UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JS-6

CIVIL MINUTES - GENERAL

Case No.	2:21-cv-01497-SVW-JPR	Date	April 15, 2021
Title	*Los Angeles County Museum of Natural History Foundation v. The Travelers Indemnity Company of Connecticut et al.*		

Present: The Honorable	STEPHEN V. WILSON, U.S. DISTRICT JUDGE

Paul M. Cruz	N/A
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: ORDER GRANTING DEFENDANT'S MOTION TO DISMISS [10]

I. Introduction

Before the Court is Defendant Travelers Indemnity Company of Connecticut's motion to dismiss the complaint filed by Plaintiff Los Angeles County Museum of Natural History Foundation. For the reasons stated below, the motion is GRANTED without leave to amend.

II. Factual Background

Plaintiff owns and/or operates museums in the greater Los Angeles area. Dkt. 1 ("Compl.") ¶ 1. Plaintiff alleges that the museums are covered by an insurance policy issued by Defendants for July 1, 2019 through July 1, 2020, with renewed coverage for July 1, 2020 through July 1, 2021. *Id.* ¶¶ 9, 14-15. Defendant has attached the relevant policies to its motion to dismiss. Declaration of Kenneth Kupec, Dkt. 11-1, Exs. 1-2.[1]

[1] Although "[a]s a general rule, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion," a court can consider extrinsic materials if their "authenticity … is not contested and the plaintiff's complaint necessarily relies on them." *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001) (citation and quotation marks omitted). Because Plaintiff seeks to recover under the policies, the complaint necessarily relies on them. Plaintiff does not dispute their authenticity. Accordingly, the Court will consider the policies in resolving this motion.

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Plaintiff alleges that, as a result of public health orders during the COVID-19 pandemic, "Plaintiff has had to completely shut down its business operations and access to the insured property is specifically prohibited," and that it "incurred expenses due to the necessary interruption of its business operations." Compl. ¶ 32. Plaintiff alleges that "COVID-19 spreads through infected droplets that are physical objects that attach to and cause harm to other objects based on its ability to survive on surfaces and infect other people." *Id.* ¶ 22. Plaintiff further alleges that the public health orders requiring it to close its operations during the pandemic were put in place "to protect the public." *Id.* ¶¶ 24, 27.

Plaintiff alleges it is entitled to coverage for its pandemic losses under the policy's provisions for Business Income and Extra Expense as well as Civil Authority. *Id.* ¶¶ 16-17.

The Business Income and Extra Expense provision provides:

> [Insurer] will pay for [t]he actual loss of Business Income you sustain due to the necessary 'suspension' of your 'operations' during the 'period of restoration'; and [t]he actual Extra Expense you incur during the 'period of restoration'; caused by direct physical loss of or damage to property at [insured] premises.... The loss or damage must be caused by or result from a Covered Cause of Loss.
> ...
> Covered Cause of Loss means Risks of Direct Physical Loss unless the loss is excluded....
>
> Kupec Decl., Ex. 1, at 62-63.[2]

The Civil Authority provision provides:

> When a Covered Cause of Loss causes damage to property other than property at the described premises, [insurer] will pay for the actual loss of Business Income you sustain

[2] As the language of the July 2019 and July 2020 policies appear identical, the Court will only cite to the July 2019 version.

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and the actual Extra Expense you incur caused by action of civil authority that prohibits access to the described premises, provided that both of the following apply:

(a) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than 100 miles from the damaged property; and

(b) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

Id. at 63-64.

An endorsement to the policy is titled, "Exclusion of Loss Due to Virus or Bacteria." *Id.* at 204. That exclusion applies to "all forms or endorsements" in the commercial property policy, including "business income, extra expense, or action of civil authority." *Id.* The exclusion provides as follows:

> [Insurer] will not pay for loss or damage caused by or resulting from any virus, bacterium, or other microorganism that induces or is capable of inducing physical distress, illness or disease.
>
> *Id.*

III. Discussion

a. Legal Standard

A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the claims stated in the complaint. *See* Fed. R. Civ. P. 12(b)(6). To survive a motion to dismiss, the plaintiff's 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 Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. A complaint that offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Id.*; *see also Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (citing *Iqbal*, 556 U.S. at 678).

In reviewing a Rule 12(b)(6) motion, a court "must accept as true all factual allegations in the complaint and draw all reasonable inferences in favor of the nonmoving party." *Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of Am.*, 768 F.3d 938, 945 (9th Cir. 2014). Thus, "[w]hile legal conclusions can provide the complaint's framework, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679.

b. Application

i. **Interpretation of Insurance Agreements**

"Under California law, interpretation of an insurance policy is a question of law, subject to the ordinary rules of contractual interpretation." *AXIS Reinsurance Co. v. Northrop Grumman Corp.*, 975 F.3d 840, 847 (9th Cir. 2020) (citations omitted). "[T]he fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties." *Id.* (quoting *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1264 (1992)).

