ORDER ON SUBMITTED MATTER

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

SAN JOSE SHARKS LLC, et al.,

Plaintiffs,

vs.

FACTORY MUTUAL INSURANCE COMPANY, et al.,

Defendants.

Case No.: 21CV383780

ORDER CONCERNING DEFENDANT FACTORY MUTUAL INSURANCE COMPANY'S: (1) DEMURRER; AND (2) MOTION TO STRIKE

The plaintiffs in this action are nineteen National Hockey League Clubs (the "Clubs"), the National Hockey League ("NHL"), NHL Enterprises, L.P., NHL Enterprises Canada, L.P., and NHL Enterprises B.V. (collectively, the "Hockey Plaintiffs"). The Hockey Plaintiffs have sued their insurer, Defendant Factory Mutual Insurance Company, seeking compensation under their policies for losses resulting from the COVID-19 pandemic.

In an order filed on March 1, 2022, the Court sustained Factory Mutual's demurrer to the First Amended Complaint ("FAC") with leave to amend ("March 2022 Order").[1] The Hockey Plaintiffs filed the operative Second Amended Complaint ("SAC") on March 30, 2022. Now, Factory Mutual demurs to and moves to strike portions of the SAC. The Hockey Plaintiffs oppose both motions. The parties filed supplemental submissions to address new cases that had been published after regular briefing had concluded.

The Court issued a tentative ruling on July 19, 2022. It held oral argument on July 21 and took the matter under submission. The Court now issues its final order, which OVERRULES Factory Mutual's demurrer and GRANTS its motion to strike in large part.

I. DEMURRER

As in its prior demurrer, Factory Mutual contends that the Hockey Plaintiffs' insurance policies do not cover losses due to COVID-19, both because they expressly exclude losses caused by "contamination" by a virus and because the policies only cover losses due to "physical loss or damage" to insured property in the first place. They also contend that plaintiffs fail to allege coverage was improperly denied under the policies' more limited Communicable Disease coverage provisions.

The Hockey Plaintiffs disagree on all points. They urge that they do allege covered claims under both the Business Interruption and Civil Authority coverages in their policies, the contamination exclusion does not bar coverage, and the SAC alleges that Communicable Disease coverage was denied.

A. Communicable Disease Coverage

There is no dispute that 'the Policies expressly provide separate coverages that respond to communicable disease outbreaks, but only up to a $1 million annual aggregate limit.' " (March 2022 Order, at p. 10.) But the Hockey Plaintiffs' very general allegation in the FAC that "Factory Mutual has not paid any of the Hockey Plaintiffs' insured losses" was insufficient to

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[1] The general factual and procedural background to the action and the legal standards governing the Court's analysis are discussed in the March 2022 Order and are not repeated here.

show that Communicable Disease coverage was denied where the Hockey Plaintiffs also alleged that

> Factory Mutual directed its adjusters to "shunt all COVID-19 claims into limited Communicable Disease Coverage …," and its response to Plaintiffs was consistent with that direction. (FAC, ¶ 237.) Considering those specific allegations, the Court cannot infer from the allegation that Factory Mutual has not *paid* any of Plaintiffs' losses that it *denied* claims based on Communicable Disease coverage. (See *Perez v. Golden Empire Transit Dist.* (2012) 209 Cal.App.4th 1228, 1236 [specific allegations in a complaint control over potentially inconsistent general allegations; "[u]nder this principle, it is possible that specific allegations will render a complaint defective when the general allegations, standing alone, might have been sufficient"].)

(March 2022 Order, at p. 11, italics original.) The Court granted the Hockey Plaintiffs leave to amend their complaint to allege facts supporting this theory.

