JS-6

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JACK SARKISSIAN, DOING BUSINESS AS JACK'S JEWELRS; SIERA JEWELRY, INC.,

Plaintiffs,

v.

BERKLEY REGIONAL INSURANCE COMPANY,

Defendants.

Case No. 2:22-cv-00927-AB-PVC

ORDER GRANTING DEFENDANT BERKLEY REGIONAL INSURANCE COMPANY'S MOTION TO DISMISS

Before the Court is Defendant Berkley Regional Insurance Company's ("Berkley") Motion to Dismiss. ("Motion," Dkt. No. 17.) Plaintiffs Jack Sarkissian dba Jack's Jewelers ("Sarkissian") and Siera Jewelry, Inc. ("Siera") (together, "Plaintiffs") filed an opposition. ("Opp'n," Dkt. No. 20.) Defendant filed a reply. ("Reply," Dkt. No. 21.) For the reasons below, the Court **GRANTS** the Motion.

I. BACKGROUND

Plaintiff Sarkissian and Plaintiff Siera purchased Policy Number BPK2057140-10 and Policy Number BPK2040783-12, respectively, from Defendant Berkley. First Amended Complaint ("FAC," Dkt. No. 2) ¶¶ 4, 5.

In March 2020, in response to the COVID-19 global pandemic, the Governor of California and Los Angeles City and County issued a series of orders ("Government

Orders") directing non-essential businesses to close and restricting non-essential gatherings. (*Id*. ¶¶ 13-19.) Plaintiffs allege that the presence of COVID-19 at the Plaintiffs' insured properties "deprived and continues to deprive Plaintiffs of the functionality and reliability of their properties by transforming the air and property into a dangerous instrumentality which affects Plaintiffs' ability to operate their businesses in a manner consistent with its intended purpose." (*Id*. ¶¶ 35-38.)

Plaintiffs made claims against their Policies for "lost business income and other financial losses totaling millions of dollars" caused by the Government Orders. (*Id*. ¶¶ 50-52.) Defendant denied the claims. (*Id*. ¶ 55.) Plaintiffs then filed this action, alleging that Defendant wrongfully denied coverage. (*Id*. ¶ 56.) The FAC asserts six causes of action: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; (3) unfair business practices under Business and Professions Code § 17200; (4) unjust enrichment; (5) negligent misrepresentation; and (6) declaratory relief. (*Id.* ¶¶ 73-122.) Defendants now moves to dismiss the action.

II. LEGAL STANDARDS

A. Motion to Dismiss for Failure to State a Claim

Federal Rule of Civil Procedure ("Rule") 8 requires a plaintiff to present a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Under Rule 12(b)(6), a defendant may move to dismiss a pleading for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To defeat a Rule 12(b)(6) motion to dismiss, the complaint must allege enough facts to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Labels, conclusions, and "a formulaic recitation of the elements of a cause of action will not do." *Id*. The complaint must also be "plausible on its face," that is, it "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly,* 550 U.S. at 570). A plaintiff's "factual allegations must be enough to raise a right to

relief above the speculative level." *Twombly*, 550 U.S. at 555. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678.

A complaint may be dismissed under Rule 12(b)(6) for the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988). When ruling on a Rule 12(b)(6) motion, "a judge must accept as true all of the factual allegations contained in the complaint." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). But a court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Iqbal*, 556 U.S. at 678 (2009) (internal quotation marks omitted).

A court generally may not consider materials other than facts alleged in the complaint and documents that are made a part of the complaint. *Anderson v. Angelone*, 86 F.3d 932, 934 (9th Cir. 1996). However, a court may consider materials if (1) the authenticity of the materials is not disputed and (2) the plaintiff has alleged the existence of the materials in the complaint or the complaint "necessarily relies" on the materials. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (citation omitted). The court may also take judicial notice of matters of public record outside of the pleadings and consider them for purposes of the motion to dismiss. *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988); *Lee*, 250 F.3d at 689-90. In federal court, "[in] alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). "Rule 9(b) requires a plaintiff averring fraud to plead the 'who, what, when, where, and how' of the alleged misconduct." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003).

