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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FRANKLIN EWC, INC. and KATHY FRANKLIN, Plaintiffs, v. THE HARTFORD FINANCIAL SERVICES GROUP, INC., SENTINEL INSURANCE COMPANY, LTD., and Does 1 through 10, inclusive, Defendants.	Case No.: 3:20-cv-04434-JSC **SENTINEL INSURANCE COMPANY, LTD.'S NOTICE OF MOTION AND MOTION TO DISMISS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** Date: September 3, 2020 Time: 9:00 a.m. Courtroom: E Judge: Jacqueline Scott Corley

NOTICE OF MOTION AND MOTION TO DISMISS

TO ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on September 3, 2020 at 9:00 a.m. or as soon thereafter as the matter may be heard in Courtroom E of the United States District Court for the Northern District of California, San Francisco Courthouse, 450 Golden Gate Avenue, San Francisco, California 94102, the Honorable Jacquelin Scott Corley presiding, Defendant Sentinel Insurance Company, Ltd. ("Sentinel") will and hereby does move, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an order that dismisses all claims asserted against it by Plaintiffs Franklin EWC, Inc. and Kathy Franklin (together, "Plaintiffs").

Sentinel moves to dismiss this action on the grounds that there is no coverage under the insurance policy at issue and Plaintiffs have failed to state a claim upon which relief can be granted.

This Motion is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities set forth below and the accompanying Exhibit A, the pleadings and records in this action, and any other such matters and argument as the Court may consider at the hearing of this motion.

July 20, 2020

Respectfully submitted,

/s/ Anthony J. Anscombe

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STATEMENT OF ISSUES TO BE DECIDED

1. Whether a provision in a property insurance policy, which excludes "loss or damage caused directly or indirectly by . . . [p]resence, growth, proliferation, spread or any activity of . . . virus," bars Plaintiffs Franklin EWC, Inc. ("Franklin EWC") and Kathy Franklin's[1] (together, "Plaintiffs") claims for business income lost as the result of the novel coronavirus, *i.e.*, a virus.

2. Whether Plaintiffs' contract-based claims—including in particular Count 1 (breach of contract), Count 2 (breach of covenant of good faith and fair dealing), Count 3 (bad faith denial of an insurance claim), and Count 8 (declaratory relief)—should be dismissed because there is no coverage under the policy.

3. Whether Plaintiffs have stated a claim for unfair business practices and for injunctive relief where they do not lack an adequate remedy at law.

4. Whether Plaintiffs have stated a claim for fraudulent misrepresentation or constructive fraud in the absence of any specific allegations of fraudulent conduct.

5. Whether Plaintiffs have stated a claim for "unjust enrichment," which is not a standalone cause of action in California, where they have not alleged any facts showing that Sentinel Insurance Company, Ltd ("Sentinel") was unjustly enriched.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs, the owners and operators of a waxing salon, seek to recover for purported losses incurred when the waxing salon closed "due to the Coronavirus Disease 2019 ('COVID-19') pandemic." *See* Compl. ¶ 1. Plaintiffs want Franklin EWC's property insurer, Sentinel, to cover the virus-related losses.[2]

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[1] Kathy Franklin is not an insured under the insurance policy at issue. To the extent this Motion to Dismiss is not granted in its entirety, Sentinel reserves all rights to challenge Ms. Franklin's right to recover for the claims asserted.

[2] Defendant The Hartford Financial Services Group, Inc. ("HFSG") has moved separately to be dismissed from this case based on lack federal subject matter jurisdiction, lack of personal jurisdiction, and failure to state a claim. It is not a party to the insurance contract between

Sentinel does not dispute that stay-at-home orders and other measures to slow the spread of the novel coronavirus have upended lives and resulted in broad disruption to the economy. But even the unprecedented economic fallout from a global pandemic does not provide a basis to override the plain terms of an insurance contract. Here, Franklin EWC's policy includes a "'Fungi', Wet Rot, Dry Rot, Bacteria And Virus" Exclusion ("Virus Exclusion") that states Sentinel "will not pay for loss or damage caused directly or indirectly by . . . [p]resence, growth, proliferation, spread or any activity of . . . virus." *See* Ex. A at 127.[3]

Plaintiffs concede that the novel coronavirus (SARS-CoV-2) is a "virus," *see, e.g.*, Compl. ¶ 4, and their alleged losses were indisputably "caused directly or indirectly" by it. Plaintiffs repeatedly allege their losses were "due to the Coronavirus Disease 2019 ('COVID-19') pandemic" (*id.* ¶ 1) and "due to the physical presence of COVID-19" (*id.* ¶ 12). *See also id.* ¶ 44 (losses "[d]ue to . . . the presence of the Coronavirus"); *id.* ¶ 56 (same). The Policy does not cover these virus-related losses.

All nine claims for relief are premised on the policy providing coverage for Plaintiffs' virus-related losses. This Court should dismiss all nine claims. The Virus Exclusion bars coverage, and Plaintiffs have otherwise failed to state a plausible claim for relief against Sentinel.