In response to the March 2022 Order, the Hockey Plaintiffs now allege that on March 13, 2020, the Hockey Plaintiffs provided Reports of Loss to Factory Mutual. (SAC, ¶ 259.) On April 24, 2020, they provided supplemental notice "of their claims 'to recover any and all losses and damages sustained by the Insureds as a result of recent impediments and disruptions to their operations at the insured locations, up to the full $2,000,000,000 (two billion dollars) in per occurrence policy limits.' " (*Id.*, ¶ 260.) "The Hockey Plaintiffs' April 24, 2020 supplemental notice of loss explicitly stated its 'losses are not limited to the sublimit for interruption by communicable disease.' " (*Id.*, ¶ 262.) Factory Mutual did not "acknowledge[] coverage for the general business interruption, civil authority, or other claims like those presented here by the Hockey Plaintiffs" and responded on May 22, 2020 "that the 'presence of COVID-19 at an insured location does not constitute "physical damage of the type insured." ' " (*Id.*, ¶¶ 263–264.) "Factory Mutual's May 22, 2020 letter to the Hockey Plaintiffs is consistent with a set of 'Talking Points' [it] prepared … to ensure that [its] adjusters shunt all COVID-19 claims into limited Communicable Disease Coverage…." (*Id.*, ¶ 269.)

In the Court's view, these allegations do not help the Hockey Plaintiffs. As with the allegations in the FAC, they do not establish that Communicable Disease coverage was denied; in fact, they suggest that Factory Mutual was prepared to provide it.

But luckily for the Hockey Plaintiffs, they have other new allegations. Specifically, they allege that "[o]n November 16, 2021, the Hockey Plaintiffs provided Factory Mutual with a detailed list of 70 representative examples of the presence of COVID-19 at insured locations of each of the Hockey Plaintiffs." (SAC, ¶ 271.) In response, Factory Mutual "did not accept coverage." (*Id.*, ¶ 272.) "To the contrary, after more than three months of unexplained and unexplainable delay, on a March 3, 2022, Factory Mutual sent the Hockey Plaintiffs a letter in which it stated, without any valid basis, that it 'disagree[d] with any contention that' that the Hockey Plaintiffs' November 16, 2021 letter was 'sufficient to establish "actual not suspected" presence of COVID-19.' " (*Ibid.*)

> To date, and despite acknowledging that "the coverage potentially available under our policy for losses arising from COVID-19 is provided by the COMMUNICABLE DISEASE RESPONSE and INTERRUPTION BY COMMUNICABLE DISEASE provisions," Factory Mutual has not accepted coverage under, or made any payment to the Hockey Plaintiffs pursuant to, either of the Communicable Disease Coverage grants. Accordingly, Factory Mutual has denied the Hockey Plaintiffs' claims under the Communicable Disease Coverage.

(SAC, ¶ 273.)

These allegations, when taken together, show—at least for pleading purposes—that Communicable Disease coverage was denied. Factory Mutual's sole argument is to claim that "[t]he allegations added to the SAC to support this claim merely state in conclusory fashion that FM did not accept coverage based on a November 16, 2021 letter from Plaintiffs. SAC ¶¶ 271-73." But the Hockey Plaintiffs clearly allege that Factory Mutual denied their claims for Communicable Disease coverage based on its statement that it "disagree[d] with any contention that" that the November 2021 letter was "sufficient to establish 'actual not suspected' presence of COVID-19."

On reply, Factory Mutual raises a totally different argument, urging that the new allegations do "not show entitlement to coverage, as the Policies' communicable disease coverages do not merely provide coverage based on proof of 'actual presence' alone, but contain other conditions to coverage, including that the presence at issue result in a shutdown of more than 48 hours." But the Hockey Plaintiffs allege that they incurred losses subject to this coverage, including shutdowns of more than 48 hours. (SAC, ¶¶ 245–252.)

"To survive a demurrer, the complaint need only allege facts sufficient to state a cause of action; each evidentiary fact that might eventually form part of the plaintiff's proof need not be alleged." (*C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 872 [identities of allegedly negligent employees need not be provided to state a claim against school district].) With limited exceptions not applicable here, the rules of pleading require no more than "general allegation[s] of ultimate fact." (*Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1548 [allegation that asserted nuisance "affect[s] a substantial number of people at the same time" suffices to state a claim although it mirrors the element of the claim].) "The pleading is adequate so long as it apprises the defendant of the factual basis for the claim." (*Id.* at p. 1549.)

