

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 Arch Specialty 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.

- (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;
- (5) UNDERWRITERS AT LLOYD'S – SYNDICATES: KLN 0510, ATL 1861, ASC 1414, QBE 1886, MSP 0318, APL 1969, CHN 2015;
- (6) UNDERWRITERS AT LLOYD'S – SYNDICATE: BRT 2987;

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

DEFENDANT ARCH SPECIALTY INSURANCE COMPANY'S NOTICE OF MOTION AND MOTION TO DISMISS; JOINDER 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
Defendants.

NOTICE OF MOTION AND MOTION

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

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

First, Arch joins in the arguments set forth in Defendant Lexington Insurance Company’s Motion to Dismiss Plaintiffs’ Amended Class Action Complaint. The arguments stated there are applicable to Arch.

Second, Arch moves for dismissal of Plaintiffs’ claims because, even if Plaintiffs had alleged direct physical loss or damage to property, Arch’s Virus Exclusion absolutely bars Plaintiffs’ claims.

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

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Arch 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 Arch should be dismissed because Plaintiffs have failed to allege the necessary physical loss or damage to property required to trigger coverage under the Arch Policy.

In addition to the reasons detailed in Lexington’s Motion, Arch 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 Arch Policy’s Virus Exclusion, which plainly and unambiguously precludes coverage for any loss, damage, cost or expense caused by, resulting from, contributed to or made worse by actual, suspected, alleged or threatened presence, discharge, dispersal, seepage, migrations, introduction, release or escape of pollutants or contaminants, which includes virus and any disease causing or illness causing agents. The Virus Exclusion applies whether direct or indirect, proximate or remote or in whole or in part caused by, contributed to or aggravated by any physical damage insured by the Policy. Because Plaintiffs fail to otherwise state plausible claims for relief, their claims against Arch should be dismissed with prejudice.

II. THE ARCH POLICY

Arch issued policy number ESP7303916-02 to Plaintiffs for the July 1, 2019 to July 1, 2020 policy period (the “Arch Policy”). The Arch Policy contains all of the terms and conditions detailed in Lexington’s Motion to Dismiss. In addition, the Arch Policy contains an exclusion that specifically bars coverage for losses resulting from the actual, suspected, alleged or threatened presence of a virus and which applies to preclude the claims sought here (the “Arch Virus Exclusion”). The Arch Virus Exclusion is set out as follows:

1 **POLLUTION AND CONTAMINATION EXCLUSION ENDORSEMENT**

2 * * *

3 This policy does not cover any loss, damage, cost or expense caused by, resulting from,
4 contributed to or made worse by actual, suspected, alleged or threatened presence,
5 discharge, dispersal, seepage, migrations, introduction, release or escape of “Pollutants
6 or Contaminants”, all whether direct or indirect, proximate or remote or in whole or in
7 part caused by, contributed to or aggravated by any physical damage insured by this
8 policy, except as specifically referenced below.

9 * * *

10 “Pollutants or Contaminants” means any material, whether solid, liquid, gaseous or
11 otherwise, which can cause or threaten damage to human health or human welfare or
12 causes or threatens damage, deterioration, loss of value, marketability or loss of use to
13 property insured hereunder. “Pollutants or Contaminants” include, but are not limited
14 to, foreign substances, impurities, hazardous materials, poisons, toxins, pathogens or
15 pathogenic organisms, bacteria, virus, and any disease causing or illness causing agents.