B. Leave to Amend

If a court determines that a complaint should be dismissed, it must then decide whether to grant leave to amend. Under Rule 15(a), leave to amend "shall be freely given when justice so requires," bearing in mind "the underlying purpose of Rule 15

[is] to facilitate decisions on the merits, rather than on the pleadings or technicalities." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (alterations and internal quotation marks omitted). When dismissing a complaint for failure to state a claim, "a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Id*. at 1130 (internal quotation marks omitted).

Accordingly, leave to amend generally shall be denied only if allowing amendment would unduly prejudice the opposing party, cause undue delay, or be futile, or if the moving party has acted in bad faith. *Leadsinger, Inc. v. BMG Music Publ'g*, 512 F.3d 522, 532 (9th Cir. 2008). At the same time, a court is justified in denying leave to amend when a plaintiff "repeated[ly] fail[s] to cure deficiencies by amendments previously allowed." *See Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 892 (9th Cir. 2010). Indeed, a "district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint." *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1058 (9th Cir. 2011) (quotation marks omitted).

III. DISCUSSION

A. The Policies

Several provisions of the Policies are relevant to the Motion.[1] They are as follows.

The Policies provide coverage under the "Business Income (And Extr Expense) Coverage Form" in relevant part as follows:

We will pay for the actual loss of Business Income you sustain due to

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[1] It appears that these provisions are the same in both Policies. *See* FAC ¶¶ 4, 5. Sarkissian's Policy is attached as Exhibit A to the FAC, and Siera's Policy is Exhibit 1 to Defendant's Request for Judicial Notice ("RJN," Dkt. No. 16). The Court **GRANTS** the unopposed RJN. In its citations, the Court will refer to the Policies as "Ex. A" and "Ex. 1," respectively, and will cite their ECF pages numbers.

> the necessary "suspension" of your "operations" during the "period of restoration." The "suspension" must be caused by *direct physical loss of or damage to property* at premises which are described in the Declarations . . . . The loss or damage must be *caused by or resulting from a Covered Cause of Loss*.

Ex. A at 81; Ex. 1 at 55 (emphases added).

The "Extra Expense" coverage covers "necessary expenses you incur during the 'period of restoration' that you would not have incurred if there had been no *direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss*." Ex. A at 81; Ex. 1 at 55 (emphasis added).

A "Covered Cause of Loss" is defined as "*direct physical loss* unless the loss is excluded or limited in this policy." Ex. A at 93; Ex. 1 at 68 (emphasis added).

Under the Policies, the "period of restoration" begins "[f]ollowing expiration of the waiting period shown in the Declarations for Business Income coverage," or "[i]mmediately after the time of *direct physical loss or damage* for Extra Expense Coverage," and ends the earlier of when the property is "repaired, rebuilt or replaced," "when business is resumed at a new permanent location," or "12 consecutive months after the date of *direct physical loss or damage*." Ex. A at 137-38; Ex. 1 at 113-14 (emphases added).

Plaintiffs also seek coverage under the "Civil Authority" provisions, which state:

> When a *Covered Cause of Loss causes damage to property* other than property at the described premises, we will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by an action of civil authority that *prohibits access* to the described premises, provided that both of the following apply: (1) *Access to the area immediately surrounding the damaged property is prohibited by civil authority* as a result of the damage, and the described premises are

> within that area but are not more than one mile from the damaged property; and (2) The action of civil authority is taken in response to dangerous *physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage*, or the action is taken to enable a civil authority to have unimpeded access to the damaged
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> property.

Ex. A at 82; Ex. 1 at 56 (emphases added).

Finally, the Policies also include an "Exclusion of Loss Due to Virus or Bacteria" that provides that Berkley "will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." Ex. A at 92; Ex. 1 at 66. The Virus Exclusion also specifies that it "applies to all coverage under all forms and endorsements that comprise this Coverage Part or Policy including but not limited to forms and endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority." *Id.*

B. Counts 1, 2, 3, and 6 Must Be Dismissed Because Plaintiffs Have Not Plausibly Alleged Claims for Coverage.

Defendant argues that Plaintiffs' claims for breach of contract (Count 1), breach of the covenant of good faith and fair dealing (Count 2), unfair business practices under Cal. Business & Professions Code § 17200 (Count 3), and declaratory relief (Count 6) all rely on Berkley's allegedly improper denial of coverage under the Policies. (*See* Mot. 7:25-8:3.) Defendant contends these claims must be dismissed because the Policies do not cover Plaintiffs' alleged losses. Specifically, Defendant argues Plaintiffs have not plausibly alleged any "direct physical loss of or damage to" property and that the Policies' Civil Authority coverage does not apply.

