Jennie Lee Anderson (SBN 203586)
ANDRUS ANDERSON LLP
155 Montgomery Street, Suite 900
San Francisco, California 94104
Telephone: 415-986-1400
Facsimile: 415-986-1474
jennie@andrusanderson.com

Adam J. Levitt (pro hac vice forthcoming)
DICELLO LEVITT GUTZLER LLC
Ten North Dearborn Street, Sixth Floor
Chicago, Illinois 60602
Telephone: 312-214-7900
Facsimile: 312-253-1443
alevitt@dicellolevitt.com

Attorneys for Plaintiffs and Proposed Class
[*Additional Counsel Listed on Next Page*]

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;
(5) UNDERWRITERS AT LLOYD'S - SYNDICATES: KLN 0510, ATL 1861,

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

PLAINTIFFS' RESPONSE TO 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

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) LANDMARK AMERICAN INSURANCE COMPANY; and
(16) SRU DOE INSURERS 1-20;

Defendants.

[*Additional Counsel*]

DICELLO LEVITT GUTZLER LLC
MARK A. DICELLO*
madicello@dicellolevitt.com
KENNETH P. ABBARNO
kabbarno@dicellolevitt.com
MARK ABRAMOWITZ*
mabramowitz@dicellolevitt.com
7556 Mentor Avenue
Mentor, OH 44060
Telephone: 440.953.8888

BURNS BOWEN BAIR LLP
TIMOTHY W. BURNS
tburns@bbblawllp.com
JEFF J. BOWEN*
jbowen@bbblawllp.com
JESSE J. BAIR*
jbair@bbblawllp.com
FREYA K. BOWEN*
fbowen@bbblawllp.com
1 South Pinckney Street, Suite 930
Madison, WI 53703
Telephone: 608.286.2302

THE LANIER LAW FIRM PC
MARK LANIER*
ALEX BROWN*
alex.brown@lanierlawfirm.com
10940 W. Sam Houston Parkway N., Ste. 100
Houston, TX 77064
Telephone: 713.659.5200

DANIELS & TREDENNICK
DOUGLAS DANIELS*
douglas.daniels@dtlawyers.com
6363 Woodway, Suite 700
Houston, TX 77057
Telephone: 713.917.0024

Attorneys for Plaintiffs and Proposed Class

(application for admission
pro hac vice to be filed)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes **Page(s)**

Other Authorities **Page(s)**

I. INTRODUCTION

Defendant Lexington Insurance Company rewrites the record when it states in the second and third sentences of its motion to dismiss that "Plaintiffs initially claimed [in their original complaint] they were entitled to coverage simply because their businesses had become 'unusable in the way they had been used before COVID-19[]' [and] Plaintiffs did not allege that anything *physically* happened to their property, nor did they allege that COVID-19 had contaminated their property and rendered it uninhabitable." Motion to Dismiss, Dkt. 62, at 1 (the "Motion") (emphasis in original). Nice Rhetoric, but completely false, as a glance at paragraphs 13, 14, 65–67, 102, and 105 of the Class Action Complaint shows. Dkt. 1-2. Truth matters, science matters, and Lexington's Motion is at odds with both.

So why did Plaintiffs Amend?

Judicial opinions decide the particular case or issue before a court and, through their explanation of legal principles, those rulings also inform nonparties of what the law is and allow them to conform their conduct to it. In *Water Sports Kauai, Inc. v. Fireman's Fund Insurance* Co. (*Water Sports Kauai*), No. 20-CV-03750-WHO, 2020 WL 6562332 (N.D. Cal. Nov. 9, 2020), and *Mudpie, Inc. v. Travelers Casualty Insurance Co. of America* (*Mudpie*), 487 F. Supp. 3d 834 (N.D. Cal. 2020), this Court decided two lawsuits seeking business interruption insurance coverage for COVID-19 related losses. The Court ruled against the policyholders in those cases, dismissing their complaints, but in doing so also set forth the legal principles that govern whether subsequent COVID-19 business interruption insurance complaints would sufficiently state a claim.

Against the backdrop of those legal principles, Plaintiffs Menominee Indian Tribe of Wisconsin, Menominee Indian Gaming Authority, and Wolf River Development Company (collectively, "the Menominee") filed their Amended Complaint. The Menominee followed this Court's legal roadmap for sufficiently pleading a COVID-19 business interruption insurance claim because the facts on the ground at the Menominee reservation allowed the Menominee to buttress the original Class Action Complaint with even more specific allegations of the presence

and physical impact of the coronavirus. Defendant Lexington Insurance Company,[1] however, now wants to redraw the roadmap, essentially maintaining if not outright saying—contrary to this Court's earlier rulings—that there exists no circumstance in which a policyholder can recover for COVID-19 losses.

For the reasons set forth below, Lexington is wrong, and indeed Lexington already has lost two COVID-19 business interruption insurance cases under the very Tribal Property Insurance Policy at issue in this case. *See Cherokee Nation v. Lexington Ins. Co.*, No. CV-20-150, 2021 WL 506271 (Okla. Dist. Ct. Jan. 28, 2021); *Choctaw Nation of Oklahoma v. Lexington Ins. Co.*, No. CV-20-42 (Okla. Dist. Ct. Feb. 15, 2021).[2] But, more fundamentally, Lexington's position strikes at one of the key tenets of the rule of law. As Justice Douglas admonished long ago: "Uniformity and continuity in the law are necessary to many activities. If they are not present, the integrity of contracts, wills, conveyances and securities is impaired. And there will be no equal justice under law if a negligence rule is applied in the morning but not in the afternoon." William O. Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735, 735–36 (1949).

II. STATEMENT OF ISSUES TO BE DECIDED

(1) Under this Courts' opinions in *Mudpie* and *Water Sports Kauai* have the Menominee alleged "direct physical loss or damage" to insured property sufficient to sustain coverage under the Business Interruption, Extra Expense, Tax Revenue, and Protection and Preservation of Property insuring agreements of the Policy?

(2) Under this Courts' opinions in *Mudpie* and *Water Sports Kauai* have the Menominee alleged "direct physical loss or damage" to property other than insured property sufficient to sustain coverage under the Civil Authority, Ingress/Egress, and Contingent Time Element insuring agreements of the Policy?

[1] Several of the other insurer defendants have joined in Lexington's Motion to Dismiss. Dkts. 63–70. "Defendants" includes Lexington and those insurer defendants, and this Opposition is intended as a response to the Joinders as well. For the avoidance of doubt, any reference to "Lexington" or "Defendants" is intended to include all these defendants.

