

FILED
CLERK, U.S. DISTRICT COURT
2/26/2021
CENTRAL DISTRICT OF CALIFORNIA
BY: CW DEPUTY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION**

**SUNSTONE HOTEL INVESTORS,
INC.,**

Plaintiff,

v.

**ENDURANCE AMERICAN
SPECIALTY INSURANCE
COMPANY,**

Defendant.

Case No.: SACV 20-02185-CJC (KESx)

**ORDER DENYING DEFENDANT’S
MOTION TO DISMISS [Dkt. 13]**

I. INTRODUCTION

In this case, Plaintiff Sunstone Hotel Investors, Inc. alleges that Defendant Endurance American Specialty Insurance Company wrongfully withheld insurance coverage related to a coronavirus “superspreader” event that took place at a February 2020 conference on one of Plaintiff’s properties, the Marriott Boston Long Wharf, which resulted in more than 20,000 coronavirus cases around the world. (Dkt. 1 [Complaint,

1 hereinafter “Compl.”].) Before the Court is Defendant’s motion to dismiss. (Dkt. 13
 2 [hereinafter “Mot.”].) For the following reasons, the motion is **DENIED**.¹

3 4 **II. BACKGROUND**

5
 6 Plaintiff—a lodging real estate investment trust with 20 hotel properties including
 7 the Marriott Boston Long Wharf—purchased a “Site Environmental Impairment Liability
 8 Coverage” policy (Dkt. 1-1, the “Policy”²) from Defendant for the period of June 22,
 9 2017, to June 22, 2020. (FAC ¶¶ 1–2, 23.) Among other things, the Policy covers
 10 “Business Interruption” (“BI”) losses “that directly result from . . . Biological Agent
 11 Condition(s) . . . on . . . a Scheduled Location” that “result in Cleanup Costs covered
 12 under this Policy.” (*Id.* ¶¶ 26–28.) “Biological Agent Condition(s)” include the presence
 13 of viruses and other pathogens. (*Id.* ¶¶ 32–33.) BI coverage is subject to a \$25 million
 14 liability limit and a 3-day waiting period. (*Id.* ¶ 25.)

15
 16 From February 24 to February 27, 2020, the Marriott Boston Long Wharf (one of
 17 Plaintiff’s properties and a Scheduled Location) hosted an international meeting of
 18 leaders from biotechnology company Biogen, Inc. (*Id.* ¶ 44.) After the Centers for
 19 Disease Control and Prevention notified Plaintiff on March 4, 2020 that three attendees
 20 tested positive for coronavirus, the hotel closed as of March 12, 2020, and remained
 21 closed for months. (*Id.* ¶¶ 44, 47.)

22
 23
 24
 25 ¹ Having read and considered the papers presented by the parties, the Court finds this matter appropriate
 26 for disposition without a hearing. *See* Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set
 27 for March 8, 2020, at 1:30 p.m. is hereby vacated and off calendar.

28 ² Plaintiff attaches a copy of the Policy, which forms the basis of its claim, to its Complaint.
 Accordingly, under the doctrine of incorporation, the Court may consider the language contained in the
 Policy in resolving this motion. *See United States v. Ritchie*, 342 F.3d 903, 907–08 (9th Cir. 2003).

1 On March 6, 2020, Plaintiff asked Defendant to cover losses it sustained due to the
2 closure. (*Id.* ¶ 43.) In a letter dated May 11, 2020, Defendant refused. It stated that
3 Plaintiff’s BI claim was subject to a \$100,000 self-insured retention (“SIR”). (*Id.* ¶ 46.)
4 Plaintiff wrote Defendant a letter on June 17, 2020, explaining why it believed Defendant
5 was wrong. (*Id.* ¶ 48.) In response, on July 17, 2020, Defendant asked Plaintiff to
6 complete a new questionnaire seeking what Plaintiff alleges was redundant and irrelevant
7 information. (*Id.* ¶¶ 4, 48–49.) Plaintiff believes that Defendant did not investigate
8 Plaintiff’s individual claim, but rather provided a more general, omnibus rejection. (*See*
9 *id.* ¶¶ 5, 45, 48–51.) In October 2020, Defendant again denied Plaintiff’s claim,
10 reiterating its position regarding the SIR. (*Id.* ¶¶ 4, 50.) In November 2020, Plaintiff
11 filed this case, asserting claims for (1) breach of contract, (2) anticipatory breach of
12 contract, (3) breach of the implied covenant of good faith and fair dealing, and
13 (4) declaratory relief. (*Id.* ¶¶ 55–76.)

