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Attorneys for Defendant Landmark American Insurance Company

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,

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 LANDMARK AMERICAN INSURANCE COMPANY'S NOTICE OF MOTION AND MOTION TO DISMISS; JOINDER IN DEFENDANT LEXINGTON INSURANCE COMPANY'S MOTION TO DISMISS PLAINTIFFS' AMENDED CLASS ACTION COMPLAINT

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

(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) LANDMARK AMERICAN INSURANCE COMPANY;
(16) XL CATLIN INSURANCE COMPANY UK LTD; and
(17) SRU DOE INSURERS 1-20,

Defendants.

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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 Landmark American Insurance Company ("Landmark") 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, Landmark 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 Landmark.

Second, Landmark moves for dismissal of Plaintiffs' claims because, even if Plaintiffs had alleged direct physical loss or damage to property, Landmark's Pathogen 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 exhibits, 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.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

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

In addition to the reasons detailed in Lexington's Motion, Landmark 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 Landmark Policies' Pathogen Exclusion, which plainly and unambiguously precludes coverage for any loss or damage caused directly or indirectly by the discharge, dispersal, seepage, migration, release, escape or application of any pathogenic or poisonous biological or chemical materials. The Pathogen Exclusion applies regardless of any other cause or event that contributes concurrently or in any sequence to the loss. Because Plaintiffs fail to otherwise state plausible claims for relief, their claims against Landmark should be dismissed with prejudice.

II. THE LANDMARK POLICIES

Landmark issued policy number LHQ424638 to Plaintiffs for the July 1, 2019 to July 1, 2020 policy period (the "Landmark DIC Policy"). The Landmark DIC Policy provides $50,000,000 coverage in the $100,000,000 excess $100,000,000 "DIC only Layer including EQ and FL." Declaration of Qianwei Fu in Support of Landmark's Motion to Dismiss ("Fu Decl."), Ex. A at 16. The Landmark DIC Policy was intended to provide coverage only for earthquake and flood that was not covered in the manuscript primary and excess lower layers. Landmark also issued policy number LHT424650 for the July 1, 2019 to July 1, 2020 policy period (the "Landmark Limited Excess Policy"). The Landmark Limited Excess Policy only identifies and covers the following named insureds: Pechanga Band of Luiseno Indians, Cherokee Nation Entertainment, LLC, Saginaw Chippewa Indian Tribe, Chickasaw Nation Department of Commerce, and Choctaw Nation of Oklahoma. Fu Decl., Ex. B at 9. The

Landmark Limited Excess Policy does not name Plaintiffs as Named Insureds. (The Landmark DIC Policy and the Landmark Limited Excess Policy are collectively referred to as the "Landmark Policies").

Nevertheless, the Landmark Policies contain all of the terms and conditions detailed in Lexington's Motion to Dismiss. In addition, the Landmark Policies contain a Pathogenic or Poisonous Biological or Chemical Materials Endorsement that bars coverage for losses resulting from any pathogenic materials and which applies to preclude the claims sought here (the "Landmark Pathogen Exclusion"). The Landmark Pathogen Exclusion states:

> **EXCLUSION OF PATHOGENIC OR POISONOUS BIOLOGICAL OR CHEMICAL MATERIALS**
>
> * * *
>
> We will not pay for loss or damage caused directly or indirectly by the discharge, dispersal, seepage, migration, release, escape or application of any pathogenic or poisonous biological or chemical materials. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

Fu Decl., Ex. A at 94 and Ex. B. at 92.

III. LEGAL STANDARD

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

1 is warranted when "the complaint [can]not be saved by any amendment." *Moss v. U.S. Secret Serv.*,
2 572 F.3d 962, 972 (9th Cir. 2009).

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

12 Here, there are two legal bases that preclude Plaintiffs' claims: (1) Plaintiffs failed to allege
13 facts to plausibly show they sustained direct physical loss or damage as required under any of the
14 provisions pleaded and (2) the Landmark Pathogen Exclusion absolutely bars Plaintiffs' claims.

15 **IV. ARGUMENT**

16 The facts pleaded in Plaintiffs' Amended Class Action Complaint ("FAC") demonstrate as a
17 matter of law that Plaintiffs cannot establish an entitlement to coverage under the Policy. As detailed
18 in Lexington's Motion to Dismiss Plaintiffs' Amended Class Action Complaint, Plaintiffs' claims
19 against all Defendants, including Landmark, should be dismissed because Plaintiffs have failed to
20 allege direct physical loss or damage to property. Accordingly, without need to consider any exclusion
21 in the Landmark Policies, Plaintiffs' claims should be dismissed.

