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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

THE MENOMINEE INDIAN TRIBE OF WISCONSIN, **THE MENOMINEE INDIAN GAMING AUTHORITY d/b/a MENOMINEE CASINO RESORT**, and **THE WOLF RIVER DEVELOPMENT COMPANY**, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

(1) LEXINGTON INSURANCE COMPANY;
(2) UNDERWRITERS AT LLOYD'S – SYNDICATES: ASC 1414, XLC 2003, TAL 1183, MSP 318, ATL1861, KLN 510, AGR 3268;
(3) UNDERWRITERS AT LLOYD'S - SYNDICATE: CNP 4444;
(4) UNDERWRITERS AT LLOYD'S - ASPEN SPECIALTY INSURANCE COMPANY;

CASE NO. 3:21-cv-00231-WHO

PLAINTIFFS' RESPONSE TO DEFENDANT LANDMARK AMERICAN INSURANCE COMPANY'S MOTION TO DISMISS AND JOINDER IN DEFENDANT LEXINGTON INSURANCE COMPANY'S MOTION TO DISMISS PLAINTIFFS' AMENDED CLASS ACTION COMPLANT

Date: June 16, 2021
Time: 2:00 p.m.
Judge: William H. Orrick
Room: Courtroom 2

(5) UNDERWRITERS AT LLOYD'S - SYNDICATES: KLN 0510, ATL 1861, ASC 1414, QBE 1886, MSP 0318, APL 1969, CHN 2015, XLC 2003;
(6) UNDERWRITERS AT LLOYD'S – SYNDICATE: BRT 2987;
(7) UNDERWRITERS AT LLOYD'S - SYNDICATES: KLN 0510, TMK 1880, BRT 2987, BRT 2988, CNP 4444, ATL 1861, NEON WORLDWIDE PROPERTY CONSORTIUM, AUW 0609, TAL 1183, AUL 1274;
(8) HOMELAND INSURANCE COMPANY OF NEW YORK;
(9) HALLMARK SPECIALTY INSURANCE COMPANY;
(10) ENDURANCE WORLDWIDE INSURANCE LTD T/AS SOMPO INTERNATIONAL;
(11) ARCH SPECIALTY INSURANCE COMPANY;
(12) EVANSTON INSURANCE COMPANY;
(13) ALLIED WORLD NATIONAL ASSURANCE COMPANY;
(14) LIBERTY MUTUAL FIRE INSURANCE COMPANY;
(15) LANDMARK AMERICAN INSURANCE COMPANY; and
(16) SRU DOE INSURERS 1-20;

Defendants.

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(application for admission
pro hac vice to be filed)

I. INTRODUCTION

Plaintiffs the Menominee Indian Tribe of Wisconsin, the Menominee Indian Gaming Authority, and Wolf River Development Company (collectively, "the Menominee") alleged that they suffered substantial business interruption losses as the coronavirus pandemic swept through their properties and Wisconsin, causing businesses to close and customers to stay home, and resulting in numerous civil authority orders that also limited permissible business activity. Plaintiffs alleged that the coronavirus was physically present on their properties and that coronavirus caused physical loss or damage to their properties through its impact on the physical surfaces, the danger to individuals, and the resulting reduced functionality of the property. This physical loss or damage produced substantial losses as well as various costly remediation measures and other expenses, but the Menominee's insurers refused to pay the insurance claim submitted, forcing the Menomonee to file the present litigation.

Landmark moves to dismiss the Amended Complaint largely on the basis of an exclusion it contends formed part of a separate insurance policy sold to the Menominee. This policy was not attached to the complaint or described in it, and the Menominee have separately moved to strike the policy from consideration at this stage of the litigation. Even if the Court did consider the exclusion, however, it does not apply to the claims raised here. The Court should deny Landmark's motion.

II. STANDARDS FOR MOTIONS TO DISMISS

When evaluating a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court must accept all material allegations in the complaint—as well as any reasonable inferences to be drawn from them—as true and construe them in the light most favorable to the non-moving party. *Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005). To survive a motion to dismiss, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Under this standard, a complaint must "contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively," and "the factual allegations that are taken as true must plausibly suggest an entitlement to relief." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