II. STATEMENT OF THE FACTS

A. The Policy

Sentinel and Franklin EWC entered into an insurance policy contract for the period June 8, 2019 through June 8, 2020, known as a Spectrum Business Owner's Policy bearing policy number 21SBARS4714 (the "Policy"). *See* Ex. A. The Policy provides that Sentinel "will pay for direct physical loss of or physical damage to Covered Property . . . caused by or resulting from a Covered Cause of Loss." *Id.* at 31 (Special Property Coverage Form at p. 1). "Covered Causes of Loss" is defined as "RISKS OF DIRECT PHYSICAL LOSS," unless the loss is

---

Franklin EWC and Sentinel. To the extent that motion is denied, HFSG joins in this Motion to Dismiss.

[3] Policy page citations correspond to ECF page numbers.

specifically excluded or limited in certain other Policy provisions. *Id.* at 32 (Special Property Coverage Form at p. 2).

With respect to coverage for "Business Income," the Policy provides that Sentinel

> will pay for the actual loss of Business Income you sustain due to the necessary suspension of your "operations" during the "period of restoration". The suspension must be caused by direct physical loss of or physical damage to property at the "scheduled premises" . . . caused by or resulting from a Covered Cause of Loss.

Id. at 40 (Special Property Coverage Form at p. 10).

With respect to "Civil Authority" coverage, the Policy provides that "insurance is extended to apply to the actual loss of Business Income" sustained during a 30-day period "when access to [the] 'scheduled premises' is specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property in the immediate area of [the] 'scheduled premises'." *Id.* at 41 (Special Property Coverage Form at p. 11).

As noted, the Policy expressly excludes loss or damage caused by a virus. *See id.* at 127 (Limited 'Fungi', Bacteria or Virus Coverage endorsement at p. 1). The Virus Exclusion provides:

> "Fungi", Wet Rot, Dry Rot, Bacteria And Virus
>
> [Sentinel] will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss:
>
> (1) Presence, growth, proliferation, spread or any activity of "fungi", wet rot, dry rot, bacteria or virus. . . .

Id. (emphasis added).[4]

[4] The Virus Exclusion has two exceptions that are not alleged to apply here: (1) when the virus results from fire or lightning, or (2) when certain limited additional coverage is applicable. The latter "only applies" if, among other conditions, the virus results from certain specified causes of loss not at issue here (*e.g.*, windstorm, hail, volcanic action) or from an equipment breakdown. *See id.* at 127-128 and 55.

B. Plaintiffs' Allegations

In their Complaint, Plaintiffs allege that Franklin EWC "owns, operates, manages, and/or controls" EWC Fresno, a waxing salon "located at 7885 North Via Del Rio, Fresno, California 93720 (the 'Insured Premises') and that employs many people." Compl. ¶ 20; *see also id.* ¶ 1. Plaintiff Kathy Franklin is "the sole owner and operator of Franklin EWC." *Id.* ¶ 21.

Plaintiffs allege that "[b]eginning on March 19, 2020, EWC Fresno was forced to close its doors to the public because of a series of orders issued by the State of California ('Closure Orders')," which "prohibited customers from accessing EWC Fresno's premises due to the Coronavirus Disease 2019 ('COVID-19') pandemic." *Id.* ¶ 1. Plaintiffs allege that as a result of the coronavirus and associated governmental orders, they suffered substantial financial losses. *See id.; see also id.* ¶¶ 42-44.

On March 19, 2020, Franklin EWC submitted a claim to Sentinel for its virus-related losses—which are characterized in the Complaint as "lost Business Income due to the Closure Orders and the damage caused by the presence of the Coronavirus in and around the Insured Premises." *Id.* ¶ 56. Sentinel denied the claim on April 8, 2020. *See id.* ¶ 57.

On May 21, 2020, Plaintiffs commenced this action in the Superior Court of the State of California, County of Contra Costa, with the filing of the Complaint. Defendants timely removed the case to this Court on July 2, 2020, based on diversity of citizenship.

III. LEGAL STANDARDS

A. Motion to Dismiss

A complaint that "fail[s] to state a claim upon which relief can be granted" is subject to dismissal under 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 has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "A pleading that offers 'labels and conclusions' or 'a formulaic

recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

Further, claims sounding in fraud must satisfy a heightened pleading standard. *See* Fed. R. Civ. P. 9(b) ("In alleging fraud … a party must state with particularity the circumstances constituting fraud…."); *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1102 (9th Cir. 2003) (fraud allegations must "be accompanied by the who, what, when, where, and how of the misconduct charged.") (internal quotations omitted); *Lazar v. Superior Court*, 12 Cal. 4th 631, 645, 909 P.2d 981 (Cal. 1996) ("In California, fraud must be pled specifically; general and conclusory allegations do not suffice. . . . This particularly requirement necessitates pleading *facts* which show how, when, where, to whom, and by what means the representations were tendered.") (emphasis in original) (internal quotations omitted).