22 Even if Plaintiffs had alleged direct physical loss or damage to property, the Landmark
23 Pathogen Exclusion offers an independent basis to preclude coverage for Plaintiffs' claims against
24 Landmark. Notably, Plaintiffs' Amended Class Action Complaint discusses several potential
25 exclusions in the primary policy form, but does not address, and in fact ignores, Landmark's Policy
26 form and its directly relevant exclusion. *See, e.g.,* Plaintiffs' Amended Class Action Complaint
27 ("FAC") at ¶¶ 56 – 58.
28

The Landmark Pathogen Exclusion excludes coverage for "loss or damage caused directly or indirectly by the discharge, dispersal, seepage, migration, release, escape or application of any pathogenic or poisonous biological or chemical materials." Fu Decl., Ex. A at 94; Fu Decl., Ex. B. at 92. The exclusion further applies "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." *Id.*

While there are no cases in Wisconsin defining the terms "pathogenic materials",[1] the dictionary defines the term "pathogenic" as "causing of capable of causing disease."[2] And the term "material" is defined as a noun that is "1(a)(1) the elements, constituents, or substances of which something is composed or can be made; (2): matter that has qualities which give it individuality and by which it may be categorized."[3] Further, courts addressing COVID-19-related issues routinely recognize and refer to the virus as a pathogen.[4]

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

- "Due to COVID-19, the Clinic also has suffered direct physical loss or damage and as a result, the Clinic's ability to provide services has been severely hampered, causing a significant drop in business and tax revenue." (Plaintiffs' FAC at p. 3, ¶7).
- "These businesses have also suffered direct physical loss or damage due to COVID-19, causing a loss in business and tax revenues for Plaintiffs." (Plaintiffs' FAC at p. 3, ¶8).

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[1] There are cases in California that recognize that pathogens include viruses, including coronaviruses, such as SARS. *See, e.g., Tri-Valley Cares v. U.S. Dep't of Energy*, No. C 08-01372 SBA, 2009 WL 347744, at *7 (N.D. Cal. Feb. 9, 2009).

[2] "*Pathogenic*," MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/pathogenic (last visited Feb. 11, 2021).

[3] "*Material*," MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/materials (last visited Feb. 11, 2021). In Wisconsin, "a court may find guidance in construing the common meaning of an insurance policy term by looking to a definition of the term in a recognized dictionary." *Weimer v. Country Mut. Ins. Co*., 216 Wis.2d 705, 722–23, 575 N.W.2d 466 (1998).

[4] *See, e.g., Basank v. Decker*, 449 F. Supp. 3d 205, 216 (S.D.N.Y. 2020) (recognizing that SARS-CoV-2, which causes COVID-19, is a highly transmissible "infectious pathogen"); *In re Approval of the Judicial Emergency Declared in the S. Dist. of California*, 955 F.3d 1135, 1139 (9th Cir. 2020) (recognizing that the State of California had a right to try to reduce aerosol transmissible *pathogens*, including COVID-19).

- "Due to COVID-19, Plaintiffs have suffered "direct physical loss or damage" to MCR, Thunderbird, the Clinic, and other businesses. COVID-19 damaged the property of MCR, Thunderbird and the Clinic, making each of them unusable in the way that they had been used before COVID-19 and effectively uninhabitable for patrons. Instead of being able to fill MCR and Thunderbird with guests, gamblers, meeting attendees, and diners, MCR and Thunderbird were required by the presence of the virus and by resulting civil authority orders to drastically reduce operations, and even to close entirely. To do anything else would have threatened further damage to the property at MCR and Thunderbird as well as further losses for Plaintiffs. Until COVID-19 was brought under control, these properties were damaged and faced the threat of further damage. Use of the properties was not possible." (Plaintiffs' FAC at p. 4, ¶13).
- "This loss is physical. Due to physical damage caused by the presence of the coronavirus, the interior spaces of MCR, Thunderbird, and the Clinic were effectively uninhabitable, or would have become so imminently, and Plaintiffs were unable to permit their customers to access their interior spaces, severely impacting their business. The physical presence of the coronavirus, the resulting damage to property, and the probability of consequential illness for any patron rendered the space effectively uninhabitable in the same way that a crumbling and open roof from the aftermath of a tornado would make the interior space of a business unusable." (Plaintiffs' FAC at p. 5, ¶16).
- "Due to the physical damage caused by the presence of COVID-19, these properties have became effectively or imminently uninhabitable by patrons and unsafe for their intended purpose and thus suffered physical loss or damage…If they were to conduct business as usual, the disease and virus would continue to appear, property would suffer further damage, and guests, gamblers, meeting attendees, diners, patients, and others would get sick." (Plaintiffs' FAC at p. 15, ¶66).
- "The presence of virus or disease has resulted in physical damage to property in that manner in this case and in addition has infested the air or imminently threatens to infest the air in the properties." (Plaintiffs' FAC at p. 16, ¶68).

