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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

The Los Angeles Lakers, Inc.,

Plaintiff,

vs.

Federal Insurance Company,

Defendant.

Case No. 2:21-cv-02281-AB (MRWx)

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

[Filed concurrently with Declaration of Kyle A. Casazza in Support of Plaintiff's Opposition to Motion to Dismiss and Plaintiff's Request for Judicial Notice]

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The Los Angeles Lakers, Inc. (the "Lakers") respectfully submit this opposition to the motion to dismiss (Dkt. 21 (the "Motion") and Dkt. 21-1 ("Mem.")) filed by defendant Federal Insurance Company ("Chubb").

INTRODUCTION

Chubb's Motion seeks to dismiss a hypothetical case it wishes the Lakers had brought rather than the actual case the Lakers have pled. Chubb asks the Court to dismiss the Lakers' claims for coverage under the Lakers' insurance policy's business interruption, extra expense, and business premises coverage provisions on the ground that the Lakers supposedly did not plead "direct physical loss or damage" to their property. Applying the relevant California appellate authorities, the terms of the insurance policy, and (if necessary) extrinsic evidence regarding the parties' understanding, "direct physical loss or damage" occurs when an unintended external physical force changes a property's physical condition either making it unsatisfactory for future use, or requiring repairs to make it usable for its intended purpose. Here, because of the nature of the Lakers' business operations and the unique function of the Staples Center, the Lakers' property was directly impacted by the coronavirus, which infiltrated and contaminated the property, rendered the property unusable for hosting Lakers' games, and required substantial physical alterations and repairs before the property could once again be safely used for its intended purpose.

In trying to persuade the Court the Lakers have not met this standard, Chubb repeatedly misstates the Lakers' allegations. On the first page of its brief, Chubb makes the following misrepresentations: (1) the Lakers only "vaguely allege[d]" the coronavirus "may" have been present at their property; (2) the Lakers do "not assert that the virus actually changed the properties themselves in any physical way"; and (3) the Lakers "concede[] that the virus can be removed from surfaces through ordinary cleaning methods." (Mem. at 1). Not true; not true; and not true.

The Lakers pled that the coronavirus was physically present at the Staples Center (not "may" have been present) and pled detailed facts supporting that allegation, including that roughly half of all NBA and NHL players who tested positive for the virus during the relevant period were present at the Staples Center. The Lakers pled that the virus changed the physical condition of the Staples Center by contaminating key building systems, such as air circulation and plumbing, and damaging fixtures such as seating, concession areas, food service facilities, toilets, plumbing fixtures, locker rooms, training facilities, playing surfaces, and equipment, thus rendering the facility unusable for continuing to host sporting and other events. Contrary to Chubb's assertion that these allegations were merely conclusory, the Lakers pled detailed facts regarding the science supporting those allegations. And the Lakers specifically pled that, in light of the Staples Center's purpose of hosting events with large, cheering crowds, "ordinary cleaning methods" were not sufficient to remediate the conditions the virus caused, and instead significant physical alterations of the property and other extensive remedial measures were required.

Chubb likewise has no basis to dismiss the Lakers' claim for civil authority coverage for losses from civil orders prohibiting access to the Lakers' property because of "direct physical loss or damage" to nearby property. Chubb claims that no civil order "prohibited access" to the Staples Center, but the Lakers were specifically ordered to not host events at the Staples Center, rendering it useless for the Lakers' business, thus "prohibiting access" to the arena within the common understanding of that phrase. Chubb also claims the Lakers have not alleged that the relevant civil orders resulted from physical loss or damage to nearby property, but that is not true. The Lakers specifically alleged that the virus was present at, and caused physical loss or damage to, specific nearby Metro stations, and the relevant civil orders explicitly state they were issued as a result of such property damage.

Thus, the facts actually pled by the Lakers – which Chubb misstates and ignores, but this Court must accept as true in resolving the Motion – are not, as

Chubb claims, "materially indistinguishable" from the "circumstances" in *Mark's Engine Co. No. 28 Restaurant, LLC v. The Travelers Indemnity Co. of Connecticut*, 2020 WL 5938689 (C.D. Cal. Oct. 2, 2020), and other cases in this District. In *Mark's Engine*, this Court granted a motion to dismiss because the policyholder did not even plead the virus was present at its property, much less that it had changed the physical conditions at the property and rendered the property unusable. Here, the Lakers have pled that the virus was actually present, changed the physical condition at the property, and made it unusable for its intended purpose.

The remaining purportedly "indistinguishable" cases that Chubb cites involve materially different factual allegations under materially different policies. Chubb wants the Court to think the Lakers' case is like everyone else's, but this case is different from the cases Chubb cites in which policyholders' complaints were dismissed because (i) they did not plead the actual presence of coronavirus at their properties,[1] and (ii) in many cases, specifically pled that the virus was not present at their properties in an effort to avoid absolute virus exclusions in their policies that are not present here.[2] In attempting to equate the Lakers' coverage claim with

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[1] *Compare Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 487 F. Supp. 3d 834, 840 n.7 (N.D. Cal. 2020) ("Had Mudpie alleged the presence of COVID-19 in its store, the Court's conclusion about an intervening physical force would be different."), *and Sky Flowers v. Hiscox Ins. Co.*, 2021 WL 1164473, at *3 (C.D. Cal. Mar. 26, 2021) (no allegation virus was present on the property) *and Long Affair Carpet & Rug, Inc. v. Liberty Mut. Ins. Co.*, 2020 WL 6865774, at *2-3 (C.D. Cal. Nov. 12, 2020) (same), *and Geragos & Geragos Engine Co. No. 28, LLC v. Hartford Fire Ins. Co.*, 2020 WL 7350413, at *3 (C.D. Cal. Dec. 3, 2020) (same), *and Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co.*, 2020 WL 6562332, at *4 (N.D. Cal. Nov. 9, 2020) (same), *and Kevin Barry Fine Art Assocs. v. Sentinel Ins. Co.*, 2021 WL 141180, at *5-6 (N.D. Cal. Jan. 13, 2021) (same), *and Travelers Cas. Ins. Co. of Am. v. Geragos & Geragos*, 495 F. Supp. 3d 848, 853 (C.D. Cal. 2020) (same), *with* Compl. ¶¶ 78-84.

