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Attorneys for Defendants
VIGILANT INSURANCE COMPANY and
FEDERAL INSURANCE COMPANY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES - CENTRAL DISTRICT

UNITED TALENT AGENCY, LLC,

Plaintiff,

v.

VIGILANT INSURANCE COMPANY; FEDERAL INSURANCE COMPANY; and DOES 1 through 10,

Defendants.

Case No. 20STCV43745

Hon. Christopher K. Lui
Department 76

NOTICE OF ENTRY OF JUDGMENT IN FAVOR OF DEFENDANTS VIGILANT INSURANCE COMPANY AND FEDERAL INSURANCE COMPANY

Final Status Conference:	Not Set
Trial Date:	Not Set
Action Filed:	11/13/2020

CLYDE & CO US LLP
355 S. Grand Avenue, Suite 1400
Los Angeles, CA 90071
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PLEASE TAKE NOTICE that Judgment was entered in favor of Defendants Vigilant Insurance Company and Federal Insurance Company and against Plaintiff United Talent Agency, LLC. The Judgment in favor of Defendants Vigilant Insurance Company and Federal Insurance Company was signed by the Honorable Christopher K. Lui on July 12, 2021, and duly entered and filed with the Court. A true and correct copy of the Judgment is attached hereto as **Exhibit A**.

DATED: July 15, 2021

CLYDE & CO US LLP

By: _____

Susan Koehler Sullivan
Gretchen S. Carner
Brett C. Safford
Attorneys for Defendants
VIGILANT INSURANCE COMPANY and
FEDERAL INSURANCE COMPANY

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EXHIBIT A

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VIGILANT INSURANCE COMPANY and
FEDERAL INSURANCE COMPANY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES - CENTRAL DISTRICT

UNITED TALENT AGENCY, LLC,

Plaintiff,

v.

VIGILANT INSURANCE COMPANY; FEDERAL INSURANCE COMPANY; and DOES 1 through 10,

Defendants.

Case No. 20STCV43745

Hon. Christopher K. Lui
Department 76

JUDGMENT [ORDER OF DISMISSAL] FOLLOWING ORDER SUSTAINING DEMURRER WITHOUT LEAVE TO AMEND

Date: June 23, 2021
Time: 8:30 a.m.
Dept.: 76

Action Filed: 11/13/2020

On June 23, 2021, this Court sustained Defendants Vigilant Insurance Company and Federal Insurance Company's Demurrer to Plaintiff United Talent Agency, LLC's First Amended Complaint without leave to amend.

IT IS THEREBY ORDERED, ADJUDGED, AND DECREED that the First Amended Complaint of Plaintiff United Talent Agency, LLC be dismissed in its entirety, with prejudice, as to Defendants Vigilant Insurance Company and Federal Insurance Company. Plaintiff United

Talent Agency, LLC shall take nothing from its First Amended Complaint, and Defendants Vigilant Insurance Company and Federal Insurance Company shall recover from Plaintiff United Talent Agency, LLC costs of suit in the sum of $_____.

Dated: 07/12/2021

Hon. Christopher K. Lui
Judge of the Superior Court

CLYDE & CO US LLP
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Los Angeles, CA 90071
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PROOF OF SERVICE

United Talent Agency, LLC v. Vigilant Insurance Co., Federal Insurance Co., et al.
LASC Case No. 20STCV43745

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Clyde & Co US LLP, 355 S. Grand Avenue, Suite 1400, Los Angeles, California 90071. On **June 29, 2021**, I served the within document(s):

JUDGMENT [ORDER OF DISMISSAL] FOLLOWING ORDER SUSTAINING DEMURRER WITHOUT LEAVE TO AMEND

☒ **EMAIL** - by transmitting via email the document(s) listed above to the email address(es) set forth in the attached Service List below on this day before 11:59:59 p.m. pursuant to the parties' agreement to electronic service and as provided for in California Code of Civil Procedure § 1010.6. Electronic service of documents and California Rules of Court Rule 8.78. Electronic service.

☐ MAIL - by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.

☐ FACSIMILE - by transmitting via facsimile the document(s) listed above to the fax number(s) set forth on the attached Telecommunications Cover Page(s) on this date before 5:00 p.m.

☐ PERSONAL SERVICE - by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

☐ OVERNIGHT COURIER - by placing the document(s) listed above in a sealed envelope with shipping prepaid, and depositing in a collection box for next day delivery to the person(s) at the address(es) set forth below via Federal Express.

SEE ATTACHED SERVICE LIST

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on **June 29, 2021**, at Simi Valley, California.

Kathy L. Rollins

CLYDE & CO US LLP
355 S. Grand Avenue, Suite 1400
Los Angeles, CA 90071
Telephone: (213) 358-7600

SERVICE LIST

United Talent Agency, LLC v. Vigilant Insurance Co., Federal Insurance Co., et al.
LASC Case No. 20STCV43745

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PROOF OF SERVICE

United Talent Agency, LLC v. Vigilant Insurance Co., Federal Insurance Co., et al.
LASC Case No. 20STCV43745

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Clyde & Co US LLP, 355 S. Grand Avenue, Suite 1400, Los Angeles, California 90071. On **July 15, 2021**, I served the within document(s):

NOTICE OF ENTRY OF JUDGMENT IN FAVOR OF DEFENDANTS VIGILANT INSURANCE COMPANY AND FEDERAL INSURANCE COMPANY

☒ **EMAIL** - by transmitting via email the document(s) listed above to the email address(es) set forth in the attached Service List below on this day before 11:59:59 p.m. pursuant to the parties' agreement to electronic service and as provided for in California Code of Civil Procedure § 1010.6. Electronic service of documents and California Rules of Court Rule 8.78. Electronic service.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on **July 15, 2021**, at Simi Valley, California.

Kathy L. Rollins

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Los Angeles, CA 90071
Telephone: (213) 358-7600

SERVICE LIST

United Talent Agency, LLC v. Vigilant Insurance Co., Federal Insurance Co., et al.
LASC Case No. 20STCV43745

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 76

20STCV43745
UNITED TALENT AGENCY, LLC vs VIGILANT INSURANCE COMPANY, et al.

July 12, 2021
8:30 AM

Judge: Honorable Christopher K. Lui
Judicial Assistant: T. Le
Courtroom Assistant: S. Sato

CSR: None
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): No Appearances

For Defendant(s): No Appearances

NATURE OF PROCEEDINGS: Non-Appearance Case Review Re: Order of Dismissal Following Order Sustaining Demurrer Without Leave to Amend;

There being no objections filed, the Order of Dismissal Following Order Sustaining Demurrer Without Leave to Amend is approved, signed, filed and entered separately this date.

The Court orders the Amended Complaint (1st) filed by United Talent Agency, LLC on 04/07/2021 dismissed with prejudice.

Defendant shall recover costs pursuant to cost bill.

Electronic copy of the order of dismissal is returned to defendant's counsel via e-filing service provider.

Clerk is to give notice and notice of entry of the Order of Dismissal.

Certificate of Mailing is attached.

Susan Koehler Sullivan (State Bar No. 156418)
susan.sullivan@clydeco.us
Gretchen S. Carner (State Bar No. 132877)
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Attorneys for Defendants
VIGILANT INSURANCE COMPANY and
FEDERAL INSURANCE COMPANY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES - CENTRAL DISTRICT

UNITED TALENT AGENCY, LLC,

Plaintiff,

v.

VIGILANT INSURANCE COMPANY; FEDERAL INSURANCE COMPANY; and DOES 1 through 10,

Defendants.