"When interpreting a policy provision, 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) (citation and quotation marks omitted).

"If contractual language is clear and explicit, it governs." *AXIS Reinsurance Co.*, 975 F.3d at 847 (quoting *Bank of the West*, 2 Cal. 4th at 1264-65). "[Courts] will not strain to create an ambiguity

where none exists or indulge in tortured constructions to divine some theoretical ambiguity in order to find coverage where none was contemplated." *Fireman's Fund Ins. Co. v. Superior Court*, 65 Cal. App. 4th 1205, 1212-13 (1997) (citations omitted).

ii. **Direct Physical Loss or Damage**

The meaning of "direct physical loss or damage" is well established under California law. Property must undergo a "distinct, demonstrable, physical alteration." *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779 (2010) (citation and quotation marks omitted). "[S]ome external force must have acted upon the insured property to cause a *physical change* in the condition of the property." *Id.* at 780 (citations omitted). "Detrimental economic impact" does not suffice. *Id.* at 779 (citation omitted); *see also Doyle v. Fireman's Fund Ins. Co.*, 21 Cal. App. 5th 33, 39 (2018) ("[D]iminution in value is not a covered peril, it is a measure of loss" in property insurance (citation omitted)). "[T]he phrase 'loss of' includes the permanent dispossession of something.'" *Total Intermodal Servs., Inc. v. Travelers Property Cas. Co. of Am.*, 2018 WL 3829767, at *4 (C.D. Cal. 2018).

In policies with similar language and scope, numerous courts have now held that neither the presence of COVID-19 in society nor government restrictions can by themselves constitute direct physical loss or damage to property under California law. *See*, *e.g.*, *Trinh, DDS, Inc. v. State Farm Gen. Ins. Co.*, 2020 WL 7696080, at *4-*5 (N.D. Cal. 2020); *Mortar and Pestle Corp. v. Atain Specialty Ins. Co.*, 2020 WL 7495180, at *3-*4 (N.D. Cal. 2020); *Geragos & Geragos Engine Co. No. 28, LLC v. Hartford Fire Ins. Co.*, 2020 WL 7350413, at *3 (C.D. Cal. 2020); *Long Affair Carpet and Rug, Inc. v. Liberty Mutual Ins. Co.*, 2020 WL 6865774, at *2-*3 (C.D. Cal. 2020); *Water Sports Kuai, Inc. v. Fireman's Fund Ins. Co.*, 2020 WL 6562332, at *3-*7 (N.D. Cal. 2020); *West Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Co.*, 2020 WL 6440037, at *4 (C.D. Cal. 2020); *Travelers Cas. Ins. Co. of Am. v. Geragos and Geragos*, 2020 WL 6156584, at *3-*5 (C.D. Cal. 2020); *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, 2020 WL 5500221, at *4-*6 (S.D. Cal. 2020); *Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 2020 WL 5525171, at *3-*7 (N.D. Cal. 2020); *10E, LLC v. Travelers Indemnity Co. of Conn.*, 483 F. Supp. 3d 828, 835-36 (C.D. Cal. 2020).

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For its Business Income and Extra Expense provision, the policy states that loss of business income "due to the necessary 'suspension' of your 'operations' during the 'period of restoration,'" and associated extra expense during that period, must be "caused by direct physical loss of or damage to property at [insured] premises." Kupec Decl., Ex. 1 at 62.

Plaintiff's primary allegations closely resemble those considered by courts to be insufficient to plead physical loss or damage at their own premises. Plaintiff alleges that it "suffered a physical loss of and damage to the Insured Properties when it was ordered to close due to the Orders." Compl. ¶ 34. As many courts have held, this allegation is plainly insufficient to constitute direct physical loss or damage because a business closure is an interference with Plaintiff's use of its museums but is not itself a distinct, demonstrable, physical alteration of its property. *See*, *e.g.*, *Water Sports Kuai, Inc.*, 2020 WL 6562332, at *6 (rejecting argument that government restrictions constitute physical loss or damage because "[t]he cases consistently conclude that there needs to be some physical tangible injury (like a total deprivation of property) to support 'loss of property' or a physical alteration or active presence of a contaminant to support 'damage to' property"). Like many other cases, Plaintiff also does not allege that public health restrictions are permanent, and therefore does not sufficiently plead "permanent dispossession" under *Total Intermodal*. 2018 WL 3829767, at *4; *see*, *e.g.*, *Long Affair Carpet and Rug, Inc.*, 2020 WL 6865774, at *3 ("Plaintiff has been dispossessed of its storefronts, but it is not a 'permanent dispossession.'").