14 15 **III. LEGAL STANDARD**

16
17 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal
18 sufficiency of the claims asserted in the complaint. The issue on a motion to dismiss for
19 failure to state a claim is not whether the claimant will ultimately prevail, but whether the
20 claimant is entitled to offer evidence to support the claims asserted. *Gilligan v. Jamco*
21 *Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). Rule 12(b)(6) is read in conjunction with
22 Rule 8(a), which requires only a short and plain statement of the claim showing that the
23 pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). When evaluating a Rule 12(b)(6)
24 motion, the district court must accept all material allegations in the complaint as true and
25 construe them in the light most favorable to the non-moving party. *Moyo v. Gomez*,
26 32 F.3d 1382, 1384 (9th Cir. 1994). Dismissal of a complaint for failure to state a claim
27 is not proper where a plaintiff has alleged “enough facts to state a claim to relief that is
28

1 plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see Ashcroft*
2 *v. Iqbal*, 556 U.S. 662, 678 (2009).

3
4 The interpretation of an insurance contract is a question of law for the courts. *See*
5 *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 18 (1995). “When interpreting a policy
6 provision, [courts] must give terms their ordinary and popular usage, unless used by the
7 parties in a technical sense or a special meaning is given to them by usage.” *Palmer v.*
8 *Truck Ins. Exch.*, 21 Cal. 4th 1109, 1115 (1999) (citation and quotation marks omitted).
9 Additionally, “[t]he terms in an insurance policy must be read in context and in reference
10 to the policy as a whole, with each clause helping to interpret the other.” *Sony Comput.*
11 *Ent. Am. Inc. v. Am. Home Assurance Co.*, 532 F.3d 1007, 1012 (9th Cir. 2008).

12
13 **IV. DISCUSSION**

14
15 Plaintiff seeks BI losses under the Policy’s Coverage D.1.,³ which states:

16 **D. COVERAGE D – BUSINESS INTERRUPTION AND EXTRA EXPENSE**
17 The Company shall pay, up to the Limits of Liability as specified in the Declarations and after the
18 **Waiting Period**, the **Insured’s Business Interruption Losses and Extra Expenses** during the
Interruption Period that directly result from **Pollution Condition(s)** or **Biological Agent**
Condition(s):
19 1. On or under a **Scheduled Location**, provided that:
20 a. Such **Pollution Condition(s)** or **Biological Agent Condition(s)** result in **Cleanup Costs**
covered under this Policy; and
21 b. The **Pollution Condition(s)** or **Biological Agent Condition(s)** were first **Discovered**
and reported to the Company during the **Policy Period** or the **Automatic Extended**
22 **Reporting Period** or the **Optional Extended Reporting Period**, if any; or

23 In relevant part, Coverage D states that Defendant shall pay BI losses that directly result
24 from Biological Agent Condition(s) that “result in Cleanup Costs covered under this

25
26 ³ Plaintiff confirmed in its opposition that it does not allege entitlement to relief under “Coverage C –
27 Biological Agent Condition(s),” or under Coverage D.2., regarding Biological Agent Condition(s) that
28 occur within 5 miles of a Scheduled Location. (Dkt. 19 [Opposition, hereinafter “Opp.”] at 1, 3–4, 7–8.)
The Court therefore does not address Defendant’s arguments regarding why Plaintiff is not entitled to
coverage under those sections of the Policy.

1 Policy.” (Policy at 2, § D.1.) The parties dispute the meaning of the modifier “covered
 2 under this Policy.” Defendant argues that “Cleanup Costs covered under this Policy”
 3 include only those Cleanup Costs that exceed the \$100,000 SIR. (Mot. at 9–12.) To
 4 support its argument that Cleanup Costs must exceed the SIR to be covered, Defendant
 5 relies on the coverage grant in Coverage C, under which Plaintiff does not seek coverage:

6 **C. COVERAGE C – BIOLOGICAL AGENT CONDITION(S)**

7 The Company shall pay, up to the Limits of Liability and in excess of the Self-Insured Retention
 8 as specified in the Declarations, on behalf of the **Insured** for:

- 9 1. **Cleanup Costs of the Insured;**
 10 2. **Liabilities for Property Damage** to property of a **Third Party** and **Cleanup Costs** of such
 11 **Third Party;**
 12 3. **Liabilities for Bodily injury** to a **Third Party;** and
 13 4. **Defense Expenses;**

14 resulting from **Biological Agent Condition(s)**: (a) at, upon or within a **Scheduled Location**
 15 which commenced on or after the applicable **Retroactive Date**, if any, and before the **Policy**
 16 terminates, and (b) first **Discovered** and reported to the Company during the **Policy Period**, the
 17 Automatic Extended Reporting Period or the Optional Extended Reporting Period, if any.