[2] Attached as Exhibit A. All authorities that are not readily available to the Court through online resources are included in the Appendix to this Response.

III. STATEMENT OF RELEVANT FACTS

The Menominee have alleged the following in the Amended Complaint. Dkt. 58 (hereinafter "AC").

A. The Insured Properties

The Menominee Tribe consists of more than 9,000 members and has a reservation located in Wisconsin that consists of approximately 235,000 acres of land. AC ¶¶ 1–2. The Menominee operate the Menominee Casino Resort ("MCR"). AC ¶¶ 3–5. The MCR includes a casino, lounge, live entertainment space, gift shop, RV park, hotel with a fitness center and indoor pool, and a convention and event center with banquet operations. AC ¶ 5. The Menominee also owns and operates the Thunderbird Complex, nine miles north of MCR; a modern facility including a mini casino, the Thunderbird restaurant, a full bar, and a venue for outdoor entertainment. AC ¶ 6.

In addition, the Menominee own and operate the Menominee Tribal Clinic, which provides healthcare to the Tribal community, including a wide range of services covering medical, dental, physical therapy, behavioral health, and many more essential functions. AC ¶ 7. Finally, the Menominee own and operate numerous other businesses located within the reservation, which serve essential functions for the Tribe. AC ¶ 8.

Once able to freely welcome visitors and provide a quality experience to its guests, the Menominee have been forced to drastically reduce its business operations across all its properties due to COVID-19. AC ¶¶ 146–50. The MCR, Thunderbird Complex, Clinic, and other businesses have seen a precipitous decline in business income. AC ¶¶ 13–16; 143–46. Moreover, to combat COVID-19, the Menominee made significant structural alterations, changes, and repairs to insured properties and have had to strictly limit the number of guests, patients, and the services offered. AC ¶¶ 14, 16, 147. Employees, guests, and patients must wear masks, remain six feet apart, and follow other social distancing measures. AC ¶¶ 119–34; 144–46. To do anything else would materially increase the likelihood of the persistence or reemergence of COVID-19. *E.g.*, AC ¶ 82–83. Until COVID-19 was brought even slightly under control, even such limited use as this was not possible.

B. The Tribal First Insurance Program

The Menominee Tribe purchased coverage in a Tribal Property Insurance Program to protect the Tribe and Tribal members. The TPIP involves separate layers of coverage that implicate different insurers and involves numerous other tribal entities that form the other Class members in this litigation. AC ¶¶ 10–11. Included in the TPIP's "Property Solutions" was a "Master Policy" (the "Policy") that the Defendants sold to the Plaintiffs. AC ¶ 11. Defendants charged a substantial premium for their Policy. AC ¶ 46.

The Menominee were not the only tribe insured under the TPIP; the insurance program sold by Tribal First, headquartered in California, included numerous layers of coverage with different insurers subscribing to different levels of risk on each layer. AC ¶ 10. The policyholders were subject to aggregate coverage limits on several layers, wherein the losses covered for one insured would reduce the total available insurance available to another insured. *See* AC ¶¶ 10–11.

The Policy includes protection for Protection and Preservation of Property as well as Business Interruption, Extra Expense, Ingress/Egress, Civil Authority, Contingent Time Element, and Tax Revenue Interruption coverage. AC ¶ 19; Dkt. 58-1 (hereinafter, the "Policy"). In the Policy, Defendants agreed to provide coverage for actual business interruption losses caused by "direct physical loss or damage, as covered by this Policy to real and/or personal property insured by this Policy, occurring during the term of this Policy." AC ¶¶ 11–12; Policy at 65 (§ III.A.1).

The Defendants agreed to pay for actual Business Interruption loss "resulting directly from interruption of business, services or rental value caused by direct physical loss or damage" to covered property during the "period of restoration." AC ¶ 62; Policy at 65 (§ III.A.1). The period of restoration begins "on the date direct physical loss occurs and interrupts normal business operations and ends on the date that the damaged property should have been repaired, rebuilt or replaced with due diligence and dispatch, but not limited by the expiration of this policy." AC ¶ 65; Policy at 69 (§ III.E.5).

Unlike many policies that provide business interruption and other coverages, the Policy

does not include, and is not subject to, an exclusion for losses caused by the spread of viruses or communicable diseases. AC ¶¶ 55–58.

C. COVID-19's Impact on Insured Property

COVID-19 can, and does, impact property. AC ¶¶ 78–100. First, respiratory droplets expelled from infected individuals land on, attach, and adhere to surfaces and objects. In doing so, they structurally change the property and its surface by becoming a part of that surface. This structural alteration makes physical contact with those previously safe, inert surfaces (e.g., fixtures, handrails, furniture) unsafe. AC ¶ 85. Second, when individuals carrying the coronavirus breathe, talk, cough, or sneeze, they expel aerosolized droplet nuclei (i.e., those smaller than 5 μm) that remain in the air and, like dangerous fumes, make the premises unsafe and affirmatively dangerous. AC ¶¶ 78, 93. This process alters the structural properties of air in buildings from safe and breathable to unsafe and dangerous. AC ¶ 93. Moreover, these dangerous conditions create the imminent threat of further damage to that property or to nearby property due to the potential for individuals who come into contact with the virus to spread it to nearby surfaces. AC ¶ 100.

As a result of the threat of COVID-19, the State of Wisconsin issued numerous Emergency Orders and Executive Orders (together, "Closure Orders") designed to combat the spread of the virus within the state. AC ¶¶ 103–18. The Menominee Tribal Legislature undertook similar actions in the same time period, instituting Emergency Orders alongside its Moving Safer Forward Plan. Both the state and Tribal restrictions imposed severe limits on business operations within their jurisdictions. AC ¶¶ 105–18, 120–34. Similar restrictions were imposed by local, state, and Tribal governments in Closure Orders throughout the United States. AC ¶¶ 135–37.

The Menominee properties, including MCR, the Thunderbird Complex, the Clinic, and its other businesses have been impacted by COVID-19. At least 42 employees of Plaintiffs tested positive in 2020. AC ¶ 139. Coronavirus-containing fomites (i.e., inanimate objects), respiratory droplets, and nuclei from those individuals came into contact with, adhered to, and attached to the surfaces of the property upon which they landed, including without limitation, the

real property, furniture, fixtures, and personal property at the properties. AC ¶ 140. The coronavirus or coronavirus-containing fomites, respiratory droplets, and nuclei made previously-safe, inert materials and surfaces on the properties dangerous. AC ¶ 141. The coronavirus made the very *air* dangerous: Air inside buildings that was previously safe to breathe but could no longer safely be breathed due to coronavirus and COVID-19, has undergone a physical alteration. AC ¶ 141. Aerosolized coronavirus has entered the air in Plaintiffs' properties. AC ¶ 142. It is a statistical certainty that the virus has been present for some time since the pandemic began and that it continues to pose a threat. AC ¶ 148. Its presence has caused direct physical damage to property and a direct physical loss of functionality of that property. AC ¶ 143.

