

1 Qianwei Fu (SBN 242669)
2 **ZELLE LLP**
3 555 12th Street, Suite 1230
4 Oakland, CA 94607
5 Telephone: (415) 693-0700
6 Facsimile: (415) 693-0770
7 qfu@zelle.com

8 Shannon O’Malley (*pro hac vice*)
9 Kristin C. Cummings (*pro hac vice*)
10 **ZELLE LLP**
11 901 Main Street, Suite 4000
12 Dallas, TX 75202
13 Telephone: (214) 742-3000
14 Facsimile: (214) 760-8994
15 somalley@zelle.com
16 kcummings@zelle.com

17 *Attorneys for Defendant Liberty Mutual Fire Insurance
18 Company*

19 **UNITED STATES DISTRICT COURT**
20 **NORTHERN DISTRICT OF CALIFORNIA**
21 **SAN FRANCISCO DIVISION**

22 MENOMINEE INDIAN TRIBE OF
23 WISCONSIN, MENOMINEE INDIAN
24 GAMING AUTHORITY d/b/a MENOMINEE
25 CASINO RESORT, and WOLF RIVER
26 DEVELOPMENT COMPANY, individually
27 and on behalf of all others similarly situated,

28 Plaintiffs,

v.

- 29 (1) LEXINGTON INSURANCE
30 COMPANY;
- 31 (2) UNDERWRITERS AT LLOYD’S –
32 SYNDICATES: ASC 1414, XLC 2003,
33 TAL 1183, MSP 318, ATL1861, KLN
34 510, AGR 3268;
- 35 (3) UNDERWRITERS AT LLOYD’S –
36 SYNDICATE: CNP 4444;
- 37 (4) UNDERWRITERS AT LLOYD’S –
38 ASPEN SPECIALTY INSURANCE
39 COMPANY;
- 40 (5) UNDERWRITERS AT LLOYD’S –
41 SYNDICATES: KLN 0510, ATL 1861,
42 ASC 1414, QBE 1886, MSP 0318, APL
43 1969, CHN 2015;
- 44 (6) UNDERWRITERS AT LLOYD’S –
45 SYNDICATE: BRT 2987;

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

**DEFENDANT LIBERTY MUTUAL FIRE
INSURANCE COMPANY’S NOTICE OF
MOTION AND MOTION TO DISMISS;
JOINER IN DEFENDANT LEXINGTON
INSURANCE COMPANY’S MOTION TO
DISMISS THE AMENDED CLASS ACTION
COMPLAINT**

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

- 1 (7) UNDERWRITERS AT LLOYD’S –
2 SYNDICATES: KLN 0510, TMK 1880,
3 BRT 2987, BRT 2988, CNP 4444, ATL
4 1861, NEON WORLDWIDE
5 PROPERTY CONSORTIUM, AUW
6 0609, TAL 1183, AUL 1274;
- 7 (8) HOMELAND INSURANCE
8 COMPANY OF NEW YORK;
- 9 (9) HALLMARK SPECIALTY
10 INSURANCE COMPANY;
- 11 (10) ENDURANCE WORLDWIDE
12 INSURANCE LTD T/AS SOMPO
13 INTERNATIONAL;
- 14 (11) ARCH SPECIALTY INSURANCE
15 COMPANY;
- 16 (12) EVANSTON INSURANCE COMPANY;
- 17 (13) ALLIED WORLD NATIONAL
18 ASSURANCE COMPANY;
- 19 (14) LIBERTY MUTUAL FIRE
20 INSURANCE COMPANY;
- 21 (15) LANDMARK AMERICAN
22 INSURANCE COMPANY;
- 23 (16) XL CATLIN INSURANCE COMPANY
24 UK LTD; and
- 25 (17) SRU DOE INSURERS 1-20,

26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52
53
54
55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100
101
102
103
104
105
106
107
108
109
110
111
112
113
114
115
116
117
118
119
120
121
122
123
124
125
126
127
128
129
130
131
132
133
134
135
136
137
138
139
140
141
142
143
144
145
146
147
148
149
150
151
152
153
154
155
156
157
158
159
160
161
162
163
164
165
166
167
168
169
170
171
172
173
174
175
176
177
178
179
180
181
182
183
184
185
186
187
188
189
190
191
192
193
194
195
196
197
198
199
200
201
202
203
204
205
206
207
208
209
210
211
212
213
214
215
216
217
218
219
220
221
222
223
224
225
226
227
228
229
230
231
232
233
234
235
236
237
238
239
240
241
242
243
244
245
246
247
248
249
250
251
252
253
254
255
256
257
258
259
260
261
262
263
264
265
266
267
268
269
270
271
272
273
274
275
276
277
278
279
280
281
282
283
284
285
286
287
288
289
290
291
292
293
294
295
296
297
298
299
300
301
302
303
304
305
306
307
308
309
310
311
312
313
314
315
316
317
318
319
320
321
322
323
324
325
326
327
328
329
330
331
332
333
334
335
336
337
338
339
340
341
342
343
344
345
346
347
348
349
350
351
352
353
354
355
356
357
358
359
360
361
362
363
364
365
366
367
368
369
370
371
372
373
374
375
376
377
378
379
380
381
382
383
384
385
386
387
388
389
390
391
392
393
394
395
396
397
398
399
400
401
402
403
404
405
406
407
408
409
410
411
412
413
414
415
416
417
418
419
420
421
422
423
424
425
426
427
428
429
430
431
432
433
434
435
436
437
438
439
440
441
442
443
444
445
446
447
448
449
450
451
452
453
454
455
456
457
458
459
460
461
462
463
464
465
466
467
468
469
470
471
472
473
474
475
476
477
478
479
480
481
482
483
484
485
486
487
488
489
490
491
492
493
494
495
496
497
498
499
500

Defendants.

TABLE OF CONTENTS

I. INTRODUCTION2

II. THE LIBERTY POLICY.....2

III. LEGAL STANDARD.....3

IV. ARGUMENT4

 A. Liberty’s Virus Exclusion Bars Plaintiffs’ Claims.....4

 B. Liberty’s Loss of Use Exclusion Precludes Coverage11

V. CONCLUSION12

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Cases

1
2
3 *7th Inning Stretch LLC v. Arch Ins. Co.*,
4 No. CV208161SDWLDW, 2021 WL 800595 (D.N.J. Jan. 19, 2021).....10
5 *10E, LLC v. Travelers Indem. Co. of Connecticut*,
6 No. 2:20-CV-04418-SVW-AS, 2020 WL 6749361 (C.D. Cal. Nov. 13, 2020).....3, 7
7 *1210 McGavock Street Hospitality Partners, LLC v. Admiral Indem. Co.*,
8 No. 3:20-cv-694, 2020 WL 7641184 (M.D. Tenn. Dec. 23, 2020)11
9 *1325 North Van Buren, LLC v. T-3 Group, Ltd.*,
10 716 N.W.2d 822 (Wis. 2016).....6
11 *AFM Mattress Co., LLC, v. Motorists Commercial Mutual Ins. Co.*,
12 No. 20 CV 3556, 2020 WL 6940984 (N.D. Ill. Nov. 25, 2020)9
13 *Ashcroft v. Iqbal*,
14 556 U.S. 662 (2009).....3, 4
15 *ATCM Optical, Inc. v. Twin City Fire Ins. Co.*,
16 No. 20-4238, 2021 WL 131282 (E.D. Pa. Jan. 14, 2021).....11
17 *BA LAX, LLC v. Hartford Fire Ins. Co.*,
18 No. 220CV06344SVWJPR, 2021 WL 144248 (C.D. Cal. Jan. 12, 2021).....9
19 *Ballas Nails & Spa, LLC v. Travelers Cas. Ins. Co. of Am.*,
20 No. 4:20 CV 1155 CDP, 2021 WL 37984 (E.D. Mo. Jan. 5, 2021)10
21 *Bell Atlantic Corp. v. Twombly*,
22 550 U.S. 544 (2007).....3
23 *Benamax Ice, LLC v. Merchant Mut. Ins. Co.*,
24 No. CV 20-8069, 2021 WL 1171633 (D.N.J. Mar. 29, 2021)10
25 *Body Physics v. Nationwide Ins.*,
26 No. CV 20-9231 (RMB/AMD), 2021 WL 912815 (D.N.J. Mar. 10, 2021)10
27 *Border Chicken AZ LLC v. Nationwide Mut. Ins. Co.*,
28 No. CV-20-00785-PHX-JJT, 2020 WL 6827742 (D. Ariz. Nov. 20, 2020).....9
Boulevard Carroll Entm't Grp., Inc. v. Fireman's Fund Ins. Co.,
No. 20-11771 (SDW) (LDW), 2020 WL 7338081 (D.N.J. Dec. 14, 2020).....10
Boxed Foods Co., LLC v. California Capital Ins. Co.,
No. 20-CV-04571-CRB, 2020 WL 6271021 (N.D. Cal. Oct. 26, 2020),
as amended (Oct. 27, 2020)9
Brian Handel D.M.D., P.C. v. Allstate Ins. Co.,
No. CV 20-3198, 2020 WL 6545893 (E.D. Pa. Nov. 6, 2020).....10
Brunswick Panini's, LLC v. Zurich Am. Ins. Co.,
No. 1:20CV1895, 2021 WL 663675 (N.D. Ohio Feb. 19, 2021)10

