needs to protect against the normal risks its business faces. For restaurant businesses like John's Grill and The French Laundry, one of those risks would be some viral or dangerous substance making its restaurant premises unsafe for food preparation or human presence. When an insurance company underwrites the policy, it will take into consideration the type and nature of the policyholder's business when analyzing the risks it is agreeing to assume and underwriting, determining the premium to charge, and considering whether to add industry- or exposure-specific endorsements (be they exclusions or extensions of

coverage). Thus, at the time they enter a contract for insurance, the insurance company has carefully considered the nature of the policyholder's business and its specific exposures. This fundamental aspect of insurance has been part of common law systems dating back to at least 18th century England and Lord Mansfield's rulings in the House of Lords where he ruled that as a matter of English law, an underwriter is presumed to know and understand the nature and ordinary risks of the businesses it chooses to underwrite.

Additionally, the circumstances of the case would also necessarily include consideration of a policyholder's business. Insurance policies cannot be interpreted in a vacuum. Instead, the analysis of coverage begins with (a) considering the language of the particular policy at issue and then (b) applying that language to the facts of the case. Only then can the court determine if the underlying injury or act is within the reasonable expectation of the parties and the policy's language.

It is this second step of the above-described analysis where the ICD may come into play. The ICD is, essentially, an insurance-specific version of the general contract rule against illusory promises. "When a statement appears to be promissory but, upon examination, it is clear that it promises nothing, the promise is illusory—a mirage." (Corbin on Cal. Contracts § 5.09.) As this Court has previously recognized, "[s]cholars define illusory contracts by what they are not . . . . [I]f a promise is expressly

made conditional on something that the parties know cannot occur, no real promise has been made." (*Asmus v. Pac. Bell* (2000) 23 Cal.4th 1, 15 (*Asmus*), citation and internal quotations omitted.)

This definition of illusory promises applies with equal force to the ICD. (See *Villalpando v. Transguard Ins. Co. of Am.* (N.D. Cal. 2014) 17 F. Supp. 3d 969, 977, ["In California, insurance policies may not provide illusory coverage. See *Md. Casualty Co. v. Reeder* [(1990) 221 Cal.App.3d 961, 977]. An illusory promise is a promise under which the promisor assumes no obligation, as when the promise is conditioned on something a promisor knows will not occur or is wholly under the promisor's control. See *Asmus*[, *supra*, 23 Cal.4th at pp. 15-16.]"].)

The only way to determine if "a promise [of coverage that] is expressly made conditional on something that the parties know cannot occur" would be to look to the circumstances surrounding the formation of the policy and what each party knew at the time. (See also Civ. Code § 1647.) As explained above, a carrier will generally know what type of business its policyholder engages in because the carrier is underwriting risks specific for that business, for which it has selected particular policy forms or endorsements. And, here, Hartford expressly knew that John's Grill operated a restaurant as the policy described John's Grill's business as "Restaurant – Fine Dining." Likewise, The French Laundry's insurer specifically included restaurant-specific coverage and endorsements. Thus, under the general contract rules and the

generally-applicable principle of illusory coverage, a court should consider the nature and exposures of a policyholder's business when analyzing ICD issues because they are part of the "context" surrounding the policy.

2. California Courts Already Implicitly Consider an Insured's Business When Analyzing Whether Terms in a Policy Would Make Coverage Illusory

California courts applying the ICD, and specifically interpreting whether a certain term would cause coverage to be illusory, regularly take into consideration that insured's business and the specific facts of the case at hand. A few examples of these cases include:

- *Shade Foods, Inc. v. Innovative Prods. Sales & Mktg. Inc.* (2000) 78 Cal.App.4th 847, 874: When analyzing whether application of an exclusion would make coverage illusory, the court focused on the policyholder's business and business practice to find application of such exclusion would make coverage illusory. The court reasoned: "[the policyholder] was in the business of processing almonds for others. He kept inventories of processed goods on his premises and then shipped them to his customers for marketing. The insurance coverage for 'stock' would be meaningless if it did not apply to the almonds, owned by others, that were processed at his plant. Again, the coverage for physical damage on his premises would be illusory if it were forfeited by transporting the products to another location."