The Closure Orders, including the issuance of the Wisconsin and Menominee Closure Orders, also prohibited access to interior spaces of MCR and Thunderbird. AC ¶ 144. They restricted the use of the Clinic and healthcare facilities, prohibiting all but the most essential healthcare services. AC ¶ 145. Several locations were forced to close completely, including the MCR, and when businesses were able to safely re-open they could operate only at a bare fraction of their ordinary capacity. AC ¶¶ 145–46.

Obvious structural alterations, changes, and repairs were made to continue business operations after sustaining property damage, including the installation of physical barriers and increased cleaning and sanitizing. AC ¶ 147.

Property damage caused by the presence of the coronavirus on covered properties and on the properties of companies supplying the Menominee with customers, and the Closure Orders that resulted from that property damage, further harmed the Menominee's business. AC ¶ 149. Finally, property damage caused by the presence of the coronavirus on covered properties, and the Closure Orders that resulted from that property damage, deprived the Menominee of tax revenue from economic activity at its businesses and by individuals. AC ¶ 150.

D. <u>The Procedural Posture of this Litigation</u>

The Menominee submitted an insurance claim for the losses that it suffered due to COVID-19 and the resultant closure orders, which its insurers summarily denied. AC ¶ 21. Seeking to protect and vindicate its rights under the TPIP and the Policy, the Menominee filed

suit against its insurers in California state court on behalf of itself and a proposed class of similarly affected individuals and entities, including many other tribes that were part of the TPIP. In response, Defendant Lexington removed the action to federal court, Dkt. 1, and subsequently filed a motion to dismiss on February 11, 2021. Dkt. 17. The Menominee filed an Amended Complaint on March 12, 2021, Dkt. 58, and Defendant Lexington filed its present motion to dismiss the Amended Complaint on April 9, 2021. Dkt. 62.

IV. ARGUMENT

A. Motions to Dismiss Face A High Hurdle

A motion to dismiss under Federal Rule of Civil Procedure Rule 12(b)(6) tests the sufficiency of the claims. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). To state a cognizable claim under federal notice pleading, a plaintiff is required to provide a "short and plain statement of the claim showing that the pleader is entitled to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (citing Fed. R. Civ. P. 8(a)(2)). The plaintiff must plead sufficient facts to be "plausible on its face;" enough to allow the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In reviewing a motion to dismiss, the Court should construe the complaint in the light most favorable to the plaintiff and accept as true all well-pleaded facts alleged. *United States v. LSL Biotechnologies*, 379 F.3d 672, 698 (9th Cir. 2004). Further, the Court should draw all possible inferences in plaintiff's favor. *Id.*

B. California Choice of Law Rules Point to California Law

As a federal court exercising diversity jurisdiction, this Court applies California choice of law rules to determine what law should apply to this case. *Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589 (9th Cir. 2012). Defendant's assertion that Wisconsin law governs the interpretation of this insurance policy does not comport with California choice of law rules in the context of a nationwide class of plaintiffs that are collectively subject to an insurance program with a limited fund. Moreover, Defendants, as the proponent of a foreign law, have not shown that Wisconsin law materially differs from California. Accordingly, this Court should apply California law.

California Civil Code § 1646 governs the interpretation of contract terms, while all other

issues are governed by a governmental interest analysis. *Glob. Commodities Trading Grp., Inc. v. Beneficio de Arroz Choloma, S.A.*, 972 F.3d 1101, 1111 (9th Cir. 2020); *see also Frontier Oil Corp. v. RLI Ins. Co.*, 153 Cal. App. 4th 1436, 1459, 63 Cal. Rptr. 3d 816, 835 (2007), *modified* (Sept. 5, 2007) ("[T]he choice-of-law rule in Civil Code section 1646 determines the law governing the interpretation of a contract, notwithstanding the application of the governmental interest analysis to other choice-of-law issues."). Under that statute, "[a] contract is to be interpreted according to the law and usage of the place where it is to be performed; or, if it does not indicate a place of performance, according to the law and usage of the place where it is made." Cal. Civ. Code § 1646 (West).

"A contract 'indicate[s] a place of performance' within the meaning of section 1646 if the contract expressly specifies a place of performance or if the intended place of performance can be gleaned from the nature of the contract and its surrounding circumstances." *Frontier Oil Corp.*, 153 Cal. App. 4th at 1459. The agreement must reference a clear geographical center to "demonstrate the intended place of performance." *Grant & Eisenhofer, P.A. v. Brown*, No. CV-17-5968-PSGPJWX, 2018 WL 3817859, at *4 (C.D. Cal. Mar. 27, 2018); *see also W. Am. Ins. Co. v. Nutiva, Inc.*, No. 17-CV-03374-HSG, 2018 WL 3861832, at *3 (N.D. Cal. Aug. 14, 2018) ("Courts have rejected broad readings of § 1646 that would render superfluous the 'place where it is made' prong.").

Unlike *Frontier*, this class action implicates dozens of places of performance across the nation. While the Menominee Indian Tribe of Wisconsin has insured properties in Wisconsin, the scope of the TPIP as an insurance program extends to tribes throughout the United States, well beyond the jurisdiction of Wisconsin courts. AC ¶ 156. The TPIP was made available to tribes throughout the United States. AC ¶ 11. Plaintiff believes that many tribes, in many states, have purchased coverage in the TPIP. AC ¶ 11. Each will name different insured properties, and different states. Moreover, the TPIP was structured in such a way that "adjudication of one Class member's rights may, as a practical matter, be dispositive of the interests of other Class members or would substantially impair or impede their ability to protect their interests." AC ¶ 10. One tribe's recovery on a loss in one state necessarily reduces the amount of available insurance for

other tribes due to aggregate coverage limits. AC ¶ 10.

In this context, the only unifying contractual "place of performance" common to the class members is California, where Tribal First brokered the policies, and which also happens to be the place that the contract was made for the purposes of section 1646. Defendants organized the TPIP through a broker headquartered in California, received California communications concerning the establishment and the purchase of the TPIP in California, required all premium payments to be mailed to California, and provided for the receipt of process in California. AC ¶¶ 23–24.