1 *Carpe Diem Spa, Inc. v. Travelers Cas. Ins. Co. of Am.*,
 No. CV 20-14860, 2021 WL 1153171 (D.N.J. Mar. 26, 2021)10

2

3 *Causeway Auto., LLC v. Zurich Am. Ins. Co.*,
 No. 20-8393 (FLW) (DEA), 2021 WL 486917 (D.N.J. Feb. 10, 2021)10

4 *Ceres Enters., LLC v. Travelers Ins. Co.*,
 No. 1:20-CV-1925, 2021 WL 634982 (N.D. Ohio Feb. 18, 2021).....10

5

6 *Chattanooga Prof'l Baseball LLC v. Nat'l Cas. Co.*,
 No. CV-20-01312-PHX-DLR, 2020 WL 6699480 (D. Ariz. Nov. 13, 2020)7, 8

7 *Chester C. Chianese DDS, LLC v. Travelers Cas. Ins. Co. of Am.*,
 No. 20-5702 (MAS) (ZNQ), 2021 WL 1175344 (D.N.J. Mar. 27, 2021)10

8

9 *Cibus LLC v. Cap. Ins. Grp.*,
 No. CV-20-00277-TUC-JGZ (DTF), 2021 WL 1100376 (D. Ariz. Mar. 23, 2021)9

10 *Circus Circus LV, LP v. AIG Specialty Ins. Co.*,
 No. 220CV01240JADNJK, 2021 WL 769660 (D. Nev. Feb. 26, 2021)10

11

12 *Colby Rest. Grp., Inc. v. Utica Nat'l Ins. Grp.*,
 No. CV 20-5927 (RMB/KMW), 2021 WL 1137994 (D.N.J. Mar. 12, 2021)10

13 *Colgan v. Sentinel Ins. Co., Ltd.*,
 No. 20-CV-04780-HSG, 2021 WL 472964 (N.D. Cal. Jan. 26, 2021).....9

14

15 *DAB Dental PLLC v. Main St. Am. Prot. Ins. Co.*,
 No. 20-CA-5504, 2020 WL 7137138 (Fla. Cir. Ct. Nov. 10, 2020).....9

16 *Day v. Allstate Indem. Co.*,
 798 N.W.2d 199 (Wis. 2011)4, 6

17

18 *Dezine Six, LLC v. Fitchburg Mutual Ins. Co.*,
 No. 3:20-cv-07964-BRM-DEA, 2021 WL 1138146 (D.N.J. Mar. 25, 2021).....10

19 *Diesel Barbershop, LLC v. State Farm Lloyds*,
 No. 5:20-CV-461-DAE, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020)8

20

21 *Digital Age Mktg. Grp., Inc. v. Sentinel Ins. Co. Ltd.*,
 No. 20-61577-CIV, 2021 WL 80535 (S.D. Fla. Jan. 8, 2021).....9

22 *Dime Fitness, LLC v. Markel Ins. Co.*,
 No. 20-CA-5467, 2020 WL 6691467 (Fla. Cir. Ct. Nov. 10, 2020).....9

23

24 *Downs Ford, Inc. v. Zurich Am. Ins. Co.*,
 No. 3:20-cv-08595-BRM-ZNQ, 2021 WL 1138141 (D.N.J. Mar. 25, 2021).....10

25 *Dye Salon, LLC v. Chubb Indem. Ins. Co.*,
 No. 20-CV-11801, 2021 WL 493288 (E.D. Mich. Feb. 10, 2021).....10

26

27 *Edison Kennedy, LLC v. Scottsdale Ins. Co.*,
 No. 8:20-cv-1416-T-02SPF, 2021 WL 22314 (M.D. Fla. Jan. 4, 2021).....9

28

1 *Equity Plan. Corp. v. Westfield Ins. Co.*,
 No. 1:20-CV-01204, 2021 WL 766802 (N.D. Ohio Feb. 26, 2021).....10

2

3 *Eric R. Shantzer, DDS v. Travelers Cas. Ins. Co. of Am.*,
 No. CV 20-2093, 2021 WL 1209845 (E.D. Pa. Mar. 31, 2021).....11

4 *Eye Specialists of Delaware v. Harleysville Worchester Ins. Co.*,
 No. 20 CV 6386, 2021 WL 506270 (Ohio Com.Pl. Feb. 01, 2021)10

5

6 *Family Tacos, LLC v. Auto Owners Ins. Co.*,
 No. 5:20-CV-01922, 2021 WL 615307 (N.D. Ohio Feb. 17, 2021).....10

7 *Firenze Ventures, LLC v. Twin City Fire Ins. Co.*,
 No. 20 C 4226, 2021 WL 1208991 (N.D. Ill. Mar. 31, 2021)10

8

9 *Founder Inst. Inc. v. Hartford Fire Ins. Co.*,
 No. 20-CV-04466-VC, 2020 WL 6268539 (N.D. Cal. Oct. 22, 2020).....9

10 *Frank Van’s Auto Tag, LLC v. Selective Ins. Co.*,
 No. CV 20-2740, 2021 WL 289547 (E.D. Pa. Jan. 28, 2021)11

11

12 *Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.*,
 No. 20-cv-04434-JSC, 2020 WL 7342687 (N.D. Cal. Dec. 14, 2020).....9

13 *Fuel Recharge Yourself, Inc. v. Amco Ins. Co.*,
 No. CV 20-4477, 2021 WL 510170 (E.D. Pa. Feb. 11, 2021).....11

14

15 *Garmany of Red Bank, Inc. v. Harleysville Ins. Co.*,
 No. 20-8676 (FLW) (DEA), 2021 WL 1040490 (D.N.J. Mar. 18, 2021).....10

16 *Gerleman Management, Inc. v. Atlantic States Ins. Co.*,
 No. 4:20-cv-183-JAJ, 2020 WL 8093577 (S.D. Iowa Dec. 11, 2020)9

17

18 *Goodwill Indus. of Cent. Oklahoma, Inc. v. Philadelphia Indem. Ins. Co.*,
 No. CV-20-511-R, 2020 WL 8004271 (W.D. Okla. Nov. 9, 2020)10

19 *Harvest Moon Distributors, LLC v. S.-Owners Ins. Co.*,
 No. 620CV1026ORL40DCI, 2020 WL 6018918 (M.D. Fla. Oct. 9, 2020)12

20

21 *HealthNOW Med. Ctr., Inc. v. State Farm Gen. Ins. Co.*,
 No. 20-cv-04340-HSG, 2020 WL 7260055 (N.D. Cal. Dec. 10, 2020)9

22 *In the Park Savoy Caterers LLC v. Selective Ins. Grp., Inc.*,
 No. CV 20-6869, 2021 WL 1138020 (D.N.J. Feb. 25, 2021).....10

23

24 *Isaac’s at Spring Ridge, LLP v. MMG Ins. Co.*,
 No. CI-20-03613 (Lancaster Cnty., Pa. Ct. Common Pleas Mar. 2, 2021)10

25 *J&H Lanmark, Inc. v. Twin City Fire Ins. Co.*,
 No. CV 5:20-333-DCR, 2021 WL 922057 (E.D. Ky. Mar. 10, 2021)10

26

27 *J.B. Variety Inc. v. Axis Ins. Co.*,
 No. CV 20-4571, 2021 WL 1174917 (E.D. Pa. Mar. 29, 2021).....11

28

1 *Karen Trinh, DDS, Inc. v. State Farm Gen. Ins. Co.*,
 No. 5:20-cv-04265-BLF, 2020 WL 7696080 (N.D. Cal. Dec. 28, 2020).....7

2

3 *Kessler Dental Assocs., P.C. v. Dentists Ins. Co.*,
 No. 2:20-CV-03376-JDW, 2020 WL 7181057 (E.D. Pa. Dec. 7, 2020)11

4 *LJ New Haven LLC v. AmGUARD Ins. Co.*,
 No. 3:20-cv-00751 (MPS), 2020 WL 7495622 (D. Conn. Dec. 21, 2020).....9

5

6 *Long Affair Carpet & Rug, Inc. v. Liberty Mut. Ins. Co.*,
 No. SACV2001713CJCJDEX, 2020 WL 6865774 (C.D. Cal. Nov. 12, 2020).....9

7 *MAC Property Group LLC v. Selective Fire and Cas. Ins. Co.*,
 No. L-2629-20, 2020 WL 7422374 (N.J. Super. Ct. App. Div. Nov. 05, 2020)10

8

9 *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Connecticut*,
 No. 2:20-CV-04423-AB-SK, 2020 WL 5938689 (C.D. Cal. Oct. 2, 2020)9

10 *Mashallah, Inc. v. W. Bend Mut. Ins. Co.*,
 No. 20 C 5472, 2021 WL 679227 (N.D. Ill. Feb. 22, 2021).....9