That standard is satisfied here with respect to Communicable Disease coverage. (Cf. *Davaloo v. State Farm Ins. Co*. (2005) 135 Cal.App.4th 409, 419 [complaint did not state a claim where insurer "cannot ascertain whether it denied policy benefits entirely for earthquake damages … based on its conclusion the damages were less than the specific policy deductible or by finding the damages reported were not earthquake related at all, or whether it actually paid policy benefits for earthquake damages but simply in an amount less than [the insureds] now contend they were entitled to …"].)

B. Conclusion

Because the Hockey Plaintiffs state a claim based on Communicable Disease coverage, the Court OVERRULES Factory Mutual's demurrer in its entirety, even though Factory Mutual also challenges the Hockey Plaintiffs' allegations concerning a claim based on other coverage

provisions. (See *Daniels v. Select Portfolio Servicing, Inc.* (2016) 246 Cal.App.4th 1150, 1167 [a demurrer is not properly sustained as to a portion of a cause of action].)

II. MOTION TO STRIKE

In addition to its demurrer, Factory Mutual moves to strike portions of the SAC (specified in its amended notice of motion filed on July 8, 2022) that concern provisions of the Hockey Plaintiffs' policies other than the coverages for Communicable Disease Response and Interruption by Communicable Disease. This procedural mechanism (i.e., a motion to strike) is appropriate to "eliminate theories within a cause of action." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 392.)

Factory Mutual contends that, as the Court held in its March 2022 Order, these provisions all require "physical loss or damage" to insured property (or neighboring/suppliers' properties)—and Plaintiffs still fail to allege such loss or damage resulting from COVID-19.[2] Since everyone agrees these provisions do require "physical loss or damage," the Court need not discuss that issue in this Order. This Order will instead focus on the new allegations in the SAC concerning physical loss or damage to property, as well as new California authorities that have issued since March.[3]

Before turning to that discussion, the Court DENIES Plaintiffs' request for judicial notice of a brief filed by Factory Mutual in a different case concerning mold, since mold is not at issue in this case.

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[2] Again, Factory Mutual also contends that a contamination exclusion applies to these coverages. The Court did not reach this issue in its March 2022 Order because it found there was no coverage for physical loss or damage. Given its consistent ruling on coverage below, it again does not need to address the exclusion.

[3] The Court has also reviewed the parties' various supplemental authorities, although it does not consider unpublished California trial court orders. (See Cal. Rules of Court, rule 8.1115(a) [unpublished California opinions "must not be cited or relied on by a court or a party in any other action"]; *Schachter v. Citigroup, Inc.* (2005) 126 Cal.App.4th 726, 738 [a trial court ruling has no precedential value]; *Drummond v. Desmarais* (2009) 176 Cal.App.4th 439, 448, fn. 4 ["in the absence of some additional showing—such as the conditions for claim or issue preclusion—the actions of other judges are simply irrelevant"].)

A. New Allegations in the SAC

The new allegations in the SAC are aptly summarized at the beginning of the pleading itself. The Hockey Plaintiffs clarify that they were forced to stop the regular season *before* applicable government closure orders went into effect—and after they were lifted—due to asserted physical harm to their arenas caused by the presence of COVID-19:

> On March 12, 2020, the Hockey Plaintiffs were forced to stop using their arenas to host games because of the presence of COVID-19 at hockey arenas and the physical harm caused to the arenas by that presence. This decision to stop using the arenas, stop playing hockey games, and pause the regular season was made (a) prior to any applicable government closure orders and (b) immediately after a number of infectious Boston Celtics and Utah Jazz basketball players were present at a shared hockey and basketball arena during a game attended by fans. Those confirmed cases were indicative of a larger population of infected people who were present at hockey arenas before March 12, 2020, but whose cases of COVID-19 could not be detected because of nascent testing. It came to be understood that those individuals released COVID-19 particles and droplets when they talked, coughed, sneezed, breathed, and touched the countless surfaces in hockey arenas, and that touching those surfaces and inhaling that air—which had been physically altered and damaged by the COVID-19 virus—could give someone a deadly disease.