1 These allegations all demonstrate Plaintiffs' claimed loss was directly or indirectly caused by a virus,
2 which is a pathogen.

3 Wisconsin courts enforce "exclusions that are clear from the face of the policy." *Day*, 798
4 N.W.2d at 206. In fact, the Wisconsin Supreme Court recognized in *Day* that an insurance policy must
5 be construed in a manner "so as to give a reasonable meaning to each provision of the contract, and [ ]
6 courts must avoid a construction which renders portions of a contract meaningless, inexplicable or mere
7 surplusage." *Id.* (citing *1325 North Van Buren, LLC v. T–3 Group, Ltd.,* 716 N.W.2d 822, 838 (Wis.
8 2016)). Accordingly, Landmark's Pathogen Exclusion must be interpreted and enforced according to
9 its plain terms.

10 Here, the Landmark Pathogen Exclusion's plain and unambiguous language excludes Plaintiffs'
11 claims for coverage resulting from a virus-induced loss, COVID-19: "We will not pay for loss or
12 damage caused directly or indirectly by the discharge, dispersal, seepage, migration, release, escape or
13 application of any pathogenic or poisonous biological or chemical materials." Fu Decl., Ex. A at 94;
14 Fu Decl., Ex. B. at 92. Moreover, the Landmark Pathogen Exclusion applies "regardless of any other
15 cause or event that contributes concurrently or in any sequence to the loss." *Id.*

16 In fact, other courts throughout the country have consistently held that the same or similar virus
17 exclusion precludes business interruption and civil authority claims arising out of COVID-19 and have
18 dismissed these claims accordingly. For example, in *Boxed Foods Co., LLC v. California Capital Ins.*
19 *Co.*, No. 20-CV-04571-CRB, 2020 WL 6271021, at *3 (N.D. Cal. Oct. 26, 2020), *as amended* (Oct.
20 27, 2020), this Court held that an exclusion for "loss or damage caused by, resulting from, contributing
21 to or made worse by the actual, alleged or threatened presence of any pathogenic organism," precluded
22 plaintiffs' claims arising from COVID-19 for business income losses and extra expenses under the
23 Civil Authority provision of the policy.

24 Courts addressing similar virus exclusions have overwhelmingly dismissed business
25 interruption and civil authority claims related to COVID-19.[5]

26

27 [5] *See Part Two LLC v. Owners Ins. Co.*, No. 7:20-cv-01047-LSC, 2021 WL 135319, at *4 (N.D. Ala. Jan. 14, 2021); *Pure Fitness LLC v. Twin City Fire Ins. Co.*, No. 2:20-CV-775-RDP, 2021 WL 512242, at *4 (N.D. Ala. Feb. 11, 2021); *Chattanooga Prof'l Baseball LLC v. Nat'l Cas. Co.*, No.
28 CV-20-01312-PHX-DLR, 2020 WL 6699480, at *4 (D. Ariz. Nov. 13, 2020); *Border Chicken AZ*