The Court may properly consider the certified copy of the Policy submitted with this Motion to Dismiss because it is relied upon and incorporated by reference in Plaintiffs' Complaint. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (acknowledging that courts ruling on motions to dismiss "must consider the complaint in its entirety, as well as . . . documents incorporated into the complaint by reference"); *Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (recognizing that the "incorporation by reference" doctrine permits courts to consider documents on which "the plaintiff's claims depend" as well as documents "whose contents are alleged in a complaint" without converting a motion to dismiss to a motion for summary judgment (citations omitted)); *see also Biltmore Assocs., LLC v. Twin City Fire Ins. Co.*, 572 F.3d 663, 665 & n.1 (9th Cir. 2009) (acknowledging that a district court appropriately considered copies of insurance policies that an insurer attached to its motion to dismiss).

In addition, the Court may disregard any allegations in the Complaint that are contradicted by the actual terms of the Policy. *See, e.g.*, *In re Gilead Sci. Secs. Litig.*, 536 F.3d 1049 (9th Cir. 2008) ("The court need not, however, accept as true allegations that contradict matters properly subject to judicial notice or by exhibit." (quoting *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001), *amended on other grounds*, 275 F.3d 1187 (9th Cir.

2001)); *see also Biltmore*, 572 F.3d at 665 (observing that "the complaint and the insurance policies control the outcome" of a motion to dismiss under Fed. R. Civ. P. 12(b)(6)).

B. Contract Interpretation – Unambiguous Language Controls

"[I]nterpretation of an insurance policy is a question of law." *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 18 (Cal. 1995).[5] Like any contract, an insurance policy is subject to the general rules of contract construction. *See Roug v. Ohio Sec. Ins. Co.*, 182 Cal. App. 3d 1030, 1035 (Ct. App. 1986) ("An insurance policy is but a contract, and, like all other contracts it must be construed from the language used; when the terms are plain and unambiguous, it is the duty of courts to enforce the agreement."). Courts must afford policy terms "their 'ordinary and popular sense,' 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 (Cal. 1999). Where the contract's language is clear and unambiguous, the language alone determines the contract's force and effect. *See id.* at 1116-17; *see also* Cal. Civ. Code § 1638 ("The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity.").

A court "may not, under the guise of strict construction, rewrite a policy to bind the insurer to a risk that it did not contemplate and for which it has not been paid." *Safeco Ins. Co. v. Gilstrap*, 141 Cal. App. 3d 524 (Ct. App. 1983). Furthermore, "[c]ourts will not strain to create an ambiguity where none exists." *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 18-19 (Cal. 1995) (citing *Reserve Ins. Co. v. Pisciotta*, 30 Cal.3d 800, 807 (Cal. 1982)); *Fireman's Fund Ins. Co. v. Super. Ct.*, 65 Cal. App. 4th 1205, 1212-13 (Ct. App. 1997) ("[W]e 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."). Where an unambiguous exclusion applies, dismissal on a Rule 12(b)(6) motion is appropriate. *Biltmore*

[5] This Motion assumes that California law applies to Plaintiffs' claims in this diversity case, given that Plaintiffs and EWC Fresno are California entities and the Policy was issued to Franklin EWC in California. *See Gov't Employees Ins. Co. v. Nadkarni*, 424 F. Supp. 3d 645, 653 (N.D. Cal. 2019).

Assocs., LLC v. Twin City Fire Ins. Co., 572 F.3d 663, 665 (9th Cir. 2009) (upholding Rule 12 dismissal on applicable exclusion).

IV. ARGUMENT

Plaintiffs have not stated a claim upon which relief can be granted because the Virus Exclusion in the Policy removes any possibility of coverage for Plaintiffs' alleged virus-related business losses. *See* Fed. R. Civ. P. 12(b)(6); *Biltmore Assocs., LLC v. Twin City Fire Ins. Co.*, 572 F.3d 663, 665 & n.1 (9th Cir. 2009) (affirming dismissal on grounds that "insured versus insured exclusion" barred coverage for the plaintiff's claims); *Hennessy v. Infinity Ins. Co.*, 358 F. Supp. 3d 1074, 1079 (C.D. Cal. 2019) (granting motion to dismiss under Fed. R. Civ. P. 12(b)(6) where the "plain language of the contract conclusively establishes that Defendant had no duty to pay [for stigma damages] under these circumstances").

A. The Virus Exclusion Bars Coverage

1. The Alleged Losses Were Caused by a Virus

The Virus Exclusion unambiguously bars coverage for all of Plaintiffs' claims against Sentinel because the alleged business losses were "caused directly or indirectly" by a virus. The Virus Exclusion provides:

> We will not pay for loss or damage caused directly or indirectly by any of the following . . . (1) Presence, growth, proliferation, spread, or any activity of 'fungi', wet rot, dry rot, bacteria or virus.

Ex. A at 127. Under this provision, any loss or damage "caused directly or indirectly" by the "[p]resence," "proliferation," "spread" or "any activity of" a "virus" is excluded from coverage under the Policy.