11

12 *Mattdogg, Inc. v. Philadelphia Indem. Specialty Ins. Co.*,
 No. L-820-20 (N.J. Super. Ct. App. Div. Nov. 17, 2020).....8

13 *Mauricio Martinez, DMD, P.A. v. Allied Ins. Co. of Am.*,
 No. 220CV00401FTM66NPM, 2020 WL 5240218 (M.D. Fla. Sept. 2, 2020).....8

14

15 *Mayssami Diamond, Inc. v. Travelers Casualty Ins. Co. of Am.*,
 No. 3:20-cv-01230-AJB-RBB, 2021 WL 1226447 (S.D. Cal. Mar. 30, 2021)7

16 *Mena Catering, Inc. v. Scottsdale Ins. Co.*,
 No. 1:20-cv-23661, 2021 WL 86777 (S.D. Fla. Jan. 11, 2021).....9

17

18 *MHG Hotels, LLC v. Emcasco Ins. Co.*,
 No. 1:20-cv-01620-RLY-TAB (S.D. Ind. Mar. 8, 2021).....9

19 *Michael J. Redenburg, Esq. PC v. Midvale Indem. Co.*,
 No. 20 CIV. 5818 (PAE), 2021 WL 276655 (S.D.N.Y. Jan. 27, 2021).....10

20

21 *MIKMAR, Inc. v. Westfield Ins. Co.*,
 No. 1:20-CV-01313, 2021 WL 615304 (N.D. Ohio Feb. 17, 2021).....10

22 *Moody v. Hartford Fin. Servs. Group, Inc.*,
 No. 20-2856, 2021 WL 135897 (E.D. Pa. Jan. 14, 2021).....11

23

24 *Mortar & Pestle Corp. v. Atain Specialty Ins. Co.*,
 No. 20-cv-03461-MMC, 2020 WL 7495180 (N.D. Cal. Dec. 21, 2020).....9

25 *Mosley v. Pac. Specialty Ins. Co.*,
 49 Cal. App. 5th 417 (2020)7

26

27 *Moss v. U.S. Secret Serv.*,
 572 F.3d 962 (9th Cir. 2009).....4

28

1 *N&S Rest. LLC v. Cumberland Mut. Fire Ins. Co.*,
 No. CV2005289RBKKMW, 2020 WL 6501722 (D.N.J. Nov. 5, 2020).....10

2

3 *Nail Nook, Inc. v. Hiscox Ins. Co., Inc.*,
 No. CV-20-933244 (Cuyahoga Cnty., Ohio Ct. Common Pleas Feb. 24, 2021).....10

4 *Nat'l Coatings & Supply, Inc. v. Valley Forge Ins. Co.*,
 No. 5:20-CV-00275-M, 2021 WL 1009305 (E.D.N.C. Mar. 16, 2021)10

5

6 *Natty Greene’s Brewing Co., LLC, v. Travelers Cas. Ins. Co. of Am.*,
 No. 1:20-CV-437, 2020 WL 7024882 (M.D.N.C. Nov. 30, 2020).....10

7 *Newchops Rest. Comcast LLC v. Admiral Indem. Co.*,
 No. CV 20-1869, 2020 WL 7395153 (E.D. Pa. Dec. 17, 2020)8

8

9 *Palmdale Estates, Inc. v. Blackboard Ins. Co.*,
 No. 20-cv-06158-LB, 2021 WL 25048 (N.D. Cal. Jan. 4, 2021)9

10 *Palmer Holdings and Inv., Inc., v. Integrity Ins. Co.*,
 No. 4:20-CV-154-JAJ, 2020 WL 7258857 (S.D. Iowa Dec. 7, 2020).....9

11

12 *Pane Rustica, Inc. v. Greenwich Ins. Co.*,
 No. 8:20-CV-1783-KKM-AAS, 2021 WL 1087219 (M.D. Fla. Mar. 22, 2021)9

13 *Part Two LLC v. Owners Ins. Co.*,
 No. 7:20-cv-01047-LSC, 2021 WL 135319 (N.D. Ala. Jan. 14, 2021).....9

14

15 *Paul Glat MD, P.C. v. Nationwide Mut. Ins. Co.*,
 No. CV 20-5271, 2021 WL 1210000 (E.D. Pa. Mar. 31, 2021)11

16 *Pez Seafood DTLA, LLC v. Travelers Indem. Co.*,
 No. CV204699DMGGJSX, 2021 WL 234355 (C.D. Cal. Jan. 20, 2021)9

17

18 *Phan v. Nationwide Gen. Ins. Co.*,
 No. CV207616MWFJPRX, 2021 WL 609845 (C.D. Cal. Feb. 1, 2021)9

19 *Phillips v. Parmelee*,
 840 N.W.2d 713 (2013)4

20

21 *Protege Rest. Partners LLC v. Sentinel Ins. Co., Ltd.*,
 No. 20-CV-03674-BLF, 2021 WL 428653 (N.D. Cal. Feb. 8, 2021).....9

22 *Pure Fitness LLC v. Twin City Fire Ins. Co.*,
 No. 2:20-CV-775-RDP, 2021 WL 512242 (N.D. Ala. Feb. 11, 2021).....9

23

24 *Quakerbridge Early Learning LLC v. Selective Ins. Co. of New England*,
 No. 20-7798 (MAS) (LHG), 2021 WL 1214758 (D.N.J. Mar. 31, 2021)10

25 *Raymond H Nahmad DDS PA v. Hartford Cas. Ins. Co.*,
 No. 1:20-CV-22833, 2020 WL 6392841 (S.D. Fla. Nov. 2, 2020)9

26

27 *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*,
 No. 2:20-CV-00087-KS-MTP, 2020 WL 6503405 (S.D. Miss. Nov. 4, 2020).....8

28

1 *Riverwalk Seafood Grill Inc. v. Travelers Cas. Ins. Co. of Am.*,
 No. 20 C 3768, 2021 WL 81659 (N.D. Ill. Jan. 7, 2021).....9

2

3 *Robert W. Fountain, Inc., v. Citizens Ins. Co. of Am.*,
 No. 20-CV-05441-CRB, 2020 WL 7247207 (N.D. Cal. Dec. 9, 2020).....9

4 *Roundin3rd Sports Bar LLC v. Hartford*,
 No. 220CV05159SVWPLA, 2021 WL 647379 (C.D. Cal. Jan. 14, 2021)9

5

6 *Santo's Italian Cafe LLC v. Acuity Ins. Co.*,
 No. 1:20-cv-01192, 2020 WL 7490095 (N.D. Ohio Dec. 21, 2020)10

7 *Seifert v. IMT Ins. Co.*,
 No. CV 20-1102 (JRT/DTS), 2020 WL 6120002 (D. Minn. Oct. 16, 2020).....10

8

9 *Selane Products, Inc. v. Continental Cas. Co.*,
 No. 220CV07834MCSAFM, 2020 WL 7253378 (C.D. Cal. Nov. 24, 2020)12

10 *Siren Salon, Inc. v. Liberty Mut. Ins. Co.*,
 No. 20 C 3108 (N.D. Ill. Mar. 22, 2021)10

11

12 *Sky Flowers, Inc. v. Hiscox Ins. Co., Inc.*,
 No. 2;20-cv-05411-ODW (MAAx), 2021 WL 1164473 (C.D. Cal. Mar. 26, 2021).....9

13 *Stanford Dental, PLLC v. Hanover Ins. Grp., Inc.*,
 No. 20-CV-11384, 2021 WL 493322 (E.D. Mich. Feb. 10, 2021).....10

14

15 *Sultan Hajer, v. Ohio Sec. Ins. Co.*,
 No. 6:20-CV-00283, 2020 WL 7211636 (E.D. Tex. Dec. 7, 2020).....11

16 *TAQ Willow Grove, LLC v. Twin City Fire Ins.*,
 No. 20-3863, 2021 WL 131555 (E.D. Pa. Jan. 14, 2021).....11

17

18 *The Eye Care Ctr. of New Jersey, PA v. Twin City Fire Ins. Co.*,
 No. CV2005743KMESK, 2021 WL 457890 (D.N.J. Feb. 8, 2021).....10

19 *Toppers Salon & Health Spa, Inc. v. Travelers Prop. Cas. Co. of Am.*,
 No. 2:20-CV-03342-JDW, 2020 WL 7024287 (E.D. Pa. Nov. 30, 2020).....10, 11

20

21 *Travelers Cas. Ins. Co. of Am. v. Geragos & Geragos*,
 No. CV 20-3619 PSG (EX), 2020 WL 6156584 (C.D. Cal. Oct. 19, 2020).....9

22 *Turek Enters., Inc. v. State Farm Mut. Auto. Ins. Co.*,
 No. 20-11655, 2020 WL 5258484 (E.D. Mich. Sept. 3, 2020).....10

23

24 *Turner v. City & Cty. of San Francisco*,
 788 F.3d 1206 (9th Cir. 2015).....3

25 *Ultimate Hearing Solutions, LLC v. Twin City Fire Ins. Co.*,
 No. 20-2401, 2021 WL 131556 (E.D. Pa. Jan. 14, 2021).....11