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LLC v. Nationwide Mut. Ins. Co., No. CV-20-00785-PHX-JJT, 2020 WL 6827742, at *3 (D. Ariz. Nov. 20, 2020); *Cibus LLC v. Cap. Ins. Grp.*, No. CV-20-00277-TUC-JGZ (DTF), 2021 WL 1100376, at *2 (D. Ariz. Mar. 23, 2021); *W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos.*, No. 220CV05663VAPDFMX, 2020 WL 6440037, at *6 (C.D. Cal. Oct. 27, 2020); *Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.*, No. 20-cv-04434-JSC, 2020 WL 7342687, at *3 (N.D. Cal. Dec. 14, 2020); *Robert W. Fountain, Inc., v. Citizens Ins. Co. of Am.*, No. 20-CV-05441-CRB, 2020 WL 7247207, at *4 (N.D. Cal. Dec. 9, 2020); *Protege Rest. Partners LLC v. Sentinel Ins. Co., Ltd.*, No. 20-CV-03674-BLF, 2021 WL 428653, at *8 (N.D. Cal. Feb. 8, 2021); *HealthNOW Med. Ctr., Inc. v. State Farm Gen. Ins. Co.*, No. 20-cv-04340-HSG, 2020 WL 7260055, at *2 (N.D. Cal. Dec. 10, 2020); *Mortar & Pestle Corp. v. Atain Specialty Ins. Co.*, No. 20-cv-03461-MMC, 2020 WL 7495180, at *5 (N.D. Cal. Dec. 21, 2020); *Palmdale Estates, Inc. v. Blackboard Ins. Co.*, No. 20-cv-06158-LB, 2021 WL 25048, at *3 (N.D. Cal. Jan. 4, 2021); *Colgan v. Sentinel Ins. Co.*, No. 20-CV-04780-HSG, 2021 WL 472964, at *4 (N.D. Cal. Jan. 26, 2021); *Founder Inst. Inc. v. Hartford Fire Ins. Co.*, No. 20-CV-04466-VC, 2020 WL 6268539, at *1 (N.D. Cal. Oct. 22, 2020); *Karen Trinh, DDS, Inc. v. State Farm Gen. Ins. Co.*, No. 5:20-cv-04265-BLF, 2020 WL 7696080, at *3 (N.D. Cal. Dec. 28, 2020); *Long Affair Carpet & Rug, Inc. v. Liberty Mut. Ins. Co.*, No. SACV2001713CJCJDEX, 2020 WL 6865774, at *3 (C.D. Cal. Nov. 12, 2020); *BA LAX, LLC v. Hartford Fire Ins. Co.*, No. 220CV06344SVWJPR, 2021 WL 144248, at *4 (C.D. Cal. Jan. 12, 2021); *10E, LLC v. Travelers Indem. Co. of Connecticut*, No. 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); *Raymond H Nahmad DDS PA v. Hartford Cas. Ins. Co.*, No. 1:20-CV-22833, 2020 WL 6392841, at *9 (S.D. Fla. Nov. 2, 2020); *Pane Rustica, Inc. v. Greenwich Ins. Co.*, No. 8:20-CV-1783-KKM-AAS, 2021 WL 1087219, at *3 (M.D. Fla. Mar. 22, 2021); *Riverwalk Seafood Grill Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 20 C 3768, 2021 WL 81659, at *3 (N.D. Ill. Jan. 7, 2021); *Mashallah, Inc. v. W. Bend Mut. Ins. Co.*, No. 20 C 5472, 2021 WL 679227, at *3 (N.D. Ill. Feb. 22, 2021); *Palmer Holdings and Inv., Inc., v. Integrity Ins. Co.*, No. 4:20-CV-154-JAJ, 2020 WL 7258857, at *13 (S.D. Iowa Dec. 7, 2020); *Whiskey River on Vintage, Inc., v. Illinois Cas. Co.*, No. 4:20-CV-185-JAJ, 2020 WL 7258575, at *14 (S.D. Iowa Nov. 30, 2020); *Gerleman Management, Inc. v. Atlantic States Ins. Co.*, No. 4:20-cv-183-JAJ, 2020 WL 8093577, at *6 (S.D. Iowa Dec. 11, 2020); *MHG Hotels, LLC v. Emcasco Ins. Co.*, No. 1:20-cv-01620-RLY-TAB, slip op. at 14-15 (S.D. Ind. Mar. 8, 2021) (Request for Judicial Notice ("RJN"), Ex. 3); *AFM Mattress Co., LLC, v. Motorists Commercial Mutual Ins. Co.*, No. 20 CV 3556, 2020 WL 6940984, at *4 (N.D. Ill. Nov. 25, 2020); *Siren Salon, Inc. v. Liberty Mut. Ins. Co.*, No. 20 C 3108, slip op. at 3 (N.D. Ill. Mar. 22, 2021) (RJN, Ex. 5); *Turek Enters., Inc. v. State Farm Mut. Auto. Ins. Co.*, No. 20-11655, 2020 WL 5258484, at *9 (E.D. Mich. Sept. 3, 2020); *J&H*