[2] *Compare Mark's Engine*, 492 F. Supp. 3d at 1058, *and Tralom, Inc. v. Beazley USA Servs., Inc.*, 2020 WL 8620224, at *5 (C.D. Cal. Dec. 29, 2020) (analyzing virus exclusion in policy), *and 10E, LLC v. Travelers Indem. Co. of Conn.*, 483 F. Supp. 3d 828, 836 (C.D. Cal. 2020) (same), *and Long Affair*, 2020 WL 6865774, at *2-3, *and W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos.*, 2020 WL 6440037, at *4 (C.D. Cal. Oct. 27, 2020) (same), *and Posh Cafe Inc. v.*

claims brought by policyholders whose properties did not experience the same physical harm, Chubb is trying to shove a square peg into a round hole. Chubb's Motion fails when the Court considers the facts the Lakers actually pled, as opposed to the facts Chubb erroneously claims were pled. The Motion should be denied.

FACTUAL BACKGROUND

A. The Lakers and their Unique Property – the Staples Center

The Lakers play at the Staples Center, which is the only sports arena in Los Angeles County which currently hosts major professional team sports. (Compl. ¶ 76). Over 200,000 fans attended games at Staples Center during January and February of 2020 alone, and the venue also hosted the Grammy Awards and the memorial event to commemorate the tragic death of Lakers legend Kobe Bryant during that same period. (*Id.* ¶ 64). As a result, the Staples Center was rarely (if ever) empty during early 2020. (*Id.*). The Lakers' primary use of the Staples Center is to host thousands of fans at games – a business which earns them hundreds of millions of dollars in annual revenue from ticket sales and other revenue sources. (*Id.* ¶¶ 9, 10, 30).

B. The Chubb Policy

In order to protect against the risk of not being able to use the Staples Center to host basketball games, the Lakers purchased an "all-risk" policy from Chubb (the "Policy"). (Compl. ¶¶ 12-14; *see* Dkt. 1-1). The Policy, which was drafted by Chubb, covers, among other things, "Business Income and Extra Expense" losses incurred by the Lakers because of "direct physical loss or damage" to property

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AmGuard Ins. Co., 2020 WL 8184062, at *2 (C.D. Cal. Dec. 21, 2020) (same), *and Sky Flowers*, 2021 WL 1164473 at *3 (same); *Ba Lax, LLC v. Hartford Fire Ins. Co.*, 2021 WL 144248, at *3 (C.D. Cal. Jan. 12, 2021) (same), *and Out W. Rest. Grp. Inc. v. Affiliated FM Ins. Co.*, 2021 WL 1056627, at *4 (N.D. Cal. Mar. 19, 2021) (same), *and Palmdale Ests. Inc. v. Blackboard Ins. Co.*, 2021 WL 25048, at *3 (N.D. Cal. Jan. 4, 2021) (same), *and Mortar & Pestle Corp. v. Atain Specialty Ins. Co.*, 2020 WL 7495180, at *4 (N.D. Cal. Dec. 21, 2020) *with* Dkt. 1-1, Policy Number 3575-77-70 (containing no virus exclusion).

("Business Interruption"), and because of an order from civil authorities prohibiting access to the Staples Center, prompted by "direct physical loss or damage" to nearby property ("Civil Authority"). (*Id*. ¶¶ 13, 37).

The Policy covers all risks of direct physical loss or damage to the Lakers' property unless specifically excluded. Although Chubb has long known that viruses and communicable diseases can cause physical loss or damage to property and often sells policies containing an exclusion for such losses developed in response to SARS (an earlier coronavirus), the Lakers' policy contains no such exclusion. (*Id*. ¶¶ 6, 14, 43-46). Thus, the Lakers reasonably expected that if damage to the arena from a virus made it impossible to safely host games with fans in attendance, or if civil authorities prohibited games from going forward, Chubb would provide coverage it had promised and for which the Lakers had paid. (*Id*. ¶¶ 16, 47).

C. The Coronavirus Caused Direct Physical Loss or Damage to the Lakers' Property that Interrupted Their Business

The coronavirus is a physical object with a material existence, and can survive outside the human body in viral fluid particles. (*Id*. ¶ 54). When the virus ultimately lands on an object, it alters the surface of property from once-safe to a fomite containing the virus. (*Id*. ¶ 58). It spreads whenever an infected person coughs, talks, shouts, sings, or even breathes, and also when a person touches an infected surface. (*Id*. ¶ 52). While larger respiratory droplets containing the virus are pulled to the ground by gravity and infect surfaces (persisting in some instances for weeks at a time), aerosols can be suspended and dispersed through air, to be inhaled by anyone present on the property, circulating through air flow and spreading the virus, until ultimately being pulled down to surfaces and infecting them. (*Id*. ¶¶ 55-56). The Complaint alleges extensive scientific studies that document the physical damage to property caused by the virus. (*Id*. ¶¶ 53-58).

Los Angeles's first documented case of the virus was observed on January 22, 2020, and community spread in Los Angeles was identified in March of 2020. (*Id*.

¶ 51). Given the unique function of the Staples Center and the hazard presented by the coronavirus, it was only a matter of time until the virus infiltrated and damaged the property and infected individuals. And here, unlike in other cases, there should be no credible dispute that occurred.

The Lakers confirmed in March 2020 that the virus was present on their property, as numerous individuals who were present at the Staples Center tested positive for the virus. (*Id*. ¶¶ 59, 78-84).[3] Indeed, in the first few weeks of March 2020, cumulatively, half of all coronavirus cases among NBA and NHL players involved athletes who were present at the Staples Center, and every positive test of an NHL player involved someone who was at the Staples Center in March of 2020. (*Id*. ¶ 84). This is not, as Chubb puts it, a "handful of NBA players." (Mem. at 5). Further, given the high volume of spectators that attended events at the Staples Center during the relevant period, the spread of the virus within the arena was undoubtedly even higher than the testing has confirmed. (Compl. ¶ 64).

Based on the extensive scientific studies, the Lakers alleged that the virus contaminates building HVAC and plumbing systems, physically alters surfaces of fixtures and other property rendering them unsafe, and changes the physical condition of such buildings from safe places to properties that are unsafe and unfit for use and occupancy. (*Id*. ¶¶ 56-58). Specifically, the Lakers alleged that "[t]he presence of the coronavirus at the Staples Center damaged the property, dispersing through the air and affixing to fixtures such as seating, concession areas, food service facilities, toilets, plumbing fixtures and systems, locker rooms, and training facilities, playing surfaces and equipment; contaminating key building systems; and damaging surfaces throughout the building." (*Id*. ¶ 60).