16 Declaration of Qianwei Fu in Support of Arch’s Motion to Dismiss (“Fu Decl.”), Ex. A at 25.

17 **III. LEGAL STANDARD**

18 A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the claims stated
19 in the complaint. *See* Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, the plaintiffs’ complaint
20 “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on
21 its face.’” *10E, LLC v. Travelers Indem. Co. of Connecticut*, No. 2:20-CV-04418-SVW-AS, 2020 WL
22 6749361, at *1 (C.D. Cal. Nov. 13, 2020) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) and
23 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although “a court must take all allegations
24 of material fact as true and construe them in the light most favorable to the nonmoving party,” *Turner*
25 *v. City & Cty. of San Francisco*, 788 F.3d 1206, 1210 (9th Cir. 2015), a complaint’s factual allegations
26 must “raise a right to relief above the speculative level,” *Twombly*, 550 U.S. at 555. A complaint that
27 offers “labels and conclusions” or a “formulaic recitation of the elements of a cause of action will not
28 do.” *Iqbal*, 556 U.S. at 678. “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of
‘further factual enhancement.’” *Id.* (citation omitted; alteration in original). Dismissal with prejudice
is warranted when “the complaint [can]not be saved by any amendment.” *Moss v. U.S. Secret Serv.*,
572 F.3d 962, 972 (9th Cir. 2009).

Under Wisconsin law, the court is to give effect to the intent of the parties and should construe
“the policy’s language according to its plain and ordinary meaning, as understood by a reasonable
person in the position of the insured.” *Phillips v. Parmelee*, 840 N.W.2d 713, 764 (Wis. 2013). When

1 determining whether a policy provides coverage, the court will “examine the facts of the claim and the
2 language of the policy to determine whether the policy’s insuring agreement makes an initial grant of
3 coverage.” *Day v. Allstate Indem. Co.*, 798 N.W.2d 199, 206 (Wis. 2011). If the claim triggers an initial
4 grant of coverage, the court then determines whether an exclusion will preclude that coverage. *Id.* The
5 insured has the burden to prove the initial grant of coverage, and this burden shifts to the insurer to
6 show that an exclusion precludes the coverage. *Id.*

7 Here, there are two legal bases that preclude Plaintiffs’ claims: (1) Plaintiffs failed to allege
8 facts to plausibly show they sustained direct physical loss or damage as required under any of the
9 provisions pleaded and (2) Arch’s Virus Exclusion absolutely bars Plaintiffs’ claims.

10 IV. ARGUMENT

11 The facts pleaded in Plaintiffs’ Amended Class Action Complaint demonstrate as a matter of
12 law that Plaintiffs cannot establish an entitlement to coverage under the Policy. As detailed in
13 Lexington’s Motion to Dismiss Plaintiffs’ Amended Class Action Complaint, Plaintiffs’ claims against
14 all Defendants, including Arch, should be dismissed because Plaintiffs have failed to allege direct
15 physical loss or damage to property. Accordingly, without need to consider any exclusion in the Arch
16 Policy, Plaintiffs’ claims should be dismissed.

17 Even if Plaintiffs had alleged direct physical loss or damage to property, the Arch Virus
18 Exclusion offers an independent basis to preclude coverage for Plaintiffs’ claims against Arch. Notably,
19 Plaintiffs’ Amended Class Action Complaint discusses several potential exclusions in the primary
20 policy form, but does not address, and in fact ignores, Arch’s Policy form and its directly relevant
21 exclusion. *See, e.g.*, Plaintiffs’ Amended Class Action Complaint (“FAC”) at ¶¶ 56 – 58. The Arch
22 Virus Exclusion excludes coverage for any loss, damage, cost or expense caused by, resulting from,
23 “contributed to or made worse by actual, suspected, alleged or threatened presence, discharge,
24 dispersal, seepage, migrations, introduction, release or escape of ‘Pollutants or Contaminants,’” which
25 are defined, in part, as including “virus, and any disease causing or illness causing agents.” *Fu Decl.*,
26 Ex. A at 25. The exclusion further applies “whether direct or indirect, proximate or remote or in whole
27 or in part caused by, contributed to or aggravated by any physical damage insured by this policy.” *Id.*