Here, Plaintiffs' alleged losses (including the losses of EWC Fresno's salon) fall squarely within the Virus Exclusion. Plaintiffs admit their losses were caused directly or indirectly by the coronavirus:

- "EWC Fresno was forced to close its doors to the public because of" the governmental Closure Orders, which "prohibited customers from accessing EWC Fresno's premises ***due to the Coronavirus Disease 2019*** . . . pandemic" (Compl. ¶ 1) (emphasis added);

- "***Due to*** the Closure Orders, as well as ***the presence of the Coronavirus*** in, on, and around the Insured Premises, Plaintiffs have suffered and continue to suffer substantial lost business income and other financial losses." (*Id.* ¶ 44 (emphasis added));
- "The Closure Orders prohibited all customers from accessing EWC Fresno's premises ***due to the physical presence of COVID-19*** in the community and on the surfaces of the property around EWC Fresno." (*Id.* ¶ 12 (emphasis added)).

Plaintiffs also acknowledge, as they must, that the governmental orders were implemented to "'control the ***spread*** of COVID-19.'" *Id.* ¶ 5 (quoting Executive order N-25-20) (emphasis added); *see also, e.g.*, *id.* ¶ 7 ("As expressly stated in multiple countywide closure orders in California . . . , the recent business closure orders have been issued ***because the Coronavirus was proliferating*** onto virtually every surface and object in, on, and around commercial premises such as that belonging to EWC Fresno" (emphasis added)). In short, Plaintiffs specifically allege that their losses were caused by the coronavirus; therefore, the losses are not covered.

Courts applying California law routinely construe unambiguous exclusions, like the Virus Exclusion, according to their plain meaning to bar coverage. *See, e.g.*, *Penn-Am. Ins. Co. v. Mike's Tailoring*, 125 Cal. App. 4th 884, 886-87 (2005) (holding that exclusion for "loss or damage caused directly or indirectly by any of the following . . . Water that backs up from a sewer or drain" must be "given its common sense interpretation to include the sewage that inevitably accompanies the water in a sewer" and reversing and remanding lower court's determination that the exclusion "did not include pollutants carried by water"); *Humboldt Bank v. Gulf Ins. Co.*, 323 F. Supp. 2d 1027, 1033 (N.D. Cal. 2004) (finding unambiguous and applying an exclusion for losses "resulting directly or indirectly from the complete or partial nonpayment of or default upon any loan . . . .").

Exclusions pertaining to losses caused by airborne irritants, bacteria or contaminants are no different – other courts routinely hold they preclude coverage. *See, e.g.*, *Certain Underwriters at Lloyds of London v. Creagh*, 563 F. App'x 209, 211 (3d Cir. 2014) (policy's "microorganism exclusion" precluded coverage for the cost of remediating bacteria that escaped

from a decomposed body at the insured's apartment building); *Sentinel Ins. Co., Ltd. v. Monarch Med. Spa, Inc.*, 105 F. Supp. 3d 464 (E.D. Pa. 2015) (enforcing exclusion for fungi, bacteria and virus against claims for bacterial infections resulting from certain surgeries); *Alea London Ltd. v. Rudley*, No. Civ.A 03-CV-1575, 2004 WL 1563002, at *3 (E.D. Pa. July 13, 2004) (mold exclusion bars coverage for suit alleging mold contamination); *Lambi v. Am. Mut. Ins. Co.*, No. 4:11-cv-906, 2012 WL 2049915, at *4-5 (W.D. Mo. June 6, 2012) (communicable disease exclusion in homeowners' policy barred insurance coverage for virus claims), *aff'd*, 498 F. App'x 655 (8th Cir. 2013).

This is the same conclusion a court in Michigan reached on July 1 regarding coverage for the very same kinds of losses at issue here, *i.e.*, business income losses arising from COVID-19. *See Gavrilides Mgmt. Co. et al. vs. Michigan Ins. Co.*, Case No. 20-258-CB-C30 (Mich. Circuit Court, Ingham County). The court concluded that plaintiff could not demonstrate any direct physical loss to its property but, even if it had, the unambiguous virus exclusion would bar coverage.[6]

Although no California court has published an opinion addressing the Virus Exclusion or an exclusion with substantially the same language, a Michigan appellate court interpreted a nearly identical "'Fungus', Wet Rot, Dry Rot And Bacteria" exclusion and held that the plain language of the exclusion barred coverage for losses from wet rot. *See Michigan Battery Equip., Inc. v. Emcasco Ins. Co.*, 892 N.W.2d 456, 460 (Mich. Ct. App. 2016). The court reasoned that "the policy plainly identifies the risks that [the insurer] was willing to, and did contract to cover, and unfortunately for [the insured], wet rot is not one of those risks." *Id.*[7]

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[6] Oral Argument and Decision on Motion to Dismiss, *Gavrilides Mgmt. Co. vs. Mich. Ins. Co.*, Case No. 20-258-CB-C30 (Mich. Circuit Court, Ingham County, July 1, 2020), available at https://www.youtube.com/watch?v=Dsy4pA5NoPw&feature=youtu.be. The court has not yet issued a written order, but the oral argument and decision from the bench were live-streamed and are available at the YouTube link.