26

27 *Valley Plumbing Supply, Inc. v. Merchants Mut. Ins. Co.*,
 No. 1:20-cv-08257-NLH-KMW, 2021 WL 567994 (D.N.J. Feb. 16, 2021).....10

28

1 *Vizza Wash, LP v. Nationwide Mut. Ins. Co.*,
 No. 5:20-CV-00680-OLG, 2020 WL 6578417 (W.D. Tex. Oct. 26, 2020)11

2

3 *W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos.*,
 No. 220CV05663VAPDFMX, 2020 WL 6440037 (C.D. Cal. Oct. 27, 2020).....9

4 *Westside Head & Neck v. Hartford Fin. Servs. Grp., Inc.*,
 No. 2:20-cv-06132 JFW (JCx), 2021 WL 1060230 (C.D. Cal. Mar. 19, 2021)9

5

6 *Whiskey Flats Inc. v. Axis Ins. Co.*,
 No. CV 20-3451, 2021 WL 534471 (E.D. Pa. Feb. 12, 2021).....11

7 *Whiskey River on Vintage, Inc., v. Illinois Cas. Co.*,
 No. 4:20-CV-185-JAJ, 2020 WL 7258575 (S.D. Iowa Nov. 30, 2020)9, 12

8

9 *Wilson v. Hartford Cas. Co.*,
 No. CV 20-3384, 2020 WL 5820800 (E.D. Pa. Sept. 30, 2020).....11

10 *Windber Hosp. v. Travelers Prop. Cas. Co. of Am.*,
 No. 3:20-CV-80, 2021 WL 1061849 (W.D. Pa. Mar. 18, 2021)11

11

12 *Zagafen Bala, LLC v. Twin City Fire Ins. Co.*,
 No. 20-3033, 2021 WL 131657 (E.D. Pa. Jan. 14, 2021).....11

13 *Zwillo V, Corp. v. Lexington Ins. Co.*,
 No. 4:20-00339-CV-RK, 2020 WL 7137110 (W.D. Mo. Dec. 2, 2020)10

14

15 Statutes

16 Fed. R. Civ. P. 12(b)(6).....1, 3

17

18

19

20

21

22

23

24

25

26

27

28

1 **NOTICE OF MOTION AND MOTION**

2 TO THE COURT AND TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE that on Wednesday, June 16, 2021, at 2:00 p.m., or as soon thereafter
4 as the matter may be heard, in the courtroom of the Honorable William H. Orrick, United States District
5 Judge, Northern District of California, located at 450 Golden Gate Avenue, San Francisco, CA 94102-
6 3489, in Courtroom 2 on the 17th Floor, or by remote conferencing as directed by the Court, Defendant
7 Liberty Mutual Fire Insurance Company (“Liberty”) will and hereby does move the Court pursuant to
8 Federal Rule of Civil Procedure 12(b)(6) for an Order dismissing the Amended Class Action Complaint
9 brought by Menominee Indian Tribe of Wisconsin, Menominee Indian Gaming Authority d/b/a
10 Menominee Casino Resort, and Wolf River Development Company (collectively, “Plaintiffs”), with
11 prejudice.

12 First, Liberty joins in the arguments set forth in Defendant Lexington Insurance Company’s
13 Motion to Dismiss the Amended Complaint. The arguments stated there are applicable to Liberty.

14 Second, Liberty moves for dismissal of Plaintiffs’ claims because, even if Plaintiffs had alleged
15 direct physical loss or damage to property, Liberty’s Virus Exclusion absolutely bars Plaintiffs’ claims
16 and Liberty’s Loss of Use Exclusion similarly precludes Plaintiffs’ claims.

17 The Motion to Dismiss is based upon this Notice of Motion and Motion, the following
18 Memorandum of Points and Authorities, Defendant Lexington’s Motion to Dismiss and Memorandum
19 of Points and Authorities and the arguments contained therein, the Declaration of Qianwei Fu and
20 attached exhibits, the reply papers filed in support of these motions, oral argument of counsel at the
21 hearing, the files and records in this action, and such other and further evidence or arguments as the
22 Court may allow.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Liberty adopts and incorporates by reference the factual background, arguments, authorities, and exhibits attached thereto, set forth in Lexington’s Motion in their entirety. Specifically, the Menominee Indian Tribe of Wisconsin and two of its commercial entities’ (collectively, “Plaintiffs”) claims and causes of action against Liberty should be dismissed because Plaintiffs have failed to allege the necessary physical loss or damage to property required to trigger coverage under the Liberty Policy.

In addition to the reasons detailed in Lexington’s Motion, Liberty also moves for dismissal of Plaintiffs’ claims and causes of action on additional grounds: Plaintiffs’ losses arising from COVID-19 and related civil authority orders are barred by the Liberty Policy’s Virus Exclusion, which plainly and unambiguously precludes coverage for any loss or damage caused directly or indirectly by virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease, however caused. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. The Virus Exclusion applies whether or not the loss event results in widespread loss or damage or affects a substantial area. Because Plaintiffs fail to otherwise state plausible claims for relief, their claims against Liberty should be dismissed with prejudice.

II. THE LIBERTY POLICY

Liberty issued policy number MQ2-L9L-470467-629 to Plaintiffs for the July 1, 2019 to July 1, 2020 policy period (the “Liberty Policy”). The Liberty Policy contains all of the terms and conditions detailed in Lexington’s Motion to Dismiss. In addition, the Liberty Policy contains two exclusions that apply to preclude the claims sought here: the “Liberty Virus Exclusion” and the “Liberty Loss of Use Exclusion,” which are set out as follows:

E. EXCLUSIONS

1. This policy does not apply to loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread loss or damage or affects a substantial area.

* * *

EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA

This clause modifies the insurance provided under the Excess Property Policy. The following changes apply to the exclusions contained in part 1. of Section E. EXCLUSIONS in the Excess Property Coverage Form:

- A. Under exclusion E.1.k., “Fungus”, Wet Rot, Dry Rot or Bacterial, all references to bacteria are deleted.
- B. The following exclusion is added to Section E.1.:

Virus or Bacteria

The Company will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease, however caused.

* * *

- 2. This policy does not apply to loss or damage caused by or resulting from any of the following:

Declaration of Qianwei Fu in Support of Liberty’s Motion to Dismiss (“Fu Decl.”), Ex. A at 39.

The Liberty Excess Policy also contains an exclusion for loss of use (the “Loss of Use Exclusion”), which states:

E. EXCLUSIONS

* * *

- b. Delay, loss of use or loss of market.

* * *

Fu Decl., Ex. A at 28.

III. LEGAL STANDARD

A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the claims stated in the complaint. *See* Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, the plaintiffs’ complaint “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *10E, LLC v. Travelers Indem. Co. of Connecticut*, No. 2:20-CV-04418-SVW-AS, 2020 WL 6749361, at *1 (C.D. Cal. Nov. 13, 2020) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although “a court must take all allegations of material fact as true and construe them in the light most favorable to the nonmoving party,” *Turner v. City & Cty. of San Francisco*, 788 F.3d 1206, 1210 (9th Cir. 2015), a complaint’s factual allegations must “raise a right to relief above the speculative level,” *Twombly*, 550 U.S. at 555. A complaint that offers “labels and conclusions” or a “formulaic recitation of the elements of a cause of action will not do.” *Iqbal*, 556 U.S. at 678. “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of

1 ‘further factual enhancement.’” *Id.* (citation omitted; alteration in original). Dismissal with prejudice
2 is warranted when “the complaint [can]not be saved by any amendment.” *Moss v. U.S. Secret Serv.*,
3 572 F.3d 962, 972 (9th Cir. 2009).

4 Under Wisconsin law, the court is to give effect to the intent of the parties and should construe
5 “the policy’s language according to its plain and ordinary meaning, as understood by a reasonable
6 person in the position of the insured.” *Phillips v. Parmelee*, 840 N.W.2d 713, 764 (Wis. 2013). When
7 determining whether a policy provides coverage, the court will “examine the facts of the claim and the
8 language of the policy to determine whether the policy’s insuring agreement makes an initial grant of
9 coverage.” *Day v. Allstate Indem. Co.*, 798 N.W.2d 199, 206 (Wis. 2011). If the claim triggers an initial
10 grant of coverage, the court then determines whether an exclusion will preclude that coverage. *Id.* The
11 insured has the burden to prove the initial grant of coverage, and this burden shifts to the insurer to
12 show that an exclusion precludes the coverage. *Id.*

13 Here, there are three legal bases that preclude Plaintiffs’ claims: (1) Plaintiffs failed to allege
14 facts to plausibly show they sustained direct physical loss or damage as required under any of the
15 provisions pleaded; (2) Liberty’s Virus Exclusion absolutely bars Plaintiffs’ claims; and (3) Liberty’s
16 Loss of Use Exclusion precludes Plaintiffs’ claims.