1. Plaintiffs have not plausibly alleged any direct physical loss of or damage to property.

As quoted above, the Business Income and Extra Expense coverages of the Policies cover *direct physical loss of or damage to* insured property. Defendant argues that Plaintiffs' failed to allege facts in the FAC demonstrating their property has been physically altered, as required under California law. (Mot. 8:20-23.) Plaintiffs argue they have sufficiently alleged that the COVID-19 virus caused real physical loss of or damage to Plaintiffs' Properties. (*See* FAC ¶¶ 33-45.)

a. Temporary loss of use is not direct physical loss.

Plaintiffs allege that COVID-19 was on their premises, *e.g.*, FAC ¶¶ 33-34, 38, and that the Government Orders issued in response to COVID-19 caused them to suspend and/or limit operations, leading to lost income. (*See id.* ¶¶ 3, 36, 41, 45.) But the Ninth Circuit has held that the temporary loss of intended use of property caused by government orders issued in response to COVID-19 does not constitute physical loss of or damage to the property under California law. *See Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885 (9th Cir. 2021). Instead, "a distinct demonstrable, physical alteration of the property" is required. *Id*. at 892. Further, the Ninth Circuit stated "California courts have carefully distinguished 'intangible,' 'incorporeal,' and 'economic' losses from 'physical' ones." *Id.* at 892 (citing *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.,* 187 Cal. App. 4th 766 (2010)).

Similarly, this Court has dismissed COVID-19 insurance coverage suits based on the meaning of "direct physical loss of or damage to property" under California law. *See JC/SC LLC v. Travelers Indem. Co. of Conn*., 2022 WL 263157, at *6 (C.D. Cal. Jan. 26, 2022) (Birotte Jr., J.) (dismissing breach of contract and breach of covenant of good faith claims brought under policies with nearly identical coverage provisions and virus exclusion). Plaintiffs cannot distinguish this case from *Mudpie* or the numerous other cases ruling the same way. The Court thus finds that Plaintiffs' alleged temporary loss of use due Government Order issues in response to the

COVID-19 pandemic is not a direct physical loss of or damage to the insured property.

b. COVID-19 does not physically damage property.

Plaintiffs allege that the presence of COVID-19 on the insured properties has caused a "distinct, demonstrable, physical change and/or tangible alteration which results in continuous physical loss and/or damage to the propert[ies]." (FAC ¶ 33.) Defendant contends the FAC contradicts itself by alleging "the virus damages property by 'attach[ing]' to surfaces for prolonged periods, remain[ing] viable in indoor air, and render[ing] property unsafe for normal use" while also alleging that Plaintiffs resumed business after adopting infection control procedures (Mot. 14:5-12.) Defendant contends that "[t]hese allegations are not consistent with physical loss of or damage to property that would require repair, rebuilding, or replacement." (Mot. 14:12-14.)

In *JC/SC*, this Court rejected an allegation like Plaintiff's that the presence of COVID-19 on surfaces of, or at, the insured properties constituted direct physical loss of or damage to properties, noting that "numerous district courts within this circuit have also rejected this argument." 2022 WL 263157, at *5 (citing cases). Indeed, Defendant points to five federal Courts of Appeal that have likewise rejected Plaintiff's theory. *See* Mot. p. 14, fn. 9. Plaintiff's claims are indistinguishable from these cases. The Court therefore rejects Plaintiffs' argument that the presence of COVID-19 on the insured properties has caused direct physical loss of or damage to the properties.