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

- 3 • "Due to COVID-19, the Clinic also has suffered direct physical loss or damage and as a
4 result, the Clinic's ability to provide services has been severely hampered, causing a
5 significant drop in business and tax revenue." (Plaintiffs' FAC at p. 3, ¶7).
- 6 • "These businesses have also suffered direct physical loss or damage due to COVID-19,
7 causing a loss in business and tax revenues for Plaintiffs." (Plaintiffs' FAC at p. 3, ¶8).
- 8 • "Due to COVID-19, Plaintiffs have suffered "direct physical loss or damage" to MCR,
9 Thunderbird, the Clinic, and other businesses. COVID-19 damaged the property of MCR,
10 Thunderbird and the Clinic, making each of them unusable in the way that they had been
11 used before COVID-19 and effectively uninhabitable for patrons. Instead of being able to
12 fill MCR and Thunderbird with guests, gamblers, meeting attendees, and diners, MCR and
13 Thunderbird were required by the presence of the virus and by resulting civil authority
14 orders to drastically reduce operations, and even to close entirely. To do anything else would
15 have threatened further damage to the property at MCR and Thunderbird as well as further
16 losses for Plaintiffs. Until COVID-19 was brought under control, these properties were
17 damaged and faced the threat of further damage. Use of the properties was not possible."
18 (Plaintiffs' FAC at p. 4, ¶13).
- 19 • "This loss is physical. Due to physical damage caused by the presence of the coronavirus,
20 the interior spaces of MCR, Thunderbird, and the Clinic were effectively uninhabitable, or
21 would have become so imminently, and Plaintiffs were unable to permit their customers to
22 access their interior spaces, severely impacting their business. The physical presence of the
23 coronavirus, the resulting damage to property, and the probability of consequential illness
24 for any patron rendered the space effectively uninhabitable in the same way that a crumbling
25 and open roof from the aftermath of a tornado would make the interior space of a business
26 unusable." (Plaintiffs' FAC at p. 5, ¶16).
- 27 • "Due to the physical damage caused by the presence of COVID-19, these properties became
28 effectively or imminently uninhabitable by patrons and unsafe for their intended purpose

1 and thus suffered physical loss or damage...If they were to conduct business as usual, the
 2 disease and virus would continue to appear, property would suffer further damage, and
 3 guests, gamblers, meeting attendees, diners, patients, and others would get sick.” (Plaintiffs’
 4 FAC at p. 15, ¶66).

- 5 • “The presence of virus or disease has resulted in physical damage to property in that manner
 6 in this case and in addition has infested the air or imminently threatens to infest the air in
 7 the properties.” (Plaintiffs’ FAC at p. 16, ¶68).

8 These allegations all demonstrate Plaintiffs’ claimed loss directly or indirectly, proximately or
 9 remotely or in whole or in part was caused by a virus.

10 Wisconsin courts enforce “exclusions that are clear from the face of the policy.” *Day*, 798
 11 N.W.2d at 206. In fact, the Wisconsin Supreme Court recognized in *Day* that an insurance policy must
 12 be construed in a manner “so as to give a reasonable meaning to each provision of the contract, and []
 13 courts must avoid a construction which renders portions of a contract meaningless, inexplicable or mere
 14 surplusage.” *Id.* (citing *1325 North Van Buren, LLC v. T-3 Group, Ltd.*, 716 N.W.2d 822, 838 (Wis.
 15 2016)). Accordingly, Arch’s Virus Exclusion must be interpreted and enforced according to its plain
 16 terms.

17 Here, the Arch Virus Exclusion’s plain and unambiguous language excludes Plaintiffs’ claims
 18 for coverage resulting from a virus-induced loss, COVID-19: “This policy does not cover any loss,
 19 damage, cost or expense caused by, resulting from, contributed to or made worse by actual, suspected,
 20 alleged or threatened presence, discharge, dispersal, seepage, migrations, introduction, release or
 21 escape of ‘Pollutants or Contaminants . . .’” Fu Decl., Ex. A at 25. Moreover, the Arch Virus Exclusion
 22 defines “Pollutants or Contaminants,” in part, as including “virus, and any disease causing or illness
 23 causing agents.”