17 **IV. ARGUMENT**

18 The facts pleaded in Plaintiffs’ Complaint demonstrate as a matter of law that Plaintiffs cannot
19 establish an entitlement to coverage under the Policy. As detailed in Lexington’s Motion to Dismiss
20 Plaintiffs’ First Amended Complaint, Plaintiffs’ claims against all Defendants, including Liberty,
21 should be dismissed because Plaintiffs have failed to plausibly allege direct physical loss or damage to
22 property. Accordingly, without need to consider any exclusion in the Liberty Policy, Plaintiffs’ claims
23 should be dismissed.

24 **A. Liberty’s Virus Exclusion Bars Plaintiffs’ Claims**

25 Even if Plaintiffs had alleged direct physical loss or damage to property, the Liberty Virus
26 Exclusion offers an independent basis to preclude coverage for Plaintiffs’ claims against Liberty.
27 Notably, Plaintiffs’ Amended Class Action Complaint discusses several potential exclusions in the
28

1 primary policy form, but does not address, and in fact ignores, Liberty’s Policy form and its directly
2 relevant exclusion. *See, e.g.*, Plaintiffs’ Amended Class Action Complaint (“FAC”) at ¶¶ 56 – 58.

3 The Liberty Virus Exclusion excludes coverage for any loss or damage caused directly or
4 indirectly “by or resulting from any virus, bacterium or other microorganism that induces or is capable
5 of inducing physical distress, illness or disease,” and applies “regardless of any other cause or event
6 that contributes concurrently or in any sequence to the loss.” Fu Decl., Ex. A at 39. The exclusion
7 further applies “whether or not the loss event results in widespread loss or damage or affects a
8 substantial area.” *Id.*

9 Plaintiffs’ Complaint contains multiple admissions that its losses were caused by or resulting
10 from the virus that causes COVID-19. For example, Plaintiffs allege:

- 11 • “Due to COVID-19, the Clinic also has suffered direct physical loss or damage and as a
12 result, the Clinic’s ability to provide services has been severely hampered, causing a
13 significant drop in business and tax revenue.” (Plaintiffs’ FAC at p. 3, ¶7).
- 14 • “These businesses have also suffered direct physical loss or damage due to COVID-19,
15 causing a loss in business and tax revenues for Plaintiffs.” (Plaintiffs’ FAC at p. 3, ¶8).
- 16 • “Due to COVID-19, Plaintiffs have suffered “direct physical loss or damage” to MCR,
17 Thunderbird, the Clinic, and other businesses. COVID-19 damaged the property of MCR,
18 Thunderbird and the Clinic, making each of them unusable in the way that they had been
19 used before COVID-19 and effectively uninhabitable for patrons. Instead of being able to
20 fill MCR and Thunderbird with guests, gamblers, meeting attendees, and diners, MCR and
21 Thunderbird were required by the presence of the virus and by resulting civil authority
22 orders to drastically reduce operations, and even to close entirely. To do anything else would
23 have threatened further damage to the property at MCR and Thunderbird as well as further
24 losses for Plaintiffs. Until COVID-19 was brought under control, these properties were
25 damaged and faced the threat of further damage. Use of the properties was not possible.”
26 (Plaintiffs’ FAC at p. 4, ¶13).
- 27 • “This loss is physical. Due to physical damage caused by the presence of the coronavirus,
28 the interior spaces of MCR, Thunderbird, and the Clinic were effectively uninhabitable, or

1 would have become so imminently, and Plaintiffs were unable to permit their customers to
2 access their interior spaces, severely impacting their business. The physical presence of the
3 coronavirus, the resulting damage to property, and the probability of consequential illness
4 for any patron rendered the space effectively uninhabitable in the same way that a crumbling
5 and open roof from the aftermath of a tornado would make the interior space of a business
6 unusable.” (Plaintiffs’ FAC at p. 5, ¶16).

- 7 • “Due to the physical damage caused by the presence of COVID-19, these properties became
8 effectively or imminently uninhabitable by patrons and unsafe for their intended purpose
9 and thus suffered physical loss or damage...If they were to conduct business as usual, the
10 disease and virus would continue to appear, property would suffer further damage, and
11 guests, gamblers, meeting attendees, diners, patients, and others would get sick.” (Plaintiffs’
12 FAC at p. 15, ¶66).
- 13 • “The presence of virus or disease has resulted in physical damage to property in that manner
14 in this case and in addition has infested the air or imminently threatens to infest the air in
15 the properties.” (Plaintiffs’ FAC at p. 16, ¶68).

16 These allegations all demonstrate Plaintiffs’ claimed loss was directly or indirectly caused by
17 or resulted from a virus.

18 Wisconsin courts enforce “exclusions that are clear from the face of the policy.” *Day*, 798
19 N.W.2d at 206. In fact, the Wisconsin Supreme Court recognized in *Day* that an insurance policy must
20 be construed in a manner “so as to give a reasonable meaning to each provision of the contract, and []
21 courts must avoid a construction which renders portions of a contract meaningless, inexplicable or mere
22 surplusage.” *Id.* (citing *1325 North Van Buren, LLC v. T-3 Group, Ltd.*, 716 N.W.2d 822, 838 (Wis.
23 2016)). Accordingly, Liberty’s Virus Exclusion must be interpreted and enforced according to its plain
24 terms.

25 Here, the Liberty Virus Exclusion’s plain and unambiguous language excludes Plaintiffs’
26 claims for coverage resulting from a virus-induced loss, COVID-19: “The Company will not pay for
27 loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces
28 or is capable of inducing physical distress, illness or disease.” *Fu Decl.*, Ex. A at 39. Moreover, the

1 Liberty Virus Exclusion applies “regardless of any other cause or event that contributes concurrently
2 or in any sequence to the loss.” *Id.* The court in *10E, LLC v. Travelers Indem. Co. of Connecticut*
3 recognized that losses “resulting from” virus are precluded by the exclusion, even when claims arising
4 from business restrictions indirectly arise from the pandemic. The court explained:

5 The virus exclusion forecloses coverage where loss or damage is “caused
6 by or resulting from any virus.” . . . “The term ‘resulting from’ broadly links
7 a factual situation with the event creating liability, and connotes only a
8 minimal causal connection or incidental relationship.” *Mosley v. Pac.*
9 *Specialty Ins. Co.*, 49 Cal. App. 5th 417, 424, 263 Cal.Rptr.3d 28 (2020)
10 (citation and quotation marks omitted). “[T]he term ‘resulting from’ is
11 generally equated ... with origination, growth or flow from the event.” *Id.*
(citation and quotation marks omitted). Even if, as Plaintiff alleges, business
restrictions enacted in response to COVID-19 were disproportionate to the
magnitude of the public health problem, they would still have a “minimal
causal connection” to or “flow from” the COVID-19 virus. Therefore, the
plain meaning of the virus exclusion does foreclose coverage under the
Policy.

12 *10E, LLC v. Travelers Indem. Co. of Connecticut*, No. 2:20-CV-04418-SVW-AS, 2020 WL 6749361,
13 at *3 (C.D. Cal. Nov. 13, 2020).

14 In fact, other courts throughout the country have consistently held that the same or similar virus
15 exclusion precludes business interruption and civil authority claims arising out of COVID-19 and have
16 dismissed these claims accordingly. For example, in the following cases, courts examined the same or
17 similar language in the Liberty Virus Exclusion and dismissed the plaintiffs’ claims:

- 18 • *Mayssami Diamond, Inc. v. Travelers Casualty Ins. Co. of Am.*, No. 3:20-cv-01230-AJB-RBB,
19 2021 WL 1226447, at *4 (S.D. Cal. Mar. 30, 2021). The court held that a policy that contains
20 a broad exclusion of coverage for any “loss or damage caused by or resulting from any virus,
21 bacterium, or other microorganisms that induces or is capable of inducing physical distress,
22 illness or disease” applies, and takes any damage resulting from any virus out of the policy’s
23 scope of coverage. This included any orders or conduct taken to slow the spread of the virus.
- 24 • *Karen Trinh, DDS, Inc. v. State Farm Gen. Ins. Co.*, No. 5:20-cv-04265-BLF, 2020 WL
25 7696080, at *3 (N.D. Cal. Dec. 28, 2020). This Court held that the virus exclusion is “plain and
26 unambiguous—any loss caused by virus that can induce physical distress, illness, or disease,
27 such as COVID-19, is excluded from coverage.”
- 28 • *Chattanooga Prof’l Baseball LLC v. Nat’l Cas. Co.*, No. CV-20-01312-PHX-DLR, 2020 WL

1 6699480, at *4 (D. Ariz. Nov. 13, 2020). The court applied the policy’s exclusion of “loss or
2 damage caused by or resulting from any virus, bacterium or other microorganism” to dismiss
3 insured’s claim arising from COVID-19 and related government orders in response to the virus.