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Lanmark, Inc. v. Twin City Fire Ins. Co., No. CV 5:20-333-DCR, 2021 WL 922057, at *3 (E.D. Ky. Mar. 10, 2021); *Stanford Dental, PLLC v. Hanover Ins. Grp., Inc.*, No. 20-CV-11384, 2021 WL 493322, at *4 (E.D. Mich. Feb. 10, 2021); *Dye Salon, LLC v. Chubb Indem. Ins. Co.*, No. 20-CV-11801, 2021 WL 493288, at *8 (E.D. Mich. Feb. 10, 2021); *Seifert v. IMT Ins. Co.*, No. CV 20-1102 (JRT/DTS), 2020 WL 6120002, at *4 (D. Minn. Oct. 16, 2020); *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, No. 2:20-CV-00087-KS-MTP, 2020 WL 6503405, at *8 (S.D. Miss. Nov. 4, 2020); *Ballas Nails & Spa, LLC v. Travelers Cas. Ins. Co. of Am.*, No. 4:20 CV 1155 CDP, 2021 WL 37984, at *6 (E.D. Mo. Jan. 5, 2021); *N&S Rest. LLC v. Cumberland Mut. Fire Ins. Co.*, No. CV2005289RBKKMW, 2020 WL 6501722, at *5 (D.N.J. Nov. 5, 2020); *The Eye Care Ctr. of New Jersey, PA v. Twin City Fire Ins. Co.*, No. CV2005743KMESK, 2021 WL 457890, at *3 (D.N.J. Feb. 8, 2021); *Zwillo V, Corp. v. Lexington Ins. Co.*, No. 4:20-00339-CV-RK, 2020 WL 7137110, at *8 (W.D. Mo. Dec. 2, 2020); *MAC Prop. Grp. LLC v. Selective Fire and Cas. Ins. Co.*, No. L-2629-20, 2020 WL 7422374, at *9 (N.J. Super. Ct. App. Div. Nov. 5, 2020); *7th Inning Stretch LLC v. Arch Ins. Co.*, No. CV208161SDWLDW, 2021 WL 800595, at *3 (D.N.J. Jan. 19, 2021); *Boulevard Carroll Entm't Grp., Inc. v. Fireman's Fund Ins. Co.*, No. 20-11771 (SDW) (LDW), 2020 WL 7338081, at *2 (D.N.J. Dec. 14, 2020); *Causeway Auto., LLC v. Zurich Am. Ins. Co.*, No. 20-8393 (FLW) (DEA), 2021 WL 486917, at *7 (D.N.J. Feb. 10, 2021); *Valley Plumbing Supply, Inc. v. Merchants Mut. Ins. Co.*, No. 1:20-cv-08257-NLH-KMW, 2021 WL 567994, at *7 (D.N.J. Feb. 16, 2021); *In the Park Savoy Caterers LLC v. Selective Ins. Grp., Inc.*, No. CV 20-6869, 2021 WL 1138020, at *2 (D.N.J. Feb. 25, 2021); *Body Physics v. Nationwide Ins.*, No. CV 20-9231 (RMB/AMD), 2021 WL 912815, at *6 (D.N.J. Mar. 10, 2021); *Colby Rest. Grp., Inc. v. Utica Nat'l Ins. Grp.*, No. CV 20-5927 (RMB/KMW), 2021 WL 1137994, at *5 (D.N.J. Mar. 12, 2021); *Garmany of Red Bank, Inc. v. Harleysville Ins. Co.*, No. 20-8676 (FLW) (DEA), 2021 WL 1040490, at *7 (D.N.J. Mar. 18, 2021); *Downs Ford, Inc. v. Zurich Am. Ins. Co.*, No. 3:20-cv-08595-BRM-ZNQ, 2021 WL 1138141, at *4 (D.N.J. Mar. 25, 2021); *Dezine Six, LLC v. Fitchburg Mutual Ins. Co.*, No. 3:20-cv-07964-BRM-DEA, 2021 WL 1138146, at *4 (D.N.J. Mar. 25, 2021); *Carpe Diem Spa, Inc. v. Travelers Cas. Ins. Co. of Am.*, No. CV 20-14860, 2021 WL 1153171, at *3 (D.N.J. Mar. 26, 2021); *Chester C. Chianese DDS, LLC v. Travelers Cas. Ins. Co. of Am.*, No. 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); *Circus Circus LV, LP v. AIG Specialty Ins. Co*., No. 220CV01240JADNJK, 2021 WL 769660, at *6 (D. Nev. Feb. 26, 2021); *Michael J. Redenburg, Esq. PC v. Midvale Indem. Co.*, No. 20 CIV. 5818 (PAE), 2021 WL 276655, at *7 (S.D.N.Y. Jan. 27, 2021); *Natty Greene's Brewing Co., LLC, v. Travelers Cas. Ins. Co. of Am.*, No. 1:20-CV-437, 2020 WL 7024882, at *4 (M.D.N.C. Nov. 30, 2020); *Nat'l Coatings & Supply, Inc. v. Valley Forge Ins. Co.*, No. 5:20-CV-00275-M, 2021 WL 1009305, at *7 (E.D.N.C. Mar. 16, 2021); *Santo's Italian Cafe LLC v. Acuity Ins. Co.*, No. 1:20-cv-01192, 2020 WL 7490095, at *13 (N.D. Ohio Dec. 21, 2020); *MIKMAR, Inc. v. Westfield Ins. Co.*, No. 1:20-CV-01313, 2021 WL 615304, at *10 (N.D. Ohio Feb. 17, 2021); *Family Tacos, LLC v. Auto Owners Ins. Co.*, No. 5:20-CV-01922, 2021 WL 615307, at *10 (N.D. Ohio Feb. 17, 2021); *Ceres Enters., LLC v. Travelers Ins. Co.*, No. 1:20-CV-1925, 2021 WL 634982, at *10 (N.D. Ohio Feb. 18, 2021); *Brunswick Panini's, LLC v. Zurich Am. Ins. Co.*, No. 1:20CV1895, 2021 WL 663675, at *9 (N.D. Ohio Feb. 19, 2021); *Equity Plan. Corp. v. Westfield Ins. Co.*, No. 1:20-CV-01204, 2021 WL 766802, at *18 (N.D. Ohio Feb. 26, 2021); *Nail Nook, Inc. v. Hiscox Ins. Co., Inc.*, No. CV-20-933244, slip op. at 3 (Cuyahoga Cnty., Ohio Ct. Common Pleas Feb. 24, 2021) (RJN, Ex. 4); *Eye Specialists of Del. V. Harleysville Worchester Ins. Co.*, No. 20 CV 6386, 2021 WL 506270, at *5 (Franklin Cnty., Ohio Ct. Common Pleas Feb. 1, 2021); *Goodwill Indus. of Cent. Oklahoma, Inc. v. Philadelphia Indem. Ins. Co.*, No. CV-20-511-R, 2020 WL 8004271, at *4 (W.D. Okla. Nov. 9, 2020); *Isaac's at Spring Ridge, LLP v. MMG Ins. Co.*, No. CI-20-03613, slip op. at 1 (Lancaster Cnty., Pa. Ct. Common Pleas Mar. 2, 2021) (RJN, Ex. 1); *Brian Handel D.M.D., P.C. v. Allstate Ins. Co.*, No. CV 20-3198, 2020 WL 6545893, at *4 (E.D. Pa. Nov. 6, 2020); *Toppers Salon & Health Spa, Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 2:20-CV-03342-JDW, 2020 WL