Case No. 20STCV43745

Hon. Christopher K. Lui
Department 76

JUDGMENT [ORDER OF DISMISSAL] FOLLOWING ORDER SUSTAINING DEMURRER WITHOUT LEAVE TO AMEND

Date: June 23, 2021
Time: 8:30 a.m.
Dept.: 76

Action Filed: 11/13/2020

On June 23, 2021, this Court sustained Defendants Vigilant Insurance Company and Federal Insurance Company's Demurrer to Plaintiff United Talent Agency, LLC's First Amended Complaint without leave to amend.

IT IS THEREBY ORDERED, ADJUDGED, AND DECREED that the First Amended Complaint of Plaintiff United Talent Agency, LLC be dismissed in its entirety, with prejudice, as to Defendants Vigilant Insurance Company and Federal Insurance Company. Plaintiff United

Talent Agency, LLC shall take nothing from its First Amended Complaint, and Defendants Vigilant Insurance Company and Federal Insurance Company shall recover from Plaintiff United Talent Agency, LLC costs of suit in the sum of $_____.

Dated: 07/12/2021

Hon. Christopher K. Lui
Judge of the Superior Court

CLYDE & CO US LLP
355 S. Grand Avenue, Suite 1400
Los Angeles, CA 90071
Telephone: (213) 358-7600

PROOF OF SERVICE

United Talent Agency, LLC v. Vigilant Insurance Co., Federal Insurance Co., et al.
LASC Case No. 20STCV43745

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Clyde & Co US LLP, 355 S. Grand Avenue, Suite 1400, Los Angeles, California 90071. On **June 29, 2021**, I served the within document(s):

JUDGMENT [ORDER OF DISMISSAL] FOLLOWING ORDER SUSTAINING DEMURRER WITHOUT LEAVE TO AMEND

☒ **EMAIL** - by transmitting via email the document(s) listed above to the email address(es) set forth in the attached Service List below on this day before 11:59:59 p.m. pursuant to the parties' agreement to electronic service and as provided for in California Code of Civil Procedure § 1010.6. Electronic service of documents and California Rules of Court Rule 8.78. Electronic service.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on **June 29, 2021**, at Simi Valley, California.

Kathy L. Rollins

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355 S. Grand Avenue, Suite 1400
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SERVICE LIST

United Talent Agency, LLC v. Vigilant Insurance Co., Federal Insurance Co., et al.
LASC Case No. 20STCV43745

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SUPERIOR COURT OF CALIFORNIA COUNTY OF LOS ANGELES	Reserved for Clerk's File Stamp
COURTHOUSE ADDRESS: Stanley Mosk Courthouse 111 North Hill Street, Los Angeles, CA 90012	**FILED** Superior Court of California County of Los Angeles 07/12/2021 Sherri R. Carter, Executive Officer / Clerk of Court By: T. Le Deputy
PLAINTIFF/PETITIONER: United Talent Agency, LLC	
DEFENDANT/RESPONDENT: Vigilant Insurance Company et al	
CERTIFICATE OF MAILING	CASE NUMBER: 20STCV43745

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the Minute Order (Non-Appearance Case Review Re: Order of Dismissal Following ...) of 07/12/2021 upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in Los Angeles, California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid, in accordance with standard court practices.

Michael S. Gehrt
Pasich LLP - OC
1230 Rosecrans Ave.
Suite 690
Manhattan Beach, CA 90266

Susan K. Sullivan
Clyde & Co. US LLP
355 S. Grand Avenue
Suite 1400
Los Angeles, CA 90071

Sherri R. Carter, Executive Officer / Clerk of Court

Dated: 07/16/2021

By: T. Le
Deputy Clerk

SUPERIOR COURT OF CALIFORNIA COUNTY OF LOS ANGELES	Reserved for Clerk's File Stamp
COURTHOUSE ADDRESS: Stanley Mosk Courthouse 111 North Hill Street, Los Angeles, CA 90012	FILED Superior Court of California County of Los Angalas 07/12/2021 Sherri R. Carter, Executive Officer / Clerk of Court By: T. Le Deputy
PLAINTIFF(S): United Talent Agency, LLC	
DEFENDANT(S): Vigilant Insurance Company et al	
NOTICE OF ENTRY OF: __ JUDGMENT ✓ DISMISSAL __ OTHER ORDER __ AMENDED	CASE NUMBER: 20STCV43745

TO THE PARTIES AND TO THEIR ATTORNEYS OF RECORD, you are hereby given notice of entry of:

__ Judgment in the above-entitled matter, entered on _____.

✓ Order of Dismissal in the above-entitled matter, filed on 07/12/2021.

__ Order _____ filed on _____.

Sherri R. Carter, Executive Officer / Clerk of Court

Dated: 07/12/2021

By T. Le
Deputy Clerk

NOTICE OF ENTRY OF JUDGMENT / DISMISSAL / ORDER

SUPERIOR COURT OF CALIFORNIA COUNTY OF LOS ANGELES	Reserved for Clerk's File Stamp FILED Superior Court of California County of Los Angeles 07/12/2021 Sherri R. Carter, Executive Officer / Clerk of Court By: T. Le Deputy
COURTHOUSE ADDRESS: Stanley Mosk Courthouse 111 North Hill Street, Los Angeles, CA 90012	
PLAINTIFF/PETITIONER: United Talent Agency, LLC	
DEFENDANT/RESPONDENT: Vigilant Insurance Company et al	
CERTIFICATE OF MAILING	CASE NUMBER: 20STCV43745

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the Notice of Entry of Judgment / Dismissal / Other Order upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in Los Angeles, California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid, in accordance with standard court practices.

Michael S. Gehrt
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Susan K. Sullivan
Clyde & Co. US LLP
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Suite 1400
Los Angeles, CA 90071

Sherri R. Carter, Executive Officer / Clerk of Court

Dated: 07/12/2021

By: T. Le
Deputy Clerk

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 76

20STCV43745 June 23, 2021
UNITED TALENT AGENCY, LLC vs VIGILANT INSURANCE COMPANY, et al. 2:45 PM

Judge: Honorable Christopher K. Lui
Judicial Assistant: T. Le
Courtroom Assistant: None

CSR: None
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): No Appearances

For Defendant(s): No Appearances

NATURE OF PROCEEDINGS: Ruling on Submitted Matter

The Court, having taken the matter under submission on 06/23/2021, now rules as follows:

DEMURRER TO FIRST AMENDED COMPLAINT

Plaintiff alleges that Defendant insurers have wrongfully denied insurance coverage for all business interruption claims associated with SARS-CoV-2, Covid-19, and subsequent actions and orders of state and local civil authorities.

Defendants Vigilant Insurance Company and Federal Insurance Company demur to the First Amended Complaint.

RULING

Defendants Vigilant Insurance Company and Federal Insurance Company's demurrer to the First Amended Complaint is SUSTAINED without leave to amend as to the first through fourth causes of action.

The case is ordered dismissed with prejudice.

The Court's ruling is fully reflected in the "Ruling re: Demurrer to First Amended Complaint (consisting of 19 pages)", which is signed and filed this date and incorporated herein by reference to the court file.

Moving party is ordered to file a [proposed] Order of dismissal.

A Non-Appearance Case Review is scheduled for 07/12/2021 at 08:30 AM in Department 76 at

20STCV43745
UNITED TALENT AGENCY, LLC vs VIGILANT INSURANCE COMPANY, et al.

June 23, 2021
2:45 PM

Judge: Honorable Christopher K. Lui
Judicial Assistant: T. Le
Courtroom Assistant: None

CSR: None
ERM: None
Deputy Sheriff: None

Stanley Mosk Courthouse.

Clerk is to give notice.

Certificate of Mailing is attached.

HEARING DATE: **June 23, 2021** TRIAL: Not set.

