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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN FRANCISCO**

JOHN'S GRILL, INC., and JOHN KONSTIN
Plaintiffs,
v.
THE HARTFORD FINANCIAL SERVICES GROUP, INC., SENTINEL INSURANCE COMPANY, LTD., NORBAY INSURANCE SERVICES, INC., and Does 1 through 10, inclusive,
Defendants.

Case No. CGC-20-584184

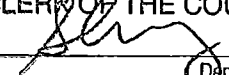
[PROPOSED] ORDER GRANTING DEFENDANT SENTINEL INSURANCE COMPANY, LTD.'S DEMURRER TO PLAINTIFFS' AMENDED COMPLAINT

Judge: Hon. Ethan P. Schulman
Department: 302
Hearing Date: February 10, 2021
Time: 9:30 a.m.

FILED
San Francisco County Superior Court

FEB 10 2021

CLERK OF THE COURT

BY:  Deputy Clerk

1 Defendant Sentinel Insurance Company, Limited's demurrer to plaintiff's first amended
2 complaint is sustained without leave to amend. None of plaintiffs' claims states a cause of
3 action. (See Code Civ. Proc. sec. 430.10(e).)

4 The Court takes judicial notice of the insurance policy per Evidence Code section 452(h)
5 because both parties refer to the policy, quote from it, and its terms are unambiguous. (See
6 *Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1285, fn.3 [taking judicial notice of letter that
7 was referenced in complaint (but not attached) where both parties referred to the letter and
8 quoted from it]; Plaintiffs' Opposition, fn.2 [referencing Sentinel's copy of the policy].)

9 Sentinel issued Spectrum Business Owner's Policy No. 57 SBA BM3821 ("Policy") to
10 plaintiffs. Plaintiffs filed this action contending that they are entitled to business interruption
11 coverage as a result of the COVID-19 pandemic and government shutdown orders. The Court
12 concludes that plaintiffs' claims fail for the reasons cogently explained in *Franklin EWC, Inc. v.*
13 *Hartford Fin. Servs. Grp., Inc.*, No. 20-cv-04434 JSC, 2020 WL 7342687 (N.D. Cal. Dec. 14,
14 2020).

15 The demurrer to causes of action 1, 2, 3, and 7 are sustained without leave to
16 amend. (Code Civ. Proc. sec. 430.10(e).) These contract-based claims fail as a matter of law
17 because there is no coverage.

18 The Policy includes a "Fungi, Wet Rot, Dry Rot, Bacteria And Virus" Exclusion
19 ("Virus Exclusion") that states Sentinel "will not pay for loss or damage caused directly or
20 indirectly by . . . [p]resence, growth, proliferation, spread or any activity of . . . virus."
21 (Anscombe Decl., Ex. A at 134 (Form SS 40 93 07 05, p. 1). The Virus Exclusion has two
22 exceptions: (1) when the virus results from fire or lightning or (2) when certain limited additional
23 coverage is applicable ("Limited Coverage"). The latter "only applies" if, among other
24 conditions, the virus results from certain specified causes of loss (e.g., windstorm, hail, smoke,
25 etc.) or from an equipment breakdown. (See *id.*, Ex. A at 135 (Form SS 40 93 07 05, p. 2); see
26 also *id.*, Ex. A at 44 (Form SS 00 07 07 05, p. 25 (defining "Specified Cause of Loss"))).

27 The Amended Complaint alleges that COVID-19 is a virus and it caused plaintiffs'
28 losses. (See, e.g., Amended Complaint, pars. 1, 8, 13, 19, 65-67.) Sentinel demonstrates that the