- 4 • *Mauricio Martinez, DMD, P.A. v. Allied Ins. Co. of Am.*, No. 220CV00401FTM66NPM, 2020
5 WL 5240218, at *3 (M.D. Fla. Sept. 2, 2020). The court held that plaintiff failed to state a claim
6 for breach of contract arising from COVID-19 based on the plain language of the policy’s virus
7 exclusion.
- 8 • *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, No. 2:20-CV-00087-KS-MTP, 2020 WL
9 6503405, at *8 (S.D. Miss. Nov. 4, 2020). The court found “even if Plaintiff was able to show
10 it suffered [direct physical] loss or damage, coverage would be precluded under the virus
11 exemption to the Policy.”
- 12 • *Mattdogg, Inc. v. Philadelphia Indem. Specialty Ins. Co.*, No. L-820-20, slip op. at 8 (N.J.
13 Super. Ct. App. Div. Nov. 17, 2020) (Request for Judicial Notice (“RJN”), Ex. 2). The court
14 found that the plaintiff’s claims “cannot survive the virus exclusion because the Governor
15 issued his “executive orders affecting Plaintiff’s business as a direct result of COVID-19 . . .
16 and any losses incurred therefrom are squarely within the exclusion.”
- 17 • *Newchops Rest. Comcast LLC v. Admiral Indem. Co.*, No. CV 20-1869, 2020 WL 7395153, at
18 *8-9 (E.D. Pa. Dec. 17, 2020). The court barred plaintiff’s claims arising from COVID-19 under
19 the policy’s unambiguous exclusion of “loss or damage caused by or resulting from any virus .
20 . . . that induces or is capable of inducing physical distress, illness, or disease” after finding “[t]he
21 lack of a specific reference to a pandemic in the policy does not render the provision
22 ambiguous” and that “there is no real distinction between ‘virus’ and ‘coronavirus pandemic.’”
- 23 • *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 WL 4724305, at
24 *7 (W.D. Tex. Aug. 13, 2020). The court found that the insurer could not be liable to pay
25 business interruption insurance “as there was no direct physical loss, and even if there were
26 direct physical loss, the Virus Exclusion applies to bar Plaintiffs’ claims.”

1 Courts addressing similar virus exclusions have overwhelmingly dismissed business
 2 interruption and civil authority claims related to COVID-19.¹