24 Recently, the court in *Circus Circus LV, LP v. AIG Specialty Ins. Co.*, No.
 25 220CV01240JADNJK, 2021 WL 769660, at *6 (D. Nev. Feb. 26, 2021) examined a nearly identical
 26 exclusion in the context of a COVID claim. The court found that “the SARS-CoV-2 virus and resulting
 27 COVID-19 pandemic falls squarely within the policy’s pollutants-or-contaminants exclusion. Circus
 28 Circus cannot reasonably claim that SARS-CoV-2 is not a virus. Its own pleadings support a finding

1 that the virus has been released, dispersed, and discharged into the atmosphere, resulting in infections
2 and transmissions.” *Id.* The court in *Circus Circus* thus found that not only did the insured fail to allege
3 sufficient physical loss or damage sufficient to trigger the policy’s coverage, the policy’s exclusion
4 independently precluded coverage for the insured’s claims.

5 Other courts throughout the country have consistently held that the same or similar virus
6 exclusion precludes business interruption and civil authority claims arising out of COVID-19 and have
7 dismissed these claims accordingly. For example, in the following cases, courts examined the same or
8 similar language in the Arch Virus Exclusion and dismissed the plaintiffs’ claims:

- 9 • *Zwillo V, Corp. v. Lexington Ins. Co.*, No. 4:20-00339-CV-RK, 2020 WL 7137110, at *8
10 (W.D. Mo. Dec. 2, 2020). The court held that an exclusion for “Contaminants or Pollutants,”
11 which included “virus” in its definition, applied to COVID-19 claims such that dismissal
12 was granted in favor of the insurer.
- 13 • *Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.*, No. 20-cv-04434-JSC, 2020 WL
14 7342687, at *3 (N.D. Cal. Dec. 14, 2020). The court held that an exclusion for “[p]resence,
15 growth, proliferation, spread or any activity of ‘fungi’, wet rot, dry rot, bacteria or virus”
16 plainly and unambiguously required dismissal of the insured’s COVID-19 claims.
- 17 • *Wilson v. Hartford Cas. Co.*, No. CV 20-3384, 2020 WL 5820800, at *7 (E.D. Pa. Sept. 30,
18 2020). The court found that an exclusion barring coverage for the “[p]resence, growth,
19 proliferation, spread or any activity of ‘fungi’, wet rot, dry rot, bacteria or virus” was
20 unambiguous and barred coverage for COVID-19 claims.
- 21 • *Raymond H Nahmad DDS PA v. Hartford Cas. Ins. Co.*, No. 1:20-CV-22833, 2020 WL
22 6392841, at *9 (S.D. Fla. Nov. 2, 2020). The court held that even if the insured had triggered
23 coverage for COVID-19 claims, the exclusion for the “[p]resence, growth, proliferation,
24 spread or any activity of ‘fungi’, wet rot, dry rot, bacteria or virus” would apply to exclude
25 coverage.
- 26 • *Natty Greene’s Brewing Co., LLC, v. Travelers Cas. Ins. Co. of Am.*, No. 1:20-CV-437,
27 2020 WL 7024882, at *4 (M.D.N.C. Nov. 30, 2020). The court held that defendants were
28 entitled to judgment on the pleadings for claims arising from COVID-19 based on the

1 unambiguous language of the policy's virus exclusion.