California's governmental interest analysis also points to California law. In California, "when there is no advance agreement on applicable law, but the action involves the claims of residents from outside California, the trial court may analyze the governmental interests of the various jurisdictions involved to select the most appropriate law." *Washington Mut. Bank, FA v. Superior Ct.*, 15 P.3d 1071, 1077 (Cal. 2001).

"California follows a three-step 'governmental interest analysis' to determine whether conflicts of law exists, and to ascertain the most appropriate law applicable to the issues, in the absence of an effective choice-of-law agreement." *In re Lithium Ion Batteries Antitrust Litig.*, No. 13-MD-2420 YGR, 2017 WL 1391491, at *12 (N.D. Cal. Apr. 12, 2017) (citing *Washington Mut. Bank.*, 15 P.3d at 1080); *Mazza*, 666 F.3d at 590. Here, Defendants do not make it past the first step.

The first step of this test is to ascertain whether the law of another concerned state materially differs from California law. *Washington Mut. Bank*, 15 P.3d at 1080. The second step of this test is to "determine what interest, if any, each state has in having its own law applied to the case." *Id.* at 1080–81. The third step of the test is to "select the law of the state whose interests would be 'more impaired' if its law were not applied." *Id.*

Under the first step of this test, "[t]he foreign law proponent must identify the applicable rule of law in each potentially concerned state and must show it materially differs from the law of California." *Id.* at 1080. In the absence of a showing of a material difference between the state laws, California law is applied. *Id.* at 1080–81.

Here, defendants have made no showing that the law of another interested state is different from the law of California with respect to the issues in dispute—their argument fails at the first step of the governmental interest analysis. Accordingly, this Court should apply California law.[3]

C. California Rules of Insurance Policy Interpretation Like Those of Most States Focus on the Intent of the Parties and the Language of the Policy

The core objective of insurance policy interpretation under California law, is to identify and effectuate the intention of the parties. *AIU Ins. Co. v. Superior Court*, 51 Cal. 3d 807, 821 (1990); *Karen Kane Inc. v. Reliance Ins. Co.*, 202 F.3d 1180, 1188 n.3 (9th Cir. 2000).

Under California law, an insured under an all-risk property insurance policy, such as the Policy at issue here, has the threshold burden of proving a loss within the policy's insuring clause. *See, e.g., Garvey v. State Farm Fire & Cas. Co.*, 48 Cal. 3d 395, 406 (1989). California law is generous to the insured in meeting this burden. Insuring Clauses, California Practice Guide: Insurance Litigation Ch. 6B-C ("The burden on the insured in this situation is usually minimal, typically requiring proof only that the insured suffered a 'direct physical loss' (or 'accidental direct physical loss') while the policy was in effect."). Ambiguous policy language is construed in favor of the insured, in a manner that is consistent with the insured's reasonable expectations. *Safeco Ins. Co. of Am. v. Robert S.*, 26 Cal. 4th 758, 763 (2001); *AIU*, 51 Cal. 3d at 822. In this light, grants of coverage in insurance policies are interpreted broadly to afford the

[3] The choice between California law and Wisconsin law is not material to any issue in this case. Wisconsin law, like California law, supports the Menominee's position, as the key case cited by Defendants makes clear. *E.g., Al Johnson's Swedish Rest. & Butik, Inc. v. Society Ins. Mut. Co.*, No. 20-CV-52 (Wis. Cir. Ct. Dec. 4, 2020) (Dkt. 62-1, Ex. A). In that case, the judge emphasized that if plaintiffs had pled the types of allegations present in *Studio 417*—and by extension this case—it would have altered his analysis. *Id.*, Hr'g Tr. at 11:17–12:19 ("I just think if we had those types of allegations this -- this may, indeed, be a different kind of a case."). Defendants also neglect another Wisconsin court's interpretation of Wisconsin law on these issues, *Colectivo Coffee Roasters, Inc. v. Society Insurance*, addressing *Al Johnson's* and finding that plaintiffs had included "scientific and factual allegations . . . that, in fact, Covid was widespread and likely was present in the plaintiffs' restaurants and the plaintiffs' premises" and that such allegations were not speculative and were sufficient to state a claim under Wisconsin law. No. 2020-CV-002597, Hr'g Tr. at 42:18–44:17 (Wis. Cir. Ct. Jan. 29, 2021) (further distinguishing cases suggesting that the ability to clean a microbe could foreclose a claim of loss from contamination by the coronavirus, and holding that a loss of use can constitute direct physical damage.); *see also In re Society Ins. Co.*, No. 20 C 02005, 2021 WL 679109, at *9 (N.D. Ill. Feb. 22, 2021) (addressing Wisconsin law).

greatest possible protection to insureds. *See Garvey v. State Farm Fire & Cas. Co.*, 48 Cal. 3d 395, 406 (1989).

Accordingly, where there are conflicting reasonable interpretations of a given policy provision, an insured's reasonable interpretation controls. *John R. MacKinnon v. Truck Ins. Exch.*, 31 Cal. 4th 635, 655 (2015) ("[E]ven if [the insurer's] interpretation is considered reasonable, it would still not prevail, for in order to do so it would have to establish that its interpretation is the only reasonable one."). Moreover, when interpreting an insurance policy, the "whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." *Atl. Mut. Ins. Co. v. J. Lamb, Inc.*, 100 Cal. App. 4th 1017, 1036 (2002). The policy language must be "so construed as to give effect to every term." *Id.*

Also, an insurer's decision not to include specific exclusionary language in a policy can indicate that it did not intend to limit coverage. *Fireman's Fund Ins. Cos. v. Atl. Richfield Co.*, 94 Cal. App. 4th 842, 852 (2001) (when an insurer fails to use available exclusionary language, it "gives rise to the inference that the parties intended not to so limit coverage"). Thus, the presence or absence of exclusions must be considered.

D. Plaintiffs Have Adequately Alleged Direct Physical Loss or Damage to Insured Property

Under this Court's analysis of California law in *Mudpie* and *Water Sports Kauai*, the Menominee need only allege that COVID-19 was present on its property and rendered the property unsafe or diminished its function. There is no further requirement of structural alteration of the property.