The complaint only makes one allegation not previously addressed by this Court. Plaintiff alleges that it "was required to make substantial detrimental physical alterations to their Insured Properties, which is a direct, physical loss and/or damage which is a Covered Cause of Loss as defined in The Policy." Compl. ¶ 33. Plaintiff does not allege that any alterations were made to remedy existing loss or damage. Moreover, the policy's Business Income provision covers "actual loss of Business Income you sustain due to the necessary 'suspension' of your 'operations' ... caused by direct physical loss of or damage to property." Kupec Decl., Ex. 1, at 62. Plaintiff does not allege that its own alterations resulted in a suspension of operations. It would make little sense for Plaintiff's alterations in response to COVID-19 to cause its suspension of operations. Plaintiff is alleging that COVID-19 and ensuing public health restrictions required prolonged closures, Compl. ¶¶ 34-35, not that its business has been slowed by its own alterations. *See Café La Trova LLC v. Aspen Specialty Ins. Co.*, 2021 WL

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602585, at *9 (S.D. Fla. 2021) (rejecting similar argument because "Plaintiff does not argue it closed its restaurant and bar because of broken chairs, scratched floors, and holes drilled for installing partitions [but instead] argues its economic losses were caused by the COVID-19 pandemic and related government orders." (citation omitted)).

Consequently, the complaint fails to plausibly allege the requisite direct physical loss or damage to demonstrate entitlement to Business Income and Extra Expense coverage.

Likewise, Plaintiff fails to plead the requisite damage at other locations for Civil Authority coverage. The policy's Civil Authority provision requires "damage to property other than property at [the insured] premises" and that a civil authority prohibit access to the surrounding area "in response to" some initial damage or "to enable ... unimpeded access to the damaged property." Kupec Decl., Ex. 1 at 63-64.[3] The complaint alleges that "COVID-19 spreads through infected droplets that are physical objects that attach to and cause harm to other objects based on its ability to survive on surfaces and infect other people." Compl. ¶ 22. However, the complaint does not describe any actual instances of property damage. Moreover, plaintiffs have not alleged that public health restrictions were adopted in response to any property damage or to enable access to any damaged property. *See West Coast Hotel Mgmt., LLC*, 2020 WL 6440037, at *4. Accordingly, the Court concludes that Plaintiff's allegations fail to show entitlement to Civil Authority coverage.

[3] One policy previously examined by this Court did not clearly have the same requirement. *See Roundin3rd Sports Bar LLC v. Hartford*, 2021 WL 647379, at *5-*6 (C.D. Cal. 2021). The Court agrees with Defendant that the policy at issue in this case is different. The policy in *Roundin3rd* described the trigger for civil authority coverage as "A Covered Cause of Loss to property" and defined "Covered Cause of Loss" to mean "RISKS OF DIRECT PHYSICAL LOSS." *Id.* While the policy in this case also defines "Covered Cause of Loss" to mean "RISKS OF DIRECT PHYSICAL LOSS," Kupec Decl., Ex. 1, at 63, the language of the Civil Authority section clearly requires some initial damage. First, Civil Authority coverage applies "[w]hen a Covered Cause of Loss *causes damage* to property other than property at the described premises." *Id.* (emphasis added). Second, Civil Authority coverage requires "[a]ccess to the area immediately surrounding the *damaged property* [to be prohibited] by civil authority as a result of the *damage*." *Id.* (emphasis added). Third, the insured premises must be "not more than 100 miles from the *damaged property*." *Id.* (emphasis added). Finally, the policy states that "[t]he action of civil authority [must be] taken in response to" dangerous conditions resulting from initial damage or a continuation of the same risks creating the initial damage, or "to enable ... unimpeded access to the damaged property." *Id.*

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iii. **Virus Exclusion**

Even if Plaintiff had properly alleged that it met the requirements for Business Income and Extra Expense or Civil Authority coverage, its claims would still be precluded under the policy's virus exclusion. The virus exclusion states that "[insurer] will not pay for loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." Kupec Decl., Ex. 1, at 204. The exclusion applies to "forms or endorsements that cover business income, extra expense, ... or action of civil authority." *Id.*

Many courts have dismissed complaints on the ground that similar virus exclusions foreclosed recovery for losses due to COVID-19-related public health restrictions. *See*, *e.g.*, *Pez Seafood DTLA, LLC v. Travelers Indemnity Co.*, 2021 WL 234355, at *7-*8 (C.D. Cal. 2021); *Long Affair Carpet and Rug, Inc. v. Liberty Mutual Ins. Co.*, 2020 WL 6865774, at *3 (C.D. Cal. 2020); *West Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Cos.*, 2020 WL 6440037, at *5 (C.D. Cal. 2020); *Travelers Cas. Ins. Co. of Am. v. Geragos and Geragos*, 2020 WL 6156584, at *3-*4 (C.D. Cal. 2020); *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Conn.*, 2020 WL 5938689, at *5 (C.D. Cal. 2020). The Court finds these cases persuasive.