CASE: **United Talent Agency, LLC v. Vigilant Insurance Company, et al.**

CASE NO.: **20STCV43745**

DEMURRER TO FIRST AMENDED COMPLAINT

MOVING PARTY: Defendants Vigilant Insurance Company and Federal Insurance Company

RESPONDING PARTY(S): Plaintiff United Talent Agency, LLC

Plaintiff alleges that Defendant insurers have wrongfully denied insurance coverage for all business interruption claims associated with SARS-CoV-2, Covid 19, and subsequent actions and orders of state and local civil authorities.

Defendants Vigilant Insurance Company and Federal Insurance Company demur to the First Amended Complaint.

RULING

Defendants Vigilant Insurance Company and Federal Insurance Company's demurrer to the First Amended Complaint is SUSTAINED without leave to amend as to the first through fourth causes of action.

The case is ordered dismissed with prejudice.

ANALYSIS

Demurrer

Meet and Confer

The Declaration of Brett Safford reflects that Defendants' counsel satisfied the meet and confer requirement set forth in CCP § 430.41.

Request For Judicial Notice

Plaintiff requests that the Court take judicial notice of the following:

1. *Financial Conduct Authority v. Arch Insurance (UK) LTD.*, [2020] EWHC 2448 (Comm) Order FL-2020-000018 [15 Sept. 2020]. A true and correct copy is attached hereto as Exhibit A.

2. *Financial Conduct Authority v. Arch Insurance (UK) Ltd., decision on appeal*, [2021] UKSC 1 [15 Jan. 2021]. A true and correct copy is attached hereto as Exhibit B.

3. Financial Conduct Authority, *Final guidance: Business interruption insurance test case – proving the presence of coronavirus (Covid-19)* (March 3, 2021). A true and correct copy is attached hereto as Exhibit C and available at https://www.fca.org.uk/publications/finalised- guidance/business-interruption-insurance-test-case-proving-presence-coronavirus.

Request Nos. 1 and 2 are DENIED. These court documents relating to a United Kingdom case are not relevant to the demurrer at hand. The Court need only take judicial notice of relevant materials. (*Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063, overruled in part on other grounds noted in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276.) The Court may deny a request for judicial notice of material unnecessary to its decision. (*Rivera v. First DataBank, Inc.* (2010) 187 Cal.App.4th 709, 713.) Defendants' objection is SUSTAINED.

Request No. 3 is DENIED. This Internet article is being offered for the truth of the matters asserted therein. However, a court may not take judicial notice of the truth of the contents of articles published on Web sites. (*Kagland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 193.) Defendants' objections are SUSTAINED.

Analysis

Plaintiff United Talent Agency, LLC ("UTA") is a talent agency which was forced to suspend its operations, and had the use and functionality of its premises, as well as those premises upon which it relies, substantially impaired due to SARS-CoV-2, COVID-19, the subsequent actions and orders of state and local civil authorities, guidance from the Centers for Disease Control and Prevention ("CDC"), and the need to mitigate its losses and damage. (1AC, ¶ 3.) Plaintiff also alleges that it suffered losses as a result of cancelled live events, as well as cancelled television and motion picture productions. (*Id.* at ¶ 6.) Plaintiff alleges that Defendants Vigilant and Federal have wrongfully withheld policy benefits that are under Plaintiff's commercial property and business interruption insurance policies. (*Id.* at ¶¶ 7, 8.)

Defendants Vigilant Insurance Company and Federal Insurance Company demur to the First Amended Complaint.

1. First Cause of Action (Breach of Contract Against Vigilant).

Defendants argue that the 1AC does not allege the presence of COVID-19 at the insured premises. Indeed, the 1AC generally alleges on information and belief that SARS-CoV-2 was present at various times in 2020 on and in its insured properties and the premises upon which it relies, **or would have been present** had it not been for the Closure Orders issued to curb the spread of SARS-CoV-2. (*See* 1AC, ¶¶ 4, 63, 65, 66.) In adding the "would have been present" language, Plaintiff so much as admits that it is making a claim for the speculative presence of SARS-CoV-2 on its property which was never confirmed.

Indeed, Plaintiff does not factually allege[1] that it knows for certain that the SARS-CoV-2 virus was even present on its property and, if so, on which portions thereof. Indeed, in the cases of contamination by mold, asbestos, mudslides, smoke, pollutants, and oil spills, these substances were presumably detected by testing at the time the claim was tendered. For instance, smoke (1AC, ¶ 42) can be detected by inhalation and an air quality monitor. Asbestos, airborne mold and lead can be detected by laboratory testing. Plaintiff's Complaint does not allege that the alleged property damage caused by the virus was **actually detected by a surface or air test at the time the claim was tendered**.

¶ 87 also alleges that at least 13 UTA employees, five spouses, and some of their dependents have tested positive for COVID-19, but this does not mean that the virus was present at Plaintiff's premises—perhaps the employees became infected elsewhere, or their spouses or dependents were the ones who infected the employees. Coverage should not arise based upon speculation. "[W]e do not believe that an insurer establishes there is a duty to indemnify by speculating about extraneous facts." (*Advent, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA* (2016) 6 Cal.App.5th 443, 460.)

Nor does Plaintiff factually allege that "dependent business premises" operated by others on whom Plaintiff depends actually contained the presence of SARS-CoV-2 on the property for purposes of the Additional Coverage for Dependent Business Premises. Plaintiff would only have a plausible claim for loss of property or damage to property if Plaintiff alleged that it **affirmatively detected the presence** of **active/viable** SARS-CoV-2 in or on its property, or other property away from the premises and **thereafter submitted a claim to Defendants based upon such confirmed contamination** —rather than simply relying on speculation that SARS-Cov-2 *must* have been present.

Plaintiff's failure to allege that it **affirmatively detected the presence** of **active/viable** SARS-CoV-2 in or on its property, or other property away from the premises distinguishes SARS-CoV-2 from all of the (mostly non-California) cases cited by Plaintiff at ¶ 24 of the 1AC. None of those cases involved a speculative claim of damage. The nature of Plaintiff's claim is inherently speculative because Plaintiff does

[1] "Although a court must on demurrer accept as true properly pleaded facts, a demurrer does not admit contentions or conclusions of law or fact." (*Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.4th 171, 185.)

not allege the actual presence of SARS-CoV-2 on or at Plaintiff's property, or other property away from the premises, as of the date the policy claim was made. And, by Plaintiff's own admission (1AC, ¶ 39), the presence of SARS-CoV-2 which entered onto Plaintiff's property prior to the date the claim was made would become non-viable long ago.

Thus, the contamination which existed on the date the policy claim was made is purely speculative as the 1AC fails to allege testing to document contamination on the date of the claim. And, even were such surface testing to be performed now and inactive viral genetic material found[2]—thereby confirming the presence of SARS-CoV-2—there is no way to determine whether the active virus was present as of the date the claim for policy benefits were made. It would appear, as matter of logic, that an inactive virus (which would not even be an eyesore) that poses no threat to human health causes no more loss or damage to property than a layer of dust (which may in fact be an eyesore). Plaintiff cannot seriously argue that the presence of dust would constitute loss of or damage to property.

The Court also addresses Defendants' argument that this cause of action fails because Plaintiff cannot allege "direct physical loss or damage" as a matter of law. In interpreting insurance policies, the Court reads the policy "in light of the parties' reasonable expectations and, when ambiguous, are interpreted to protect the reasonable expectations of the insured. (Citation omitted.)" (*Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302, 311.)

Plaintiff alleges that the following provisions provide coverage for Plaintiff's losses: Business Income With Extra Expense Coverage (1AC, ¶¶ 71 – 76; Ex. A at UTA00062; UTA00064-00065; Ex. B at UTA00430; UTA00433-00434; UTA00468); Extra Expense Coverage (1AC, ¶¶ 77 – 80; Exh. A at UTA00093-00094; Exh. B at UTA00444-00446). Building and Personal Property Coverage (¶¶ 81, 82; Exh. A at UTA00033-00035; Exh. B at UTA000401-00403).