In *Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co.*, this Court held "that the mere threat of coronavirus cannot cause a 'direct physical loss of or damage to' covered property as required under" a standard-form property insurance policy. No. 20-CV-03750-WHO, 2020 WL 6562332, at *3 (N.D. Cal. Nov. 9, 2020). This Court recognized that if there is "sufficient evidence of the presence of the contaminant at the property plus an imminent threat from it," there is direct physical loss or damage. *Id.*

Relying on *Mudpie, Inc. v. Travelers Casualty Insurance Co. of America*, this Court explained that actual exposure to a harmful agent causing the closure of property would constitute direct physical loss or damage. *Id.* at *3–4 (citing 487 F. Supp. 3d at 840 (N.D. Cal. 2020). This Court also noted in *Water Sports Kauai* as it did in *Mudpie* that the presence of the virus that causes the need to fix, replace or disinfect any of the property could constitute direct physical loss of or damage to property. *Id.* at *6.

In *Mudpie*, "[r]ather than alleging that COVID-19 or any other physical impetus caused the loss of functionality of its storefront, [the plaintiff] allege[d] that its 'loss is caused by government closure orders and thus will last for however long those restrictions remain." 487 F. Supp. 3d at 841. Surveying the case law, in *Mudpie*, this Court noted that for there to be direct physical loss or damage "some outside physical force must have *induced* a detrimental change in the property's capabilities before a plaintiff alleging loss of use can establish "direct physical loss of property.' " *Id.*

In *Mudpie*, this Court specifically noted that "[h]ad Mudpie alleged the presence of COVID-19 in its store, the Court's conclusion about an intervening physical force would have been different." *Id.* at 841 n.7. According to this Court, "SARS-CoV-2 – the coronavirus responsible for the COVID-19 pandemic is transmitted either through respiratory droplets or through aerosols which can remain suspended in the air for prolonged periods of time – is no less a 'physical force' than the 'accumulation of gasoline' in *Western Fire* or the 'ammonia release [which] physically transformed the air' in *Gregory Packaging*." *Id.*

Explaining why the district court appropriately refused to dismiss in *Studio 417, Inc. v. Cincinnati Insurance Co.*, 478 F. Supp. 3d 794 (2020), the Court quoted the type of allegations that are sufficient to state a claim: "Plaintiffs allege that over the last several months, it is likely that customers, employees, and/or visitors to the insured properties were infected with COVID-19 and thereby infected the insured properties with the virus. Plaintiffs allege that COVID-19 'is a physical substance,' that it 'live[s] on' and is 'active on inert physical surfaces,' and is 'emitted into the air.' Plaintiffs further allege that the presence of COVID-19 'renders physical property

in their vicinity unsafe and unusable,' and that they 'were forced to suspend or reduce business at their covered premises.'" *Id.* at 842 (quoting *Studio 417*, 778 F. Supp. 3d at 800).[4]

Just like the Plaintiffs in *Studio 417*, the Menominee have alleged that persons with COVID-19 were on covered property, infected the covered property, and rendered it unsafe and diminished its function.

The Amended Complaint alleges the actual presence of coronavirus-positive individuals entering covered property, including MCR, Thunderbird, and the Tribal Clinic. AC ¶ 139. Forty-two employees tested positive in 2020. *Id.*

The Menominee have alleged that the virus rendered the property unsafe and diminished its function. The Menominee allege that "COVID-19 damaged the property of MCR, Thunderbird, the Clinic, and other businesses, making them unusable in the way that they had been used before COVID-19 and effectively uninhabitable for patrons." AC ¶ 13. The Menominee also have alleged that the presence of coronavirus reduced usable space in the hotel, casino, dining and other areas. AC ¶¶ 14, 16.

In addition, the Menominee have alleged each of the facts that this Court noted as reasons that in *Studio 417* the plaintiff was held to have stated a claim. The facts this Court described as key to how the plaintiffs in *Studio 417* sufficiently stated a claim are the following: (1) the likelihood that employees, customers and visitors to the covered property were infected and thereby infected the property; (2) that COVID-19 is a physical substance; (3) that it lives on and is active on inert physical surfaces; (4) that it is emitted into the air; (5) that it renders property unsafe and unusable; and (6) that plaintiffs were forced to reduce business at their covered premises.

[4] This Court maintained its standard in a second ruling in this case; unlike the *Water Sports Kauai* plaintiffs' Second Amended Complaint, the Menominee have pled at least that COVID-19 was present on and thereby caused direct physical damage to its properties. *Water Sports Kauai, Inc. v. Fireman's Fund Ins. Co.* (*Water Sports Kauai II*), No. 20-CV-03750-WHO, 2021 WL 775397, at *1 (N.D. Cal. Feb. 1, 2021) ("[I]nstead of pleading facts showing that coronavirus was present at a specific Sand People's store or at a specific supply chain business that caused plaintiff some specific, connected loss, plaintiff pleaded only additional facts showing that the coronavirus was "likely" in the environment surrounding at least three specific Sand People stores.").

With respect to (1), the Menominee not only allege the likelihood of virus on covered property, AC ¶ 81, the Menominee, as discussed above allege the actual presence of coronavirus-positive individuals entering covered property, including MCR, Thunderbird, and the Tribal Clinic. AC ¶ 139. Forty-two employees tested positive in 2020. AC ¶ 139. The is no doubt, however, that the Amended Complaint goes every bit as far as allegations this Court described in *Studio 417*. According to the Amended Complaint, "[g]iven the employees, visitors, and patrons entering Plaintiffs' properties since the start of the pandemic, and the number of cases confirmed in the State of Wisconsin and on the Menominee reservation, it is statistically certain that the virus has been present for some period of time since the COVID-19 outbreak began." AC ¶ 148.

With respect to (2), (3), and (4), the Menominee specifically alleged that "the coronavirus and coronavirus-containing respiratory droplets and nuclei are physical substances that are active on physical surfaces and are also emitted into the air. AC ¶ 78. In addition, the Menominee alleged in detail the dangers of COVID-19 and its transmission mechanisms. AC ¶¶ 79–90, 93–100.

With respect to (5), the Menominee have alleged that COVID-19 renders a property unsafe and unusable. According to the Amended Complaint, the presence of COVID-19 at a property renders "a property that usable and safe for humans into a property that, absent remedial measures, is unsatisfactory for use, uninhabitable, unfit for its intended function, and extremely dangerous and potentially deadly for humans." AC ¶ 99.

Finally, with respect to (6) the Menominee alleged that COVID-19 forced them to reduce business at their covered premises. According to the Amended Complaint, "[i]nstead 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. AC ¶ 13; *see also* AC ¶ 146 (further outlining closures and reduced operations of covered properties).

In sum, the Menominee more than stated a claim under this Court's analysis in *Mudpie* and *Water Sports Kauai*. *See also Goodwill Indus. of Orange Cty. California v. Philadelphia Indem. Ins. Co.*, No. 30-2020-01169032-CU-IC-CXC, 2021 WL 476268, at *2 (Cal. Super. Jan.