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

4
5 ¹ See *Part Two LLC v. Owners Ins. Co.*, No. 7:20-cv-01047-LSC, 2021 WL 135319, at *4 (N.D. Ala.
6 Jan. 14, 2021); *Pure Fitness LLC v. Twin City Fire Ins. Co.*, No. 2:20-CV-775-RDP, 2021 WL
7 512242, at *4 (N.D. Ala. Feb. 11, 2021); *Chattanooga Prof'l Baseball LLC v. Nat'l Cas. Co.*, No.
8 CV-20-01312-PHX-DLR, 2020 WL 6699480, at *4 (D. Ariz. Nov. 13, 2020); *Border Chicken AZ
9 LLC v. Nationwide Mut. Ins. Co.*, No. CV-20-00785-PHX-JJT, 2020 WL 6827742, at *3 (D. Ariz.
10 Nov. 20, 2020); *Cibus LLC v. Cap. Ins. Grp.*, No. CV-20-00277-TUC-JGZ (DTF), 2021 WL
11 1100376, at *2 (D. Ariz. Mar. 23, 2021); *W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard
12 Ins. Cos.*, No. 220CV05663VAPDFMX, 2020 WL 6440037, at *6 (C.D. Cal. Oct. 27, 2020); *Boxed
13 Foods Co., LLC v. California Capital Ins. Co.*, No. 20-CV-04571-CRB, 2020 WL 6271021, at *5
14 (N.D. Cal. Oct. 26, 2020), as amended (Oct. 27, 2020); *Robert W. Fountain, Inc., v. Citizens Ins.
15 Co. of Am.*, No. 20-CV-05441-CRB, 2020 WL 7247207, at *4 (N.D. Cal. Dec. 9, 2020); *Protege
16 Rest. Partners LLC v. Sentinel Ins. Co., Ltd.*, No. 20-CV-03674-BLF, 2021 WL 428653, at *8 (N.D.
17 Cal. Feb. 8, 2021); *HealthNOW Med. Ctr., Inc. v. State Farm Gen. Ins. Co.*, No. 20-cv-04340-HSG,
18 2020 WL 7260055, at *2 (N.D. Cal. Dec. 10, 2020); *Mortar & Pestle Corp. v. Atain Specialty Ins.
19 Co.*, No. 20-cv-03461-MMC, 2020 WL 7495180, at *5 (N.D. Cal. Dec. 21, 2020); *Palmdale
20 Estates, Inc. v. Blackboard Ins. Co.*, No. 20-cv-06158-LB, 2021 WL 25048, at *3 (N.D. Cal. Jan.
21 4, 2021); *Colgan v. Sentinel Ins. Co.*, No. 20-CV-04780-HSG, 2021 WL 472964, at *4 (N.D. Cal.
22 Jan. 26, 2021); *Founder Inst. Inc. v. Hartford Fire Ins. Co.*, No. 20-CV-04466-VC, 2020 WL
23 6268539, at *1 (N.D. Cal. Oct. 22, 2020); *Karen Trinh, DDS, Inc. v. State Farm Gen. Ins. Co.*, No.
24 5:20-cv-04265-BLF, 2020 WL 7696080, at *3 (N.D. Cal. Dec. 28, 2020); *Long Affair Carpet &
25 Rug, Inc. v. Liberty Mut. Ins. Co.*, No. SACV2001713CJCJDEX, 2020 WL 6865774, at *3 (C.D.
26 Cal. Nov. 12, 2020); *BA LAX, LLC v. Hartford Fire Ins. Co.*, No. 220CV06344SVWJPR, 2021 WL
27 144248, at *4 (C.D. Cal. Jan. 12, 2021); *10E, LLC v. Travelers Indem. Co. of Connecticut*, No.
28 2:20-CV-04418-SVW-AS, 2020 WL 6749361, at *3 (C.D. Cal. Nov. 13, 2020); *Pez Seafood DTLA,
LLC v. Travelers Indem. Co.*, No. CV204699DMGGJSX, 2021 WL 234355, at *7 (C.D. Cal. Jan.
20, 2021); *Roundin3rd Sports Bar v. The Hartford*, No. 220CV05159SVWPLA, 2021 WL 647379,
at *8 (C.D. Cal. Jan. 14, 2021); *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), 2021 WL 1060230, 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); *Mayssami Diamond, Inc. v. Travelers Casualty Ins. Co. of Am.*, No.
3:20-cv-01230-AJB-RBB, 2021 WL 1226447, at *4 (S.D. Cal. Mar. 30, 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); *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); *Mauricio Martinez, DMD, P.A.
v. Allied Ins. Co. of Am.*, No. 220CV00401FTM66NPM, 2020 WL 5240218, at *3 (M.D. Fla. Sept.
2, 2020); *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

(Cont'd on next page)