¶ 85 alleges

> UTA has sustained covered Business Income and Extra Expense losses as defined in the Policies. These Business Income and Extra Expense losses were sustained due to the "impairment" of UTA's business operations as a result of "direct physical loss or damage" to its insured premises and "dependent business premises." These Business Income and Extra Expense losses were also caused by the Closure Orders issued throughout the United States, each of which constitute a "prohibition of access by a civil authority" as that phrase is used in the Policies.

[2] Obviously, if traces of an active virus are found, these would not have been present as of the date the of claim for policy benefits which forms the basis of this lawsuit.

Each of the policies cited by Plaintiff contain a requirement that there be "direct physical loss or damage."

The Business Income and Extra Expense provision indicates that insurer will pay for actual business income loss due to actual impairment of operations and extra expense incurred due to the actual or potential impairment of operations. However, such actual or potential impairment of operations must be caused by or result from "direct physical loss or damage" by a covered peril to property. (1AC, Ex. A at UTAC0062 [Premises Coverages, Business Income and Extra Expenses]; UTA00064-00065 [Additional Coverages, Any Other Location; Civil Authority]; Ex. B at UTA00430 [Premises Coverages, Business Income and Extra Expenses]; UTA00433-00434 [Additional Coverages, Any Other Location; Civil Authority]; UTA00468 [Dependent Business Premises).

The Extra Expense Coverage provision Exh. A UTA00093-00094 [Premises Coverages, Extra Expense and Civil Authority]; Exh. B at UTA00444, 00446 [Premises Coverages, Extra Expense and Civil Authority]) also the actual or potential impairment of operations must be caused by or result from "direct physical loss or damage" by a covered peril to property.

The Building and Personal Property Coverage Exh. A at UTA00033-00035 [Premises Coverage, Building Or Personal Property and Loss Prevention Expense]; Exh. B at UTA000401-00403 [Premises Coverage, Building Or Personal Property and Loss Prevention Expense]) also require "direct physical loss or damage" by a peril not otherwise excluded.

Under the subject Premises Coverage Policies, the issue is whether there is a causal link between a covered peril (here, SARS-CoV-2, COVID-19) and "direct physical loss or damage" to the covered property. As argued by Defendants, under California law, the phrase "direct physical loss" means an " 'actual change in insured property . . . occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so.' " (*MRI Healthcare Center of Glendale v. State Farm General Ins. Co.* (2010) 187 Cal.App.4th 766, 779.) Further, "loss" requires that "some *external force*" acted upon the insured property to cause a " 'distinct, demonstrable, physical alteration' " of the property—in other words, the property "must have been 'damaged' within the common understanding of that term." (*Id.* at pp. 779-80.) However, the requirement of "direct physical loss or damage" is " 'widely held . . . to preclude any claim against the property insurer where the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.' " (*Simon Marketing, Inc. v. Gulf Ins. Co.* (2007) 149 Cal.App.4th 616, 623. citation omitted.)

Although there does not appear to be any state law decisions to date, recent federal district court decisions[3] have interpreted California law as requiring a tangible, distinct, demonstrable, physical alteration of the property, which is not accomplished by the presence of COVID-19 on insured property. (*See, e.g., Wellness Eatery La Jolla LLC v. Hanover Ins. Grp.* (S.D.Cal. Feb. 3, 2021, No. 20cv1277-AJB-RBB) 2021 U.S.Dist.LEXIS 23014, at *7-23, **recounting recent COVID-19 insurance coverage cases.**)

> Here, the business income, extra expense, and extended business income provisions contain terms such as "period of restoration" and "repaired, rebuilt, or replaced" (Doc. No. 8-3 at 48, 49)—the ordinary and popular definitions of which strongly indicate that the "physical loss" contemplated by the Policy requires, as the aforementioned California cases state, some **distinct, demonstrable, physical alteration of the property**. *See* Merriam-Webster's Online Dictionary (2021) (defining (1) restoration as "a bringing back to a former position or condition" or "a restoring to an unimpaired or improved condition"; (2) repair as "to restore by replacing a part or putting together what is torn or broken" or "to restore to a sound or healthy state"; (3) rebuilt as "to make extensive repairs" or 'to restore to a previous state"; and (4) repair as "to restore to a former place or position" or "to take the place of especially as a substitute or successor".) Interpreting the Policy in context and with the assistance of surrounding terms, the Court finds that **without some tangible physical alteration to the property, there would be no need to restore, repairs, rebuild, or replace**. *See Palmer v. Truck Ins. Exch.*, 21 Cal. 4th 1109, 1115, 90 Cal. Rptr. 2d 647, 988 P.2d 568 (1999) ("When interpreting a policy provision, we must give its terms their ordinary and popular sense . . . We must also interpret these terms in context . . . and give effect to every part of the policy with each clause helping to interpret the other.") (citation omitted); *Waller*, 11 Cal. 4th at 18 (same).

(*Wellness Eatery La Jolla LLC v. Hanover Ins. Grp.* (S.D.Cal. Feb. 3, 2021, No. 20cv1277-AJB-RBB) 2021 U.S.Dist.LEXIS 23014, at *12-13 [bold emphasis added].)

> In another attempt to claim a physical loss or damage, Plaintiffs allege that COVID-19 droplets have physically spread and proliferated "onto virtually every surface and object in, on, and around Wellness Eatery and its surrounding environs." (Doc. No. 1-2 at ¶19.) However, Plaintiffs do not plausibly allege that that their business income losses were due to the presence of COVID-19 on their property. Rather, **Plaintiffs' business income losses were due to the government Closure Orders** prohibiting

[3] "Unpublished federal district court decisions are citable and may be persuasive authority. (Aleman v. AirTouch Cellular (2012) 209 Cal.App.4th 556, 576, fn. 8 [146 Cal. Rptr. 3d 849].)" (*Akopyan v. Wells Fargo Home Mortgage, Inc.* (2013) 215 Cal.App.4th 120, 142 n.13.)

on-site dining. (Doc. No. 1-2 at ¶ 1 ("Parakeet Cafe was forced to close its doors to the public because of a series of orders issued by the City and County of San Diego.").

The Court acknowledges that Plaintiffs allege that the Closure Orders "were issued due to droplets containing the Coronavirus being on surfaces and objects in, on, around and in the immediate area of the Parakeet Cafe locations." (*Id.* at ¶ 55.) However, **the Closure Orders referenced in Plaintiffs' complaint make no mention of COVID-19 presence at Parakeet Café. Thus, the Court finds that Plaintiffs' allegations that the Closure Orders were prompted by the presence of COVID-19 on their property amount to nothing more than "bare assertions" and "mere conclusory statements," which are not entitled to the presumption of truth**. *Ashcroft v. Iqbal*, 556 U.S. 662, 631, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *See also Platt Elec. Supply, Inc. v. EOFF Elec., Inc.*, 522 F.3d 1049, 1052 n. 1 (9th Cir. 2008) ("The same standard [for a motion to dismiss] applies to judgment on the pleadings.")

