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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:22-cv-00881-RGK-JC	Date	May 3, 2022
Title	***Goergio Cosani Menswear Inc., et al. v. AmGuard Insurance Company, et al.***		

Present: The Honorable	R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE	
Joseph Remigio	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiff:	Attorneys Present for Defendant:	
Not Present	Not Present	

Proceedings: **(IN CHAMBERS) Order Re: Defendant's Motion to Dismiss [DE 13]**

I. INTRODUCTION

On July 21, 2021, a group of Los Angeles businesses ("Plaintiffs")[1] filed a lawsuit in Los Angeles County Superior Court against AmGUARD Insurance Company ("Defendant"). Plaintiffs did not serve Defendant in that action until January 27, 2022, after they filed a First Amended Complaint ("FAC"). (*See* Notice of Removal at 1, ECF No. 1.) Defendant then removed the action to this Court on February 8, 2022. (*Id.* at 2.)

Presently before the Court is Defendant's Motion to Dismiss. (*See* ECF No 13.) For the following reasons, the Court **GRANTS** the Motion.

II. FACTUAL BACKGROUND

The following facts are alleged in the Complaint, unless otherwise noted:

Plaintiffs are a group of businesses that operate in Los Angeles County. They each purchased a policy from Defendant, and those policies are substantially identical. Relevant provisions of the policies include:

- "Business Income Coverage": An insured is covered under this provision for "the actual loss of business income" sustained due to "necessary suspension of [] operations during

[1] (1) Goergio Cosani Menswear, Inc.; (2) Men's Suit Outlet, Inc.; (3) Hagop Nersis; (4) School Uniforms, USA, Inc.; (5) Photo Perfections, Inc.; (6) Samba Group, Inc.; (7) Southbay Restaurant Group, Inc.; (8) Dynamic Tone Corp.; (9) and H K Electrical, Inc.

the period of restoration. The suspension must be caused by direct physical loss of or damage to property at the described premises. The loss or damage must be caused by or result from a *Covered Cause of Loss*." (*See* Rineheimer Decl. Ex. A at A10, ECF No. 14-1 (emphasis added).)[2]

- "Extra Expense Coverage": An insured is covered under this provision for "necessary Extra Expense[s] you incur during the period of restoration that you would not have incurred if there had been no direct or physical loss or damage to property at the described premises. The loss or damage must be caused by or result from a *Covered Cause of Loss*." (*Id.* at A12 (emphasis added).)

- "Civil Authority Coverage": An insured is covered under this provision "[w]hen a *Covered Cause of Loss* causes damage to property other than property at the described premises." (*Id.* at A12.) In this situation, the policies cover "actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises," so long as certain predicate facts exist. (*Id.* at A13 (emphasis added).)

Under the above policy provisions, Defendant is only obligated to cover losses caused by a "Covered Cause of Loss." If a Cause of Loss is listed as an "Exclusion," it is not covered. One such exclusion, the "Virus Exclusion," states that "any loss or damage caused directly or indirectly by . . . [a]ny virus, bacterium, or other microorganism that induces or is capable of inducing physical distress, illness or disease" is excluded under the policies. (*Id.* at A22.) "Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." (*Id.* at A19.)

Plaintiffs were forced to suspend their operations under orders issued on March 15 and 19, 2020, by Los Angeles Mayor Eric Garcetti, and on March 19, 2020, by California Governor Gavin Newsom. All of these orders were issued as measures to control the spread of the COVID-19 virus. Plaintiffs made claims under their insurance policies which Defendant rejected because: (1) the Virus Exclusion

[2] Defendant requests that the Court take judicial notice of the insurance policies at issue. (*See* Def.'s Request for Judicial Notice at 1, ECF No. 16.) While the scope of a court's review of a 12(b)(6) motion is typically limited to the contents of the complaint, a court may consider exhibits attached to or incorporated by reference in the complaint. *Hal Roach Studios, Inc. v. Richard Feiner Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990). Plaintiffs both attach and incorporate by reference the insurance policies to their FAC. Accordingly, the Court **GRANTS** Defendant's request as to the insurance policies.

precluded coverage; and (2) even if it did not, COVID-19 and the shut-down orders did not cause "direct physical loss of or damage to property," a required predicate to trigger the relevant policy provisions.