(SAC, ¶ 1.) "By the end of March 2020, the Hockey Plaintiffs became aware of at least 20 confirmed cases of COVID-19 at insured locations associated with at least eight Clubs…." (*Id.*, ¶ 127.) Moreover,

> [e]ven after many governmental authorities lifted or eased restrictions in the spring and early summer of 2020, the Hockey Plaintiffs could not use their arenas to play games (with or without fans), absent extraordinary measures, because the COVID-19 virus continued to be present at hockey arenas, continuing to physically harm air and surfaces. From March 2020, and continuing through the

> end of 2020, the Hockey Plaintiffs—despite mitigation efforts—repeatedly and contemporaneously confirmed that the COVID-19 virus was present in—and thus causing physical harm to—their arenas. During that time period, the Hockey Plaintiffs confirmed more than 285 instances of the presence of the COVID-19 virus at insured locations, including arenas, of every Hockey Plaintiff. The repeated and substantial presence of COVID-19 and the resulting physical harm to property made the normal use of the Hockey Plaintiffs' arenas impossible.

(SAC, ¶ 3; see also ¶¶ 128–131, 153–157 [detailing confirmed cases of COVID-19 at insured locations from April through December 2020].)

The Hockey Plaintiffs also continue to allege that government orders issued beginning in March 2020 "prevented fans and players from accessing the Hockey Plaintiffs' arenas" at all (SAC, ¶ 2), and later orders imposed "capacity restrictions" and "limited fan access" to games (*id.*, ¶ 5).

What these theories have in common with one another and with the FAC is the type of "physical harm" and associated remediation they allege: the presence of the virus in the air and on surfaces, necessitating "repairs to and modifications of HVAC systems, replacement of HVAC filters, and measures to increase the external air that flowed into the arenas"; cleaning and sanitizing—albeit cleaning so extensive that it was impossible as a practical matter "given the thousands of persons present in the hockey arenas"; and "physical changes to property, including … remodeling and reconfiguring physical spaces … and installing Plexiglas barriers, hand sanitizer dispensers, and touchless features such as faucets." (SAC, ¶¶ 7–8, 137; see also ¶¶ 81–102 [allegations of physical harm largely unchanged from the FAC], 107 [surfaces and air were "physically altered from safe to unsafe" by COVID-19], 162 [detailing physical and procedural upgrades].) The Hockey Plaintiffs allege that—even after cleaning and disinfection—"some physical impact remains for long periods on surfaces that have been affected by the COVID-19 virus" and surfaces can be continuously re-contaminated with virus due to the presence of infected people. (*Id.*, ¶¶ 101–102, 108, 110, 134.) As they did in the FAC, Plaintiffs allege that they were consequently "able to re-open their doors to fans only

because of significant repairs and preventive measures they took and, subsequently, the wide availability of vaccines." (*Id.*, ¶ 162.)

B. New California Authorities

The March 2022 Order discusses relevant authorities pre-dating that order, including *MRI Healthcare Center of Glendale, Inc. v. State Farm General Ins. Co.* (2010) 187 Cal.App.4th 766 and *Inns-by-the-Sea v. California Mutual Ins. Co.* (2021) 71 Cal.App.5th 688 (*Inns-by-the-Sea*), and that discussion is not repeated here. The Court maintains its view that these authorities support a finding of no coverage here.

Since the March 2022 Order issued, three new published California opinions have addressed whether policies covering physical loss or damage to property encompass losses resulting from the COVID-19 pandemic:

1. *Musso & Frank Grill Co., Inc. v. Mitsui Sumitomo Ins. USA Inc.* (2022) 77 Cal.App.5th 753 (*Musso & Frank*). This case held on the pleadings that there was no coverage.
2. *United Talent Agency v. Vigilant Ins. Co*. (2022) 77 Cal.App.5th 821 (*United Talent*). This case also held on the pleadings that there was no coverage.
3. *Marina Pacific Hotel & Suites, LLC v. Fireman's Fund Ins. Co.* (July 13, 2022, No. B316501) ___Cal.App.5th___ [2022 Cal. App. LEXIS 608] (*Marina Pacific*). This case held on the pleadings that a sufficient coverage case had been pled.