Plaintiff raises two primary arguments that the virus exclusion does not apply, but neither is persuasive. First, Plaintiff argues its losses were caused by government restrictions rather than the COVID-19 virus. Many courts have rejected precisely this argument. *See*, *e.g.*, *Pez Seafood*, 2021 WL 234355, at *7 ("Plaintiff cannot escape that a virus is the root cause of" public health restrictions). The virus exclusion extends to "loss or damage caused by or resulting from any virus...." Plaintiff cannot plausibly allege that government restrictions intended to mitigate the spread of the COVID-19 virus did not "result from" a virus.

This conclusion is required by the broad interpretation of "resulting from" language in California law. "The term 'resulting from' broadly links a factual situation with the event creating liability, and connotes only a minimal causal connection or incidental relationship." *Mosley v. Pac. Specialty Ins. Co.*, 49 Cal. App. 5th 417, 424 (2020) (citation and quotation marks omitted). "[T]he term 'resulting from' is generally equated … with origination, growth or flow from the event." *Id.* (citation omitted).

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Plaintiff's complaint attempts to tiptoe around this result, but instead walks straight into it. The complaint alleges that the relevant public health restrictions were adopted "to protect the public" or "to protect the public good, welfare, and benefit." Compl. ¶¶ 24, 29. Plaintiff does not and cannot plausibly plead that these measures were adopted to protect the public from some threat other than a virus. Those measures consequently resulted from a virus.

Plaintiff's second main argument is that a pandemic is distinguishable from a virus. On this theory, because Plaintiff does not allege that its losses resulted from the virus entering its premises or sickening its employees, its losses are the result of a pandemic and not a virus. This argument has also been raised before, and it has also been consistently rejected. *See*, *e.g.*, *W. Coast Hotel Mgmt.*, 2020 WL 640037, at *6 (explaining that this position is "akin to arguing that a coverage exclusion for damage caused by fire does not apply to damage caused by a very large fire"). Plaintiff does not and cannot plausibly allege that a pandemic is anything other than a virus spreading on a global scale. In other words, the pandemic results from a virus, and the virus exclusion therefore applies.

Plaintiff briefly makes three other points, but none are persuasive. First, there is no ambiguity in policy language excluding losses "resulting from" a virus. S*ee Fireman's Fund Ins. Co. v. Superior Court*, 65 Cal. App. 4th 1205, 1212-13 (1997) (citations omitted) ("[Courts] will not strain to create an ambiguity where none exists or indulge in tortured constructions to divine some theoretical ambiguity in order to find coverage where none was contemplated."). Second, under these circumstances, questions of causation do not need testing at summary judgment or at trial because Plaintiff does not and cannot plausibly allege that anything other than a virus is the efficient proximate cause of its losses. *See*, *e.g.*, *Boxed Foods Co., LLC v. Cal. Capital. Ins. Co.*, 2020 WL 6271021, at *4 (N.D. Cal. 2020). Third, while exclusions must be conspicuous, plain, and clear under California law, the policy explicitly ties the virus exclusion to "forms or endorsements that cover business income, extra expense, ... or action of civil authority." Kupec Decl., Ex. 1, at 204.

Accordingly, the Court concludes that the virus exclusion bars coverage.

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iv. **Breach of Contract and Bad Faith Claims**

Because Plaintiff fails to plausibly allege coverage, Plaintiff fails to state claims for breach of contract and bad faith.

v. **Leave to Amend**

In evaluating a request for leave to amend, we consider the following factors: "undue delay, the movant's bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility." *Brown v. Stored Value Cards, Inc.*, 953 F.3d 567, 574 (9th Cir. 2020) (citation omitted). "Leave to amend is warranted if the deficiencies can be cured with additional allegations that are 'consistent with the challenged pleading' and do not contradict the allegations in the original complaint." *United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th Cir. 2011) (citation omitted).

Numerous courts have dismissed similar lawsuits without leave to amend. *See*, *e.g.*, *Caribe Restaurant & Nightclub, Inc. v. Topa Ins. Co.*, 2021 WL 1338439, at *4 (C.D. Cal. 2021); *West Coast Hotel Mgmt.*, 2020 WL 6440037, at *6; *Geragos and Geragos*, 2020 WL 6156584, at *5; *Mark's Engine Co. No. 28 Rest., LLC*, 2020 WL 5938689, at *6. The Court concludes that leave to amend would be futile. The deficiencies in Plaintiff's complaint result not from poor drafting or insufficient detail but from an incurably flawed legal theory. Accordingly, the Court denies leave to amend.

IV. Conclusion

For the foregoing reasons, the Court GRANTS Defendant's motion to dismiss without leave to amend.

IT IS SO ORDERED.

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