Moreover, **the Court does not find that the presence of COVID-19 qualifies as physical damage to property because the virus harms human beings, not property**. *Uncork & Create LLC v. Cincinnati Ins. Co.*, --- F. Supp. 3d ---, 2020 U.S. Dist. LEXIS 204152, 2020 WL 6436948, at *5 (S.D.W. Va. Nov. 2, 2020) ("In short, the pandemic impacts human health and human behavior, not physical structures."); *Kevin Barry Fine Art Assocs. v. Sentinel Ins. Co., Ltd.*, 2021 U.S. Dist. LEXIS 10458, 2021 WL 141180, at *6 (N.D. Cal. Jan. 13, 2021) (same). Consequently, the Court finds that allegations regarding the virus being present on and damaging Plaintiffs' property do not support a claim for insurance coverage. *See, e.g., Pappy's Barber Shops, Inc. v. Farmers Group, Inc.*, --- F. Supp. 3d --- 2020 U.S. Dist. LEXIS 182406, 2020 WL 5847570, at *1 (S.D. Ca. Oct. 1, 2020) (even assuming presence of virus at plaintiffs' business premises, business income losses were caused by precautionary measures taken by the state to prevent the spread of COVID-19 rather than by direct physical loss of or damage to property)

Lastly, to the extent that Plaintiff relies on *Total Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.* for an expansive view of the phrase "direct physical loss of" property, the Court is unpersuaded. 2018 U.S. Dist. LEXIS 216917, 2018 WL 3829767, at *1 (C.D. Cal. July 11, 2018). In *Total Intermodal*, the plaintiff filed an insurance claim for cargo that was inadvertently returned to China and later destroyed. *Id.* The court concluded that in the absence of physical damage, "the phrase 'loss of' includes the permanent dispossession of something." 2018 U.S. Dist. LEXIS 216917, [WL] at *4. Here, **Plaintiffs do not and cannot allege that they have been permanently dispossessed of property**. Thus, the Court finds *Total Intermodal* is inapplicable to this case. Other courts have

found the same. *See 10E, LLC*, 2020 U.S. Dist. LEXIS 165252, 2020 WL 5359653, at *4-5; *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, --- F. Supp. 3d ---, 2020 U.S. Dist. LEXIS 166808, 2020 WL 5500221, at *5 (S.D. Cal. Sept. 11, 2020). Accordingly, for the reasons stated, the Court finds that Plaintiffs have not alleged a covered loss under the Business Income provision.

(*Wellness Eatery La Jolla LLC v. Hanover Ins. Grp.* (S.D.Cal. Feb. 3, 2021, No. 20cv1277-AJB-RBB) 2021 U.S.Dist.LEXIS 23014, at *16-18 [bold emphasis and underlining added].)

Further, although it is not binding authority, the Court finds to be quite persuasive the language in, and adopts the reasoning of, the U.S. District Court for the Western District of Washington set forth set forth in *Nguyen v. Travelers Cas. Ins. Co. of Am.* (W.D.Wash. May 28, 2021) 2021 U.S.Dist.LEXIS 101894, regarding the interpretation of "direct physical damage to property" and "direct physical loss of property" in the context of COVID-19 insurance policy claims. Notably, *Nguyen* relies in part upon the California state court decision in *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal.App.4th 766, discussed above.

a. Direct Physical Damage to Property

The Court begins with "damage" as it is more straightforward. Most of the Plaintiffs before this Court seem to concede that COVID-19, as an airborne virus that can live only briefly on non-organic surfaces, does not cause damage to those surfaces, such as the buildings, counters, dentist chairs, and other insured property of the businesses at issue. *See, e.g.*, Omnibus Resp. at 11-16 (focusing on arguments that COVID-19 causes "loss of" insured property). Some Plaintiffs, however, have argued that COVID-19 causes "damage to" covered property as "[a]n average purchaser of insurance . . . would understand that the physical presence of COVID-19 causes 'loss' and/or 'damage' because it contaminates and thereby alters physical surfaces in a way that creates a risk of serious illness and death for patients and staff." *Aspen Lodging*, Pl. the Vancouver Clinic's Mot. for Partial Summ. J. against Def. Affiliated FM Ins. Co., No. 20-cv-0138, Dkt. No. 33 at 18-19.

The Court rejects this interpretation of direct physical damage. As numerous courts have recognized, "**COVID-19 hurts people, not property**," *Johnson v. Hartford Fin. Servs. Grp., Inc.*, No. 20-cv-02000, 2021 U.S. Dist. LEXIS 3463, 2021 WL 37573, at *7 (N.D. Ga. Jan. 4, 2021), as "the pandemic impacts human health and human behavior, not physical structures," *Uncork & Create LLC v. Cincinnati Ins. Co.*, 498 F. Supp. 3d 873, 884 (S.D.W. Va. 2020); *see also, e.g., Select Hosp., LLC v. Strathmore Ins. Co.*, No. 20-cv-11414, 2021 U.S. Dist. LEXIS 68343, 2021 WL 1293407, at *3 (D. Mass. Apr. 7, 2021); *Wellness Eatery La*

Jolla LLC v. Hanover Ins. Grp., No. 20-cv-1277, 2021 U S. Dist. LEXIS 23014 , 2021 WL 389215, at *7 (S.D. Cal. Feb. 3, 2021). **Thus, all that is needed to decontaminate is to "wipe[] [the virus] off the surface with disinfectant," attesting to the fact that there is no underlying damage.** *Woolworth LLC v. The Cincinnati Ins. Co.*, No. 20-cv-01084, 2021 U.S. Dist. LEXIS 72942, 2021 WL 1424356, at *4 (N.D. Ala. Apr. 15, 2021); *see also, e.g., Town Kitchen LLC v. Certain Underwriters at Lloyd's, London*, No. 20-cv-22832, 2021 U.S. Dist. LEXIS 36191, 2021 WL 768273, at *7 (S.D. Fla. Feb. 26, 2021) (relying on *Mama Jo's Inc. v. Sparta Ins. Co.*, 823 F. App'x 868 (11th Cir. 2020)). The Court concludes that COVID-19 does not cause direct physical damage to property as the term is used in the insurance policies.

(*Nguyen v. Travelers Cas. Ins. Co. of Am.* (W.D.Wash. May 28, 2021) 2021 U.S.Dist.LEXIS 101894, at *36-38 [bold emphasis and underlining added].)

b. Direct Physical Loss of Property

The Parties debate whether COVID-19 causes direct physical loss of property at greater length. The key term in this context is "loss." Defendants argue that "loss" means that the property incurred an "actual and discernable physical alteration" or that the insured has been "permanent[ly] and physical[ly] dispossess[ed]" of the property, such as through theft or total destruction. Omnibus Reply at 8. Plaintiffs counter that "loss" means not only a physical alteration of the insured property, but it also includes "the loss of the ability to use property." Omnibus Resp. at 11.

In determining the meaning of "loss" as used in these insurance policies, the Court turns to its common definition. "Loss" is defined as "the act or fact of being unable to keep or maintain something" or "the act of losing possession" of something. *Loss*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/loss (last visited May 28, 2021). **"Possess," in turn, is commonly defined as "to have and hold as property," similar to "own," or to "seize and take control of."** *Possess*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/possess (last visited May 28, 2021). **Thus, "loss of" is best understood as no longer being able to own or control the property in question. When combined with "direct" and "physical" the Court determines that, in its common usage, "loss" means that the alleged peril must set in motion events which cause the inability to physically own or manipulate the property, such as theft or total destruction.**

This reasoning aligns with most of the federal courts who have confronted this question and held that "physical loss of" requires

tangible, material, discernable, or corporeal dispossession of the covered property, which COVID-19 does not cause. To be certain, the terminology courts have used varies. **For example, most California courts have adopted the phrase "distinct, demonstrable, physical alteration,"** *see, e.g., Island Rests., LP v. Affiliated FM Ins. Co.*, 20-cv-02013, 2021 U.S. Dist. LEXIS 65015, 2021 WL 1238872, at *3 (S.D. Cal. Apr. 2, 2021); *O'Brien Sales & Mktg., Inc. v. Transp. Ins. Co.*, No. 20-cv-02951, 2021 U.S. Dist. LEXIS 6003, 2021 WL 105772, at *3 (N.D. Cal. Jan. 12, 2021); *10E, LLC v. Travelers Indem. Co. of Conn.*, 483 F. Supp. 3d 828, 836 (C.D. Cal. 2020), which derives from the California Court of Appeals' decision in *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 115 Cal. Rptr. 3d 27, 37 (Cal. Ct. App. 2010). While that definition derives from a California court applying California law, there is nothing that limits this understanding to California law, as the phrase is popular outside of that State in courts applying the law of their home states. *MRI Healthcare* itself took the phrase from a treatise on insurance law, attesting to its wider applicability. *See MRI Healthcare Ctr.*, 115 Cal. Rptr. 3d at 37 (quoting *Generally; "Physical" loss or damage*, 10A Couch on Ins. § 148:46 (3d ed. 2020)). Other phrases are commonly used by courts, including "tangible alteration," "material, perceptible destruction or deprivation of possession," "physical manifestation of loss or damage," and "physically impact[ed]."