- *Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.* (1996) 45 Cal.App.4th 1, 47: The court rejected a carrier's argument for a commercial general liability policy's trigger of coverage, in part, because such

interpretation would make coverage illusory in light of the policyholder's business. There, the court specifically considered the policyholder's business (manufacturing) when analyzing coverage, and stated: "[T]he insurers' approach would essentially render the asbestos manufacturers' insurance coverage illusory, for by the time asbestos diseases caused detectable impairments (in the 1970's), insurance companies ceased issuing policies that adequately covered asbestos-related disease. Hence, the insurers' theory would deprive the manufacturers of coverage for product liability injuries of which they were unaware during the policy periods." (*Ibid.*)

- *Oliver Mach. Co. v. U.S. Fid. & Guar. Co.* (1986) 187 Cal.App.3d 1510, 1514-1515: The court considered whether a clause that excluded coverage for products that were relabeled after the policyholder delivered a product resulted in illusory coverage. The court held that the exclusion would cause illusory coverage because the policyholder's business was distributing machines that were relabeled by the third party upon delivery pursuant to the policyholder's contract with that third party. The court held that "to interpret this clause as [the carrier] argues would render the endorsement covering additional insured Oliver a nullity." (*Ibid.*)

- *Maryland Cas. Co. v. Reeder* (1990) 221 Cal.App.3d 961, 977-978: The Court of Appeal found that applying an exclusion "[g]iven the[] circumstances" of the case "would likely render the policy illusory at to him [*i.e.*, the particular policyholder]." Due to this, the Court of Appeal held—as "counseled by general rules of contract interpretation to avoid a construction under which a contracting party receives no benefit from a contract"—that the exclusion would not apply to bar coverage. (*Id.* at p. 978.)

Thus, California courts are already applying a fact-specific inquiry to the ICD analysis, including consideration of a policyholder's business.

Further, applying a fact-specific inquiry to whether the ICD applies to a policy condition would not be a unique phenomenon under California law. In fact, it would comport with how California law analyzes policy conditions or terms that, if read strictly, may result in the forfeiture of coverage.

For example, Hartford acknowledges that its policy includes as a condition to coverage that its policyholder was required to "provide prompt notice of any physical loss or damage," and that "if an insured fails to give prompt notice . . . the claim is not covered." (Hartford Op. Br. at 31) But it is black letter law in California that if a policyholder delays providing notice to its carrier, the policyholder may still obtain coverage if its delay in providing notice did not prejudice the carrier (referred to as the "notice-prejudice rule"). (See *Lat v. Farmers New World Life Ins. Co.* (2018) 29 Cal.App.5th 191, 196 ["Under the notice prejudice rule, an insurance company may not deny an insured's claim under an occurrence policy based on lack of timely notice or proof of claim unless it can show actual prejudice from the delay."], citations omitted.) In other words, if a policyholder provides delayed notice in violation of the literal language of a policy's condition requiring prompt notice, the carrier must prove that it was prejudiced by such delay to enforce the strict terms of the notice condition. (See *id.* at pp. 196-197) Such an inquiry is fact-specific. (See *ibid.* ["To establish prejudice, the insurer must show it lost something that would have changed the handling of the underlying claim."].)

Thus, it comports with California law that, if a coverage provision includes a condition precedent that, read strictly, would result in a loss of all coverage under that provision, a court should apply a fact-specific inquiry to whether the condition precedent causes the coverage provision to be illusory.