The presence of the virus at the Staples Center rendered it unusable for its

[3] Similarly, two athletes and individuals who visited the UCLA Health Training Center were diagnosed with the coronavirus, demonstrating the virus was present on that property. (*Id*. ¶ 93).

intended purpose of hosting large events, like Laker games, without substantial physical alterations being made to the arena and other remedial measures. (*Id*. ¶¶ 2-3, 60-62). Simply cleaning surfaces would have been insufficient as the property would be continually re-contaminated without substantial alterations and extensive safety protocols. (*Id.*; *see also id*. ¶ 55). The presence of the virus required the Lakers to make substantial physical repairs and alterations and significant remedial measures at the Staples Center as well as at the UCLA Health Training Center. (*Id*. ¶¶ 62-63, 100-02). To both "ensure the safety of the arena" and "protect against further property damage," the Staples Center implemented substantial physical measures and other practices to receive accreditation under the rigorous GBAC STAR Accreditation Program. (*Id.* ¶ 63).

D. Civil Orders Also Prohibited Access to the Staples Center Due to Direct Physical Loss or Damage Both at the Staples Center and Nearby Properties

The virus was also present at and caused physical loss or damage to other properties within a mile of the Staples Center, including five Metro stations. (*Id*. ¶¶ 87-88). On March 15, 2020, shortly after the NBA temporarily paused games, Los Angeles Mayor Eric Garcetti issued an order closing all live performance venues to the public. (*Id*. ¶ 71). Less than a week later, Mayor Garcetti issued his "Safer at Home" order on March 19, 2020, which provided the reason for the closure: coronavirus posed a risk to "life and property in the City of Los Angeles." (*Id*. ¶ 72). And again, on April 1, 2020, the Mayor issued a revised order that reiterated that "[T]he COVID-19 virus can spread easily from person to person and *it is physically causing property loss or damage due to its tendency to attach to surfaces for prolonged periods of time*." (*Id*. ¶ 72) (emphasis added).[4]

The City of Los Angles and Los Angeles Department of Public Health issued subsequent orders which continued to prohibit access to the Staples Center. (Compl.

[4] All emphases in original unless otherwise stated.

¶¶ 73-75).[5] The Lakers could not so much as practice at the Staples Center or the UCLA Health Training Center until June 12, 2020, (Casazza Decl., Ex. 3), and could not play games in front of fans until *April 15, 2021* (*id.*, Ex. 4 at 1; *id.*, Ex. 5).

ARGUMENT

I. THE LAKERS' COMPLAINT PROPERLY PLEADS DIRECT PHYSICAL LOSS OR DAMAGE TO COVERED PROPERTY

California has well-settled rules for interpreting insurance policies that apply in determining what the phrase "direct physical loss or damage" means in the Lakers' Policy. The Court's objective is to determine the mutual understanding of Chubb and the Lakers at the time of contracting. *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 821-22 (1990). This requires giving insurance policy provisions their ordinary and popular meaning, read in the context of the entire insurance policy. *Garamendi v. Mission Ins. Co.*, 131 Cal. App. 4th 30, 41-42 (2005).

Policy language in insuring agreements – like the "direct physical loss or damage" clause – must be read broadly to protect the insured's reasonable expectations. *MacKinnon v. Truck Ins. Exch.*, 31 Cal. 4th 635, 648 (2003). Where policy provisions have more than one reasonable meaning, they are ambiguous and must be construed in favor of the policyholder and against the insurer. *Safeco Ins. Co. of Am. v. Robert S.*, 26 Cal. 4th 758, 763 (2001). Further, "even if a contract appears unambiguous on its face, a latent ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning to which the language of the contract is yet reasonably susceptible." *Dore v. Arnold Worldwide, Inc.*, 39 Cal. 4th 384, 391 (2006).

Thus, in order to prevail, Chubb must "establish that its interpretation [here,

[5] Additionally, the City of El Segundo issued "Administrative Order No. 2 to Address COVID-19," which applied the Los Angeles Safer at Home Order as "necessary for the protection of life *and property*" to the UCLA Health Training Center. (Compl. ¶ 94). More than 120 Lakers employees who work at the UCLA Health Training Center have been denied access to their workspaces. (*Id.* ¶ 97).

of "direct physical loss or damage"] is the *only* reasonable one." *MacKinnon*, 31 Cal. 4th at 655. "Even if the insurer's interpretation is reasonable, the court must interpret the policy in the insured's favor if any other reasonable interpretation would permit coverage for the claim." *Palp, Inc. v. Williamsburg Nat'l Ins. Co.*, 200 Cal. App. 4th 282, 290 (2011).

A. Under California Precedent, "Direct Physical Loss or Damage" Includes Property Being Rendered Unusable for Its Intended Purpose

Although the California Supreme Court has not yet addressed the "physical" loss or damage requirement, several Court of Appeal cases have. Chubb misreads one of these decisions, and ignores the others.

In *MRI Healthcare Center of Glendale, Inc. v. State Farm General Insurance Co.* – upon which Chubb relies heavily[6] – the Court of Appeal held that "[a] direct physical loss contemplates an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so." 187 Cal. App. 4th 766, 779-80 (2010) (internal quotation marks omitted). The court explained that this requires "some external force [to] act[] upon the insured property to cause a physical change in the condition of the property." *Id.* at 780. Thus, under *MRI*, the "physical" loss or damage standard requires (1) "some external force," that is an "accident or other fortuitous event," and (2) that the force "cause[d] a physical change in the condition of the [insured's] property" such that the property "become[s] unsatisfactory for future use or requiring that repairs be made to make it so." *Id.* at 779-80.

[6] The facts of the *MRI* case are not like those here. In that case, where the policyholder sought coverage for losses it suffered as a result of a storm, the court held that the insured was not entitled to coverage for costs related to its MRI machine which was not damaged due to the storm but instead failed to function properly due to an internal defect in the machine. Thus, the court held, no "external force" had caused a physical change to the property. *Id*. at 780.

There can be no dispute that the presence of coronavirus at the Staples Center is an "external force" and a "fortuitous event." Coronavirus was not originally a part of the Staples Center and the Lakers did not purposefully bring it there. Chubb contends that "a physical change in the condition" of the insured's property requires that some destruction of the property have occurred such that repairs are required. But that is plainly not what the *MRI* court meant since it referred to a "physical change in the condition" of the property that requires repairs *or* causes the property to "become unsatisfactory for future use." *Id.* at 779. Thus, when an "external force" that is a "fortuitous event" – like the coronavirus – changes the physical conditions of a property by rendering the property unsatisfactory for continued use, that constitutes "physical loss or damage" to the property under *MRI*.

Other appellate decisions that Chubb ignores confirm that "physical" loss or damage to property – a "distinct, demonstrable, physical alteration" as put by the *MRI* court – does not require any destruction of the property and, instead, occurs any time an external, fortuitous force changes the physical conditions of the property and causes the property to become unsatisfactory for continued use. *See Strickland v. Federal Ins. Co.*, 200 Cal. App. 3d 792 (1988); *Hughes v. Potomac Ins. Co. of D.C.*, 199 Cal. App. 2d 239 (1962); *see also Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.*, 45 Cal. App. 4th 1, 91 (1995).