"As a general rule, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Williams v. Cty. of Alameda*, 26 F. Supp. 3d 925, 935 (N.D. Cal. 2014) (quoting *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001)). Courts only recognize three exceptions to this general rule. *Poisson v. Aetna Life Insurance Co.*, 488 F. Supp. 3d 942, 945–46 (C.D. Cal. 2002). First, pursuant to Federal Rule of Evidence 201, a court may take judicial notice of adjudicative facts that are "not subject to reasonable dispute," such as "matters of public record" and facts that are "generally known" or that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999 (9th Cir. 2018) (quoting Fed. R. Evid. 201(b)). Second, a court may consider documents that are attached to or "properly submitted as part of the complaint." *Poisson*, 488 F. Supp. 3d at 945. Lastly, a court may consider a document that is not "physically attached to the complaint," but only if the complaint "necessarily relies" on the document *and* the document's "authenticity . . . is not contested." *Lee*, 250 F.3d at 688. However, if a document "merely creates a defense to the well-pled allegations in the complaint, then that document did not 'necessarily form the basis of the complaint' and cannot be incorporated by reference." *Khoja*, 899 F.3d at 1002.

When interpreting an insurance policy, if the "meaning a layperson would ascribe to the language of a contract of insurance is clear and unambiguous, a court will apply that meaning." *Montrose Chem. Corp. v. Admiral Ins. Co.*, 913 P.2d 878, 10 Cal. 4th 645, 666 (1995). At the same time, a policy provision "will be considered ambiguous when it is capable of two or more constructions, both of which are reasonable." *Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co.*, 959 P.2d 265, 18 Cal. 4th 857, 868 (1998). "If an asserted ambiguity is not eliminated by the language and context of the policy, courts then invoke the principle that ambiguities are generally construed against the party who caused the uncertainty to exist (i.e., the insurer) in order to protect the insured's reasonable expectation of coverage." *Id*. In addition, insurance coverage is "interpreted broadly so as to afford the greatest possible protection to the insured," while "exclusionary clauses are interpreted narrowly against the insurer." *MacKinnon v. Truck Ins. Exch.*, 73 P.3d 1205, 1213, 31 Cal. 4th 635, 648 (2003). Accordingly, insurers must "phrase

exceptions and exclusions in clear and unmistakable language." *Id*. Whereas the insured has the burden to establish that the claims fall within the basic scope of coverage, the insurer must demonstrate that the claim is specifically excluded. *Id*.

III. ARGUMENT

A. The Court should Dismiss Landmark's Motion without Considering the Documents Attached to the Motion

Landmark first seeks to dismiss the Amended Complaint based on the arguments raised in Lexington's motion to dismiss. For the reasons set forth in the Menominee's opposition to that motion, Dkt. 72, the motion should be denied. The Amended Complaint expressly alleges the presence of the virus on insured property, physical loss or damage to property as a result of the virus, and business interruption losses and other expenses flowing from that physical loss or damage. Given the high standards this Court applies to motions to dismiss, and the need to make every inference in favor of the non-moving party, the motion must be denied.

Landmark next seeks to apply an exclusion purportedly attached to a separate excess policy issued by Landmark that was neither attached to the Amended Complaint nor described in that complaint. For the reasons set forth in the Menominee's separately filed Motion to Strike, the Court should strike this extrinsic documentation. The Menominee have no record of receiving any such policy from Landmark. Dkt. 73-1 (hereinafter, "Bowman Decl."). Instead, the only property policies the Menominee received were contained in the Tribal First "Property Solutions" book. Bowman Decl. Based on the information the Menominee possessed, the Menominee believed that the Tribal First "Property Solutions" book, *see* Dkt. 58-1, contained all of the relevant policy language governing their relationship with their insurers, including Landmark. Bowman Decl. For these reasons, the Menominee dispute the authenticity of the purported Landmark excess policy and its application here.

Accordingly, this Court should not consider this disputed, extrinsic document at this stage of the litigation. *E.g., City of Royal Oak Retirement System v. Juniper Networks, Inc.*, 880 F. Supp. 2d 1045, 1060 (N.D. Cal. 2012) (granting motion to strike because the "Declaration falls into none of these categories [of 12(b)(6) exceptions] and thus cannot be considered by the Court

for purposes of ruling on the pending motions to dismiss"); *In re Easysaver Rewards Litig.*, 737 F. Supp. 2d 1159, 1169 (S.D. Cal. 2010) ("The law allows a court to consider extrinsic evidence in a motion to dismiss when it is incorporated into the complaint, however, the rule expressly states that the material must be beyond dispute . . . In this instance, the requirements of the rule have not been met because Plaintiffs challenge the authenticity of the screenshots."); *Davis v. Minnesota Life Ins. Co.*, No. 1:19-CV-00453-DCN, 2020 WL 6163119, at *7 (D. Idaho Oct. 21, 2020) ("In sum, the Court can hardly evaluate the terms of the Policy if it does not know which documents actually constitute the Policy . . . . Discovery is clearly necessary to flesh out what constituted the Policy and the [summary plan description] in this case, who authored the various documents, which documents were in effect during the relevant time period, and which documents [the insured] was aware of.").[1]

Because the Menominee have alleged "direct physical loss or damage," and because Landmark's purported policy should not be considered at this stage, Landmark's motion should be denied.