28, 2021) (Plaintiffs sufficiently alleged direct physical loss by means of an external force causing a physical change to the condition of the property, including that COVID "physically alters the air and surfaces to which it attaches and causes them to be unsafe, deadly and dangerous."); *NeCo, Inc. v. Owners Ins. Co.*, No. 20-CV-04211-SRB, 2021 WL 601501, at *4 (W.D. Mo. Feb. 16, 2021) (Plaintiff alleged a "causal relationship" between its losses and COVID-19 due to the physical presence of the virus altering its structure, its presence on the premises, and the loss of functionality in its space.); *P.F. Chang's China Bistro, Inc. v. Certain Underwriters at Lloyd's of London*, No. 20STCV17169, 2021 WL 818659, at *1 (Cal. Super. Feb. 04, 2021) (The virus caused direct physical loss or damage in a variety of ways, including both its presence on the premises and the loss of functionality of the space caused by government orders.); *Boardwalk Ventures CA, LLC v. Century-National Ins. Co.*, No. 20-STCV27359, 2021 WL 1215892, at *3–4 (Cal. Super. Mar. 18, 2021) (Plaintiff's pleading, among other descriptions of COVID-19 causing physical damage, that: "The presence of the Virus particles renders items of physical property unsafe, and impairs its value, usefulness and normal function" was sufficient to allege direct physical loss or damage.); *Advance Cable Co., LLC v. Cincinnati Ins. Co.*, 788 F.3d 743, 746–48 (7th Cir. 2015) (under Wisconsin law, recognizing that the term "direct physical loss or damage" encompassed a broad swath of injury, including loss of functionality and cosmetic damage, and certainly was not limited to structural alteration); *In re Society Ins. Co. COVID-19 Bus. Interruption Prot. Ins. Litig.*, No. 20-C-02005, 2021 WL 679109, at *9 (N.D. Ill. Feb. 22, 2021) (under the law of Wisconsin and several other states "a reasonable jury can find that the Plaintiffs did suffer a direct 'physical' loss of property on their premises. . . . the Plaintiffs cannot use (or cannot fully use) the physical space").

E. Even if California Law Requires Allegations of Structural Alteration, Which It Does Not, the Menominee Have Sufficiently Pled Structural Alteration

Unlike the insurance policies this Court construed in *Mudpie* and *Water Sports Kauai*, the Menominee's policy does not contain the preposition "of" in "direct physical loss of or damage." Even if the absence of the preposition "of" in requires some alteration to the property, the Menominee have pled such an alteration.

In *Total Intermodal Services Inc. v. Travelers Property Casualty Co. of America*, the Central District of California relied on the presence of the preposition "of" in the term "direct physical loss of or damage to property" to distinguish the case from other cases requiring an alteration of the property for there to be direct physical loss or damage. No. CV 17-04908 AB (KSX), 2018 WL 3829767, at *1 (C.D. Cal. July 11, 2018). This Court in *Mudpie* and *Water Sports Kauai* pointed favorably to the distinction made by the *Total Intermodal* court, suggesting that policies that do not include the preposition "of" do require allegations of alteration of the property necessitating repairs. *But see, e.g.*, *Derek Scott Williams PLLC v. Cincinnati Ins. Co.*, No. 20 C 2806, 2021 WL 767617, at *1 (N.D. Ill. Feb. 28, 2021) (refusing to place any significance on the distinction between "loss of" and "loss to" and holding such a reading "is simply another way of attempting to read the terms 'loss' and 'damage' as meaning the same thing, which they plainly do not").[5]

Even if the absence of "of" carries the weight of requiring structural alteration, the Menominee have alleged such an alteration of property. The Amended Complaint specifically

[5] Defendants cite numerous cases in this district for the proposition that "COVID-19 harms people (and not property)," and that COVID-19 as a result is not a "plausible basis for 'direct physical loss or damage.' " Mot. at 15. These cases are broadly distinguishable on the specific allegations pled by the plaintiffs in those cases, the presence of unambiguous virus exclusions absent from this case, or on other critical facts. *E.g.*, *Barbizon School of San Francisco v. Sentinel Ins. Co.*, No. 20-CV-08578-TSH, 2021 WL 1222161, at *8 (N.D. Cal. Mar. 31, 2021) (no allegation of physical damage or alteration of property); *Protege Rest. Partners LLC v. Sentinel Ins. Co., Ltd.*, No. 20-CV-03674-BLF, 2021 WL 428653, at *5 (N.D. Cal. Feb. 8, 2021) ("Plaintiff does not actually claim any confirmed cases of COVID-19 were present on its property."); *Kevin Barry Fine Art Assocs. v. Sentinel Ins. Co., Ltd.*, No. 20-CV-04783-SK, 2021 WL 141180, at *6 (N.D. Cal. Jan. 13, 2021) (plaintiff did not plead physical damage to property); *Karen Trinh, DDS, Inc. v. State Farm Gen. Ins. Co.*, No. 5:20-CV-04265-BLF, 2020 WL 7696080, at *4 (N.D. Cal. Dec. 28, 2020) (involving an unambiguous virus exclusion and plaintiff pled that respiratory droplets, *not* the virus, were the cause of damage); *Mortar & Pestle Corp. v. Atain Specialty Ins. Co.*, No. 20-CV-03461-MMC, 2020 WL 7495180, at *4 (N.D. Cal. Dec. 21, 2020) (policy expressly excluded loss of use and contained an unambiguous virus exclusion); *Kevin Barry Fine Art Assocs. v. Sentinel Ins. Co.*, Ltd., No. 20-CV-04783-SK, 2021 WL 141180, at *6 (N.D. Cal. Jan. 13, 2021) (involved a policy with a virus exclusion and without any allegations of the presence of the virus). In *Kevin Barry*, in opining whether the Court would have ruled differently *had* plaintiffs alleged the virus was present, Magistrate Judge Kim simply ignored what the Court had to say in *Mudpie* and *Water Sports Kauai*, *see id.* at *3–4, as did Magistrate Judge Beeler in *Baker v. Oregon Mutual Insurance Company*, No. 20-CV-05467-LB, 2021 WL 1145882, at *3 (N.D. Cal. Mar. 25, 2021). Magistrate Judge Hixton, at least, referenced *Mudpie* in holding the presence of a harmful virus is not direct physical loss or damage, but dismissed the opinion of this Court on that point as *dicta* in favor of turning judicial reasoning into a numbers game and siding with what he considered to be the majority of courts on that point. *Out W. Rest. Grp. Inc. v. Affiliated FM Ins. Co.*, No. 20-CV-06786-TSH, 2021 WL 1056627, at *5 (N.D. Cal. Mar. 19, 2021).