Also common is an understanding of what direct physical loss does not cover, including "purely economic losses." *See, e.g., Equity Plan. Corp. v. Westfield Ins. Co.*, No. 20-cv-01204, 2021 U.S. Dist. LEXIS 36452, 2021 WL 766802, at *10 (N.D. Ohio Feb. 26, 2021); *Rococo Steak, LLC v. Aspen Specialty Ins. Co.*, No. 20-cv-2481, 2021 U.S. Dist. LEXIS 15191, 2021 WL 268478, at *5 (M.D. Fla. Jan. 27, 2021); *Tappo of Buffalo, LLC v. Erie Ins. Co.*, No. 20-cv-754, 2020 U.S. Dist. LEXIS 245436, 2020 WL 7867553, at *4 (W.D.N.Y. Dec. 29, 2020). **This Court finds that, in arguing that direct physical loss covers loss of income in these circumstances, Plaintiffs conflate *physical* loss with non-physical loss of use. Detrimental economic impact, however, does not trigger coverage under the property insurance here at issue. As numerous courts have held, "economic business impairments caused by COVID-19 safety orders *do not fall within the scope of coverage*."** *Caribe Rest. & Nightclub, Inc. v. Topa Ins. Co.*, No. 20-cv-03570, 2021 U.S. Dist. LEXIS 69580, 2021 WL 1338439, at *3 (C.D. Cal. Apr. 9, 2021) (emphasis in original) (citing *10E*, 483 F. Supp. 3d at 836); *see, e.g., Cafe Int'l Holding Co. LLC, v. Westchester Surplus Lines Ins. Co.*, No. 20-cv-21641, 2021 U.S. Dist. LEXIS 86454, 2021 WL 1803805, at *1 (S.D. Fla. May 4, 2021) ("Plaintiff may have lost business because of the pandemic, but a decline in restaurant revenue or profits is merely an economic loss, not a loss covered by the policy."); *see also* 2021 U.S. Dist. LEXIS 86454, [WL] at *8.

Terminology aside, the result is the same. **In order to trigger coverage under a direct physical loss theory, an outside peril must cause an inability to interact with the property because of an alteration to its physical status**. COVID-19, and more specifically the Governor's Proclamations, may have limited the uses of the property by preventing certain indoor activities previously conducted on the premises, but **they did not cause dispossession of the buildings, chairs, dental tools, etc.** As other courts have adeptly summarized, the "property did not change. The world around it did." *Town Kitchen*, 2021 U.S. Dist. LEXIS 36191, 2021 WL 758273, at *5.

Interpreting direct physical loss to include only tangible dispossession aligns with insurance law doctrine which holds that all-risk contracts are intended to cover damage to property, not economic loss. As a commonly cited treatise states,

> **The requirement that the loss be "physical," given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property.**

Generally; "Physical" loss or damage, 10A Couch on Ins. § 148:46 (3d ed. 2020) (footnotes omitted).

Numerous federal courts have followed *Couch* in finding that damages resulting from COVID-19 are not covered by the policies at issue in these COVID cases. In other words, "Plaintiff[s'] operations are not what is insured—the building and the personal property in or on the building are." *Real Hosp., LLC v. Travelers Cas. Ins. Co. of Am.*, 499 F. Supp. 3d 288 (S.D. Miss. 2020).

Several Plaintiffs seek to distinguish their cases from this conclusion by asserting the actual presence of COVID-19 on their premises, *e.g.*, by visitation from an infected person, rather than merely the threat of exposure. Given the Court's conclusion that COVID-19 does not cause physical harm or damage to non-organic surfaces, the Court finds that the pleading of actual presence is immaterial[4].

[4] By contrast, this Court's decision rests on *both* the failure to allege the confirmed physical presence of SARS-CoV-2 on or at the property, as well as the inability to plead a cognizable loss of property or damage to property from SARS-CoV-2.

> This Court joins the numerous courts across the country that have held that COVID-19 does not trigger direct physical loss or damage.
>
> (*Nguyen v. Travelers Cas. Ins. Co. of Am.* (W.D.Wash. May 28, 2021) 2021 U.S.Dist.LEXIS 101894, at *38-42 [bold emphasis added].)

Here, Plaintiff UTA's Complaint does not allege that the presence of coronavirus on or at Plaintiff's (as yet unidentified) property so altered the property that it must be repaired or replaced, nor that Plaintiff lost the ability to control or possess the property itself. Indeed, the government entities orders did not prohibit property owners or their employees from being at the properties.

Nor does Plaintiff plead that remediation of the property is required, thereby triggering the period of restoration referred to in the Business Income With Extra Expense coverage. That period commences with the "physical loss or damage" and "continue[s] until your operations are restored, with reasonable speed, to the level which would generate the business income amount that would have existed if no direct physical loss or damage occurred, including the time required to: [¶] A. repair or replace the property . . ." (1AC, Ex. A at UTA00140 & Ex. B at UTA00477 [bold emphasis removed].)

> The Court finds that Plaintiff has not plausibly alleged a claim for coverage under the Policy. Defendant argues that Plaintiff's allegations do not establish "direct physical loss of or damage to" property, as required by the Business Income and Extra Expense provisions. Mot. at 14. Plaintiff argues that he has sufficiently alleged "direct physical loss of," pointing to a "temporar[y]" loss "of access and use" to his salons. Dkt. No. 29 ("Opp.") at 5. California courts have required a "distinct, demonstrable, physical alteration of the property" or a "physical change in the condition of the property" to demonstrate direct physical loss. *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 771, 779-80, 115 Cal.Rptr.3d 27 (2010); *Ward Gen. Ins. Servs., Inc. v. Employers Fire Ins. Co.*, 114 Cal. App. 4th 548, 556, 7 Cal. Rptr. 3d 844, 851 (2003), *as modified on denial of reh'g* (Jan. 7, 2004) (concluding "loss of the database, with its consequent economic loss, but with no loss of or damage to tangible property, was not a 'direct physical loss of or damage to' covered property"); *see also Mortar & Pestle Corp. v. Atain Specialty Ins. Co.*, No. 20-CV-03461-MMC, 2020 U.S. Dist. LEXIS 240060, 2020 WL 7495180, at *3 (N.D. Cal. Dec. 21, 2020) (same).
>
> When read in context, this interpretation also comports with the "period of restoration" language included in both the Business Income and Extra Expense provisions. These provisions provide coverage for certain losses and expenses incurred during the "period of restoration," which is elsewhere defined as the period that "[b]egins with the date of direct physical loss or physical damage" and ends when the property "should be

repaired, rebuilt or replaced with reasonable speed and similar quality.' *See* Dkt. No. 13-1 at 57 (emphasis added). **Plaintiff's allegations of temporary loss of access and use, which claim no loss requiring repair, rebuilding, or replacement, are plainly insufficient. The Court thus finds that Plaintiff has not plausibly alleged "direct physical loss of or damage to" property, as required by the Policy.**

(*Colgan v. Sentinel Ins Co.* (N.D.Cal. Jan. 26, 2021, No. 20-cv-04780-HSG) 2021 U.S.Dist.LEXIS 27055, at *5-7 [bold emphasis added].)