Hughes provides a dramatic example of how property rendered unusable by an external, fortuitous force yet structurally intact is still "damaged" under the common-sense meaning of the term. There, a landslide left a policyholder's home on the edge of a cliff, but without having changed the home's structure. 199 Cal. App. 2d at 242-43. The insurer denied coverage, arguing, similarly to Chubb's argument here, the home was not "damaged" because "its paint remains intact and its walls adhere to one another." *Id.* at 248. The Court of Appeal rejected this argument, holding: "[c]ommon sense requires that a policy should not be [] interpreted" in such a way that an insured home "might be rendered completely

useless to its owners" yet the insurer "would deny that any loss or damage had occurred unless some tangible injury to the physical structure itself could be detected." *Id.* at 248-49; *see also Strickland*, 200 Cal. App. 3d at 799 (physical loss or damage still occurs "even in the absence of physical destruction" where a property is "rendered completely useless to its owners").

Similarly, in the liability insurance context, the Court of Appeal has held that property is "physically" injured and that property damage has therefore occurred when noxious substances, even in small or threatened quantities, impair the safe use of the property. *See Armstrong*, 45 Cal. App. 4th at 91 ("injury to the buildings is a *physical* one" when a policyholder is deemed liable for "the release of asbestos fibers, whatever the level of contamination," or for the "health hazard [] of the potential for future releases").[7]

Consistent with these authorities, certain California state courts have ruled in favor of policyholders on allegations materially similar to those here. *See, e.g., Boardwalk Ventures CA, LLC v. Century-Nat'l Ins. Co.*, 2021 WL 121589, at 6-7 (Cal. Super. Ct. Mar. 18, 2021) (denying motion for judgment on the pleadings based on allegations that coronavirus was transmitted to property surfaces); *P.F. Chang's China Bistro, Inc. v. Certain Underwriters at Lloyd's of London*, 2021 WL 818659, at *1 (Cal. Super. Ct. Feb. 04, 2021) (denying motion for judgment on the pleadings based on allegations of coronavirus presence in or around property, changes to physical behaviors, government closures of physical spaces, and need to take mitigating steps); *Goodwill Indus. of Orange Cty. v. Phila. Indem. Ins. Co.*, 2021 WL 476268, at *2 (Cal. Super. Ct. Jan. 28, 2021) (overruling demurrer on similar allegations); *Best Rest Motel Inc. v. Sequoia Ins. Co.*, 2020 WL 7229856, at

[7] The only other California appellate authorities cited by Chubb involved intangible property and on that basis are inapt here, where the insured properties are buildings. *See Ward Gen. Ins. Servs., Inc. v. Employers Fire Ins. Co.*, 114 Cal. App. 4th 548, 556 (2003) (computer data); *Simon Mktg., Inc. v. Gulf Ins. Co.*, 149 Cal. App. 4th 616, 623 (2007) (business contracts and trade secrets).

*1 (Cal. Super Ct. Sept. 20, 2020) ("sufficient facts alleged in the complaint to withstand a demurrer"); *see also Kingray Inc. v. Farmers Grp. Inc.*, 2021 WL 837622, at *8 (C.D. Cal. Mar. 4, 2021) (citing *Hughes*).[8] And in the most recent case on this issue in the Central District, while there was ultimately no coverage because the policy had a virus exclusion, the court "adopted" the approach of "other district courts [who] have held that the presence of COVID-19 constitutes a physical intrusion that compromises the physical integrity of property." *Hair Perfect Int'l, Inc. v. Sentinel Ins. Co.*, 2021 WL 2143459, at *5 (C.D Cal. May 20, 2021) (internal quotation marks omitted). The court rightly explained that "[o]n a motion to dismiss, this approach gives appropriate weight to potential factual disputes as to the necessary extent of cleaning and other remedial measures." *Id.* ("Defendant's argument that the virus can be easily removed is one that goes to the measure of loss, not whether there is coverage.").

These California appellate and trial court decisions are also consistent with persuasive authorities from other states, which have recognized that "physical" loss or damage to property occurs when an external, fortuitous force changes the physical conditions of a property and renders it unsatisfactory for continued use. Such changed conditions have included the presence of gas vapors, carbon

[8] Chubb argues that the "mere inability to use an insured property" as opposed to "permanent dispossession" is not "physical loss or damage." (Mem. at 14). But the Lakers are not simply unable to use their property without any change having occurred at the property. Instead, their property was rendered unusable due to a physical condition (*i.e.*, physical loss or damage to their property). *Compare Sky Flowers*, 2021 WL 1164473 at *3 (alleging "loss of use"), *and Tralom*, 2020 WL 8620224 at *5 (same), *with* Compl. ¶ 61 ("The *damage* caused by the presence of the virus at the Staples Center made it unusable for hosting Lakers games with fans in attendance for months, *so that physical alterations and building system changes could be made to the property to make it safe for fans to attend, and new protocols for disinfection and infectious disease could be implemented*."). Such loss or damage is almost never "permanent"; otherwise, policyholders would not be entitled to recover unless it was impossible to ever repair/remediate the property.

monoxide, cat urine, methamphetamine fumes, and ammonia.[9] Notably, a leading insurance treatise, cited in *MRI*, has likewise explained that "physical damage" can be found without any "physical alteration of the property" when the property has been rendered uninhabitable by a fortuitous force. *See* 10A Couch on Ins. § 148:46 at 99-100.

B. Reading the Lakers' Policy as a Whole, "Direct Physical Loss or Damage" Encompasses Property Being Rendered Unusable for Its Intended Purposes Due to a Physical Change

Chubb did not define the phrase "direct physical loss or damage" in the Policy; nor did it provide that the phrase requires destruction of property. Although left undefined by Chubb, however, when reading the Policy as a whole as California law requires, it is clear that "direct physical loss or damage" to property includes situations where the property is rendered unusable due to some physical change to the property's condition. This is clear because Chubb included specific exclusions to address some such situations, but not others (like viruses).