Finally, Hartford asserts a "sky is falling" argument, predicting that if this Court holds that California courts may consider a policyholder's particular business when analyzing whether coverage is illusory it would saddle the insurance industry and the court system with additional costs:

- "Setting a rule of interpretation that requires an insurer to demonstrate how each provision of a policy provides a material benefit to each insured would be burdensome on insurance companies and courts alike and would limit California policyholders' access to routine, standardized coverages." (Op. Brief at 46)

- "Creating an interpretative rule that requires an insurer to demonstrate how each peril provides a material benefit to each insured would limit California policyholders' access to routine standardized coverages and greatly increase costs for both insurers and insureds. It would also require courts to speculate as to what precisely is likely to occur during the policy period or risk a policy interpretation that goes far beyond the parties' intentions." (Reply at 30-31)

As explained above, however, California courts already apply the highly fact-specific notice prejudice rule in cases that a policyholder's notice becomes an issue. Like the notice-prejudice rule, which only comes up in limited cases where the timing of a policyholder's notice is at issue, the ICD too only comes up in the

limited cases where a policy term eliminates so much coverage that it renders the protection and risk mitigation the policyholder intended to purchase for its business illusory. Contrary to Hartford's assertion, there would be no requirement that a carrier "demonstrate how each provision of a policy provides a material benefit to each insured." For starters, this type of analysis would only be potentially implicated in the narrow circumstances of a claim arising against a policyholder's business, and the insurance company responds to that claim by asserting that the broad risk protection the business believes it purchased does not actually cover the normal business risk giving rise to the claim. As shown by the dearth of case law on the subject of illusory coverage, these circumstances arise rarely.

Moreover, a determination of this sort simply would not be ripe for a court to rule on generally. (See *Pacific Legal Foundation v. Cal. Coastal Com.* (1982) 33 Cal.3d 158, 171 ["A controversy is ripe when it has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made."].) Instead, the ICD is only invoked as an analytical tool where a policyholder believes it had coverage under a specific provision of the policy, makes a claim to its insurance company, and the insurer responds to the claim contending that another term in the policy effectively eliminates that reasonably expected coverage.

Further, and as explained above, when a carrier underwrites a policy, it analyzes the risk that it is covering to determine what premium to charge and whether to provide industry- or exposure-specific coverages or exclusions (as did The French Laundry's insurer). As such, carriers should be (and presumably are) providing coverage that is equal to the potential exposure that it assessed. It is apparent that carriers do, in fact, match coverage with potential exposure by the numerous industry-specific endorsements and exclusions that carriers offer and will include in certain policyholder's policies. Applying the ICD in limited cases should simply prompt insurers to do what they should be aiming to do: provide good customer service by matching the coverage they sell to the exposures of their customers.

The Eighth Circuit in *Sletten & Brettin Orthodontics, LLC v. Continental Casualty Co.* provides a good example of the limited nature of the ICD. ((8th Cir. 2015) 782 F.3d 931, 938.) There, a policyholder argued that its policy was illusory because it listed coverage for the intentional torts of battery and assault but included an exclusion for intentional acts. (*Ibid.*) Yet, because the policyholder did not actually seek coverage for liability arising from assault or battery allegations, the court rejected the policyholder's argument and refused to apply the ICD. (*Ibid.*) The court reasoned that the "[ICD] operates as a remedy where an insured seeks coverage under a provision that purports to provide coverage but such coverages turns out to be functionally nonexistent," and that because the policyholders did not seek

coverage for those torts, the "[ICD] cannot provide them with a remedy in th[e] case." (*Ibid.*)

It follows that the ICD will only be invoked in a narrow category of cases. As such, any concern that requiring fact-specific inquiries in every case is fanciful; such enquiries, similar to the fact-specific inquiry of the notice prejudice rule, would occur only where the policy coverage dramatically fails to fit the exposures of the policyholder.