1. *Musso & Frank*

Musso & Frank broadly proclaimed that "[a]t this point, there is no real dispute. Under California law, a business interruption policy that covers physical loss and damages does not provide coverage for losses incurred by reason of the COVID-19 pandemic." (*Musso & Frank, supra*, 77 Cal.App.5th at p. 760.) True, the Court of Appeal's reasoning was concise, and it is not clear whether the plaintiff in that case alleged that the virus was physically present at its insured property—rather, the opinion focused on the plaintiff restaurant's theory that government orders forced it to shut down completely. But *Musso & Frank* makes it crystal clear that this

theory, which is among those still alleged by the Hockey Plaintiffs here, does not work in California.

2. *United Talent*

United Talent does address allegations that the virus was physically present at insured property, in addition to rejecting the closure order theory. The allegations supporting the physical presence theory were summarized at length, and are indistinguishable from those at issue here:

> UTA alleged that it was "informed and believes, and on that basis alleges, that SARS-CoV-2 has been present in the vicinity of and on and in its [insured] properties, or would have been present but for [UTA's] efforts to reduce, prevent, or otherwise mitigate its presence" and "had the Closure Orders not been issued." UTA alleged when "an infected person breathes, speaks, coughs, or sneezes," the virus permeates the air, settles on surfaces, and also "remain[s] airborne for a time sufficient to travel a considerable distance, filling indoor and outdoor spaces, and lingering in, attaching to, and spreading through heating, ventilation, and air conditioning ('HVAC') systems." In addition, "[s]tudies suggest that SARS-CoV-2 can remain contagious on some surfaces for at least 28 days." Thus, "respiratory droplets … expelled from infected individuals land on and adhere to surfaces and objects. In doing so, they physically change the property by becoming a part of its surface. This physical alteration makes physical contact with those previously safe, inert surfaces (e.g., handrails, doorknobs, bathroom fixtures) unsafe. When SARS-CoV-2 attaches or binds to surfaces and objects, it converts those surfaces and objects to active fomites, which constitutes physical loss and damage." UTA alleged, "Just like invisible smoke in air alters the air, the presence of the SARS-CoV-2 virus *alters* the air and airspace in which it is found and the property on which it lands. This physical change constitutes physical loss and damage." UTA asserted that "SARS-CoV-2 is no different from mold, asbestos, mudslides,

> smoke, oil spills, or other similar elements that cause property damage, although they later might be removed, cleaned, or remediated."

(*United Talent, supra*, 77 Cal.App.5th at pp. 826–827.)

Like the plaintiff here, "UTA argue[d] that its allegations are different than those in *Inns-by-the-Sea, Mudpie* [(also cited in the March 2022 Order)], and other cases in that UTA alleged not only loss of use, but also that the physical presence of the virus on UTA's insured premises constituted 'physical damage.' " (*United Talent, supra*, 77 Cal.App.5th at p. 834.) However, explaining that "[m]any courts have rejected the theory that the presence of the virus constitutes physical loss or damage to property" (*id.* at pp. 835–836), *United Talent* unequivocally "agree[d] with the majority of the cases finding that the presence or potential presence of the virus does not constitute direct physical damage or loss." (*Id.* at p. 838.) The opinion explained:

> While the infiltration of asbestos … or environmental contaminants … constituted property damage in that they rendered a property unfit for a certain use or required specialized remediation, the comparison to a ubiquitous virus transmissible among people and untethered to any property is not apt. Asbestos in installed building materials … and environmental contaminants … are necessarily tied to a location, and require specific remediation or containment to render them harmless. Here, by contrast, the virus exists worldwide wherever infected people are present, it can be cleaned from surfaces through general disinfection measures, and transmission may be reduced or rendered less harmful through practices unrelated to the property, such as social distancing, vaccination, and the use of masks. Thus, the presence of the virus does not render a property useless or uninhabitable, even though it may affect how people interact with and within a particular space.

(*United Talent, supra*, 77 Cal.App.5th at p. 838.)