[7] Likewise, another federal court in California has acknowledged that a provision excluding "loss or damage caused directly or indirectly by . . . [p]resence, growth, proliferation, spread or any activity of 'fungus,' wet or dry rot or bacteria" barred coverage for mold that developed on a property following a hurricane except as provided in certain limited additional

The same reasoning applies here – the unambiguous Virus Exclusion bars coverage because "virus" is "not one of [the] risks" that Sentinel agreed to cover, except in limited circumstances not alleged or present here. Accordingly, there is no coverage for Plaintiffs' alleged losses.

2. The Governmental Orders Aimed At Slowing the Spread of the Coronavirus Are Not Covered Causes of Loss

Plaintiffs allege that "[d]ue to the Closure Orders, as well as the presence of the Coronavirus in, on, and around the Insured Premises, Plaintiffs have suffered and continue to suffer substantial lost business income and other financial losses." Compl. ¶ 44; *see also id.* ¶ 12. To the extent Plaintiffs are asserting that the governmental orders are also a cause of their losses, Plaintiffs' claims still fail because governmental orders are not themselves "Covered Causes of Loss" under the plain terms of the Policy, and, thus, do not themselves trigger coverage under the Policy.

A federal district court in Florida addressed this issue directly and expressly rejected a policyholder's attempt to characterize an order of civil authority as a risk of direct physical loss. *See Prime Alliance Grp., Ltd. v. Hartford Fire Ins. Co.*, No. 06-22535-CIV-UNGARO, 2007 WL 9703576 (S.D. Fla. Oct. 19, 2007). There, the policyholder suffered losses as a result of an order to evacuate issued in connection with Hurricane Frances making landfall in southern Florida. *See id.* at *1. The losses did not exceed the policy's deductible for "windstorm" but did exceed the "standard" deductible. *See id.* at *1-2. Thus, a key issue for the court was whether the cause of loss was "windstorm" or a peril that would be subject to the standard deductible.

The policyholder asserted "that the windstorm deductible is inapplicable to their claim because their business interruption losses were caused not by a windstorm but by an order of civil authority, a separate peril." *Id.* at *3. The court rejected that argument: "No matter how much Plaintiffs would like to believe that interruption by civil or military authority is a

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coverage. *See WBP No. 1, LLC v. Valley Forge Ins. Co.*, Civil No. 05cv2027-L(BLM), 2007 WL 9702161, at *2-3 (S.D. Cal. Mar. 27, 2007). The general applicability of the exclusion to mold appears to have been undisputed. The court's holding focused on whether the loss was covered under an exception to the exclusion. *Id.* at *3-5.

separately listed named peril, the structure and language of the policy, when read as a whole, says otherwise." *Id.* at *4 (quotations omitted). The court concluded: "The order of civil authority cannot in any reasonable manner be construed as a 'peril,'" where "[p]erils insured against" included "all risk of direct physical loss." *Id.* at *1, *4.

Here, as in *Prime Alliance*, a civil authority order "cannot in any reasonable manner" be construed as a Covered Cause of Loss under the plain terms of the Policy. The entire structure and wording of the Special Property Coverage Form makes clear that Civil Authority is not a peril or a Covered Cause of Loss, but instead is an *extension* of coverage in certain well-defined and limited circumstances.[8] The Policy defines "Covered Causes of Loss" as "risks of direct physical loss" (unless the loss is otherwise excluded or limited by the terms of the Policy). Ex. A at 32. The governmental orders that allegedly prohibited access to EWC Fresno are clearly not a "risk[] of direct physical loss." Rather, they are governmental measures taken to avoid or mitigate the effects of a transmissible virus. *See, e.g.*, Compl. ¶¶ 5, 7.

Civil Authority coverage *extends* coverage to a specific situation that would not otherwise be covered under the policy. The "extended" coverage applies *only* "when access to" the premises insured by the Policy is "specifically prohibited by order of a civil authority as the direct result of a Covered Cause of Loss to property in the immediate area of" the insured premises. Ex. A at 41. That is, the Civil Authority provision applies only when there is direct physical loss or damage to property *other than the insured premises*.

Nothing in the Policy, however, suggests that this limited extension of coverage changes the scope of the definition of "Covered Causes of Loss." For example, nothing in the Civil Authority provision mentions, much less changes, the requirement that a Covered Cause of Loss must be a "risk[] of direct physical loss" or damage.

Not only would such a reading be inconsistent with the plain wording of the Policy, but it would also render certain Policy provisions meaningless, which California law does not allow. *See Collin v. Am. Empire Ins. Co.*, 21 Cal. App. 4th 787, 818-19 (1994) (citing *AIU Ins. Co. v.*

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[8] The provision states, "This insurance *is extended to apply* to the actual loss of Business Income you sustain . . . ." Ex. A at 41 (emphasis added).