3. Many Other States Also Permit Courts to Consider a Policyholder's Business When Analyzing the ICD

As explained above, California law regarding contract interpretation dictates that courts take a fact-specific inquiry when analyzing the ICD, and California courts have also considered policyholders' businesses when analyzing the ICD. Additionally, many other states also take a fact-specific approach to analyzing the ICD, which includes analyzing the policyholder's business.

While Hartford asserts, without any citations, that the Court of Appeal's ICD standard requiring Hartford show coverage was not illusory "based on events the parties might reasonably have anticipated during the Policy period" "is not the standard anywhere," (Op. Br. 43). This statement is flatly incorrect; multiple states consider the "circumstances" under which coverage

could exist which necessarily are tied to the particulars of the policyholder's business and exposures. In other words, it is no answer to the ICD to say that a filling station's insurance policy provides coverage for construction defects if it excludes fuel-related exposures.

In fact, as the Connecticut Supreme Court has expressed, Connecticut and "*the case law of virtually every other state*," recognize that "a policy provision offering coverage for a particular peril will not be deemed illusory unless it would not result in coverage under any *reasonably expected set of circumstances*." (*Karas v. Liberty Ins. Corp.* (Conn. 2019) 335 Conn. 62, 108, italics added [collecting cases].) Thus, Connecticut, and "virtually every other state" according to the Connecticut Supreme Court, look at what "reasonably expected set of circumstances" the parties anticipated when executing the policy at issue.

Illinois law provides that "[t]he status of the insured and all other pertinent factual circumstances must be considered in connection with the construction of an insurance policy." (*Michael Nicholas v. Royal Ins. Co. of Am.* (2001) 321 Ill.App.3d 909, 915 (*Michael Nicholas*), overruled in other part *Va. Sur. Co. v. N. Ins. Co.* (2007) 224 Ill.2d 550, 570.)

In *Michael Nicholas*, the policyholder was a subcontractor that had an employee suffer a workplace injury during a construction project for a third-party company. (*Id.* at 788.) The

employee subsequently sued the company, and the company in turn sued the subcontractor for alleged negligence contributing to the employee's injuries. (*Ibid.*) The subcontractor sought coverage from its insurer in the lawsuit. (*Ibid.*)

The carrier denied coverage, arguing the claim fell under an "employee exclusion" and failed to qualify for the exception to said exclusion. (*Id.* at 788.) The exception permitted coverage for lawsuits arising from employee injuries only if the policyholder had "assume[d] the tort liability of another party pursuant to a contract or agreement." (*Id.* at 788–789.) Although the subcontractor had assumed the third-party company's tort liability for the construction project, the carrier claimed that the subcontractor did not qualify for the exception because the subcontractor's assumption of tort liability was not fault-based. (*Id.* at 791.)

The Illinois appellate court rejected the carrier's construction of the exception, reasoning that "[i]n light of the fact that plaintiff is in the construction business, the parties must have reasonably anticipated that most of its contracts would involve construction, where indemnifying another party for that party's negligence is forbidden by statute." (*Ibid.*) Thus, the court found, "it is difficult to envision any situation where the exception would apply in plaintiff's line of work because if plaintiff ever agreed to indemnify another party for its own negligence, the contract would be unenforceable." (*Id.* at 791.) The court therefore concluded that

the coverage provided by the insurer to the policyholder was illusory. (*Id.* at. 790.)

Under Indiana law, courts consider whether coverage would be available under "any reasonably expected set of circumstances," and if not, then coverage is illusory. (*Haag v. Castro* (Ind. 2012) 959 N.E.2d 819, 824, citation and internal quotations omitted.) As one court applying Indiana law explained, "an insurer cannot avoid an illusory coverage problem by simply conceiving of a single hypothetical situation to which coverage would apply." (*Monticello Ins. Co. v. Mike's Speedway Lounge* (S.D. Ind. 1996) 949 F. Supp. 694, 701 (*Mike's Speedway*).) Instead, "illusory coverage is a matter of degree, not absolutes" and "coverage [is] illusory where the likelihood of coverage [is] considered sufficiently remote to be deemed illusory." (*Ibid.*, citations and internal quotations omitted.)