alleges that "[w]hen the coronavirus and COVID-19 attach to and adhere on surfaces and materials, they become part of those surfaces and materials, converting the surfaces and materials to fomites" and "[t]his represents a physical change in the affected surface or material." AC ¶ 91. In addition, the Amended Complaint alleges "[t]he presence of the virus, whether circulating or stagnant, has changed the object, surface, or premises, in that it has become dangerous to handle and/or enter." AC ¶ 98. "Coronavirus or coronavirus-containing fomites, respiratory droplets, nuclei physically altered the property to which they adhered." AC ¶ 141. "In addition, the coronavirus physically altered the air" in that "[a]ir inside buildings that was previously safe to breathe . . . could no longer safely be breathed due to coronavirus and COVID-19 [and] has undergone a physical alteration." AC ¶ 141.

Plaintiffs also have alleged that COVID-19 cannot be eliminated by simple cleaning and disinfecting. According to the Amended Complaint, "[m]erely cleaning surfaces may reduce but does not altogether eliminate the risk of transmission." AC ¶ 92. Moreover, the removal provided by cleaning "is temporary at best" because "a space may remain contaminated if an aerosol is present, and immediately become contaminated thereafter if another infected person is present in the area." AC ¶ 92.

Defendants' contention that COVID-19 harms people, not property does nothing to make the Menominee's allegations less plausible. Defendants may believe that COVID-19 can just be wiped away, leaving no structural alteration in its place. But, that belief is contradicted by the facts alleged in the Amended Complaint and significant scientific evidence,[6] making structural alteration a quintessential jury issue—not susceptible to adjudication on a motion to dismiss.

Notably, on the Menominee's property, the presence of coronavirus "required the installation of physical barriers and increased cleaning and sanitizing at MCR, Thunderbird, and

[6] The World Health Organization expressly recognizes that COVID-19 transforms everyday surfaces into fomites, making them transmission vehicles for disease. Studies have demonstrated that COVID-19 is "much more resilient to cleaning than other respiratory viruses tested." Nevio Cimolai, *Environmental and Decontamination Issues for Human Coronaviruses and Their Potential Surrogates*, 92 J. of Med. Virology 11, 2498–510 (June 21, 2020), https://doi.org/10.1002/jmv.26170. A decontaminant may or may not be efficacious depending on the type of decontaminant and the contact time of the decontaminant on the property surface. *Id.* Further, the interaction of the decontaminant with the virus may make it difficult to test whether the decontaminant has actually eliminated the virus. *Id.*

the Clinic" and that "[s]ignificant repair and remediation was required before use of the properties could be permitted without risking further physical damage to property." AC ¶ 14. *See also* AC ¶¶ 15–16. These allegations defeat Defendants' contention that COVID-19 losses are not covered based on the "period of restoration" provision of the Policy. Even if that provision could reasonably be read to require direct physical loss or damage to necessitate the repair of insured property, the Menominee have alleged such repairs. Moreover, courts looking closely at this issue have rejected Defendants' argument. *In re Society Ins. Co.*, No. 20 C 02005, 2021 WL 679109, at *9 (N.D. Ill. Feb. 22, 2021) ("First and foremost, the 'Period of Restoration' describes a time period during which loss of business income will be covered, rather than an explicit definition of coverage.").

F. The Menominee Have Sufficiently Pled Loss Causation

Defendants' contention that the closure orders *alone* caused the Menominee's business interruptions "as opposed to the actual presence of COVID-19 on any insured property," Mot. at 17–18, is also misplaced.

The Menominee have specifically pled facts establishing that COVID-19 directly caused their business interruptions and have satisfied causation requirements to establish *at a minimum* that COVID-19 is a proximate cause of the Menominee's business interruption losses. In California, "An insurer is liable for a loss of which a peril insured against was the proximate cause, although a peril not contemplated by the contract may have been a remote cause of the loss." Cal. Ins. Code § 530. In the context of COVID-19, invoking the "efficient proximate cause" test, this court held that: "The Civil Authority Orders would not exist absent the presence of COVID-19; COVID-19 is therefore the efficient proximate of Plaintiffs' losses." *Boxed Foods Co., LLC v. California Cap. Ins. Co.*, No. 20-CV-04571-CRB, 2020 WL 6271021, at *4 (N.D. Cal. Oct. 26, 2020), *as amended* (Oct. 27, 2020) (dismissing Plaintiff's claims because the policy contained an unambiguous virus exclusion that is *not* present in this case.); *see also In re Society*, No. 20 C 02005, 2021 WL 679109, at *7 (N.D. Ill. Feb. 22, 2021) (citing *Manpower, Inc. v. Ins. Co. of the State of Pennsylvania*, No. 08-C-0085, 2009 WL 3738099, at *6 (E.D. Wis. Nov. 3, 2009)) (employing a proximate cause analysis under Wisconsin law).

Accordingly, the Court should deny Defendants' Motion to Dismiss as to Business Income and Extra Expense coverage.

G. The Menominee Have Sufficiently Pled Coverage Under the Policy's Other Insuring Agreements

1. Civil Authority

The Policy provides Civil Authority coverage, which applies to loss sustained when a civil authority issues an order that prohibits access to covered property due to property damage "at a property located within a 10 mile radius of covered property," for up to 30 days. AC ¶ 71; Policy at 66 (§ III.B.2). Defendants contend that the Menominee have not sufficiently alleged Civil Authority coverage, arguing that the Menominee "do not allege facts indicating that property within 10 miles of insured property was physically damaged or destroyed." Mot. at 21. That is not correct.

The Menominee have specifically alleged that "[t]hose Closure Orders were issued in response to the physical presence of the coronavirus at properties in Menominee and Wisconsin, including property within a 10 mile radius of Plaintiff's properties, and the imminent threat of further physical spread of the virus and resulting danger to individuals." AC ¶ 144. Indeed, for the same reasons COVID-19 caused physical loss or damage to the Menominee's businesses, COVID-19 caused direct physical loss or damage to all nearby businesses. As shown above, that direct physical loss or damage is sufficient to trigger the Civil Authority coverage.