B. Even if Considered, Landmark's Chemical Release Exclusion Would Not Bar the Menominee's Claim

If the Court considers the policy attached to Landmark's Motion, the Court should still deny the motion to dismiss because the purported exclusion cited by Landmark does not apply to the business interruption and other losses sought by the Menominee. Landmark seeks to apply what is essentially a pollutant exclusion, designed to address accidental spills of chemical or biological materials, to the spread of a virus during a pandemic. Nether the text nor the purpose of the exclusion support Landmark's position. If Landmark wished to exclude loss caused by the spread of a virus, it could have included an express virus exclusion in its policy, as did the insurers in many of the cases Landmark cites. Landmark did not do so.

[1] *See also Weeks v. Home Depot U.S.A., Inc.*, No. CV 19-6780 FMO (ASX), 2020 WL 1652539, at *1 (C.D. Cal. Jan. 21, 2020) (denying motion to dismiss without prejudice for "improperly referencing materials outside the pleadings").

Landmark's chemical release exclusion does not extend to the spread of a virus from external sources during a pandemic. The exclusion reads:

> We will not pay for loss or damage caused directly or indirectly by the discharge, dispersal, seepage, migration, release, escape or application of any pathogenic or poisonous biological or chemical materials. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

Landmark Motion, Dkt. 69 at 3; Dkt. 69-2, Ex. A, at 95; Dkt. 69-3, Ex. B, at 93.

This language does not apply to the Menominee's losses. First, the exclusion falls within a long line of pollution exclusions attached to property policies. Courts have routinely interpreted such exclusions to apply to traditional environmental pollution or analogous situations. *E.g.*, *MacKinnon*, 73 P.3d at 1216 ("Limiting the scope of the pollution exclusion to injuries arising from events commonly thought of as pollution, i.e. environmental pollution, also appears to be consistent with the choice of terms 'discharge, dispersal, release or escape.' . . . .[T]here appears to be little dispute that the pollution exclusion was adopted to address the enormous potential liability resulting from anti-pollution laws enacted between 1966 and 1980."); *see also Century Sur. Co. v. Casino W., Inc.*, 329 P.3d 614, 616 (Nev. 2014) ("The absolute pollution exclusion's drafting history further supports the conclusion that the exclusion was designed to apply only to outdoor, environmental pollution."); *Am. States Ins. Co. v. Koloms*, 687 N.E.2d 72, 75 (Ill. 1997); ("Accordingly, we agree with those courts which have restricted the exclusion's otherwise potentially limitless application to only those hazards traditionally associated with environmental pollution."); *Sullins v. Allstate Ins. Co.*, 667 A.2d 617, 623 (Md. 1995) ("It appears from the foregoing discussion that the insurance industry intended the pollution exclusion to apply only to environmental pollution."). Courts have applied similar reasoning to the comparable pollution exclusion in first-party property policies. *E.g.*, *Vigilant Ins. Co. v. V.I. Tech., Inc.*, 253 A.D.2d 401, 402 (N.Y. Sup. Ct. App. Div. 1998) (declining to apply first-party pollution exclusion and noting that the "commonly understood meaning of the language in question should not be held to be different depending on whether it is used in a 'first-party' or 'third-party' policy"). Courts have also applied similar reasoning when rejecting the application of a pollution exclusion to a claim based on the coronavirus pandemic.

E.g., *JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.*, No. A-20-816628-B, 2020 WL 7190023 (Nev. Dist. Ct. Nov. 30, 2020) (denying motion to dismiss because "Starr has not shown that it is unreasonable to interpret the Pollution and Contamination Exclusion to apply only to instances of traditional environmental and industrial pollution and contamination that is not at issue here, where JGB's losses are alleged to be the result of a naturally-occurring, communicable disease."); *see also Thor Equities, LLC v. Factory Mut. Ins. Co.*, No.1:20-CV-03380, 2021 WL 1226983 (S.D.N.Y. Mar. 31, 2021) (declining to apply contaminant exclusion on the ground it was ambiguous). Like the purchasers of these policies with pollution exclusions, the Menominee could have expected the exclusion to apply to situations involving pollution or contamination from a polluting event, not a pandemic resulting in the infestation of property through the simple visitation of customers and employees.