Critically, *United Talent* specifically rejected a potential "closure to sanitize" theory based on dictum in *Inns-by-the-Sea*, which was discussed in the March 2022 Order and which the Court allowed plaintiffs to assert by amendment here. The Court of Appeal reasoned:

[A] discussion of a hypothetical scenario is not a statement of California law, and UTA cites no other case suggesting that such a scenario demonstrates "direct physical loss or damage." To the contrary, other courts have rejected similar claims. In the Sixth Circuit case *Brown Jug,* [*Inc. v. Cincinnati Ins. Co*. (U.S.6th Cir. 2022)], 27 F.4th 398, for example, a plaintiff restaurant, Dino Drop, "alleges that several of its employees and customers tested positive for COVID-19, likely after exposure to the virus by a live band that played at one of its restaurants. This outbreak purportedly 'damaged' the property, because Dino Drop had to take remediation measures, such as cleaning and reconfiguring spaces, to reduce the threat of COVID-19." (*Id.* at p. 404.) The Sixth Circuit held that such a claim did not constitute property damage…

Other courts have also held that cleaning or employing minor remediation or preventive measures to help limit the spread of the virus does not constitute direct property damage or loss. (See, e.g., *L&J Mattson's Co. v. Cincinnati Ins. Co., Inc.* (N.D. Ill. 2021) 536 F.Supp.3d 307, 315, fn. 3 ["additions such as Plexiglas, hand sanitizer, air purifiers or improved HVAC systems do not constitute repairs to damaged property where a plaintiff has not alleged damage to property. Instead, those additions constitute improvements to stop the spread of virus from one person to another"]; *Cafe La Trova LLC v. Aspen Specialty Ins. Co.* (S.D. Fla. 2021) 519 F.Supp.3d 1167, 1182 ["Plaintiff's rearranging of furniture and installation of partitions cannot 'reasonably be described as repairing, rebuilding, or replacing'" and cannot constitute "the very 'damage' it now asserts is sufficient to invoke coverage"]); *Independence Restaurant Group v. Certain Underwriters at Lloyd's, London* (E.D.Pa. 2021) 513 F.Supp.3d 525, 534–535 [moving equipment and adding plexiglass to make property "functional and reasonably safe for patrons" cannot reasonably be described as repairing, rebuilding, or

replacing. "Neither can disinfecting or cleaning property that is contaminated."].)

Moreover, UTA has not alleged that its properties required unique abatement efforts to eradicate the virus.

(*United Talent, supra*, 77 Cal.App.5th at p. 839.)

3. *Marina Pacific*

Finally, while "recogniz[ing] this conclusion is at odds with almost all (but not all) decisions considering whether business losses from the pandemic are covered by the business owners' first person commercial property insurance," *Marina Pacific* held that the issue of whether COVID-19 causes direct physical loss or damage to property is not appropriately resolved on demurrer. (*Marina Pacific, supra*,___Cal.App.5th___ [2022 Cal. App. LEXIS 608, at *20].) It expressly disagreed with *United Talent* in this regard. (See *id.* at *23–24.)

C. Discussion

The Court follows *United Talent*. The Hockey Plaintiffs contend that *United Talent* conflicts with *Inns-by-the-Sea*, and the Court should follow the latter authority. But as *United Talent* specifically holds, the discussion in *Inns-by-the-Sea* that the Hockey Plaintiffs rely on is dictum. The Court finds that *United Talent* controls here given its thorough, persuasive reasoning and discussion of authorities.

The Hockey Plaintiffs urge that their policies "include coverage-promoting language not contained in the *Inns*, *UTA*, and *Musso* policies." But ultimately, the policies at issue here—like those in all three authorities—all require physical loss or damage to property. *United Talent* conclusively holds that the presence of COVID-19 in the air and on surfaces is not physical loss or damage to property.