Super. Ct., 51 Cal. 3d 807, 827-28 (1990) (en banc)) (applying the "fundamental rule that one cannot read a policy term in such a way that would render some of its words meaningless" and reversing trial court ruling that failed to give full effect to "of use" as used in the policy term "loss of use"); *Oceanside Pier View, L.P. v. Travelers Prop. Cas. Co. of Am.*, No. 07-cv-1174-WQH-POR, 2008 WL 7822214, at *8 (S.D. Cal. May 6, 2008) (declining to interpret a property policy's "Builders' Risk" provision in the manner urged by the insured on grounds that this interpretation "would render [a separate "Additional Coverage" provision] "superfluous, ambiguous, and . . . meaningless" to the extent that it failed to account for the $100,000 limit under the additional coverage); *see also* Cal. Civ. Code § 1641 ("The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.").

Treating a governmental order as a Covered Cause of Loss would render the Additional Coverage for Civil Authority superfluous. It would also eliminate the requirement that an insured demonstrate direct physical loss or damage caused by a Covered Cause of Loss to obtain Business Income coverage. Indeed, if a governmental order were a Covered Cause of Loss, there would be no need for an *Additional* Coverage for Civil Authority that *extends* coverage to losses arising from such orders; it would already exist under the Business Income coverage (which it does not). *See* Ex. A at 41.

Simply put, a governmental order "cannot in any reasonable manner" be construed as a Covered Cause of Loss under the plain terms of the Policy. *See Prime Alliance*, 2007 WL 9703576, at *4. Thus, there is only one peril that has led to Plaintiffs' losses here—a virus—and it is excluded.

B. Plaintiffs Fail to State a Claim Upon Which Relief Can Be Granted

Each of Plaintiffs' nine causes of action hinges on a finding of coverage. Because there is no coverage, and Plaintiffs have otherwise failed to state a claim for relief against Sentinel, all of Plaintiffs' claims should be dismissed.

1. Plaintiffs' Contract-Based Claims (Counts 1, 2, 3, and 8) Fail

Four of Plaintiffs' nine causes of action—specifically, Count 1 (breach of contract), Count 2 (breach of covenant of good faith and fair dealing), Count 3 (bad faith denial of an insurance claim), and Count 8 (declaratory relief)—are all explicitly predicated on alleged breaches of the Policy contract. As detailed above, there is no coverage under the Policy; thus, the Policy contract has not been breached, and Plaintiffs' contract-based claims must be dismissed. *See, e.g.*, *Cove Partners, LLC v. XL Specialty Ins. Co.*, No. CV 15-07635, 2016 WL 461918, at *7, 11, 12 (C.D. Cal. Feb. 2, 2016) (dismissing without leave to amend insured's claims for breach of contract, breach of covenant of good faith and fair dealing, and declaratory relief based on no-coverage finding given unambiguous exclusions in policy contract); *Lion Corp. Ltd. v. Navigators Ins. Co.*, No. CV 13-07173, 2013 WL 11024960, at *4 (C.D. Cal. Dec. 11, 2013) ("Since the claim for breach of contract has been dismissed, the claim for bad faith must be dismissed as well.").

2. Plaintiffs' Remaining Claims (Counts 4-7 and 9) Likewise Fail

Plaintiffs' other causes of action—Counts 4 through 7 and 9—fare no better. Even construed in the light most favorable to Plaintiffs, these claims fall far short of stating a plausible claim for relief against Sentinel.

a. Count 4 – Unfair Business Practices

In Count 4, for unfair business practices under California's Unfair Competition Law ("UCL"), B&PC §17200 *et seq.*, Plaintiffs allege that "Defendants' acts and practices . . . constitute unlawful or unfair business practices against Plaintiffs," including by failing to perform a sufficient claim investigation, asserting invalid coverage defenses, and charging and accepting premiums for the property coverage they purchased, subject to relevant exclusions. *See* Compl. ¶¶ 81-82. This cause of action targets the exact same conduct as Plaintiffs' contract-based claims and, like those claims, fails as a matter of law.

Moreover, the UCL claim is a legal impossibility. It is well-settled that the UCL does not permit a claim for damages, but rather only restitution and injunctive relief, and a plaintiff may only seek such equitable relief under the UCL where there is no adequate remedy at law. *Sooner*

v. Premier Nutrition Corp., 962 F.3d 1072, 1081 (9th Cir. 2020) (plaintiff "must establish that she lacks an adequate remedy at law before securing equitable restitution for past harm under the UCL" (citations omitted)). *See also Moss v. Infinity Ins. Co.*, 197 F. Supp. 3d 1191, 1203 (N.D. Cal. 2016) (citing *Philips v. Ford Motor Co.*, No. 14-CV-02989-LHK, 2015 WL 4111448, at *16 (N.D. Cal. July 7, 2015) ("[T]he UCL provides only the equitable remedies of restitution and injunctive relief. A plaintiff seeking equitable relief in California must establish that there is no adequate remedy at law available.") (citations omitted)). "Where, as here, a plaintiff can seek money damages if she prevails on claims for breach of contract or breach of the implied covenant of good faith and fair dealing, she has an adequate remedy at law." *Id.* (collecting cases dismissing UCL claims where money damages available if plaintiffs were to recover on breach of contract claim). "Such is the case even if all of plaintiff's non-UCL claims ultimately fail." *Id.* (citing *Rhynes v. Stryker Corp.*, No. 10-5619 SC, 2011 WL 2149095, at *4 (N.D. Cal. May 31, 2011)).