III. JUDICIAL STANDARD

Under Federal Rule of Civil Procedure ("Rule") Rule 8(a), a complaint must contain a "short and plain statement of the claim showing that the [plaintiff] is entitled to relief. If a complaint fails to adequately state a claim for relief, the defendant may move to dismiss the claim under Rule 12(b)(6) for failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible if the plaintiff alleges enough facts to allow the court to draw a reasonable inference that the defendant is liable. *Id*. A plaintiff need not provide detailed factual allegations, but must provide more than mere legal conclusions. *Twombly*, 550 U.S. at 555. However, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice." *Iqbal*, 556 U.S. at 678.

When ruling on a 12(b)(6) motion, the court must accept the factual allegations in the complaint as true and construe them in the light most favorable to the non-moving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996). "Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Dismissal is "appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008).

IV. DISCUSSION

Plaintiffs allege the following claims: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; (3) unfair business practices under California Business and Professions Code §§ 17200, *et seq.*; (4) unjust enrichment; (5) negligent misrepresentation; and (6) declaratory relief. The majority of Plaintiffs' claims—breach of contract, breach of the covenant of good faith and fair dealing, unfair business practices, and declaratory relief (collectively, the "Contract-Based Claims")—rise or fall with a determination of whether their insurance claims are covered by the policies. Accordingly, the Court analyzes the coverage issue first, then discusses whether Plaintiffs state a claim for unjust enrichment and negligent misrepresentation.

A. Whether Plaintiffs' Insurance Claims are Covered

Defendants argue that Plaintiffs' Contract-Based Claims should be dismissed because they are not covered by the policies due to the Virus Exclusion. Plaintiffs counter that it is unreasonable to expect

laypeople to understand that the Virus Exclusion would apply to all consequences of COVID-19 (including government shut-down orders), and that Defendant should have explicitly excluded coverage for "pandemics" if it wanted to deny coverage in this situation. The Court agrees with Defendant.

An insurance agreement is interpreted under California law according to the "ordinary rules of contractual interpretation." *AXIS Reinsurance Co. v. Northrop Grumman Corp.*, 975 F.3d 840, 847 (9th Cir. 2020). Thus, when interpreting a policy provision or an exclusion, "we must give terms their ordinary and popular usage, unless used by the parties in a technical sense or a special meaning is given to them by usage." *Palmer v. Truck Ins. Exch.*, 21 Cal. 4th 1109, 1115 (1999). If the language is "clear and explicit, it governs." *AXIS Reinsurance Co.*, 975 F.3d at 847.

Here, the Virus Exclusion bars coverage for "any loss or damage caused directly or indirectly by . . . [a]ny virus . . . that induces or is capable of inducing physical distress, illness or disease." (Rineheimer Decl. Ex. A at A22.) These losses are excluded "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." (*Id.* at A19.) At the outset, Plaintiffs' Opposition essentially concedes that the Virus Exclusion applies by arguing that the FAC "clearly and unequivocally alleged that the COVID-19 virus caused real physical loss of or damage to Plaintiffs' Properties." (Pls.' Opp'n to Mot. at 8, ECF No. 21.) It is difficult to imagine a clearer admission that Plaintiffs' losses fit squarely within the plain language of the Virus Exclusion.

Even if Plaintiffs had not fatally undermined their position, their arguments against application of the Virus Exclusion are unavailing. The Ninth Circuit recently addressed a Virus Exclusion almost identical to the one here and found that it barred coverage for COVID-based losses. *See Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 15 F.4th 885 (9th Cir. 2021). Although Plaintiffs argue that it would not be reasonable for them to know that a Virus Exclusion would bar coverage for downstream consequences of the virus (*i.e.*, government closure orders), there is no "attenuated causal chain between the virus and [Plaintiffs'] losses." *Mudpie*, 15 F.4th at 894. The closure orders were "issued in response to the COVID-19 pandemic, and the point is not debatable." *Id.* Further, the "efficient cause, i.e., the one that set [the closure orders] in motion," was "the spread of the virus throughout California." *Id.* This Court joins myriad other courts in this district in finding that the Virus Exclusion bars coverage here. *See, e.g.*, *Hovagimian v. Maxum Cas. Ins. Co.*, 2022 WL 765005, at *3 (C.D. Cal. March 8, 2022) (holding identically in nearly-identical case brought by Plaintiffs' law firm); *Discount Elecs., Inc. v. Wesco Ins. Co.*, 2022 WL 123114, at *5 (C.D. Cal. Jan. 10, 2022) (same).