1 WL 7258857, at *13 (S.D. Iowa Dec. 7, 2020); *Whiskey River on Vintage, Inc., v. Illinois Cas. Co.*,
 2 No. 4:20-CV-185-JAJ, 2020 WL 7258575, at *14 (S.D. Iowa Nov. 30, 2020); *Gerleman*
 3 *Management, Inc. v. Atlantic States Ins. Co.*, No. 4:20-cv-183-JAJ, 2020 WL 8093577, at *6 (S.D.
 4 Iowa Dec. 11, 2020); *MHG Hotels, LLC v. Emcasco Ins. Co.*, No. 1:20-cv-01620-RLY-TAB, slip
 5 op. at 14-15 (S.D. Ind. Mar. 8, 2021) (Request for Judicial Notice (“RJN”), Ex. 3); *AFM Mattress*
 6 *Co., LLC, v. Motorists Commercial Mutual Ins. Co.*, No. 20 CV 3556, 2020 WL 6940984, at *4
 7 (N.D. Ill. Nov. 25, 2020); *Siren Salon, Inc. v. Liberty Mutual Ins. Co.*, No. 20 C 3108, slip op. at 3
 8 (N.D. Ill. Mar. 22, 2021) (RJN, Ex. 5); *Firenze Ventures, LLC v. Twin City Fire Ins. Co.*, No. 20 C
 9 4226, 2021 WL 1208991, at *3 (N.D. Ill. Mar. 31, 2021); *Turek Enters., Inc. v. State Farm Mut.*
 10 *Auto. Ins. Co.*, No. 20-11655, 2020 WL 5258484, at *9 (E.D. Mich. Sept. 3, 2020); *J&H Lanmark,*
 11 *Inc. v. Twin City Fire Ins. Co.*, No. CV 5:20-333-DCR, 2021 WL 922057, at *3 (E.D. Ky. Mar. 10,
 12 2021); *Stanford Dental, PLLC v. Hanover Ins. Grp., Inc.*, No. 20-CV-11384, 2021 WL 493322, at
 13 *4 (E.D. Mich. Feb. 10, 2021); *Dye Salon, LLC v. Chubb Indem. Ins. Co.*, No. 20-CV-11801, 2021
 14 WL 493288, at *8 (E.D. Mich. Feb. 10, 2021); *Seifert v. IMT Ins. Co.*, No. CV 20-1102 (JRT/DTS),
 15 2020 WL 6120002, at *4 (D. Minn. Oct. 16, 2020); *Real Hosp., LLC v. Travelers Cas. Ins. Co. of*
 16 *Am.*, No. 2:20-CV-00087-KS-MTP, 2020 WL 6503405, at *8 (S.D. Miss. Nov. 4, 2020); *Ballas*
 17 *Nails & Spa, LLC v. Travelers Cas. Ins. Co. of Am.*, No. 4:20 CV 1155 CDP, 2021 WL 37984, at
 18 *6 (E.D. Mo. Jan. 5, 2021); *N&S Rest. LLC v. Cumberland Mut. Fire Ins. Co.*, No.
 19 CV2005289RBKMW, 2020 WL 6501722, at *5 (D.N.J. Nov. 5, 2020); *MAC Prop. Grp. LLC v.*
 20 *Selective Fire and Cas. Ins. Co.*, No. L-2629-20, 2020 WL 7422374, at *9 (N.J. Super. Ct. App.
 21 Div. Nov. 5, 2020); *The Eye Care Ctr. of New Jersey, PA v. Twin City Fire Ins. Co.*, No.
 22 CV2005743KMESK, 2021 WL 457890, at *3 (D.N.J. Feb. 8, 2021); *7th Inning Stretch LLC v.*
 23 *Arch Ins. Co.*, No. CV208161SDWLDW, 2021 WL 800595, at *3 (D.N.J. Jan. 19, 2021);
 24 *Boulevard Carroll Entm't Grp., Inc. v. Fireman's Fund Ins. Co.*, No. 20-11771 (SDW) (LDW),
 25 2020 WL 7338081, at *2 (D.N.J. Dec. 14, 2020); *Causeway Auto., LLC v. Zurich Am. Ins. Co.*, No.
 26 20-8393 (FLW) (DEA), 2021 WL 486917, at *7 (D.N.J. Feb. 10, 2021); *Valley Plumbing Supply,*
 27 *Inc. v. Merchants Mut. Ins. Co.*, No. 1:20-cv-08257-NLH-KMW, 2021 WL 567994, at *7 (D.N.J.
 28 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); *Mattdogg, Inc. v. Philadelphia Indem.*
Specialty Ins. Co., No. L-820-20, slip op. at 8 (N.J. Super. Ct. App. Div. Nov. 17, 2020) (RJN, Ex.
 2); *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); *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*
 (Cont'd on next page)

