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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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

Plaintiffs,

vs.

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

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

PLAINTIFFS' RESPONSE TO DEFENDANT LIBERTY MUTUAL FIRE INSURANCE COMPANY'S MOTION TO DISMISS AND JOINDER IN DEFENDANT LEXINGTON INSURANCE COMPANY'S MOTION TO DISMISS PLAINTIFFS' AMENDED CLASS ACTION COMPLANT

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

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

Defendants.

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(application for admission
pro hac vice to be filed)

I. INTRODUCTION

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

Defendant Liberty Mutual Fire Insurance Company ("Liberty") moves to dismiss the Amended Complaint largely on the basis of two exclusions it contends formed part of a separate insurance policy sold to the Menominee: a "Virus or Bacteria" exclusion and a "loss of use" exclusion. Dkt. 68. This policy, however, was not attached to the complaint or described in it, and the Menominee have separately moved to strike the policy from consideration at this stage of the litigation. For this reason, the Court should deny Liberty's motion.

II. STANDARDS FOR MOTIONS TO DISMISS

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

suggest an entitlement to relief." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

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

III. ARGUMENT

A. The Court should Deny Liberty's Motion without Considering the Documents Attached to the Motion

Liberty first seeks to dismiss the Amended Complaint based on the arguments raised in Lexington's motion to dismiss, Dkt. 62 (hereinafter, "Lexington Motion"). For the reasons set forth in the Menominee's opposition to that motion, Dkt. 72, the motion should be denied. The Amended Complaint expressly alleges the presence of the virus on insured property, physical loss or damage to property as a result of the virus, and business interruption losses and other expenses flowing from that physical loss or damage. Given the high standards applicable at the motion to dismiss stage, and the need to take every inference in favor of the non-moving party,

the motion must be denied.

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

Accordingly, this Court should not consider this disputed, extrinsic document at this stage of the litigation. *E.g.*, *City of Royal Oak Retirement System v. Juniper Networks, Inc.*, 880 F. Supp. 2d 1045, 1060 (N.D. Cal. 2012) ("[The] Declaration falls into none of these categories [of 12(b)(6) exceptions] and thus cannot be considered by the Court for purposes of ruling on the pending motions to dismiss. Accordingly, Defendants' motion to strike the [Declaration] is GRANTED."); *In re Easysaver Rewards Litig.*, 737 F. Supp. 2d 1159, 1169 (S.D. Cal. 2010) ("The law allows a court to consider extrinsic evidence in a motion to dismiss when it is incorporated into the complaint, however, the rule expressly states that the material must be beyond dispute . . . In this instance, the requirements of the rule have not been met because Plaintiffs challenge the authenticity of the screenshots."); *Davis v. Minnesota Life Ins. Co.*, No. 1:19-CV-00453-DCN, 2020 WL 6163119, at *7 (D. Idaho Oct. 21, 2020) ("In sum, the Court can hardly evaluate the terms of the Policy if it does not know which documents actually constitute the Policy . . . . Discovery is clearly necessary to flesh out what constituted the Policy and the [summary plan description] in this case, who authored the various documents, which documents were in effect during the relevant time period, and which documents [the insured]

was aware of.").[1]

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

B. Even if Considered, Liberty's Loss of Use Exclusion Would Not Bar the Menominee's Claim

If the Court does consider the policy attached to Liberty's Motion, the Court should still reject Liberty's argument that the purported "loss of use" exclusion bars coverage. Dkt. 68 at 11–12.[2] According to Liberty, when a policyholder's claim is based solely on loss of use, "without accompanying direct physical loss or damage," *id.* at 11, there is no coverage. Liberty's argument misses the mark.

First, as explained in detail in the Menominee's opposition to Lexington's motion to dismiss, the Menominee *have* specifically alleged direct physical loss or damage. Dkt. 72. Second, the Menominee are not seeking to recover for "loss of use;" rather, they are seeking to recover the loss of their business income, rental value, and tax revenue under the business interruption and other time element coverages because of the impairment of their properties. AC ¶ 16 n.4. These losses are not barred by the loss of use exclusion.

Here's the difference between seeking recovery for "loss of use" and seeking recovery for the loss of business income resulting from direct physical loss of or damage to covered property: some businesses have lost the use of their physical space because of COVID-19, but nevertheless have seen an increase of their business income. Those businesses do not have a claim for coverage for loss of business income (because they have not suffered such a loss) and their loss of use claims are not covered. Here, the Menominee have suffered a loss of business

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

[2] With respect to Liberty's purported "virus or bacteria" exclusion, the precise wording of that exclusion will be critical in analyzing its alleged application to the Menominee's claim. Thus, as explained herein, further discovery is needed regarding the materials presented by Liberty.

income (as well as losses of rental value and tax revenue) that are compensable. Applying the "loss of use" exclusion here, when the Menomonie have alleged "direct physical loss or damage," would be completely circular because a policyholder would experience a "loss of use" whenever they suffered "direct physical loss or damage" to their property—but that's the whole reason the policyholder purchased business interruption insurance in the first place.

Indeed, at least two courts that have interpreted the same loss of use exclusion that Liberty purports applies here have rejected Liberty's argument, explaining that a broad application of the loss of use exclusion would render the business interruption coverage illusory: "business interruption coverage as contemplated by the TPIP Policy necessar[ily] only results from some loss of use—*i.e.*, from some *interruption of business* . . . . Thus, if all loss of use was excluded, the business interruption coverage would be illusory . . . . For that reason, the Court accepts the proposition that when a dangerous condition like a fire, tornado, or the Pandemic causes loss of use, the exclusion would not apply." *Cherokee Nation v. Lexington Ins. Co.*, No. CV-20-150, 2021 WL 506271, at *12 (Okla. Dist. Ct. Jan. 28, 2021); *see also Choctaw Nation of Oklahoma v. Lexington Ins. Co.*, No. CV-20-42, at *14 (Okla. Dist. Ct. Feb. 15, 2021) (attached as Ex. A).

C. The Court Should Not Apply Liberty's Purported Exclusions Without Giving The Menominee an Opportunity to Conduct Discovery Regarding their Inclusion in the Policy

As explained above, the Menominee believe this Court should strike the portion of Liberty's motion relating to the purported exclusions it attached to the motion. However, in the event the Court does consider the exclusions, the Menominee believe that it would be premature to grant the motion at this time, before the Menominee have had an opportunity to conduct discovery regarding the inclusion, communication, and interpretation of the exclusions.

If the Court chooses to consider materials outside the pleadings and to convert a motion under Rule 12(b)(6) into a motion for summary judgment, the court must give the parties notice and a reasonable opportunity to supplement the record. *Williams v. Cty. of Alameda*, 26 F. Supp. 3d 925, 935–36 (N.D. Cal. 2014) (citing *Bank Melli Iran v. Pahlavi*, 58 F.3d 1406, 1408 (9th Cir.

1995)). That opportunity might include a motion under Federal Rule of Civil Procedure 56(d) for additional discovery. *See generally Williams*, 26 F. Supp. 3d at 936.[3] If the Court does decide to consider the exclusions, the Menominee respectfully request the opportunity under Rule 56(d) to conduct discovery into the materials presented by Liberty.

Dated this 7th day of May 2021

Respectfully submitted,

ANDRUS ANDERSON LLP

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

Attorneys for Plaintiffs and Proposed Class.

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

CERTIFICATE OF SERVICE

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

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

/s/ Jennie Lee Anderson
Jennie Lee Anderson