3
 4 ¹ See *Part Two LLC v. Owners Ins. Co.*, No. 7:20-cv-01047-LSC, 2021 WL 135319, at *4 (N.D. Ala.
 5 Jan. 14, 2021); *Pure Fitness LLC v. Twin City Fire Ins. Co.*, No. 2:20-CV-775-RDP, 2021 WL
 6 512242, at *4 (N.D. Ala. Feb. 11, 2021); *Border Chicken AZ LLC v. Nationwide Mut. Ins. Co.*, No.
 7 CV-20-00785-PHX-JJT, 2020 WL 6827742, at *3 (D. Ariz. Nov. 20, 2020); *Cibus LLC v. Cap.*
 8 *Ins. Grp.*, No. CV-20-00277-TUC-JGZ (DTF), 2021 WL 1100376, at *2 (D. Ariz. Mar. 23, 2021);
 9 *W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos.*, No.
 10 220CV05663VAPDFMX, 2020 WL 6440037, at *6 (C.D. Cal. Oct. 27, 2020); *Boxed Foods Co.,*
 11 *LLC v. California Capital Ins. Co.*, No. 20-CV-04571-CRB, 2020 WL 6271021, at *5 (N.D. Cal.
 12 Oct. 26, 2020), as amended (Oct. 27, 2020); *Robert W. Fountain, Inc., v. Citizens Ins. Co. of Am.*,
 13 No. 20-CV-05441-CRB, 2020 WL 7247207, at *4 (N.D. Cal. Dec. 9, 2020); *Protege Rest. Partners*
 14 *LLC v. Sentinel Ins. Co., Ltd.*, No. 20-CV-03674-BLF, 2021 WL 428653, at *8 (N.D. Cal. Feb. 8,
 15 2021); *HealthNOW Med. Ctr., Inc. v. State Farm Gen. Ins. Co.*, No. 20-cv-04340-HSG, 2020 WL
 16 7260055, at *2 (N.D. Cal. Dec. 10, 2020); *Mortar & Pestle Corp. v. Atain Specialty Ins. Co.*, No.
 17 20-cv-03461-MMC, 2020 WL 7495180, at *5 (N.D. Cal. Dec. 21, 2020); *Palmdale Estates, Inc. v.*
 18 *Blackboard Ins. Co.*, No. 20-cv-06158-LB, 2021 WL 25048, at *3 (N.D. Cal. Jan. 4, 2021);
 19 *Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.*, No. 20-cv-04434-JSC, 2020 WL 7342687,
 20 at *3 (N.D. Cal. Dec. 14, 2020); *Colgan v. Sentinel Ins. Co.*, No. 20-CV-04780-HSG, 2021 WL
 21 472964, at *4 (N.D. Cal. Jan. 26, 2021); *Founder Inst. Inc. v. Hartford Fire Ins. Co.*, No. 20-CV-
 22 04466-VC, 2020 WL 6268539, at *1 (N.D. Cal. Oct. 22, 2020); *Long Affair Carpet & Rug, Inc. v.*
 23 *Liberty Mut. Ins. Co.*, No. SACV2001713CJCJDEX, 2020 WL 6865774, at *3 (C.D. Cal. Nov. 12,
 24 2020); *BA LAX, LLC v. Hartford Fire Ins. Co.*, No. 2:20-cv-06344-SVW-JPR, 2021 WL 144248,
 25 at *4 (C.D. Cal. Jan. 12, 2021); *Pez Seafood DTLA, LLC v. Travelers Indem. Co.*, No.
 26 CV204699DMGGJSX, 2021 WL 234355, at *7 (C.D. Cal. Jan. 20, 2021); *Roundin3rd Sports Bar*
 27 *v. The Hartford*, No. 220CV05159SVWPLA, 2021 WL 647379, at *8 (C.D. Cal. Jan. 14, 2021);
 28 *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Connecticut*, No. 2:20-CV-04423-
 AB-SK, 2020 WL 5938689, at *6 (C.D. Cal. Oct. 2, 2020); *Phan v. Nationwide Gen. Ins. Co.*, No.
 CV207616MWFJPRX, 2021 WL 609845, at *4 (C.D. Cal. Feb. 1, 2021); *Travelers Cas. Ins. Co.*
of Am. v. Geragos & Geragos, No. CV 20-3619 PSG (EX), 2020 WL 6156584, at *5 (C.D. Cal.
 Oct. 19, 2020); *Westside Head & Neck v. Hartford Fin. Servs. Grp., Inc.*, No. 2:20-cv-06132 JFW
 (JCx), at *3 (C.D. Cal. Mar. 19, 2021); *Sky Flowers, Inc. v. Hiscox Ins. Co., Inc.*, No. 2;20-cv-
 05411-ODW (MAAx), 2021 WL 1164473, at *4 (C.D. Cal. Mar. 26, 2021); *LJ New Haven LLC v.*
AmGUARD Ins. Co., No. 3:20-cv-00751 (MPS), 2020 WL 7495622, at *8 (D. Conn. Dec. 21,
 2020); *Raymond H Nahmad DDS PA v. Hartford Cas. Ins. Co.*, No. 1:20-CV-22833, 2020 WL
 6392841, at *9 (S.D. Fla. Nov. 2, 2020); *Dime Fitness, LLC v. Markel Ins. Co.*, No. 20-CA-5467,
 2020 WL 6691467, at *5 (Fla. Cir. Ct. Nov. 10, 2020); *DAB Dental PLLC v. Main St. Am. Prot.*
Ins. Co., No. 20-CA-5504, 2020 WL 7137138, at *6 (Fla. Cir. Ct. Nov. 10, 2020); *Edison Kennedy,*
LLC v. Scottsdale Ins. Co., No. 8:20-cv-1416-T-02SPF, 2021 WL 22314, at *7 (M.D. Fla. Jan. 4,
 2021); *Digital Age Mktg. Grp., Inc. v. Sentinel Ins. Co. Ltd.*, No. 20-61577-CIV, 2021 WL 80535,
 at *4 (S.D. Fla. Jan. 8, 2021); *Mena Catering, Inc. v. Scottsdale Ins. Co.*, No. 1:20-cv-23661, 2021
 WL 86777, at *6 (S.D. Fla. Jan. 11, 2021); *Pane Rustica, Inc. v. Greenwich Ins. Co.*, No. 8:20-CV-
 1783-KKM-AAS, 2021 WL 1087219, at *3 (M.D. Fla. Mar. 22, 2021); *Riverwalk Seafood Grill*
Inc. v. Travelers Cas. Ins. Co. of Am., No. 20 C 3768, 2021 WL 81659, at *3 (N.D. Ill. Jan. 7,
 2021); *Mashallah, Inc. v. W. Bend Mut. Ins. Co.*, No. 20 C 5472, 2021 WL 679227, at *3 (N.D. Ill.
 Feb. 22, 2021); *Palmer Holdings and Inv., Inc., v. Integrity Ins. Co.*, No. 4:20-CV-154-JAJ, 2020
 WL 7258857, at *13 (S.D. Iowa Dec. 7, 2020); *Whiskey River on Vintage, Inc., v. Illinois Cas. Co.*,
 No. 4:20-CV-185-JAJ, 2020 WL 7258575, at *14 (S.D. Iowa Nov. 30, 2020); *Gerleman*
Management, Inc. v. Atlantic States Ins. Co., No. 4:20-cv-183-JAJ, 2020 WL 8093577, at *6 (S.D.
 Iowa Dec. 11, 2020); *MHG Hotels, LLC v. Emcasco Ins. Co.*, No. 1:20-cv-01620-RLY-TAB, slip
 op. at 14-15 (S.D. Ind. Mar. 8, 2021) (RJN, Ex. 3); *AFM Mattress Co., LLC, v. Motorists*
Commercial Mutual Ins. Co., No. 20 CV 3556, 2020 WL 6940984, at *4 (N.D. Ill. Nov. 25, 2020);
 (Cont'd on next page)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Siren Salon, Inc. v. Liberty Mut. Ins. Co., No. 20 C 3108, slip op. at 3 (N.D. Ill. Mar. 22, 2021) (RJN, Ex. 5); *Firenze Ventures, LLC v. Twin City Fire Ins. Co.*, No. 20 C 4226, 2021 WL 1208991, at *3 (N.D. Ill. Mar. 31, 2021); *Turek Enters., Inc. v. State Farm Mut. Auto. Ins. Co.*, No. 20-11655, 2020 WL 5258484, at *9 (E.D. Mich. Sept. 3, 2020); *J&H Lanmark, Inc. v. Twin City Fire Ins. Co.*, No. CV 5:20-333-DCR, 2021 WL 922057, at *3 (E.D. Ky. Mar. 10, 2021); *Stanford Dental, PLLC v. Hanover Ins. Grp., Inc.*, No. 20-CV-11384, 2021 WL 493322, at *4 (E.D. Mich. Feb. 10, 2021); *Dye Salon, LLC v. Chubb Indem. Ins. Co.*, No. 20-CV-11801, 2021 WL 493288, at *8 (E.D. Mich. Feb. 10, 2021); *Seifert v. IMT Ins. Co.*, No. CV 20-1102 (JRT/DTS), 2020 WL 6120002, at *4 (D. Minn. Oct. 16, 2020); *Zwillo V, Corp. v. Lexington Ins. Co.*, No. 4:20-00339-CV-RK, 2020 WL 7137110, at *8 (W.D. Mo. Dec. 2, 2020); *Ballas Nails & Spa, LLC v. Travelers Cas. Ins. Co. of Am.*, No. 4:20 CV 1155 CDP, 2021 WL 37984, at *6 (E.D. Mo. Jan. 5, 2021); *N&S Rest. LLC v. Cumberland Mut. Fire Ins. Co.*, No. CV2005289RBKMW, 2020 WL 6501722, at *5 (D.N.J. Nov. 5, 2020); *MAC Prop. Grp. LLC v. Selective Fire and Cas. Ins. Co.*, No. L-2629-20, 2020 WL 7422374, at *9 (N.J. Super. Ct. App. Div. Nov. 5, 2020); *7th Inning Stretch LLC v. Arch Ins. Co.*, No. CV208161SDWLDW, 2021 WL 800595, at *3 (D.N.J. Jan. 19, 2021); *The Eye Care Ctr. of New Jersey, PA v. Twin City Fire Ins. Co.*, No. CV2005743KMESK, 2021 WL 457890, at *3 (D.N.J. Feb. 8, 2021); *Boulevard Carroll Entm't Grp., Inc. v. Fireman's Fund Ins. Co.*, No. 20-11771 (SDW) (LDW), 2020 WL 7338081, at *2 (D.N.J. Dec. 14, 2020); *Causeway Auto., LLC v. Zurich Am. Ins. Co.*, No. 20-8393 (FLW) (DEA), 2021 WL 486917, at *7 (D.N.J. Feb. 10, 2021); *Valley Plumbing Supply, Inc. v. Merchants Mut. Ins. Co.*, No. 1:20-cv-08257-NLH-KMW, 2021 WL 567994, at *7 (D.N.J. Feb. 16, 2021); *In the Park Savoy Caterers LLC v. Selective Ins. Grp., Inc.*, No. CV 20-6869, 2021 WL 1138020, at *2 (D.N.J. Feb. 25, 2021); *Body Physics v. Nationwide Ins.*, No. CV 20-9231 (RMB/AMD), 2021 WL 912815, at *6 (D.N.J. Mar. 10, 2021); *Colby Rest. Grp., Inc. v. Utica Nat'l Ins. Grp.*, No. CV 20-5927 (RMB/KMW), 2021 WL 1137994, at *5 (D.N.J. Mar. 12, 2021); *Garmany of Red Bank, Inc. v. Harleysville Ins. Co.*, No. 20-8676 (FLW) (DEA), 2021 WL 1040490, at *7 (D.N.J. Mar. 18, 2021); *Downs Ford, Inc. v. Zurich Am. Ins. Co.*, No. 3:20-cv-08595-BRM-ZNQ, 2021 WL 1138141, at *4 (D.N.J. Mar. 25, 2021); *Dezine Six, LLC v. Fitchburg Mutual Ins. Co.*, No. 3:20-cv-07964-BRM-DEA, 2021 WL 1138146, at *4 (D.N.J. Mar. 25, 2021); *Carpe Diem Spa, Inc. v. Travelers Cas. Ins. Co. of Am.*, No. CV 20-14860, 2021 WL 1153171, at *3 (D.N.J. Mar. 26, 2021); *Chester C. Chianese DDS, LLC v. Travelers Cas. Ins. Co. of Am.*, No. 20-5702 (MAS) (ZNQ), 2021 WL 1175344, at *3 (D.N.J. Mar. 27, 2021); *Benamax Ice, LLC v. Merchant Mut. Ins. Co.*, No. CV 20-8069, 2021 WL 1171633, at *5 (D.N.J. Mar. 29, 2021); *Quakerbridge Early Learning LLC v. Selective Ins. Co. of New England*, No. 20-7798 (MAS) (LHG), 2021 WL 1214758, at *4 (D.N.J. Mar. 31, 2021); *Circus Circus LV, LP v. AIG Specialty Ins. Co.*, No. 220CV01240JADNJK, 2021 WL 769660, at *6 (D. Nev. Feb. 26, 2021); *Michael J. Redenburg, Esq. PC v. Midvale Indem. Co.*, No. 20 CIV. 5818 (PAE), 2021 WL 276655, at *7 (S.D.N.Y. Jan. 27, 2021); *Natty Greene's Brewing Co., LLC, v. Travelers Cas. Ins. Co. of Am.*, No. 1:20-CV-437, 2020 WL 7024882, at *4 (M.D.N.C. Nov. 30, 2020); *Nat'l Coatings & Supply, Inc. v. Valley Forge Ins. Co.*, No. 5:20-CV-00275-M, 2021 WL 1009305, at *7 (E.D.N.C. Mar. 16, 2021); *Santo's Italian Cafe LLC v. Acuity Ins. Co.*, No. 1:20-cv-01192, 2020 WL 7490095, at *13 (N.D. Ohio Dec. 21, 2020); *MIKMAR, Inc. v. Westfield Ins. Co.*, No. 1:20-CV-01313, 2021 WL 615304, at *10 (N.D. Ohio Feb. 17, 2021); *Family Tacos, LLC v. Auto Owners Ins. Co.*, No. 5:20-CV-01922, 2021 WL 615307, at *10 (N.D. Ohio Feb. 17, 2021); *Ceres Enters., LLC v. Travelers Ins. Co.*, No. 1:20-CV-1925, 2021 WL 634982, at *10 (N.D. Ohio Feb. 18, 2021); *Brunswick Panini's, LLC v. Zurich Am. Ins. Co.*, No. 1:20CV1895, 2021 WL 663675, at *9 (N.D. Ohio Feb. 19, 2021); *Equity Plan. Corp. v. Westfield Ins. Co.*, No. 1:20-CV-01204, 2021 WL 766802, at *18 (N.D. Ohio Feb. 26, 2021); *Nail Nook, Inc. v. Hiscox Ins. Co., Inc.*, No. CV-20-933244, slip op. at 3 (Cuyahoga Cnty., Ohio Ct. Common Pleas Feb. 24, 2021) (RJN, Ex. 4); *Eye Specialists of Del. V. Harleysville Worchester Ins. Co.*, No. 20 CV 6386, 2021 WL 506270, at *5 (Franklin Cnty., Ohio Ct. Common Pleas Feb. 1, 2021); *Goodwill Indus. of Cent. Oklahoma, Inc. v. Philadelphia Indem. Ins. Co.*, No. CV-20-511-R, 2020 WL 8004271, at *4 (W.D. Okla. Nov. 9, 2020); *Isaac's at Spring Ridge, LLP v. MMG Ins. Co.*, No. CI-20-03613, slip op. at 1 (Lancaster Cnty., Pa. Ct. Common Pleas Mar. 2, 2021) (RJN, Ex. 1); *Brian Handel D.M.D., P.C. v. Allstate Ins. Co.*, No. CV 20-3198, 2020 WL 6545893, at *4 (E.D. Pa. Nov. 6, 2020); *Toppers Salon &*

(Cont'd on next page)

1 Because the Liberty Virus Exclusion is clear and unambiguous and applies to all coverages in
 2 the Liberty Policy, Plaintiffs are not entitled to coverage for losses caused directly or indirectly by a
 3 virus under any of the coverage provisions as alleged in the Complaint. Therefore, Plaintiffs' claims
 4 against Liberty should be dismissed.