2. The Policies' Civil Authority Coverage does not apply.

Plaintiffs also allege that their claims are covered by the Policies' Civil Authority Coverage. For the Policies' Civil Authority coverage to apply, Plaintiffs must plausibly allege (1) "an action of civil authority that prohibits access" to the premises; (2) the action was a result of "damage to [other] property" within one mile of the insured premises caused by a Covered Cause of Loss; and (3) the action was

"taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage" or "to enable a civil authority to have unimpeded access to the damaged property." Ex. A at 82; Ex. 1 at 56.

a. The Government Orders were not issued as a result of damage to property within one mile of the insured premises.

Plaintiffs allege that the Government Orders were issued in response to the damage to property caused by COVID-19. (FAC ¶ 67). However, this Court has previously found such allegations do not meet the "damage to other property" pleading requirements." *See JC/SC*, WL 263157, at *5 (finding Civil Authority coverage was not triggered where COVID-19 government "orders were not issued due to direct physical loss of or damage to property other than at Plaintiff's properties.") Furthermore, Plaintiffs have not alleged any damage to property not more than one mile from the insured premises that caused the Government Orders to be issued. Thus, this Court finds Plaintiffs' argument unpersuasive.

b. The Government Orders do not prohibit access to the insured premises.

In *JC/SC*, this Court interpreted the same government orders at issue in the present case. *See* 2022 WL 263157, at *1. There, this Court distinguished orders that prohibit access to an insured premise from orders temporarily restricting permitted activity at the insured premise. *Id*. at *5. Further, the plaintiff "d[id] not allege that any COVID-19 government order prohibited [it] from accessing its properties; rather, [it] was allegedly prevented from using certain properties 'for their intended purpose and function.'" *Id*. Similarly, Plaintiffs in the present case have only alleged that they have been temporarily prevented from using the insured properties for their intended purpose and function by the Government Orders. Thus, Plaintiffs have not plausibly alleged that Civil Authority coverage was triggered.

3. The Virus Exclusion and Other Exclusions preclude coverage.

The Virus Exclusion precludes coverage for "loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." (RJN Ex. 1 at 66.) In *Mudpie*, the Ninth Circuit interpreted an identical virus exclusion and found that it precluded coverage for COVID-19-related losses under California law. *Mudpie*, 15 F.4th at 893–94. Plaintiff's argument attributing their losses to the Government Orders rather than to the virus, and their argument for a different interpretation of the Policies, cannot overcome *Mudpie*.

Defendant also argues that two other exclusions apply to bar coverage. The Ordinance or Law Exclusion excludes coverage for "loss or damage caused directly or indirectly by . . . the enforcement of or compliance with any ordinance or law . . . regulating the construction, use, or repair of any property." Ex. A at 93; Ex. 1 at 68 (emphases added). And the Policies' Acts or Decisions Exclusion similarly provides that Berkley "will not pay for loss or damage caused by or resulting from . . . [a]cts or decisions, including the failure to act or decide, of any person, group, organization or governmental body." Ex. A at 96; Ex. 1 at 71. Other courts have held that such exclusions bar claims like Plaintiffs' claims. *See, e.g., Bradley Hotel Corp. v. Aspen Spec. Ins. Co.*, 19 F.4th 1002, 1008 (7th Cir. 2021) ("The ordinance or law exclusion . . . also bars coverage here."); *FlorExpo LLC v. Travelers Prop. Cas. Co. of Am.*, 524 F. Supp. 3d 1051, 1061 (S.D. Cal. 2021) (identical Acts or Decisions Exclusion precluded coverage where alleged losses stemmed from governmental closure orders). Plaintiffs did not respond to these arguments and thus concede them. *See* Local Rule 7-12.

Thus, even if coverage were available under any of the above Policy coverages, the Virus Exclusion, the Ordinance or Law Exclusion, and the Policies' Acts or Decisions Exclusion would bar that coverage.

For all of the above reasons, the Court finds, based on the allegations in the

FAC, that Defendant has complied with the plain language of the policies in denying Plaintiffs' claims. Accordingly, Plaintiffs' Counts 1, 2, 3, and 6 fail.

C. Plaintiffs' Other Claims Fail.

Plaintiffs' other claims—for unjust enrichment and negligent misrepresentation—fail as well.