The Hockey Plaintiffs argue that "UTA's broad statement that the 'presence or potential presence of the virus does not constitute direct physical damage or loss,' [*United Talent, supra*] 77 Cal.App.5th at 838, is not binding as applied to Hockey's distinguishable facts and policy language." In a footnote, they explain:

Unlike Hockey, the *UTA* plaintiff did not allege that (1) anyone who tested positive for COVID-19 was "present at UTA property while infected"; (2) any

> insured "facilities were closed as a direct result" of the COVID-19 virus on site; (3) it lost earnings because of physical damage to *insured* business premises rather than third-party properties; or (4) it undertook any "remedial measures" at its properties or any "unique abatement efforts to eradicate the virus." *Compare* 77 Cal.App.5th at 835, 838, fn. 12, 839, *with* SAC ….

But while the plaintiff in *United Talent* did not allege these things with precision, it argued that they could be inferred from its allegations, and the Court of Appeal allowed the plaintiff this "generous interpretation of [its] allegations." (*United Talent, supra*, 77 Cal.App.5th at p. 838, fn. 12; see also *id.* at p. 838 ["UTA asserts, 'This is exactly what UTA has alleged: the presence of the virus, confirmed by its employees testing positive for COVID-19, and the resulting closure of facilities.' "].) *United Talent* held, not that the plaintiff failed to allege the virus was present at its properties, but that it "has not established that the presence of the virus *constitutes physical damage* to insured property." (*Id.*, p. 840, italics added.) And as the Hockey Plaintiffs acknowledge, *United Talent* applied this holding in the specific context of civil authority coverage, too. (See *id.* at p. 840 ["just as the presence of the virus does not constitute physical loss or damage to insured property, it also does not constitute physical loss or damage to" neighboring properties—even where closure orders attempted to characterize the pandemic this way].)

The Hockey Plaintiffs argue that *United Talent* conflicts with non-California cases, and they cite four cases from Nevada, New Jersey, Texas, and Pennsylvania in a footnote. But the Hockey Plaintiffs do not actually argue that these specific states' laws apply here. And they make no attempt to show that these few, unpublished trial court rulings accurately represent the state of the law in those jurisdictions.[4] As stated in *United Talent*, "[t]he majority of cases in California (and elsewhere)" have "rejected the theory that the presence of the virus constitutes

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[4] Indeed, Factory Mutual cites a more recent and directly contrary Texas authority on reply. (See *NTT Data Int'l LLC v. Zurich Am. Ins. Co.* (N.D.Tex. Jan. 21, 2022, No. 3:21-CV-890-S) 2022 U.S.Dist.LEXIS 11439.) And *United Talent* cites a directly contrary Pennsylvania authority. (*See Indep. Rest. Grp. v. Certain Underwriters at Lloyd's* (E.D.Pa. 2021) 513 F. Supp. 3d 525.)

physical loss or damage to property." (*United Talent, supra*, 77 Cal.App.5th at p. 835.) The Hockey Plaintiffs fail to identify a contrary state's law that applies in this case.

Finally, the Hockey Plaintiffs urge the Court to apply *Marina Pacific*, a decision which is admittedly "at odds with almost all … decisions" dismissing claims for business losses due to COVID-19. (*Marina Pacific, supra*, ___Cal.App.5th___ [2022 Cal. App. LEXIS 608, at *20].) Respectfully, the Court declines to follow this case. *Marina Pacific* essentially held that the nature of the virus's impact on air and surfaces is a factual issue that is not properly resolved on demurrer, even though "common sense" theoretically might dictate that it does not cause physical loss or damage to property. (*Id.* at *30.)

But in the Court's view, it need only consider the SAC itself, giving it "a reasonable interpretation, reading it as a whole and its parts in their context," and without being "required to accept the truth of the factual or legal conclusions" it may assert. (*Id.* at *13–14, internal citations and quotation marks omitted.) The SAC describes physical and procedural *upgrades* that were necessitated by the virus and expressly alleges that anything that could be reasonably considered remediation—i.e., cleaning and sanitizing—was insufficient, because *people* would inevitably bring the virus back. (SAC, ¶ 102.) The Hockey Plaintiffs allege that they were "able to re-open their doors to fans only because of significant repairs and preventive measures they took and, subsequently, the wide availability of vaccines." (*Id.*, ¶ 162.) But the SAC does not identify anything that could reasonably be interpreted as a "repair." The Court agrees with *United Talent*: Plaintiffs' allegations inevitably reveal that COVID-19 is not a truly remediable contaminant like asbestos, and—as the clear majority of courts have held by now—"cleaning or employing minor remediation or preventive measures to help limit the spread of the virus does not constitute direct property damage or loss." (*United Talent, supra*, 77 Cal.App.5th at p. 839.)