Moreover, the language of the Civil Authority provisions (1AC, Exh. A, Business Income With Extra Expense, UTA00064; Exh. B, Business Income With Extra Expense, UTA00433) clarifies that an order of civil authority prohibiting access to the covered property which causes loss of earnings and extra expense **does not itself constitute "direct physical loss or damage to property."** Rather, there must be "direct physical result or damage to property" away from the premises or dependent business premises, caused by a "covered peril," **which direct physical loss or damage to property in turn caused the civil authority to issue an order** which prohibits access to property:

We will pay for the actual

- Business income loss; or
- extra expense,

you incur due to the actual impairment of your operations, directly caused by the prohibition of access to:

- your premises; or
- a dependent business premises,

by a civil authority.

This prohibition of access by a civil authority must be the direct result of direct physical loss or damage to property away from such premises or such dependent business premises by a covered peril, provided such property is within:

- one mile; or
- the applicable miles shown in the Declarations,

from such premises or dependent business premises, whichever is greater.

(Civil Authority, 1AC, Exh. A Business Income With Extra Expenses, UTA00064)(bold emphasis removed, underlining added.)

We will pay for the actual

- Business income loss you incur due to the actual impairment of your operations; and
- extra expense you incur due to the actual or potential impairment of you operations directly caused by the prohibition of access to:
- your premises; or
- a dependent business premises,

by a civil authority.

This prohibition of access by a civil authority must be the direct result of direct physical loss or damage to property away from such premises or such dependent business premises by a covered peril, provided such property is within:

- one mile; or
- the applicable miles shown in the Declarations,

from such premises or dependent business premises, whichever is greater.

(Civil Authority, 1AC, Exh. B, Business Income With Extra Expense, UTA00433)(bold emphasis removed, underlining added).

As such, the civil authority order cannot *itself* cause the "physical loss or damage to property," which is the theory underlying Plaintiff's 1AC. Rather, the "physical loss or damage to property" *precedes and necessitates* the issuance of the civil authority. Plaintiff does not allege that its property, or other property away from the premises, was actually identified as contaminated with SARS-CoV-2, and a government order issued as to that specific property. Rather, the government orders were issued and made applicable regardless of confirmed actual contamination of specific buildings.

As the Court issues this ruling, California has now allowed businesses to reopen. Was there a change to the physical condition of Plaintiff's property and other property which caused California to issue such reopening orders? Are the government orders a result of property no longer being damaged, or possession and control thereof returned to the owner? Clearly, no. The change in the government orders was due to changes in human behavior, vaccination of the population, and the infection rate falling, not because property was reclaimed, or because property damage was remediated.

Indeed, consistent with Plaintiff's own allegations at ¶¶ 36 – 47 of the 1AC, the SARS-CoV-2 virus is still being deposited onto real property and in the airspace in viable

form. Yet, what property loss or damage flows from the presence of the virus now that the orders have been lifted, and business can resume as usual? By Plaintiff's own admission, the SARS-CoV-2 virus will not remain viable on surfaces past a month (1AC, ¶ 39), at which time a claim of property loss or damage to property would be implausible. Logically, dead/non-viable viral genetic material does not constitute "loss or damage" to property because it no longer poses a threat to humans, and leaving dead/non-viable viral genetic material on property will not cause the property to deteriorate. (While Plaintiff frames this as going to the duration of damage, not the fact of damage, as discussed above, Plaintiff did not plead that it confirmed the actual presence of SARS-CoV-2 on any property prior to making its insurance claim.)

After this point when the virus becomes non-viable (and no longer a threat to humans), per the allegations in the 1AC, Plaintiff would still be suffering business losses **because of the government entity orders** mandating closure of non-essential businesses and activities which were enacted to protect members of the public from risk of serious illness and death resulting from community transmission of COVID-19. (*See, e.g.*, 1AC, ¶¶ 50, 53 - 62.) The fact that Mayor Garcetti allegedly announced that the virus was "physically causing property loss or damage due to its tendency to attach to surfaces for prolonged periods of time," (1AC, ¶ 60) does not establish such physical damage to or loss to property for purposes of insurance coverage.

Indeed, the only direct loss was caused by the government closure orders. (1AC, ¶¶ 7, 51.) The loss was not a physical deprivation of property, but rather an interruption of business operations. Plaintiff's property *itself* did not suffer physical damage, nor was possession and control thereof lost: Plaintiff does not allege that its personal or real property suffered damage or was lost such that it can no longer be used. Plaintiff does not allege that an employee or any person wearing appropriate protective gear would be physically unable to enter onto or used Plaintiff's real or personal property. Indeed, if fully vaccinated individuals can now enter onto Plaintiff's real property and utilize Plaintiff's personal property, Plaintiff has not pled **what physical change** occurred to its real and personal property **which now enables such patronage to resume**. What Plaintiff alleges is a loss of the ability to commercially exploit its property. As Plaintiff admits, the barrier to use of its property was the government orders, not a physical change in or to the property itself. And, as discussed above, under the Civil Authority provisions, there must be a physical loss to property.

Moreover, the following legal conclusions pled in ¶¶ 63, 64 of the 1AC need not be accepted as true for purposes of demurrer[5]:

> 63. Because SARS-CoV-2 causes a distinct, demonstrable, physical alteration to property, it constitutes "direct physical loss or damage" to property as that phrase is used in the Policies. Additionally, the presence

[5] *Freeman v. San Diego Assn. of Realtors* (1999) 77 Cal.App.4th 171, 185.

> or potential presence of SARS-CoV-2 at, on, and in insured property prevents or impairs the use of the property, thus constituting "direct physical loss" to property as that phrase is used in the Policies, even if it did not constitute "damage" to property as that term is used in the Policies.
>
> 64. Indeed, by mid-March 2020, SARS-CoV-2 had rapidly spread through the United States. This spread and the presence of SARS-CoV-2 caused "direct physical loss or damage," as that phrase is used in the Policies, including by physical alterations to air, airspace, and other property.

Nor does Plaintiff allege that, in the absence of closure orders (i.e., once they are modified or lifted), persons will still be prohibited from entering any building which may have SARS-CoV-2/COVID-19 because such property would be considered "damaged" by or "lost" because of the presence SARS-CoV-2. Plaintiff does not allege why people, wearing masks, practicing social distancing, washing their hands, and perhaps vaccinated, would not be permitted to enter a building **known** to have SARS-CoV-2 present, once the government orders are lifted.

Of the cases cited by Plaintiff at ¶ 24 of the 1AC which applied California law, *AIU Insurance Co. v. Superior Court* (1990) 51 Cal.3d 807, 842, involved contamination of 79 different hazardous waste disposal sites, groundwater beneath the sites, aquifers beneath adjoining property, and surrounding surface waters. (*Id.* at 815.) Similarly, *Aetna Casualty & Surety Co, v Pintlar Corp.* (9th Cir. 1981) 948 F.2d 1507, 1514 involved environmental contamination resulting from mining and smelting facilities over a nearly 100-year period. (*Id.* at 1509.) This type of contamination is of a different nature than SARS-CoV-2, which may land on surfaces but, as Plaintiff admits, will not remain permanently viable, and thus will not pose a threat to humans by virtue of its presence on the property once it is inactive. Likewise, as to *Hughes v. Potomac Insurance Co.* (1962) 199 Cal.App.2d 239, which involved a house left partially overhanging a cliff. (1AC, ¶ 25.)

In the Opposition, Plaintiff also cites *Armstrong World Indus., Inc. v. Aetna Cas. & Sur. Co.* (1996) 45 Cal.App.4th 1, 103 for the proposition that the introduction of asbestos fibers into the building air supply and onto building surfaces is property damage via contamination. However, in that case, the presence of asbestos on the subject property was established. No such facts are pled here. Also, the health hazard presented by the presence of asbestos at property does not naturally abate and requires costly and invasive remediation. By contrast, any health hazard presented by SARS-CoV-2 at a property will naturally abate, and can be mitigated sooner by taking simple precautions, including simple and inexpensive disinfecting steps.