In connection with the unjust enrichment claim, Plaintiffs seek to "disgorge[e] all monies" they paid to Berkley because it has allegedly been "unjustly enriched at the expense of and to the detriment of Plaintiffs" because the Policies "will never cover a loss." FAC ¶¶ 99, 103-04. First, Plaintiffs have alleged no facts showing that the Policies were illusory because they will never cover a loss. To the contrary, that the Policies did not cover Plaintiffs' COVID-related losses does not mean that they will never cover a loss. *See Secard Pools, Inc. v. Kinsale Ins. Co.*, 318 F. Supp. 3d 1147, 1153 (C.D. Cal. 2017) (explaining that an exclusion can only render a policy "illusory" if it "result[s] in a complete lack of any policy coverage"), *aff'd,* 732 F. App'x 616 (9th Cir. 2018). Second, the Policies represent valid contracts between the parties and "unjust enrichment is an action in quasi-contract, which does not lie when an enforceable, binding agreement exists defining the rights of the parties." *Madison Int'l v. Valley Forge Ins. Co.*, No. CV 21-8246-GW-KKX, 2022 WL 224853, at *4 (C.D. Cal. Jan. 18, 2022) (quoting *Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1167 (9th Cir. 1996)) (tentative order dismissing unjust enrichment claim in COVID-19 insurance dispute), *adopted at* 2022 WL 224852 (Jan. 20, 2022).

In connection with the negligent misrepresentation claim, Plaintiffs allege ""Defendants represented that the policies contained coverage for their businesses under all circumstances *or* Defendants failed to explain that certain situations, such as a virus, would not be covered and completely failed to explain the virus exclusion." FAC ¶ 58 (emphasis added). This disjunctive allegation, lacking any specific factual allegations, falls short of Fed. R. Civ. P. 9(b)'s heightened pleading standard. In any event, the claim fails to plead facts to plausibly establish a negligent misrepresentation

claim, which requires proof of five elements: (1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage. *Kobashi v. Sentry Ins.*, 2021 WL 1231425, at *6 (C.D. Cal. Mar. 2, 2021). Plaintiffs have not identified a plausible misrepresentation, as they cannot plausibly allege that the Defendants represented that the policies covered their businesses under "all circumstances" given that the Policies contain specific exclusions. Nor does an insurer's failure to explain an exclusion amount to a misrepresentation "because a negligent misrepresentation requires 'a positive assertion to show a misrepresentation of material fact; an omission or an implied assertion will not suffice.'" *Discount Elecs., Inc. v. Wesco Ins. Co.*., 2022 WL 123114, at *6 (C.D. Cal. Jan 10, 2022) (citing *Cutler v. Rancher Energy Corp*., 2014 WL 1153054, at *7 (C.D. Cal. Mar. 11, 2014)). Finally, the FAC is "devoid of details as to how Plaintiff was justified in relying on the alleged misrepresentations [that the Policies covered 'all circumstances'], particularly when the Policy itself explains its limitations." *Hovagimian v. Maxum Cas. Ins. Co.*, 2022 WL 765005, at *4 (C.D. Cal. Mar. 8, 2022) ("[a]ny failure on Plaintiff's part to read the Virus Exclusion within the Policy does not give rise to a claim of negligent misrepresentation").

For these reasons, Plaintiffs' claims for unjust enrichment and negligent misrepresentation fail.

D. Leave to Amend

Plaintiffs have already amended their complaint once. Furthermore, their claims are deficient as a matter of law based on the plain terms of their Policies, and pursuant to binding case law from the Ninth Circuit and the California Courts of Appeal. Plaintiffs cannot distinguish this case from those cases. Any amendment would be futile. Accordingly, Plaintiffs' action will be dismissed without leave to amend.

IV. CONCLUSION

For the reasons stated above, the Court **GRANTS** Defendant's Motion. Plaintiffs' action is **DISMISSED WITH PREJUDICE.** Defendant must file a proposed Judgment within 5 days of the issuance of this Order. Plaintiffs will have 3 days thereafter to file any objections.

IT IS SO ORDERED.

Dated: September 19, 2022

HONORABLE ANDRÉ BIROTTE JR.
UNITED STATES DISTRICT COURT JUDGE