For example, the Lakers' Policy includes an exclusion addressing not only animal "infestation" but also the "discharge or release of waste products or secretions of any insect, bird, rodent or other animal." (*See* Dkt. 1-1 at 45). Animal urine of course does not change the structure of a building, but when present in sufficient quantities, it can render a building unusable for its intended purpose. *See, e.g.*, *Mellin*, 115 A.3d at 805. Chubb recognized this risk would constitute "direct physical loss or damage" and chose to exclude it. Chubb similarly chose to exclude certain other risks that generally do not alter the structure of property but render the

[9] *See, e.g.*, *Mellin v. N. Sec. Ins. Co., Inc.,* 115 A.3d 799, 805 (N.H. 2015) (cat urine odor); *W. Fire Ins. Co. v. First Presbyterian Church,* 437 P.2d 52, 55 (Colo. 1968) (gasoline vapors); *Matzner v. Seaco Ins. Co.,* 1998 WL 566658, at *3-4 (Mass. Super. Ct. Aug. 26, 1998) (carbon monoxide); *Farmers Ins. Co. of Or. v. Trutanich*, 858 P.2d 1332, 1335-36 (Or. Ct. App. 1993) (pervasive odor from methamphetamine laboratory); *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co.*, 2014 WL 6675934, at *16-17 (D.N.J. Nov. 25, 2014) (ammonia levels).

property unusable for its intended purposes. (*See, e.g.*, Dkt. 1-1 at 46, 47 (excluding "radioactive contamination" and certain "pollutants")). Such exclusions would be unnecessary if destruction of property was required to constitute "direct physical loss or damage." Their inclusion shows the parties understood that "direct physical loss or damage" includes property being rendered unusable by a changed physical condition.

Chubb suggests that the Policy's "period of restoration" – which uses the words "repair or replace" – shows that "direct physical loss or damage" must only mean destruction of the property that must be repaired. (Mem. at 11). Chubb has things backwards. The Policy's broad definition of the "period of restoration" actually confirms the Policy was intended to cover precisely the circumstances for which the Lakers seek coverage here.

The Policy provides that once the Lakers' operations are impaired by "direct physical loss or damage" to their property, Chubb will cover the Lakers' expenses and losses for the entire "period of restoration" which is broadly defined to begin "immediately after the time direct physical loss or damage" occurs and "continu[es] until [the Lakers'] **operations** are restored, with reasonable speed, to the level which would generate the **business income** amount that would have existed if no direct physical loss or damage occurred," including, among other things, the time it takes to "repair or replace" the property as well as the time the business remains impaired "to comply with any ordinance or law." (Dkt. 1-1 at 108). As set forth above, the Lakers were required to make substantial physical alterations to their property (*i.e.*, "repairs")[10] in order to make it capable of being safely used for its intended purpose

[10] *See, e.g.*, *Kingray*, 2021 WL 837622 at *5, 8 ("Plaintiffs have physically altered their floor plans [due to] Covid-19 shutdown orders, which impose limited capacity and require modifications like plexiglass shields, removing tables and chairs, and hand sanitizing stations. . . . If Plaintiff was not allowed to operate or invite others onto its property, it was disposed in some way. Dispossession is a form of loss."); *Ungarean, DMD v. CNA*, 2021 WL 1164836, at *8 (Pa. Com. Pl. Mar. 25, 2021).

and, even after such repairs were made, the Lakers continued to be unable to use the property to "comply with any ordinance of law" (*i.e.*, civil orders prohibiting them from using the property). Per the Policy's plain terms, the covered "period of restoration" continued for that entire period. The Policy's "period of restoration" thus confirms, rather than contradicts, that "direct physical loss or damage" is not limited to destruction of property, and instead includes the property being rendered unusable due to a physical condition until the property can once again be safely used for its intended purpose.

C. Extrinsic Evidence Confirms that the Parties Understood "Direct Physical Loss or Damage" to Include Property Being Rendered Unusable by a Virus

Under the applicable California appellate authority and the plain language of the Lakers' Policy, "direct physical loss or damage" to property encompasses (or, at a minimum, is reasonably understood as encompassing) the property being rendered unusable for its intended purposes due a virus changing the conditions at the property and rendering the property unsatisfactory for continued use. But even if that was not clear from the face of the Policy, extrinsic evidence the Court is required to consider confirms that the Policy is reasonably susceptible to such interpretation. Extrinsic evidence shows that Chubb understood that if a virus rendered the Lakers' property unusable that would constitute covered "direct physical loss or damage" and that Chubb chose on at least two different occasions to not exclude such otherwise covered losses. Under California law, this powerful evidence must be considered in interpreting the Policy's "direct physical loss or damage" language, and it refutes Chubb's argument that the impact of a virus on the Lakers' property does not trigger Chubb's coverage.

Unlike in many states, where extrinsic evidence may only be considered if contractual language is first found to be ambiguous, under California law, "even if a contract appears unambiguous on its face, a latent ambiguity may be exposed by

extrinsic evidence . . . ." *Dore*, 39 Cal. 4th at 391. "'Where the meaning of the words used in a contract is disputed, the trial court must provisionally receive any proffered extrinsic evidence which is relevant to show whether the contract is reasonably susceptible of a particular meaning.'" *Lust v. Animal Logic Entm't US*, 2019 WL 11908135, at *7 (C.D. Cal. Sept. 18, 2019) (quoting *Morey v. Vannucci*, 64 Cal. App. 4th 904, 912 (1998)).

"Indeed, it is reversible error for a trial court to refuse to consider such extrinsic evidence on the basis of the trial court's own conclusion that the language of the contract appears to be clear and unambiguous on its face." *Id.* "The upshot of California's rule is that '[u]nless a court can to a certainty and with sureness by a mere reading of the document, determine which is the correct interpretation . . . extrinsic evidence becomes admissible as an aid to interpretation . . .' and may prevent a court from definitively interpreting the contract as a matter of law" on a motion to dismiss or for summary judgment. *See KST Data, Inc. v. Northrop Grumman Sys. Corp.*, 2019 WL 2619638, at *6 (C.D. Cal. Apr. 17, 2019) (quoting *Burch v. Premier Homes,* LLC, 199 Cal. App. 4th 730, 741-42 (2011)).

Here, extrinsic evidence confirms Chubb understood that the impact of a virus on its insureds' properties would constitute "direct physical loss or damage" to the property, yet chose not to exclude such losses from the scope of the coverage it provided to the Lakers. Recognizing that viruses can cause physical loss and damage to property, after the SARS outbreak, Chubb and other major insurers added "virus exclusions" to some of their policies in order to avoid paying claims, and represented to their regulators that such exclusions were being added to protect insurers from paying claims for physical loss or damage caused to property by viruses like SARS. (Compl. ¶¶ 6, 44-45). SARS is a type of coronavirus. (*Id.* ¶ 48). Yet, Chubb chose not to add such an exclusion to the Lakers' Policy.