Plaintiffs' secondary argument, that coverage for a pandemic and its concomitant closure orders should only be barred by an explicit "pandemic exclusion" provision, also fails. A pandemic is just the spread of a virus on a global scale. Plaintiffs' argument is "akin to arguing that a coverage exclusion for

damage caused by fire does not apply to damage caused by a very large fire." *West Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos.*, 498 F. Supp. 3d 1233, 1242 (C.D. Cal. 2020).

Because the Virus Exclusion bars coverage, it necessarily precludes Plaintiffs' Contract-Based Claims:

- **Breach of Contract:** Because Defendant was not obligated to cover the claims, there can be no breach of contract.
- **Breach of the Implied Covenant of Good Faith and Fair Dealing:** This claim requires that "benefits due under the policy" were withheld, and thus fails for the same reason that Plaintiffs' breach of contract claim fails. *See Love v. Fire Ins. Exch.*, 221 Cal. App. 3d 1136, 1151 (1990).
- **Unfair Competition:** This claim also requires a finding that Plaintiffs were contractually entitled to coverage, and fails because they were not. *See Travelers Cas. Ins. Co. of Am. V. Geragos and Geragos*, 495 F. Supp. 3d 848, 854 (C.D. Cal. 2020.)
- **Declaratory Relief:** Plaintiffs' declaratory relief claim seeks a declaration that the policy provides coverage—which it does not.

Accordingly, Plaintiffs fail to state a claim for each of the above causes of action.[3]

B. Unjust Enrichment

In order to maintain a claim for unjust enrichment, a plaintiff must demonstrate that there is no "express binding agreement[]." *Cal. Med. Ass'n, Inc. v. Aetna U.S. Healthcare of Cal., Inc.*, 94 Cal. App. 4th 151, 172 (2001). "When parties have an actual contract covering a subject, a court cannot—not even under the guise of equity jurisprudence—substitute the court's own concepts of fairness regarding that subject in place of the parties' own contract." *Id.* There is no dispute that the parties have an express

[3] There is an independent reason to find that the policies do not cover Plaintiffs' claims. Even if the policies had no Virus Exclusion, the coverage provisions require that Plaintiffs suffer a "direct physical loss of or damage to" their property. (*See, e.g.*, Rineheimer Decl. Ex. A at A10.) This Court has already held that the potential presence of COVID-19 in Plaintiffs' properties was not a "distinct, demonstrable, physical alteration of property [that is] the benchmark for triggering coverage under [the relevant] provisions." *Ragged Point Inn v. State Nat. Ins. Co.*, 2021 WL 4391208, at *4 (C.D. Cal. Sep. 24, 2021) (finding no coverage and collecting cases finding the same).

binding agreement between them, in the form of the insurance contracts. Accordingly, there is no viable claim for unjust enrichment.

C. Negligent Misrepresentation

A claim for negligent misrepresentation requires that a plaintiff plausibly allege: "(1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage." *Hovagimian*, 2022 WL 765005, at *4. Plaintiffs argue that, if the policies indeed do not cover their losses, then the "representations Defendants made within the policies were, in fact false" because "Defendants did not plan or intend to insure losses associated with viruses or pandemics." (FAC ¶ 115, ECF No. 1-1.) As already discussed, Defendant explicitly informed Plaintiffs that "any loss or damage caused directly or indirectly by . . . [a]ny virus, bacterium, or other microorganism that induces or is capable of inducing physical distress, illness or disease" is excluded from coverage. (Rineheimer Decl. Ex. A at A22.) Because there is simply no misrepresentation plausibly alleged here, Plaintiffs fail to state their negligent misrepresentation claim.

V. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendant's Motion. Plaintiffs request leave to amend, but such a request need not be granted if amendment would be futile. *See Brown v. Stored Value Cards, Inc.*, 953 F.3d 567, 574 (9th Cir. 2020.) This Court holds, in accord with numerous other district courts courts faced with similar lawsuits, that Plaintiffs' FAC is deficient due to "an incurably flawed legal theory," and therefore any amendment would be futile. *Discount Elecs., Inc.*, 2022 WL 123114, at *7. Accordingly, the dismissal is **without leave to amend**.

IT IS SO ORDERED.

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