Simply put, Sentinel cannot be ordered to pay Plaintiffs policy benefits to which they are not entitled, and it cannot be enjoined to grant coverage where none exists.

b. Count 5 – Fraudulent Misrepresentation

In Count 5, for fraudulent misrepresentation, Plaintiffs allege:

> Defendants committed actionable fraud against Plaintiffs by way of affirmative misrepresentations and the concealment of material facts. For example, Defendants affirmatively misrepresented that there was full coverage for business interruption whenever there was a business interruption cause by physical damage. . . . Defendants knew and concealed from the Plaintiffs that there was a policy that Defendants would not pay any claims during a pandemic, notwithstanding the express provision for such coverage in the Policy. . . .

Compl. ¶ 90. Plaintiffs then allege, in true conclusory fashion, the basic elements of a fraud claim. *See id.* ¶¶ 91-95. These bare-bones allegations do not come close to stating a plausible fraud claim with particularity.

The elements of fraud in California are: "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." *Rosenthal & Rosenthal of*

California, Inc. v. Hilco Trading, LLC, No. 2:19-cv-10315, 2020 WL 2510587, at *9 (C.D. Cal. Apr. 14, 2020) (quoting *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1126 (9th Cir. 2009)). Fraud claims must satisfy a heightened pleading standard, requiring Plaintiffs to set forth the specific circumstances of the purported fraud. *See* Fed. R. Civ. P. 9(b) ("In alleging fraud … a party must state with particularity the circumstances constituting fraud…."); *Vess*, 317 F.3d at 1102 (fraud allegations must "be accompanied by the who, what, when, where, and how of the misconduct charged.") (internal quotations omitted); *Lazar*, 12 Cal. 4th 631, 645 ("In California, fraud must be pled specifically; general and conclusory allegations do not suffice. . . . This particularly requirement necessitates pleading *facts* which show how, when, where, to whom, and by what means the representations were tendered.") (emphasis in original) (internal quotations omitted).

Here, Plaintiffs' allegations fall far short of this bar. Plaintiffs do not provide any detail. Rather, they simply restate the basic elements of the claim with no specificity as to the supposedly fraudulent conduct on the part of Sentinel. The "who, what, when, where, and how" are entirely missing. Under settled California law and pleading standards, Plaintiffs have not and cannot state a claim for fraud against Sentinel.

Moreover, even if Plaintiffs had sufficiently alleged fraud, their claim would still fail. The terms of the Policy contract defeat any claim that Plaintiffs justifiably relied on (unspecified) oral representations made to Plaintiffs about the Policy. *See Omni Home Financing, Inc. v. Hartford Life & Annuity Ins. Co.*, No. 06cv0921, 2008 WL 4616796, at *3-4 (S.D. Cal. Aug. 1, 2008) (collecting and discussing various California state and federal cases holding that insureds cannot reasonably rely on oral statements about the scope of coverage to the extent written documents contradicted the oral misrepresentations); *Hinesley v. Oakshade Town Ctr.*, 135 Cal. App. 4th 289, 301-03 (Cal. App. 2005) (cannot rely on a promise or alleged representation that a contract effectively rejects to support a fraud claim).[9] Simply put, the Policy defeats "reasonable

[9] Other courts similarly follow the general rule that reliance is unreasonable when oral misrepresentations contradict an explicit contract. *See, e.g.*, *Health Plans, Inc. v. New York Life Insurance Co.*, 898 F. Supp. 941, 946 (D. Mass. 1995) (reliance on oral representation that ran directly contrary to contract was unreasonable as a matter of law); *Foremost Guar. Corp. v.*

reliance" as a matter of law. Accordingly, Plaintiffs have not stated a claim for fraud against Sentinel.

c. Count 6 – Constructive Fraud

Plaintiffs also fail to state a constructive fraud claim against Sentinel. "To state a claim for constructive fraud under California law, a party must allege: (1) a fiduciary or confidential relationship; (2) an act, omission, or concealment involving a breach of that duty; (3) reliance; and (4) resulting damage." *Olenicoff v. UBS AG*, No. SACV 08-1029, 2009 WL 10687550, at *7 (C.D. Cal. July 31, 2009) (citing *Dealertrack, Inc. v. Huber*, 460 F. Supp. 2d 1177, 1183 (C.D. Cal. 2006), citing *Assilzadeh v. Cal. Fed. Bank*, 82 Cal. App. 4th 399, 414 (2000) ("Constructive fraud is a unique species of fraud applicable only to a fiduciary or confidential relationship.")). Like actual fraud, constructive fraud "must be pleaded with specificity." *Knox v. Dean*, 205 Cal. App. 4th 417, 434 (Cal. App. 2012).