For similar reasons, Defendants are mistaken when they suggest that the Complaint fails to state a claim because the Menominee did not plead a prohibition of access to their premises based on damage to other nearby property. The policy requirement on which Defendants base this contention is on its face designed just to ensure that the policyholder's business was located in a place subject to the civil authority orders:

> This Policy is extended to include the actual loss sustained by the Named Insured, as covered hereunder during the length of time, not exceeding 30 days, when as a direct result of damage to or destruction of property by a covered peril(s) occurring at a property located within a 10 mile radius of the covered property, access to the covered property is specifically prohibited by order of a civil authority.

Policy at 66 (§ III.B.2).

COVID-19 caused property damage, including "property located within a 10 mile radius of the covered property" in the same manner that it caused direct physical loss or damage to covered property and the civil authority orders were issued to mitigate its spread and avert the damage the coronavirus causes. AC ¶ 201. The closure orders "prohibited access within a ten-mile radius area that included covered property." *Id.*

Defendant further contends that the civil authority restrictions are not sufficient to trigger coverage because the Menominee were not completely barred from accessing their properties. Mot. at 23–24. The plain language of the Policy, however, makes clear that a complete prohibition of access to the insureds' premises is not required to trigger coverage. Rather, the Policy requires merely that access be "prohibited" by a civil authority.

Courts around the country have concluded that COVID-19 plaintiffs plausibly have alleged civil authority coverage under this very language—policies that say "prohibit." As the *Studio 417* court explained:

> Upon review of the record, the Court finds that Plaintiffs have adequately alleged that their access was prohibited . . . With respect to Plaintiffs' restaurants, the Closure Orders mandated "that all inside seating is prohibited in restaurants," and that "every person in the State of Missouri shall avoid eating or drinking at restaurants," with limited exceptions for "drive-thru, pickup, or delivery options." At the motion to dismiss stage, these allegations plausibly allege that access was prohibited to such a degree as to trigger the civil authority coverage . . . This is particularly true insofar as the Policies require that the "civil authority prohibits access," but does not specify "all access" or "any access" to the premises. For these reasons, Plaintiffs have adequately stated a claim for civil authority coverage.

2020 WL 4692385, at *7; *see also Blue Springs Dental Care v. Owners Ins. Co.*, 488 F. Supp. 3d 867 (2020).

The Menominee have pled they were subject to the Closure Orders in *response* to dangerous physical conditions resulting from direct physical loss or damage to nearby properties and the Orders prohibited access to the surrounding areas. AC ¶¶ 122–134, 144, 201. Defendants

should not be permitted to evade their Civil Authority coverage obligations and the Court should deny the Defendants' motion to dismiss as to Civil Authority coverage.

2. Ingress/Egress

The Policy provides ingress and egress coverage when ingress or egress to the described premises is physically prevented due to direct physical loss or damage to property within ten miles of the insured property. AC ¶ 70; Policy at 66 (§ III.B.1). Defendants contend that no coverage is provided under this clause because, first, no facts were alleged to "support that any specific property within a 10-mile radius of insured property actually sustained physical loss or damage," and second, that no facts were alleged to "support that any purported physical loss or damage to property actually 'prevented' ingress to or egress from insured property." Mot. at 19–20. Like its argument with respect to Civil Authority coverage, however, Defendants' position is misplaced because the Menominee have alleged direct physical loss or damage to nearby property that prevented access to the Menominee's property—as discussed above. The Court should deny Defendants' Motion to Dismiss as to Ingress/Egress coverage.

3. Contingent Time Element

For the same reason, Defendants dispute the sufficiency of the Menominee's allegations with respect to contingent time element coverage. That coverage applies when direct physical loss or damage takes place at a business that facilitate travel by customers to the Menominee properties. For example, the Menominee included the "War Bonnet Bar & Grill," in the Amended Complaint as an example of an area restaurant that was forced to close due to the presence of the coronavirus and whose closure caused the Menominee to suffer a loss:

> The Closure Orders and the property damage caused by the presence of the coronavirus at Plaintiffs' properties and at the properties of companies supplying Plaintiffs with customers further harmed Plaintiffs' business. . . . For example, area *restaurants within ten miles* of Plaintiffs' property, such as the War Bonnet Bar & Grill, released statements in September 2020 confirming that they were forced to close for everything but curbside carry-out orders.

AC ¶ 149.

The crux of Defendants' argument is that COVID-19 *cannot cause* physical loss or damage, and plaintiff's pleadings fail as a result. The Menominee, however, specifically allege that "area hotels, restaurants, and other businesses that facilitated travel by customers to MCR and Thunderbird experienced exposure to and physical damage from the coronavirus." AC ¶ 149. An allegation of exposure to the coronavirus is an allegation of the presence of the coronavirus. If the coronavirus can cause property damage, as the Menominee have demonstrated above, then coverage is triggered. The Court should deny the Defendants' motion to dismiss as to Contingent Time Element coverage.

4. Tax Revenue Interruption

Similarly, damage caused by the coronavirus "at other businesses and households" throughout the Menominee reservation and at tribal-owned entities had a demonstrable effect on the tribe. The Menominee pled property damage across its holdings and on its reservation that affected its tax revenues that suffices to state a claim for Tax Revenue Interruption. AC ¶¶ 66, 76, 218. The Court should deny the Defendants' motion to dismiss as to Tax Revenue Interruption coverage.

5. Protection and Preservation of Property

The Menominee have pled that they undertook significant, remedial actions to *protect their property* from further damage caused by the physical presence of the virus, and these allegations are sufficient to state a claim for coverage under the Policy's Protection and Preservation of Property coverage. Defendants, however, contend that Plaintiffs have not sufficiently alleged property damage caused by COVID-19 and that Plaintiffs' actions protected people from COVID-19 transmission, not property from physical damage." Mot. at 25. For the reason discussed above, Defendants' arguments do not withstand scrutiny. The Menominee have sufficiently alleged that COVID-19 causes property damage under this Court's previous decisions. Moreover, Defendants' arguments ignore one of the key allegations in the Amended Complaint concerning why the Menominee instituted repairs: "The restrictions and conditions also required increased spending by Plaintiffs for physical barriers, cleaning, sanitizing, and

other measures aimed at remediating the physical presence of the virus, repairing the damage to property, and preventing further damage to property and to patrons." AC ¶ 145. This is sufficient to state a claim for coverage. The Court should deny the Defendants' motion to dismiss as to Protection and Preservation of Property coverage.

V. CONCLUSION

For the foregoing reasons, this Court should deny Lexington's Motion to Dismiss and the related Joinders.[7]

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.

[7] If for any reason the court should decide to grant Defendants' motion in whole or in part, the Menominee request leave to amend. Pursuant to Federal Rule of Civil Procedure 15(a), the Court should freely grant leave to amend "when justice so requires." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc).

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