Chubb also created a communicable disease exclusion which it includes in some policies but, again, not the Lakers' Policy. Notably, on May 7, 2021 – barely

a week after Chubb moved to dismiss the Lakers' claims – Chubb sent the Lakers a "Notice of Conditional Renewal" for the Policy at issue in this case which stated "that a new Communicable Disease Contamination endorsement will be added to [the Lakers'] policy." (Casazza Decl., Ex. 1 at 2). This new endorsement "includes a Communicable Disease exclusion and a premises coverage that applies to extraordinary costs to clean up or remove a communicable disease present and the premises *and resulting business income loss* . . . ." (*Id.* (emphasis added)). Should the Lakers suffer business income losses from another pandemic, the policy's coverage is now "subject to a $1,000 annual aggregate limit." (*Id.*). As reflected in this endorsement, the exclusion was created by Chubb no later than March 2019 – prior to the COVID pandemic – yet Chubb did not include it in the Lakers' Policy. (*See id.*, Ex. 2 at 1-5 ("Rev. 3/19" notation)).

If the presence of a virus or communicable disease at a property could not cause physical loss or damage, such exclusions would be unnecessary and illusory. Their existence confirms that Chubb understood full well – contrary to its current stance – that if property was rendered unusable due to the presence of a virus at the property, that would constitute physical loss or damage. More importantly, they confirm that a reasonable insured such as the Lakers, would reasonably expect that "direct physical loss or damage" includes property rendered unusable by a virus, and that a policy without a virus exclusion would cover such a loss.

The California Supreme Court has explained that if an insurer is aware of an exclusion that bars coverage but chooses not to use it, the insurer cannot obtain a construction of its policy that imposes the language of the exclusion it chose not to use. *See Robert S.*, 26 Cal. 4th at 763-64 ("Because Safeco chose not to have a criminal act exclusion, instead opting for an illegal act exclusion, we cannot read into the policy what Safeco has omitted. To do so would violate the fundamental principle that in interpreting contracts, including insurance contracts, courts are not to insert what has been omitted."). Yet that is precisely what Chubb asks this Court

to do, by arguing that the Court should read "direct physical loss or damage" as excluding losses caused by the presence of a virus at the Lakers' property.[11]

Chubb claims that other courts have rejected "similar arguments," but none of the cases cited by Chubb applied California law, and that matters here.[12] By way of example, in one of Chubb's cases, the court explicitly noted that it could not consider extrinsic evidence about virus exclusions being "developed by ISO following the outbreaks of SARS and the avian flu" because under Massachusetts law "it is well-settled that the Court may not consider extrinsic evidence *unless* the policies are ambiguous." *Kamakura, LLC v. Greater N.Y. Mut. Ins. Co.*, 2021 WL 1171630, at *8 (D. Mass. Mar. 9, 2021) (emphasis added). That's not the law in California. *See Dore*, 39 Cal. 4th at 391 (extrinsic evidence may expose ambiguity in a contract unambiguous on its face).[13]

D. The Lakers Have Pled More Than Enough to Show "Direct Physical Loss or Damage" to Their Property

Applying the applicable standard discussed above, the Lakers have pled more than enough to show that their property was rendered unusable for its intended

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[11] Recognizing this problem, Chubb suggests in its brief that virus exclusions were only necessary because virus-laden tornadoes might infect swine and such losses would otherwise be covered as direct physical loss or damage. *Cf. Curtis O. Griess & Sons, Inc. v. Farm Bureau Ins. Co. of Neb.*, 528 N.W.2d 329, 331-33 (Neb. 1995). But that is not what Chubb and its fellow insurers told regulators when they sought approval for their virus exclusions. (Compl. ¶¶ 44-45).

[12] Chubb's one California federal case applied Hawaii law. *See Water Sports Kaui*, 2020 WL 6562332 at *2.

[13] In its list of non-California authority, Chubb notably omits a case that directly contradicts its position. *See In re Soc'y Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, 2021 WL 679109, at *10 (N.D. Ill. Feb. 22, 2021) (denying insurer's motion for summary judgment because "the scope of the term 'direct physical loss' is genuinely in dispute" and finding consideration of extrinsic evidence regarding virus exclusions was necessary to resolve dispute). Because the provision was ambiguous, extrinsic evidence regarding the existence of virus exclusions – and the industry's understanding that, absent such an exclusion, "the policy necessarily encompasses business interruption due to viruses and pandemics" – was the "proper subject of discovery, both factual and perhaps expert." *Id.* at *10 n.6.

purpose due to a changed physical condition at the property and, thus, suffered "direct physical loss or damage." Specifically, they have pled detailed allegations that coronavirus was present at their property, that based on science this presence changed the property's condition and rendered the property unusable for its purpose of hosting large crowds at sporting and other events, and that substantial repairs and physical alterations to the property were required before the property could once again be safely used for its intended purpose. (Compl. ¶¶ 53-65, 78, 85-86, 95-98, 101-102). Rather than confronting what the Lakers actually pled, Chubb resorts to misstating and mischaracterizing the Lakers' allegations.

Chubb claims the Lakers pled only that the coronavirus "may" have been present at their property. (*See, e.g.*, Mem. at 1). Not true. The Lakers specifically pled that the coronavirus was present at their property. (*See, e.g.*, Compl. ¶¶ 78-84).

Chubb also argues that even if the Lakers pled the presence of coronavirus at their property (as they did), the Lakers' allegations of such presence are too "vague" to survive a motion to dismiss. (*See, e.g.*, Mem. at 1). Not so. The Lakers did not merely make a conclusory allegation that coronavirus was present at its property. Instead, they included detailed allegations that multiple, specific people were infected with the virus while at the Staples Center, including not only Lakers' players, but visiting players from other NBA and NHL teams. (Compl. ¶¶ 78-84).

Indeed, half of all reported cases of coronavirus in the NBA and NHL during the early days of the pandemic involved players who were present at the Staples Center in March 2020. (*Id.* ¶ 84). If that were not enough, the Lakers also pled that during the relevant period, while coronavirus was spreading rapidly within the Los Angeles community, the Staples Center was home to some of the largest public gatherings in the Los Angeles area, during which time hundreds of thousands of spectators flocked to the property, undoubtedly further spreading coronavirus within the Staples Center. (*Id.* ¶ 64). Chubb forgets that this is a motion to dismiss, not the trial. The Lakers will prove to the jury that coronavirus was present at their

property, but for now they need only plausibly allege that it was, and have done so with more than enough detail to survive a motion to dismiss.[14]