Plaintiffs do not allege a single specific factual allegation to meet these elements. Rather, like their fraud claim, Plaintiffs simply recite the basic elements of the claim. *See* Compl. ¶¶ 98-101. That is insufficient under *Iqbal* and *Twombly*, and it falls far short of the heightened pleading standard required for claims sounding in fraud. Plaintiffs fail to provide any specific information whatsoever about the circumstances of the alleged fraud. Moreover, although Plaintiffs allege generically that "Defendants owe fiduciary and quasi-fiduciary duties to Plaintiffs," Compl. ¶ 98, they fail to explain how or why that is the case. "The California Supreme Court has held that the insurer-insured relationship is not a fiduciary relationship," and thus "constructive fraud applies to the insurer-insured relationship only if that relationship is

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Meritor Sav. Bank, 910 F.2d 118, 126 (4th Cir. 1990) ("[O]ne may not reasonably rely upon an oral statement when he has in his possession a contrary statement in writing"); *Lord Indus., Inc. v. Ins. Co. of N. Am.*, 153 F.3d 721, at *4 (4th Cir. 1998) (explaining because the contract unambiguously limited plaintiff's compensation to a specified price, "reliance on contrary statements or actions by [defendant's] agents was not justified" (citation omitted)); *Jones v. Jim Walter Homes, Inc.*, 930 F.2d 23, at *3 (4th Cir. 1991) ("We have consistently followed the rule that ordinarily one cannot complain of fraud in the misrepresentation of the content of a written instrument when the truth could have been ascertained by reading the instrument, and one entering into a written contract should read it and avail himself of every reasonable opportunity to understand its content and meaning" (citations omitted)).

confidential." *Petrosyan v. AMCO Ins. Co.*, No. CV 12-06876, 2012 WL 12884920, at *5 (C.D. Cal. Oct. 9, 2012) (citation omitted). Here, Plaintiffs have not alleged facts that show Franklin EWC's relationship with Sentinel was "anything more than a set of contractual obligations," which is insufficient to create a confidential relationship. *See id.* at *5. Plaintiffs thus have not and cannot set forth facts that would allow them to recover on a constructive fraud theory against Sentinel.

d. Count 7 – Unjust Enrichment

In Count 7, Plaintiffs seek to recover for unjust enrichment. Unjust enrichment, however, is not a standalone cause of action in California. *See Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015). Rather, it is merely a form a restitution.

Even if such a claim did exist, however, Plaintiffs' "unjust enrichment" claim would still fail. Plaintiffs allege that they "may lose the financial benefit of the amounts that Plaintiffs paid for those portions of the Policy that were illegal, unfair, or deceptive," and that "Defendants . . . were unjustly enriched at the expense of and to the detriment of Plaintiffs." Compl. ¶¶ 104-105. The thrust of Plaintiffs' unjust enrichment claim is that the premiums paid to "Defendants" somehow unjustly enriched "Defendants" because there is no coverage under the Policy's Virus Exclusion. *See id.* ¶ 106. That claim is absurd on its face. Insurance companies are not unjustly enriched by charging premiums for insuring certain risks but not others.

As explained above, Sentinel properly denied Franklin EWC's claim for coverage under the Policy based on, among other things, the Virus Exclusion. Sentinel did not receive premiums from Plaintiffs to cover loss or damage arising from a virus except in limited circumstances not present here. Sentinel, therefore, was not unjustly enriched in any way. Put differently, Sentinel cannot be "unjustly enriched" because it received no premiums for risk it does not cover. *See Peterson v. Cellco Partnership*, 164 Cal. App. 4th 1583, 1593 (2008) ("The elements of an unjust enrichment claim are the receipt of a benefit and [the] unjust retention of the benefit at the expense of another. . . . [T]he mere fact that a person benefits another is not of itself sufficient to require the other to make restitution therefor.") (citations and internal quotation marks omitted).

e. Count 9 – Injunctive Relief

Finally, in Count 9, Plaintiffs ask the Court to "enjoin[] and restrain[] Defendants' . . . unfair and unlawful business practices and their wrongful denials of coverage under the Policy." *See* Prayer for Relief ¶ B. As explained above, Plaintiffs are not entitled to injunctive relief because the relief available for their contract-based claims—money damages—is an adequate remedy at law. The alleged harm, in other words, is not irreparable. Because Plaintiffs have an adequate legal remedy in the form of their claims for damages, they do not have a legitimate claim for injunctive relief. And as noted above, this is the case even if Plaintiffs' damages claims fail (which they do). *See Moss*, 197 F. Supp. at 1203 (citation omitted). Simply put, Sentinel cannot be enjoined to grant coverage where none exists.[10]

V. CONCLUSION

For all of the foregoing reasons and others appearing in the record, Sentinel respectfully requests that the Court dismiss, with prejudice, all claims asserted against it in the Complaint.

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Respectfully submitted,

/s/ Anthony J. Anscombe

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[10] To the extent Plaintiffs seek prospective injunctive relief, they lack standing, because the Policy issued to Franklin EWC terminated on June 8, 2020.

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