5 **B. Liberty's Loss of Use Exclusion Precludes Coverage**

6 Plaintiffs' allegations in their Complaint essentially argue that due to the virus, they are unable
 7 to use their property as usual. *See, e.g.*, Plaintiffs' FAC at ¶¶13, 15, 17, 20 (Plaintiffs asserted their
 8 property is now "unusable in the way that they had been used before COVID-19"; and Plaintiffs have
 9 "experienced loss of functionality and diminishment of the usable physical space" of their property).
 10 These are essentially claims solely for "loss of use", without any accompanying property damage.

11 The Liberty Policy, however, expressly excludes claims for "loss of use":

- 12 2. This policy does not apply to loss or damage caused by or resulting from
 13 any of the following:

14 * * *

- 15 b. Delay, loss of use or loss of market.

16 When the insured's claim is solely based on loss of use, without accompanying direct physical
 17 loss or damage, there is no coverage. Courts addressing COVID claims have recognized that the "loss

18 *Health Spa, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:20-CV-03342-JDW, 2020 WL 7024287,
 19 at *3 (E.D. Pa. Nov. 30, 2020); *Kessler Dental Assocs., P.C. v. Dentists Ins. Co.*, No. 2:20-CV-
 20 03376-JDW, 2020 WL 7181057, at *3 (E.D. Pa. Dec. 7, 2020); *ATCM Optical, Inc. v. Twin City*
 21 *Fire Ins. Co.*, No. 20-4238, 2021 WL 131282, at *7 (E.D. Pa. Jan. 14, 2021); *Moody v. Hartford*
 22 *Fin. Servs. Group, Inc.*, No. 20-2856, 2021 WL 135897, at *8 (E.D. Pa. Jan. 14, 2021); *Wilson v.*
 23 *Hartford Cas. Co.*, No. CV 20-3384, 2020 WL 5820800, at *7 (E.D. Pa. Sept. 30, 2020); *Ultimate*
 24 *Hearing Solutions, LLC v. Twin City Fire Ins. Co.*, No. 20-2401, 2021 WL 131556, at *10 (E.D.
 25 Pa. Jan. 14, 2021); *Zagafen Bala, LLC v. Twin City Fire Ins. Co.*, No. 20-3033, 2021 WL 131657,
 26 *7 (E.D. Pa. Jan. 14, 2021); *TAQ Willow Grove, LLC v. Twin City Fire Ins.*, No. 20-3863, 2021
 27 WL 131555, at *7 (E.D. Pa. Jan. 14, 2021); *Frank Van's Auto Tag, LLC v. Selective Ins. Co.*, No.
 28 CV 20-2740, 2021 WL 289547, at *7 (E.D. Pa. Jan. 28, 2021); *Fuel Recharge Yourself, Inc. v.*
Amco Ins. Co., No. CV 20-4477, 2021 WL 510170, at *3 (E.D. Pa. Feb. 11, 2021); *Whiskey Flats*
Inc. v. Axis Ins. Co., No. CV 20-3451, 2021 WL 534471, at *4 (E.D. Pa. Feb. 12, 2021); *Windber*
Hosp. v. Travelers Prop. Cas. Co. of Am., No. 3:20-CV-80, 2021 WL 1061849, at *6 (W.D. Pa.
 Mar. 18, 2021); *J.B. Variety Inc. v. Axis Ins. Co.*, No. CV 20-4571, 2021 WL 1174917, at *5 (E.D.
 Pa. Mar. 29, 2021); *Paul Glat MD, P.C. v. Nationwide Mut. Ins. Co.*, No. CV 20-5271, 2021 WL
 1210000, at *7 (E.D. Pa. Mar. 31, 2021); *Eric R. Shantzer, DDS v. Travelers Cas. Ins. Co. of Am.*,
 No. CV 20-2093, 2021 WL 1209845, at *5 (E.D. Pa. Mar. 31, 2021); *1210 McGavock Street*
Hospitality Partners, LLC v. Admiral Indem. Co., No. 3:20-cv-694, 2020 WL 7641184, at *7 (M.D.
 Tenn. Dec. 23, 2020); *Sultan Hajer, v. Ohio Sec. Ins. Co.*, No. 6:20-CV-00283, 2020 WL 7211636,
 at *4 (E.D. Tex. Dec. 7, 2020); *Vizza Wash, LP v. Nationwide Mut. Ins. Co.*, No. 5:20-CV-00680-
 OLG, 2020 WL 6578417, at *7 (W.D. Tex. Oct. 26, 2020).

1 of use” exclusion precludes coverage for pure loss of use claims, unaccompanied by physical loss or
 2 damage.² Therefore, because Plaintiffs’ claims are wholly based on their loss of use of their property
 3 and Liberty’s Policy expressly excludes Loss of Use, Plaintiffs’ claims for pure economic damages
 4 arising from the loss of use of their property fails.

5 V. CONCLUSION

6 For all of the foregoing reasons, and those incorporated by reference from Lexington’s Motion
 7 to Dismiss and Memorandum of Points and Authorities In Support Thereof, this Court should GRANT
 8 this motion and dismiss with prejudice the claims against Defendant Liberty Mutual Fire Insurance
 9 Company and GRANT such other relief as this Court may deem just and proper.

10
 11 DATED: April 9, 2021

Respectfully submitted,

12 By: /s/ Qianwei Fu

13 Qianwei Fu (SBN 242669)
 14 **ZELLE LLP**
 15 555 12th Street, Suite 1230
 16 Oakland, CA 94607
 Telephone: (415) 693-0700
 Facsimile: (415) 693-0770
 qfu@zelle.com

17 Shannon O’Malley (*pro hac vice* to be filed)
 18 Kristin C. Cummings (*pro hac vice* to be filed)
 19 **ZELLE LLP**
 20 901 Main Street, Suite 4000
 Dallas, TX 75202
 Telephone: (214) 742-3000
 Facsimile: (214) 760-8994
 somalley@zelle.com
 kcummings@zelle.com

21
 22 *Attorneys for Defendant Liberty Mutual Fire
 Insurance Company*

23
 24
 25 ² *Selane Products, Inc. v. Continental Cas. Co.*, No. 220CV07834MCSAFM, 2020 WL 7253378, at
 26 *6 (C.D. Cal. Nov. 24, 2020) (finding the Policy precluded coverage in part because it had an
 27 exclusion for “loss of use or loss or market”); *Whiskey River on Vintage, Inc.*, 2020 WL 7258575
 28 at *18 (finding in addition to the failure of the insured to demonstrate direct physical loss or
 damage, which requires the tangible alteration of property and that loss of use alone is insufficient,
 the “loss of use” exclusion applied to preclude the insured’s COVID-19 claim); *Harvest Moon
 Distributors, LLC v. S.-Owners Ins. Co.*, No. 620CV1026ORL40DCI, 2020 WL 6018918, at *6
 (M.D. Fla. Oct. 9, 2020) (applying the loss of use exclusion in part to preclude coverage).

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been served on April 9, 2021, to all counsel of record who are deemed to have consented to electronic service via the Court’s CM/ECF system, and on the following parties via email:

Counsel for Plaintiffs and the Proposed Class

Jennie Lee Anderson
ANDRUS ANDERSON LLP
155 Montgomery Street, Suite 900
San Francisco, CA 94104
(415) 986-1400
jennie@andrusanderson.com

Adam J. Levitt
Mark S. Hamill
DiCELLO LEVITT GUTZLER LLC
10 North Dearborn Street, Sixth Floor
Chicago, IL 60602
(312) 214-7900
alevitt@dicellolevitt.com
mhamill@dicellolevitt.com

Mark A. DiCello
Kenneth P. Abbarno
Mark Abramowitz
DiCELLO LEVITT GUTZLER LLC
7556 Mentor Avenue
Mentor, OH 44060
(440) 953-8888
madicello@dicellolevitt.com
kabbarno@dicellolevitt.com
mabramowitz@dicellolevitt.com

Timothy W. Burns
Jeff J. Bowen
Jesse J. Bair
Freya K. Bowen
BURNS BOWEN BAIR LLP
1 South Pinckney Street, Suite 930
Madison, WI 53703
(608) 286-2302
tburns@bbblawllp.com
jbowen@bbblawllp.com
jbair@bbblawllp.com
fbowen@bbblawllp.com

Mark Lanier
Alex Brown
THE LANIER LAW FIRM PC
10940 West Sam Houston Parkway North,
Suite 100
Houston, TX 77064
(713) 659-5200
WML@lanierlawfirm.com
alex.brown@lanierlawfirm.com

Douglas Daniels
DANIELS & TREDENNICK
6363 Woodway, Suite 700
Houston, TX 77057
(713) 917-0024
douglas.daniels@dtlawyers.com

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at Fremont, California on April 9, 2021.

/s/ Qianwei Fu
Qianwei Fu