18 (*Id.*) Defendant highlights that Coverage C states that the Company will only pay
 19 Cleanup Costs in excess of the SIR. Since Plaintiff has not incurred Cleanup Costs in
 20 excess of that amount (Opp. at 4), Defendant argues that Plaintiff’s claim for BI losses
 21 must be dismissed.

22 Plaintiff, on the other hand, argues that the phrase “covered under this Policy”
 23 means only “fitting within the Policy’s definition of Cleanup Costs.” (Opp. at 4–7.) The
 24 Policy defines Cleanup Costs as “the reasonable and necessary costs incurred in
 25 performing Corrective Actions and/or Restorative Actions at, upon, within, under or
 26 migrating from a Scheduled Location,” without regard to the SIR. (Policy at 18 ¶ 10.)
 27 Plaintiff argues that Coverage C’s SIR is not a factor in determining what Cleanup Costs
 28 are “covered under this Policy” under Coverage D, and that Plaintiff need not have
 incurred \$100,000 in Cleanup Costs to obtain Coverage D coverage. (Opp. at 4–7.)

Though “insurance contracts have special features, they are still contracts to which
 the ordinary rules of contractual interpretation apply.” *Bank of the W. v. Superior Court*,

1 2 Cal. 4th 1254, 1264 (1992). Accordingly, “[c]lear, explicit, and unambiguous
 2 contractual language governs.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d
 3 1025, 1031 (9th Cir. 2008) (citing *Boghos v. Certain Underwriters at Lloyd’s of London*,
 4 36 Cal. 4th 495, 501 (2005) and Cal. Civ. Code § 1638). Defendant’s argument rests on
 5 incorporating Coverage C’s \$100,000 SIR into Coverage D. But the Policy does not
 6 make it clear, explicit, and unambiguous that Coverage C’s SIR applies to Coverage D.
 7 Nowhere in Section D does it say that an insured must incur \$100,000 in Cleanup Costs
 8 to trigger Coverage D coverage. Instead, to find the limitation Defendant seeks to
 9 impose, one must look in a whole other coverage section—one under which Plaintiff does
 10 not seek coverage.

11
 12 What is more, there are express indications that Coverage C’s SIR does *not* apply
 13 to Coverage D, and that only a 3-day waiting period applies instead:

Item 7. Coverage Schedule:	Purchased	Limit of Liability*	Self Insured Retention / Waiting Period**	Retroactive Date
Coverage Section Insuring Agreements				
A. Coverage A - Pollution Condition(s):	Yes	\$25,000,000	\$100,000	N/A
B. Coverage B - Nonowned Disposal Sites:	Yes	\$25,000,000	\$100,000	N/A
C. Coverage C - Biological Agent Condition(s):	Yes	\$25,000,000	\$100,000	N/A
D. Coverage D - Business Interruption and Extra Expense:	Yes	\$25,000,000	3 days	N/A

14
 15
 16
 17
 18 (Policy, Declarations Item 7.)

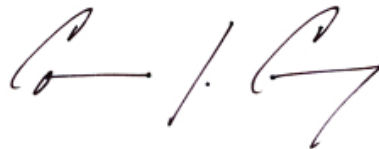
19
 20
 21
 22
 23
 24
 25 The meaning and function of the “covered under this Policy” language, and
 26 precisely what circumstances trigger coverage under Coverage D, is therefore at best
 27 ambiguous. In the event of an ambiguity, the court “must interpret contractual terms to
 28 protect the objectively reasonable expectations of the insured.” *Id.*; see *Rallod Transp.*

1 *Co. v. Cont'l Ins. Co.*, 727 F.2d 851, 853 (9th Cir. 1984) (“When interpreting an
2 insurance policy, the intent of the parties and the reasonable expectations of the insured
3 are considered.”). Coverage D contains strong language indicating that BI losses that
4 directly result from viruses on Scheduled Locations will be covered. It seems to the
5 Court that it would be a very rare situation where losses caused by a virus like the
6 coronavirus resulted in Cleanup Costs over \$100,000. If Defendant wished to make
7 coverage for BI losses contingent on significant Cleanup Costs, it should have done so
8 clearly and unambiguously. It did not. Put another way, the Policy gave Plaintiff
9 reasonable expectations that BI losses would be covered even if, as in the usual case, they
10 did not result in significant Cleanup Costs.

11
12 **V. CONCLUSION**

13
14 For the foregoing reasons, Defendant’s motion to dismiss is **DENIED**. Defendant
15 is **ORDERED** to file an Answer by **March 12, 2021**.

16
17 DATED: February 26, 2021



18
19 _____
20 HON. CORMAC J. CARNEY

21 UNITED STATES DISTRICT JUDGE
22
23
24
25
26
27
28