In addition, the Hockey Plaintiffs distinguish the numerous federal cases arrayed against them, citing the arguable difference in pleading standards between California and federal courts. But in the Court's views, none of these federal cases relied solely upon the "plausibility" (or lack thereof) of the insured's allegations. Rather, these cases noted that when looking at the insured's

allegations as a whole, there was no showing of direct property damage or loss. "Plausibility" had little to do with that determination.

In the end, applying *United Talent*, the Court concludes that the Hockey Plaintiffs fail to allege covered physical loss or damage to property due to COVID-19.

D. Scope of Motion to Strike

In response to Factory Mutual's amended notice of motion, the Hockey Plaintiffs argue that the motion to strike is overbroad in targeting general factual allegations relevant to their surviving Communicable Disease claims as well as allegations concerning non-Communicable Disease coverages. The Court agrees. It will therefore grant the motion to strike as to the narrower set of allegations stated below.[5]

E. Conclusion

The Court GRANTS IN PART Factory Mutual's motion to strike allegations concerning non-Communicable Disease coverages, and does so WITHOUT leave to amend.[6] The following allegations are hereby STRUCK from the SAC:

- Paragraphs 219–244;
- Paragraphs 253–258;
- Paragraphs 278–282;
- The following portion of paragraph 291, at p. 77, ll. 12–20:

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[5] In its tentative ruling, the Court had asked the parties to meet and confer as to the propriety of striking the specific allegations identified by the Court in light of its rulings on coverage, and note any areas of disagreement at the hearing. At the July 21 hearing, the parties did not discuss this issue; rather, they focused on the merits of the Court's tentative coverage rulings. Therefore, the Court assumes the Hockey Plaintiffs, while certainly objecting to some of the Court's coverage rulings, are not objecting to striking certain allegations in the FAC in light of those rulings.

[6] The Hockey Plaintiffs have not shown specifically how they could further amend their complaint to comply with *United Talent*. And the Hockey Plaintiffs already had one chance to fix previous pleading problems. Therefore, the Court is granting the motion to strike *without* leave to amend.

- Factory Mutual is contractually obligated under the All Risks Policies to indemnify the Hockey Plaintiffs for their real property losses, time element losses, extra expense, and other losses sustained as a result of direct loss or damage to property due to the COVID-19 virus and/or COVID-19;

- Factory Mutual is contractually obligated under the All Risks Policies to indemnify the Hockey Plaintiffs for their time element losses and extra expense as a result of qualifying orders of civil authority that have limited, restricted, and/or prohibited access to insured properties as a result of the COVID-19 virus and/or COVID-19 at insured properties or other locations within any required vicinity of insured properties;

- The following portion of paragraph 298, at p. 78, ll. 14–15:

  - disregarded facts and evidence showing that the COVID-19 virus causes direct physical loss or damage to property.

- The following portion of paragraph 1 of the Prayer for Relief, at p. 79, ll. 4–12:

  - Factory Mutual is contractually obligated under the All Risks Policies to indemnify the Hockey Plaintiffs for their real property losses, time element losses, extra expense, and other losses sustained as a result of direct loss or damage to property due to the COVID-19 virus and/or COVID-19;

  - Factory Mutual is contractually obligated under the All Risks Policies to indemnify the Hockey Plaintiffs for their time element losses and extra expense as a result of qualifying orders of civil authority that have limited, restricted, and/or prohibited access to insured properties as a result of the COVID-19 virus and/or

COVID-19 at insured properties or other locations within any required vicinity of insured property;

IT IS SO ORDERED.

Date: August 8, 2022

The Honorable Sunil R. Kulkarni
Judge of the Superior Court