In *Mike's Speedway*, the policyholder was a tavern that sold alcohol, the policy defined the policyholder's business as being a "Restaurant-with sale of alcoholic beverages," and the policy included an "absolute liquor exclusion." (*Id.* at p. 700.) Applying Indiana law, the court found that this exclusion caused coverage to be illusory because the carrier "issued a commercial general liability policy to a tavern and incorporated an exclusion from coverage that would apply to virtually any claim the insured might reasonably be expected to file"; *i.e.*, the circumstances made "the prospect" for coverage "sufficiently remote that the liability

coverage must be deemed illusory." (*Id.* at p. 702, citation and internal quotations omitted.)

Pennsylvania law expressly provides that, "[w]hether coverage is illusory must be determined under the specific facts of each case." (*TIG Ins. Co. v. Tyco Int'l Ltd.* (M.D. Pa. 2013) 919 F. Supp. 2d 439, 466, citing *Heller v. Pa. League of Cities & Municipalities* (Pa. 2011) 32 A.3d 1213, 1223.) Further, the *TIG* court held that "[t]he relevant inquiry is whether a particular coverage provision is swallowed-up by an exclusion, not whether the policy as a whole provides some degree of coverage despite the existence of an exclusion"; instead coverage will be illusory where "the policy would not pay benefits under any reasonably expected set of circumstances." (*TIG Ins. Co. v. Tyco Int'l Ltd.*, *supra*, 919 F. Supp. 2d at p. 466; see also *Cushman & Wakfield, Inc. v. Nat'l Ins. Co.* (N.D. Ill. April 20, 2018) 2018 U.S. Dist. LEXIS 67523, at *32, fn. 25 [rejecting a carrier's proposed interpretation of "investment" as used in an exclusion because such interpretation "would essentially eliminate coverage for all Claims brought in connection with [the policyholder's] appraisal business"].)

Under Idaho law "a policy is illusory if it appears that if any actual coverage does exist it is extremely minimal and affords no realistic protection to any group or class of injured persons." (*Pena v. Viking Ins. Co.* (2022) 169 Idaho 730, 737, citation and internal quotations omitted.) Put another way, under Idaho law:

> Illusory coverage exists when [t]he declarations page of the policy contains language and words of coverage, then by definition and exclusion takes away the coverage. [Citations.] That there might be some rare circumstance where coverage might exist is insufficient to save a deficient policy. [Citation.]

(*Id.* at pp. 737-38, internal quotations omitted.)

Rhode Island and Arkansas take a similar approach. (See *Great American E & S Ins. Co. v. End Zone Pub & Grill of Narragansett, Inc.* (R.I. 2012) 45 A.3d 571, 576 ("We will deem an exclusion to an insurance policy illusory only when it would preclude coverage in almost any circumstance"], internal quotation marks; *Farm Bureau Mut. Ins. Co. of Ark., Inc. v. Sells* (Ark. Ct. App. 2010) 379 S.W.3d 605, 608 (Pittman, J. Concurring) [applying Arkansas law and recognizing that coverage is illusory where "there is no coverage under any reasonably expected set of circumstances"].)

To apprise this Court of relevant authority, The French Laundry notes that there are some states that hold that courts should analyze the ICD by looking only to the policy language and governing law. (See, e.g., *Knispel v. Northland Ins. Co.* (Wis. Ct. App. 2005) 704 N.W.2d 423, ["Our non-exhaustive review of cases indicates that Wisconsin courts typically assess whether coverage is illusory by looking to the policy and governing law, not to the particular circumstances of the insured."]; but see *Piper v. Nitschke's N. Resort Condo. Owner's Ass'n* (Wis. App. Ct. 2009) 777

N.W.2d 677, 680 [holding "[c]overage is illusory when a premium is paid 'for coverage which would not pay benefits under any *reasonably expected set of circumstances*'"], italics added, quoting *Link v. General Cas. Co*. Wis. App. Ct. (1994) 518 N.W.2d 261.)