Second, the exclusion uses terms that do not apply in a pandemic. Words like "discharge," "dispersal," "seepage," "migration," "release," "escape," and "application" are used to describe the management and escape of traditional pollutants otherwise thought to be contained. Those terms could conceivably apply to the rupture of a sealed medical waste container used to prevent the "release," "escape," or "dispersal" of a harmful bacteria or virus, but they plainly do not apply to the spread of a communicable disease, like COVID-19. Nothing in the Amended Complaint suggests that the virus was "discharged" by the Menominee, that it dispersed, seeped, or escaped from any kind of container, or that the Menominee somehow "applied" the virus to its property.

Third, the exclusion does not expressly apply to a "virus" but only to "pathogenic or poisonous biological or chemical materials." Landmark points to no case interpreting the phrase "pathogenic materials," relying instead on two separate dictionary definitions for "pathogenic" and "materials." However, even assuming the adjective "pathogenic" applies to a virus, the exclusion does not apply to "pathogens" but rather to "pathogenic materials." The use of the phrase strongly suggests that the pathogen at issue must be contained in some kind of material or substance, which could be stored or used on the property. The use of "pathogenic materials" rather than "pathogens" further highlights that the exclusion is aimed at the storage and handling

of hazardous materials, not the spread of a virus. As Landmark argues, courts should "avoid a construction which renders portions of a contract meaningless, inexplicable or mere surplusage." Landmark Motion, Dkt. 69 at 7 (citing *Day v. Allstate Indem. Co.*, 798 N.W.2d 199, 206 (Wis. 2011)). Landmark's interpretation, however, reads the word "materials" out of the contract. If Landmark had intended to apply the exclusion to pathogens, rather than pathogenic materials, it could have said so.

Fourth, the combination of "pathogenic or poisonous materials" and active words like "discharge," "release," and "application," implies that some action or inaction on the part of the policyholder, or a separate event on the policyholder's property, such as a rupture or leak, is required in order to trigger the exclusion. Landmark, however, points to no allegations in the complaint that refer to any such action or event. Rather, Landmark simply cites allegations that the loss was "caused by a virus." Landmark Motion, Dkt. 69 at 7. Such general allegations are insufficient to trigger application of the specific terms of the exclusion.

Landmark cites several cases applying a virus exclusion to losses incurred in the pandemic, but these cases merely highlight the difference between an actual virus exclusion, like the ones described in those cases, and a pollutant or contamination exclusion which also applies to pathogenic or poisonous materials, such as the one contained in the Landmark policy. For example, Landmark discusses this Court's decision in *Boxed Foods Co., LLC v. California Capital Ins. Co.*, but the exclusion in that case applied to the "alleged or threatened presence of any pathogenic organism." No. 20-CV-04571-CRB, 2020 WL 6271021, at *3 (N.D. Cal. Oct. 26, 2020). Here, the exclusion does not apply to any "presence" of a "pathogenic organism" but to the "discharge" or "release" of "pathogenic materials" on the property.

Similarly, Landmark includes a long string cite extending over three pages purporting to list cases "addressing similar virus exclusions." Landmark Motion, Dkt. 69 at 7 n.5. Landmark does not show, however, that any of those cases involve contamination exclusions applying to the "release," "discharge," or "application" of "pathogenic materials" like the one in the Landmark policy. Instead, these cases largely involve an explicit virus exclusion of the type readily available to property insurers. *See, e.g., Franklin EWC, Inc. v. Hartford Fin. Servs. Grp.*,