Chubb also argues the Lakers did not adequately plead "direct physical loss or damage" because they supposedly did not plead "any actual change from the COVID-19 pandemic to the insured properties themselves." (Mem. at 11).[15] Again, that is not true. As summarized in detail above, the Lakers specifically pled that the presence of coronavirus caused specific physical changes to the Lakers' property that rendered it unsafe and unusable for its intended purpose of hosting large events, absent significant changes being made to the property. (Compl. ¶¶ 55-63, 78-84; *see also* 5-7, *supra*). Those facts, which Chubb ignores, must be accepted as true in deciding Chubb's motion.[16]

Chubb also represents: "Plaintiff concedes that the virus can be removed from surfaces through ordinary cleaning methods." (Mem. at 1). The Lakers actually

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[14] The Lakers' detailed, specific allegations distinguish this case from those Chubb cites on page 12 of its brief. *Cf. 10E, LLC*, 483 F. Supp. 3d at 836 ("[T]he FAC does not describe particular property damage or articulate any facts connecting the alleged property damage to restrictions on in-person dining."); *Tralom*, 2020 WL 8620224 at *5 (allegations were "wholly conclusory"); *W. Coast Hotel*, 2020 WL 6440037 at *4 ("The Complaint merely states that there was 'direct physical loss of or damage to the [hotels].'" (alteration in original)).

[15] To the extent Chubb contends that the Lakers must plead that the coronavirus caused structural damage to the property, as explained in detail above, that is not the applicable standard under California law or the terms of the Policy.

[16] None of the cases Chubb cites evaluated detailed allegations of the property damage and necessary repair and remediation steps required due to COVID-19. *Compare, e.g.*, *Ba Lax*, 2021 WL 144248 at *3 (no allegation of physical alteration requiring repair), *and Jonathan Oheb MD, Inc. v. Travelers Cas. Ins. Co. of Am.*, 2020 WL 7769880, at *3-4 (C.D. Cal. Dec. 30, 2020) (same), *and Rialto Pockets, Inc. v. Certain Underwriters At Lloyd's, Including Beazley Furlonge*, 2021 WL 267850, at *1-2 (C.D. Cal. Jan. 7, 2021) (same), *and Long*, 2020 WL 6865774 at *2-3 (same), *and Selane Prods., Inc. v. Cont'l Cas. Co.*, 2020 WL 7253378, at *5-6 (C.D. Cal. Nov. 24, 2020) (same), *and Posh*, 2020 WL 8184062 at *2 (same), *and Daneli Shoe Co. v. Valley Forge Ins. Co.*, 2021 WL 1112710, at *4 (S.D. Cal. Mar. 17, 2021) (same), *and Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, 490 F. Supp. 3d 738, 740 (S.D. Cal. 2020) (same), *and Mortar*, 2020 WL 7495180 at *4 (same), *and Barbizon Sch. of S.F., Inc. v. Sentinel Ins. Co.*, 2021 WL 1222161, at *9 (N.D. Cal. Mar. 31, 2021) (same), *and Karen Trinh, DDS, Inc. v. State Farm Gen. Ins. Co.*, 2020 WL 7696080, at *5 (N.D. Cal. Dec. 28, 2020) (same), *with* Compl. ¶¶ 55-63 (alleging extensive alterations required to repair property damage).

pled the opposite, explaining that ordinary cleaning methods are not sufficient to remediate the damage coronavirus causes at property, like the Staples Center, whose purpose is to host thousands of cheering fans at large events in a crowded indoor space. To the contrary, "[i]n structures like sports arenas, the purpose of which is to hold thousands of people comfortably but compactly, substantial physical alterations and extensive safety protocols must be instituted to prevent ongoing and future property damage and protect public health and safety." (Compl. ¶ 2).[17]

Indeed, as the Lakers pled, the presence of coronavirus at the Staples Center, and its impact on the property, required the Lakers to make substantial alterations to the arena and implement extensive procedures including upgrading all of the air filters to MERV 15 standards to remove extremely small airborne particles, installing hundreds of hand sanitizing stations, installing touchless plumbing fixtures and light switches, installing touchless toilets and sinks, installing nanoseptic sleeves on elevator buttons and door handles, installing numerous plexiglass dividers, and reconfiguring the entire space to limit recontamination. (*Id*. ¶¶ 62-63). The Lakers also pled that, contrary to Chubb's assertions, wiping down surfaces would not eliminate the property damage, because infected persons would re-contaminate the property if it were to be used for its intended purpose. (*Id*. ¶¶ 55-57).

II. CHUBB'S MOTION TO DISMISS THE LAKERS' CIVIL AUTHORITY CLAIM FAILS

On the Lakers' Civil Authority claim, Chubb again misstates what the Lakers

[17] Chubb's fact-intensive "alternate cause" argument – based on cases where the loss resulted from civil-authority orders, not the virus – are inapposite for the same reason: those cases did not involve allegations that the virus itself caused extensive property damage requiring repair, as here. *See Another Planet Entm't, LLC v. Vigilant Ins. Co.*, 2021 WL 774141, at *2 (N.D. Cal. Feb. 25, 2021); *Baker v. Or. Mut. Ins. Co.*, 2021 WL 24841, at *2 (N.D. Cal. Jan. 4, 2021); *Pappy's*, 490 F. Supp. 3d at 740; *Tralom*, 2020 WL 8620224, at *4-5; *Musso & Frank Grill Co. v. Mitsui Sumitomo Ins. USA Inc.*, 2020 WL 7346569, at *2 (Cal. Super. Ct. Nov. 9, 2020).

pled. Unlike the cases dismissing such claims, the Lakers specifically pled physical harm to specific property away from the insured premises, and resulting civil-authority orders that prohibited access to the Staples Center. Those allegations are sufficient to survive a motion to dismiss.

Chubb incorrectly claims the Lakers did not plead any civil order resulting from physical loss or damage to any "property elsewhere" than their own property. Staples Center is across the street from Pico Station on L.A.'s Metro, and four other Metro stations are within a mile, including "the heart of the entire Metro rail network." (*Id*. ¶ 87). The complaint specifically alleges that the coronavirus was present in the Metro system, noting that at the time of the complaint Metro had reported 1,640 cases just among employees and contractors, and that even though the first case was not documented until March 23, 2020 "epidemiologists confirm that the coronavirus was present in the Metro system much earlier." (*Id.* ¶ 88). On that basis, the complaint goes on to allege the coronavirus "had already begun causing significant damage to property in Los Angeles, including within one mile of the Staples Center," and that the Mayor's "orders were issued because of the presence of the virus at properties in these areas." (*Id.* ¶ 89).