However, as explained above, consideration of a policyholder's business both (a) comports with California's applicable rules of contract interpretation, and (b) is already done by California courts.

B. It Is Black Letter Law in California That Exceptions to Exclusions Are Interpreted Broadly in Favor of Coverage

Throughout its briefs, Hartford makes the misleading argument that the ICD is only properly applied where a policy exclusion is ambiguous such that the ICD is used to narrow the interpretation of that exclusion. (See, e.g., Op. Brief at 36-37 ["[W]hen an ambiguous exclusion would (if read broadly) render an explicit coverage grant meaningless, the courts interpret the exclusion narrowly to avoid eliminating coverage that the insured reasonably expects"], citations omitted.)

This red herring argument ignores the fact that under California law, exclusions are already interpreted narrowly. In fact, it is the rule of policy interpretation in California that "[c]overage provisions are construed broadly in favor of the insured, while exclusion provisions are construed strictly against

the insurer." (*Nat'l Union Fire Ins. Co. v. Lynette C.* (1991) 228 Cal.App.3d 1073, 1077 (*Lynette C.*).)

Thus, the Court should ignore Hartford's argument that the ICD should only be applied to narrowly interpret exclusions as such a rule would make the ICD merely redundant of the long-settled California policy interpretation rules, which are also universally applied in every jurisdiction.

Further, Hartford asserts an argument that the Court of Appeal erred by finding that John's Grill reasonably could have expected coverage under the Limited Virus coverage even if John's Grill did not meet all pre-conditions to coverage. (Op. Br. at 33-34.) But again, this argument contradicts California law. This argument, in essence, takes issue with the Court of Appeal interpreting the Limited Virus exception to the Virus Exclusion broadly in favor of coverage. But as explained below, that is precisely what California law requires.

"The function of an exception to an exclusionary clause is to give back coverage taken away by the exclusion." (Cal. Practice Guide: Ins. Lit. (Rutter Grp.) 4:400.) This Court has acknowledged that an exception to an exclusion *is* a "coverage provision." (*Aydin Corp. v. First State Ins. Co.* (1998) 18 Cal.4th 1183, 1192 (*Aydin Corp.*); see also *Lynette C., supra*, 228 Cal.App.3d at p. 1082 [recognizing that "exceptions to exclusions are somewhat analogous to coverage provisions"].)

As this Court has previously explained, because an exception to an exclusion is "a coverage provision, the exception will be construed broadly in favor of the insured. (*Aydin Corp., supra*, 18 Cal.4th at p. 1192, citing *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 667; *Lynette C.*, *supra*, 228 Cal.App.3d at p. 1082.)

This Court has reinforced this rule, applying it in multiple other cases. (See *State of Cal. v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1018; *TRB Invs., Inc. v. Fireman's Fund Ins. Co.* (2006) 40 Cal.4th 19, 27; *E.M.M.I. Inc. v. Zurich Am. Ins. Co.* (2004) 32 Cal.4th 465, 476.)

Further, California Courts of Appeal have applied this Court's rule for over two decades. (See, e.g., *Frontier Oil Corp. v. RLI Ins. Co.* (2007) 153 Cal.App.4th 1436, 1463; *Great W. Drywall, Inc. v. Interstate Fire & Cas. Co.* (2008) 161 Cal.App.4th 1033, 1040.)

III. CONCLUSION

For the reasons discussed above, The French Laundry respectfully requests that this Court hold that (a) an analysis of whether a policy violates the ICD requires consideration of the specific facts of the case, including the particulars of a policyholder's business, and (b) the well-settled rule that an exception to an exclusion be interpreted broadly in favor of

coverage, just as other policy provisions granting coverage and interpreted.