(Cont'd on next page)

1 Because the Landmark Pathogen Exclusion is clear and unambiguous and applies to all
2 coverages in the Landmark Policies, Plaintiffs are not entitled to coverage for losses caused directly or
3 indirectly by a virus under any of the coverage provisions as alleged in the Complaint. Therefore,
4 Plaintiffs' claims against Landmark 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 Landmark American Insurance
9 Company and GRANT such other relief as this Court may deem just and proper.

10

11 DATED: April 9, 2021 Respectfully submitted,

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17 7024287, at *3 (E.D. Pa. Nov. 30, 2020); *Kessler Dental Assocs., P.C. v. Dentists Ins. Co.*, No. 2:20-CV-03376-JDW, 2020 WL 7181057, at *3 (E.D. Pa. Dec. 7, 2020); *ATCM Optical, Inc. v. Twin City Fire Ins. Co.*, No. 20-4238, 2021 WL 131282, at *7 (E.D. Pa. Jan. 14, 2021); *Moody v. Hartford Fin. Servs. Group, Inc.*, No. 20-2856, 2021 WL 135897, at *8 (E.D. Pa. Jan. 14, 2021); *Ultimate Hearing Solutions, LLC v. Twin City Fire Ins. Co.*, No. 20-2401, 2021 WL 131556, at *10 (E.D. Pa. Jan. 14, 2021); *Zagafen Bala, LLC v. Twin City Fire Ins. Co.*, No. 20-3033, 2021 WL 131657, *7 (E.D. Pa. Jan. 14, 2021); *TAQ Willow Grove, 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); Wilson v. Hartford Cas. Co.*, No. CV 20-3384, 2020 WL 5820800, at *7 (E.D. Pa. Sept. 30, 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).
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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:

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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
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