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

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 Arch Specialty Insurance
 9 Company and GRANT such other relief as this Court may deem just and proper.

10 DATED: April 9, 2021

Respectfully submitted,

11 By: /s/ Qianwei Fu
 12 Qianwei Fu (SBN 242669)
 13 ZELLE LLP

14
 15 *Ins. Co.*, No. 20 CV 6386, 2021 WL 506270, at *5 (Franklin Cnty., Ohio Ct. Common Pleas Feb.
 16 1, 2021); *Goodwill Indus. of Cent. Oklahoma, Inc. v. Philadelphia Indem. Ins. Co.*, No. CV-20-
 17 511-R, 2020 WL 8004271, at *4 (W.D. Okla. Nov. 9, 2020); *Isaac's at Spring Ridge, LLP v. MMG*
 18 *Ins. Co.*, No. CI-20-03613, slip op. at 1 (Lancaster Cnty., Pa. Ct. Common Pleas Mar. 2, 2021)
 19 (RJN, Ex. 1); *Brian Handel D.M.D., P.C. v. Allstate Ins. Co.*, No. CV 20-3198, 2020 WL 6545893,
 20 at *4 (E.D. Pa. Nov. 6, 2020); *Toppers Salon & Health Spa, Inc. v. Travelers Prop. Cas. Co. of*
 21 *Am.*, No. 2:20-CV-03342-JDW, 2020 WL 7024287, at *3 (E.D. Pa. Nov. 30, 2020); *Kessler Dental*
 22 *Assocs., P.C. v. Dentists Ins. Co.*, No. 2:20-CV-03376-JDW, 2020 WL 7181057, at *3 (E.D. Pa.
 23 Dec. 7, 2020); *ATCM Optical, Inc. v. Twin City Fire Ins. Co.*, No. 20-4238, 2021 WL 131282, at
 24 *7 (E.D. Pa. Jan. 14, 2021); *Moody v. Hartford Fin. Servs. Group, Inc.*, No. 20-2856, 2021 WL
 25 135897, at *8 (E.D. Pa. Jan. 14, 2021); *Ultimate Hearing Solutions, LLC v. Twin City Fire Ins. Co.*,
 26 No. 20-2401, 2021 WL 131556, at *10 (E.D. Pa. Jan. 14, 2021); *Zagafen Bala, LLC v. Twin City*
 27 *Fire Ins. Co.*, No. 20-3033, 2021 WL 131657, *7 (E.D. Pa. Jan. 14, 2021); *TAQ Willow Grove,*
 28 *LLC v. Twin City Fire Ins.*, No. 20-3863, 2021 WL 131555, at *7 (E.D. Pa. Jan. 14, 2021); *Frank*
Van's Auto Tag, LLC v. Selective Ins. Co., No. 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); *Newchops Rest. Comcast LLC v. Admiral Indem. Co.*, No. CV 20-1869, 2020
 WL 7395153, at *8-9 (E.D. Pa. Dec. 17, 2020); *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); *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-
 CV-461-DAE, 2020 WL 4724305, at *7 (W.D. Tex. Aug. 13, 2020).

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

555 12th Street, Suite 1230
Oakland, CA 94607
Telephone: (415) 693-0700
Facsimile: (415) 693-0770
qfu@zelle.com

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

*Attorneys for Defendant Arch Specialty Insurance
Company*

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