DATED: December 21, 2023

REED SMITH LLP

By /s/ Katherine J. Ellena
John N. Ellison
Richard P. Lewis, Jr.
Katherine J. Ellena
Kathryn M. Bayes

CERTIFICATION OF COMPLIANCE WITH CAL. R. CT. 14(C)(1)

Pursuant to California Rule of Court 14(c)(1), the foregoing Application To File *Amici Curiae* Brief and *Amici Curiae* Brief of French Laundry Partners, LP, DBA The French Laundry; KRM, Inc. DBA Thomas Keller Restaurant Group; and Yountville Food Emporium, LLC DBA Bouchon Bistro; in support of Plaintiffs and Appellants John's Grill, Inc., *et al.* of *Amici Curiae* French Laundry Partners, LP, DBA The French Laundry; KRM, Inc. DBA Thomas Keller Restaurant Group; and Yountville Food Emporium, LLC DBA Bouchon Bistro, is double-spaced and was printed in proportionately spaced 14-point Times New roman typeface. It is 33 pages long (inclusive of footnotes, but exclusive of tables and this Certificate) and contains 6,041 words. In preparing this certificate, I relied on the word count generated by MS Word 2010.

Executed on December 21, 2023, 2023, at Oakland, California.

/s/ Katherine J. Ellena
Katherine J. Ellena

PROOF OF SERVICE

John's Grill v. The Hartford Financial Services Group
California Supreme Court Case No: S278481
First Appellate District, Division 4 Case No. A162709
San Francisco Superior Court, Case No. CGC20584184

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH LLP, 355 South Grand Avenue, Suite 2900, Los Angeles, CA 90071. On December 21, 2023, I served the following document(s) by the method indicated below:

APPLICATION TO FILE *AMICI CURIAE* BRIEF AND *AMICI CURIAE* BRIEF OF FRENCH LAUNDRY PARTNERS, LP, DBA THE FRENCH LAUNDRY; KRM, INC. DBA THOMAS KELLER RESTAURANT GROUP; AND YOUNTVILLE FOOD EMPORIUM, LLC DBA BOUCHON BISTRO; IN SUPPORT OF PLAINTIFFS AND APPELLANTS JOHN'S GRILL, INC., *ET AL*.

☒	E-Service via TrueFiling

Brian Danitz Nanci Eiko Nishimura Julia Qisi Peng Andrew F. Kirtley Law Offices of Cotchett Pitre & McCarthy, LLP 840 Malcolm Road, Suite 200 Burlingame, CA 940103	***Attorneys for Plaintiff and Appellant John's Grill, Inc. and John Konstin***
Anthony J. Anscombe Steptoe & Johnson LLP One Market Street, Steuart Toward 10th Floor, Suite 1070 San Francisco, CA 94105 Tadhg Dooley Evan Bianchi WIGGIN AND DANA LLP 265 Church Street New Haven, CT 06510	***Attorneys for Defendant and Respondent The Hartford Financial Services Group, Inc. and Sentinel Insurance Company, Ltd.***

Sarah Gordon Steptoe & Johnson, LLP 1330 Connecticut Avenue, NW Washington, DC, DC 20036 Jonathan M. Freiman Wiggin & Dana LLP 265 Church Street New Haven, CT 06510 Anna-Rose Mathieson Complex Appellate Litigation Group LLP 96 Jessie Street San Francisco, CA 94105 Melanie Gold Complex Appellate Litigation Group LLP 600 West Broadway, Suite 700 San Diego, CA 92101	

☒	by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.

Clerk, Honorable Ethan P. Schulman San Francisco Superior Court 400 McAllister Street San Francisco, CA 94102	***Trial Court*** **Case No. CGC20584184**

I declare under penalty of perjury under the State of California that the above is true and correct. Executed on December 21, 2023, at Los Angeles, California.

Heather Valencia