Those specific allegations about the coronavirus's physical loss or damage to the Metro stations, which must be treated as true on a motion to dismiss, make this case different than every case Chubb cites on page 19 of its brief. *See, e.g.*, *Roundin3rd Sports Bar LLC v. Hartford*, 2021 WL 647379, at *7 (C.D. Cal. Jan. 14, 2021) ("Here, Plaintiff has not alleged that any closure order resulted from damage (or a risk of damage) to a nearby property."). The Lakers' specific allegations about physical damage or loss at their own properties and the Metro stations also distinguish this case from any case relying solely on a civil-authority order's reference to property loss or damage. (*See* Mem. at 20 (citing some of those cases)). Chubb obfuscates by calling the Lakers' allegations "naked," but the allegations are sufficiently detailed and plausible to survive a motion to dismiss.

Chubb concludes by incorrectly claiming that the Lakers did not plead that the relevant civil-authority orders "prohibited access" to the Staples Center or the UCLA Health Training Center and supposedly "effectively ackowledg[ed]" that "employees, staff, contractors, and personnel could still access the properties." (Mem. at 21). Not true.

The Lakers pled, and the relevant civil orders confirm, that "California, Los Angeles County, and the City of Los Angeles all independently issued orders that prohibited the Lakers from hosting fans at home games at the Staples Center." (Compl. ¶ 18; *see also* 7-8, *supra*). Civil orders prevented the Lakers from hosting fans at Staples Center from the time arenas were ordered closed in March 2020 until a limited number of fans were allowed to return on April 15, 2021. (Compl. ¶¶ 69-75; Casazza Decl., Exs. 4-5). These various civil orders prohibiting the Staples Center from hosting sporting events and closing it to the public thus "prohibited access" under any reasonable meaning of the phrase – the government specifically prohibited the Lakers from using the Staples Center for their business operations of hosting basketball games.

Contrary to Chubb's contention the Lakers did not "acknowledge" in their complaint that they continued to have access to the Staples Center while it was closed to their fans. And, even if certain Lakers employees were permitted limited access to the Staples Center to help repair the property and implement preventative measures, it would be an absurd interpretation to find that this meant the civil orders had not "prohibited access" to the Staples Center. *See, e.g.*, *Pez Seafood DTLA, LLC v. Travelers Indem. Co.*, 2021 WL 234355, at *6 (C.D. Cal. Jan. 20, 2021); *Newchops Rest. Comcast LLC v. Admiral Indem. Co.*, 2020 WL 7395153, at *4 n.23 (E.D. Pa. Dec. 17, 2020) ("Nothing in the policy requires total inaccessibility."); *Studio 417, Inc. v. Cincinnati Ins. Co.*, 478 F. Supp. 3d 794, 803-04 (W.D. Mo. 2020); *Ungarean*, 2021 WL 1164836, at *10 (rejecting interpretation that would preclude coverage where a business is effectively closed to the public, but

"employees, or certain other individuals," may still enter the premises to perform ministerial functions).[18] This case is unlike those Chubb cites, in which a business was permitted to stay open for some purposes;[19] rather, civil orders completely prohibited the Staples Center from hosting events such as Lakers games, which is the entire purpose of an arena. The Lakers have sufficiently alleged that the civil orders prohibited access to the Staples Center.

III. CHUBB'S MOTION TO DISMISS THE LAKERS' BAD FAITH CLAIM FAILS

Chubb argues the Lakers' bad faith claim fails because no coverage is due under the Policy, but as demonstrated in detail above, Chubb is not entitled to dismissal of the Lakers' claims for coverage under the Policy.

Chubb also argues it was reasonable for it to deny coverage because a "legion of courts have held there is no insurance coverage in precisely the circumstances Plaintiff alleges here", but this argument misunderstands the Lakers' bad faith claim and actually helps illustrate why that claim is viable. The Lakers alleged that Chubb's coverage denial was unreasonable not due to a mere disagreement between

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[18] As discussed above, under California law, insurance policies must be broadly construed in favor of coverage to protect the reasonable expectations of the insured. *See, e.g.*, *Thee Sombrero, Inc. v. Scottsdale Ins. Co.*, 28 Cal. App. 5th 729, 737 (2018) ("The reasonable expectations of the insured would be that 'loss of use' means the loss of *any* significant use of the premises, not the total loss of all uses.").

[19] Wellness Eatery's "patrons" could "access the property to purchase food and beverage for pick-up and off-site consumption." *Wellness Eatery La Jolla LLC v. Hanover Ins. Grp.*, 2021 WL 389215, at *7 (S.D. Cal. Feb. 3, 2021). Dr. Oheb could still perform some hand and orthopedic surgeries. *Jonathan*, 2020 WL 7769880 at *1, 4. The restaurant Protégé "was only required to stop in-person dining and could continue to operate its kitchen to prepare take-out orders." *Protégé Rest. Partners LLC v. Sentinel Ins. Co., Ltd.*, 2021 WL 428653, at *1 (N.D. Cal. Feb. 8, 2021). Barbizon School of Modelling of Manhattan could still "offer[] modeling, acting, and studio services," when the applicable order merely "reduced the in-person workforce." *Barbizon*, 2021 WL 1222161 at *1, 9. To the extent *Pappy's Barbershops* stands for the proposition that an order closing barbershops did not "prohibit access" for purposes of establishing civil authority coverage, the Lakers respectfully submit that it was wrongly decided.

the parties regarding the policy language or evidence, but because Chubb performed no investigation whatsoever regarding the specific circumstances of the Lakers' claim. (Compl. ¶ 107).

Chubb is required to "fully inquire into possible bases that might support the insured's claim" and "cannot reasonably and in good faith deny payment to its insured without thoroughly investigating the foundation for its denial." *Egan v. Mut. of Omaha Ins. Co.,* 24 Cal. 3d 809, 819 (1979). An insurance company acts unreasonably – and, therefore, in bad faith – when it ignores evidence that supports the insured's claim. *See, e.g.*, *Mariscal v. Old Republic Life Ins. Co.*, 42 Cal. App. 4th 1617, 1624 (1996).

That is precisely what the Lakers have alleged that Chubb did here. Chubb denied coverage to the Lakers without conducting any investigation and without considering the facts establishing the Lakers' entitlement to coverage. Instead, Chubb decided, without any investigation, that the Lakers' claim was the same as very different claims submitted by other policyholders – an erroneous position that it has now doubled-down on its Motion. It sent a form denial letter, because of an instruction from the highest levels of Chubb to never approve COVID-related business interruption claims under any circumstances. (Compl. ¶ 107).

CONCLUSION

This case is different than nearly all others to date. A ruling in favor of Chubb would mean that there is no set of facts under which a plaintiff seeking coverage for physical loss or damage from the coronavirus could ever survive a motion to dismiss, let alone obtain coverage. That is inconsistent with California law, and Chubb's Motion should be denied accordingly.

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