Plaintiff's other authorities in the Opposition applying non-California law or applying California law to non-COVID-19 cases (*see, e.g.*, Opposition at Page 11, footnote 4; Page 13, footnote 5) are not persuasive in light of the federal district court decisions applying California law to COVID-19 cases.

While Plaintiff criticizes this Court's previously distinction between SARS-CoV-2, on the one hand, and smoke, fumes, vapors, odors, and chemical contaminants on the other (Page 12:1-5), these later substances are detectable via testing in connection with a claim for policy benefits. While it appears that there are tests available to detect the presence of SARS-CoV-2 on property, Plaintiff has not alleged that such a test was performed to confirm the presences of SARS-CoV-2 on the subject property prior to submission of the claim. Plaintiff has already had an opportunity to do in this amended complaint. Further, smoke, fumes, vapors, odors, and chemical contaminants irritate the senses, affecting use of the property, whereby SARS-CoV-2 itself, even when viable, is not an irritant.

Plaintiff's allegation regarding Chubb's public admission that a pandemic would be a huge liability for the insurance industry (*see* Complaint, ¶¶ 30 – 32) is more suited to whether the coronavirus is a "covered peril," but does not adequately address whether there has been "direct physical loss or damage" to the insured property.

Defendants also argue that the absence of a virus exclusion does not create coverage. In this regard, Plaintiff alleges that the existence of the Biological Agents exclusion in *liability* coverage, applicable to viruses, confirms the view that such loss or damage comes within the scope of *property* coverage, which does not include a Biological Agents exclusion. (1AC, ¶¶ 83, 84.) Plaintiff also alleges that due to Defendants' failure to include the 2006 standard-form "Exclusion Of Loss Due To Virus Or Bacteria," or a communicable disease or pandemic exclusion, such losses are Covered Perils. However, policy exclusions cannot expand the scope of coverage. (*August Entertainment, Inc. v. Philadelphia Indemnity Ins. Co.* (2007) 146 Cal.App.4th 565, 582-583.) While Plaintiff argues that their argument is a compare-and-contrast illustration regarding parallel policy provisions rather than an attempt to create coverage through exclusions, this is not a compelling argument. Similarly, Plaintiff argues in the Opposition that the inclusion of a Fungus Exclusion, which includes "microorganisms," is a recognition that microorganisms can cause "direct physical loss or damage." The Court does not find this argument persuasive, either. What the Fungus Exclusion recognizes is that fungus and similar types of microorganisms cause visible, physical property damage requiring remediation.

Indeed, as Defendants argue in the Reply, by Plaintiff's reasoning, SARS-CoV-2 has "damaged" every structure in the world. In that case, then, there may be a floodgate of insurance claims simply because SARS-CoV-2 *statistically should be present* on or in every real property location, even though persons would be able to visit such real property as allowed by government orders, and business operations could resume, despite such *likely "damage."*

For the foregoing reasons, the first cause of action is not adequately pled.

The demurrer to the first cause of action is SUSTAINED without leave to amend.

2. Second Cause of Action (Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing Against Vigilant).

Defendants argue that there can be no bad faith as there is no coverage as a matter of law.

"An insurer breaches the implied covenant of good faith and fair dealing when it unreasonably withholds policy benefits. (Citation omitted.)" (*Hobbs v. Allstate Ins. Co.* (2011) 193 Cal.App.4th 809, 820.) However, "an insured cannot maintain a claim for tortious breach of the implied covenant of good faith and fair dealing absent a covered loss." (*Benavides v. State Farm General Ins. Co.* (2006) 136 Cal.App.4th 1241, 1249-1253.) As discussed above, Plaintiff has failed to plead a covered loss. As such, the cause of action for breach of the implied covenant of good faith and fair dealing also fails.

The demurrer to the second cause of action is SUSTAINED without leave to amend.

3. Third Cause of Action (Declaratory Relief Against Vigilant) and Fourth Cause of Action (Declaratory Relief Against Federal).

Defendants argues that the declaratory relief causes of action fail because Plaintiff has failed to state a claim for coverage under either policy, so there is no cognizable legal theory or set of facts alleged to warrant the declaratory relief sought.

Here, because the first and second causes of action are not sufficiently pled, the Court exercises its discretionary power to deny declaratory relief where such a determination is not necessary or proper under all the circumstances. (*Jefferson, Inc. v. Torrance* (1968) 266 Cal.App.2d 300, 302-03.)

> Of course, judgments sustaining general demurrers to declaratory relief actions have been upheld where the trial court, in effect, has exercised its discretionary power to deny a declaration despite the existence of a controversy "where its declaration or determination is not necessary or proper at the time under all the circumstances." (Citations omitted.) Similarly, where a complaint sets forth a good cause of action for declaratory relief regarding only a disputed question of law, declarations on the merits unfavorable to a plaintiff have been upheld although such determinations were made in the form of a judgment sustaining a demurrer. (Wilson v. Civil Service Com., 224 Cal.App.2d 340, 344 [36 Cal.Rptr. 559].)

(*Jefferson, Inc. v. Torrance* (1968) 266 Cal.App.2d 300, 302-03.)

The demurrer to the third and fourth causes of action is SUSTAINED without leave to amend.

The case is ordered dismissed with prejudice.

6/23/21
DATE

HON. CHRISTOPHER K. LUI
JUDGE, LOS ANGELES SUPERIOR COURT

SUPERIOR COURT OF CALIFORNIA COUNTY OF LOS ANGELES	Reserved for Clerk's File Stamp
COURTHOUSE ADDRESS: Stanley Mosk Courthouse 111 North Hill Street, Los Angeles, CA 90012	FILED Superior Court of California County of Los Angeles 06/23/2021 Sherri R. Carter, Executive Officer / Clerk of Court By: T. Le Deputy
PLAINTIFF/PETITIONER: United Talent Agency, LLC	
DEFENDANT/RESPONDENT: Vigilant Insurance Company et al	
CERTIFICATE OF MAILING	CASE NUMBER: 20STCV43745

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the Minute Order (Ruling on Submitted Matter) of 06/23/2021 upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in Los Angeles, California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid, in accordance with standard court practices.

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Sherri R. Carter, Executive Officer / Clerk of Court

Dated: 06/23/2021

By: T. Le
Deputy Clerk

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 76

20STCV43745
UNITED TALENT AGENCY, LLC vs VIGILANT INSURANCE COMPANY, et al.

June 23, 2021
8:30 AM

Judge: Honorable Christopher K. Lui

Judicial Assistant: T. Le
Courtroom Assistant: S. Sato

CSR: Wil S. Wilcox, CSR # 9178 (appearing via Video)
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): Michael S. Gehrt and Caitlin Oswald (both appearing via Video)

For Defendant(s): Susan K. Sullivan and Brett Safford (both appearing via Video)

Other Appearance Notes:

NATURE OF PROCEEDINGS: Hearing on Demurrer - without Motion to Strike; Case Management Conference

Pursuant to Government Code sections 68086, 70044, and California Rules of Court, rule 2.956, Wil S. Wilcox, CSR # 9178, certified shorthand reporter is appointed as an official Court reporter pro tempore in these proceedings, and is ordered to comply with the terms of the Court Reporter Agreement. The Order is signed and filed this date.

The matters are called for hearing.

The Court has read and considered the moving, opposition and reply papers. The Court give its oral tentative ruling and hears argument from counsel.

After consideration of all documents filed and oral argument, The Court takes the Hearing on Demurrer - without Motion to Strike and Case Management Conference under submission.

The court to issue a written ruling.