Inc., No. 20-CV-04434-JSC, 2020 WL 7342687, at *2 (N.D. Cal. Dec. 14, 2020) ("presence, growth, proliferation, spread" of virus); *Robert W. Fountain, Inc., v. Citizens Ins. Co. of Am.*, No. 20-CV-05441-CRB, 2020 WL 7247207, at *2 (N.D. Cal. Dec. 9, 2020) ("loss or damage caused directly or indirectly by . . . any virus"); *Protege Rest. Partners LLC v. Sentinel Ins. Co., Ltd.*, No. 20-CV-03674-BLF, 2021 WL 428653, at *7 (N.D. Cal. Feb. 8, 2021) ("presence, growth, proliferation, spread" of virus); *HealthNOW Med. Ctr., Inc. v. State Farm Gen. Ins. Co.*, No. 20-CV-04340-HSG, 2020 WL 7260055, at *2 (N.D. Cal. Dec. 10, 2020) ("any loss caused by . . . [v]irus"); *Mortar & Pestle Corp. v. Atain Specialty Ins. Co.*, No. 20-CV-03461-MMC, 2020 WL 7495180, at *5 (N.D. Cal. Dec. 21, 2020) ("in any way related in whole or in part to any . . . virus"). Landmark implies that its exclusion resembles these cases, but the cases themselves demonstrate that Landmark could have, but did not, attach an actual virus exclusion to the policy. Landmark's own exclusion is very different, and these cases have no bearing on Landmark's policy.

In fact, one court has examined the exclusion cited by Landmark in a claim brought under the same property program at issue here. *Cherokee Nation v. Lexington Ins. Co.*, No. CV-20-150, 2021 WL 506271 (Okla. Dist. Ct. Jan. 28, 2021). That decision granted summary judgment to the plaintiff policyholders and is currently on appeal by the insurers. *See id.* The court assumed without deciding for the purposes of the motion that the exclusions cited by various excess insurers including Landmark formed part of the property program and did not address fact-based arguments against their application. *Id*. at *2 n.7. Even assuming that the exclusions were valid, however, the court concluded that the exclusions, including Landmark's exclusion, "did not clearly and distinctly apply" to the loss. *Id*. at *14 ("The Nation demonstrated through various examples that insurance carriers are aware of the risk of pandemics as a peril, regularly exclude them with clear and distinct language, but that these Defendant Insurers failed to do so here.") This Court should similarly decline to apply Landmark's exclusion.

C. The Court Should Not Apply Landmark's Purported Exclusion Without Giving the Menominee an Opportunity to Conduct Discovery Regarding its Inclusion in the Policy

The Menominee believe this Court should strike the portion of Landmark's motion relating to the purported exclusion it attached to the motion. The Menominee further believe that, if the Court considers the exclusion, the Court should conclude it does not apply to the Menominee's losses. In the event that the Court does consider the exclusion and believes it could apply to the losses at issue, the Menominee also believes it would be premature to grant the motion at this time, before the Menominee has had an opportunity to conduct discovery regarding the inclusion, communication, and interpretation of the exclusion.

If the Court chooses to consider materials outside the pleadings and to convert a motion under Rule 12(b)(6) into a motion for summary judgment, the court must give the parties notice and a reasonable opportunity to supplement the record. *Williams v. Cty. of Alameda*, 26 F. Supp. 3d 925, 935–36 (N.D. Cal. 2014) (citing *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1408 (9th Cir. 1995)). That opportunity might include a motion under Federal Rule of Civil Procedure 56(d) for additional discovery. *See generally Williams*, 26 F. Supp. 3d at 936.[2] If the Court does decide to consider the exclusions, the Menominee respectfully request the opportunity under Rule 56(d) to conduct discovery into the materials presented by Landmark.

Dated this 7th day of May 2021

Respectfully submitted,

ANDRUS ANDERSON LLP

By: */s/ Jennie Lee Anderson*
Jennie Lee Anderson

Attorneys for Plaintiffs and Proposed Class.

[2] *Id.* ("Given the relatively early stage of this litigation, the Court exercises its discretion and declines to convert Defendants' motion to dismiss into a motion for summary judgment. The Court finds that the evidence submitted by Defendants is more appropriately considered after the parties have had an adequate opportunity to fully develop the factual record. Neither party has suggested that the factual record is sufficiently developed such that a motion for summary judgment is appropriate at this stage of the proceedings."); *see also Michael v. La Jolla Learning Inst., Inc.*, No. 17-CV-934 JLS (MDD), 2019 WL 4747658, at *5 (S.D. Cal. Sept. 30, 2019) ("'Converting Defendants' Motion into one for summary judgment would be premature at this point in the case,' in part because '[t]he record discloses [that] no discovery [has been] conducted.'") (quoting *Lacey v. Malandro Commc'n, Inc.*, No. CV-09-01429-PHX-GMS, 2009 WL 4755399, at *4 (D. Ariz. Dec. 8, 2009)).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been served on May 7, 2021 to all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Jennie Lee Anderson, California on May 7, 2021.

/s/ Jennie Lee Anderson
Jennie Lee Anderson