1 Virus Exclusion’s plain and unambiguous language excludes coverage for losses caused directly
2 or indirectly by a virus. (*Franklin EWC, Inc.*, 2020 WL 7342687 at * 2 [“The Virus Exclusion’s
3 plain and unambiguous language excludes coverage for losses caused directly or indirectly by a
4 virus.”]; see also *id.* [“Confronted with the same or similar virus exclusion provisions, numerous
5 courts have determined that these provisions exclude coverage for business losses related to
6 COVID-19.” (collecting authorities)].) Plaintiffs allege that the exclusion does not apply
7 because it relates solely to losses caused by a virus on the insureds’ premises as opposed to a
8 global pandemic. (Amended Complaint, pars. 88-92.) The Virus Exclusion is not reasonably
9 susceptible to plaintiffs’ interpretation. Contract interpretation is a matter of law and the Virus
10 Exclusion has no territory or premises component. (*Franklin EWC, Inc.*, 2020 WL 7342687 at *
11 3 [“Nothing in the Virus Exclusion indicates it is limited to viruses arising from the insured
12 premises rather than a pandemic. Other courts have arrived at similar conclusions.”].) “Courts
13 will not strain to create an ambiguity where none exists.” (*Waller v. Truck Ins. Exch., Inc.*
14 (1995) 11 Cal.4th 1, 18-19; see also *Roug v. Ohio Sec. Ins. Co.* (1986) 182 Cal.App.3d 1030,
15 1035 [“An insurance policy is but a contract; and, like all other contracts it must be construed
16 from the language used; when the terms are plain and unambiguous, it is the duty of courts to
17 enforce the agreement.”]; *Hollister Park Inv. Co. v. Goleta Cnty. Water Dist.* (1978) 82 Cal.
18 App. 3d 290, 292 [language of document controls over conflicting allegations].)

19 Plaintiffs allege that the Virus Exclusion does not apply based on the doctrine of
20 regulatory estoppel. Plaintiffs aver that industry trade groups that represented defendants made
21 misrepresentations to regulators regarding the Virus Exclusion. (Amended Complaint, pars. 93-
22 104.) However, “California courts reject the regulatory estoppel doctrine.” (*Franklin EWC,*
23 *Inc.*, 2020 WL 7342687, at *3, citing *ACL Techs., Inc. v. Northbrook Prop. & Cas. Ins. Co.*
24 (1993) 17 Cal.App.4th 1773, 1797 n.39 [referring to other jurisdictions employing regulatory
25 estoppel].)

26 Plaintiffs further contend that even if the Virus Exclusion applies, they are entitled to
27 Limited Coverage and the “specified cause of loss” coverage requirement is unenforceable
28 because it is virtually impossible to meet the requirement with respect to a virus. Stated

1 differently, plaintiffs assert that viruses do not result from “specified causes of loss” or
2 “Equipment Breakdown Accidents” and the purported Limited Coverage is illusory. This
3 argument too founders.

4 The Limited Coverage would be illusory if there were no possibility of coverage under
5 the policy. (See *Scottsdale Ins. Co. v. Essex Ins. Co.* (2002) 98 Cal.App.4th 86, 95 [“An
6 agreement is illusory and there is no valid contract when one of the parties assumes no
7 obligation”]; *Secard Pools, Inc. v. Kinsale Ins. Co.*, 318 F.Supp.3d 1147, 1153 (C.D. Cal. 2017)
8 [“the mere *possibility* of *some* coverage is enough” (emphasis in original)].) Here, Sentinel
9 assumed an obligation. It is not a stretch of the imagination to conclude that some of the listed
10 specified causes of loss (e.g. water damage or windstorm) could cause fungi damage. In
11 addition, it is possible that a windstorm could cause a virus. (See *Curtis O. Griees & Sons, Inc.*
12 *v. Farm Bureau Ins. Co. of Neb.*, 528 N.W.2d 329, 331 (Neb. 1995) [virus resulted from
13 tornado/windstorm].)

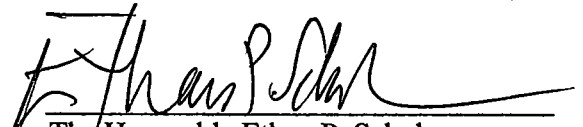
14 Plaintiffs claim that the Limited Coverage does not meet the insured’s reasonable
15 expectations. But that doctrine does not apply because the Policy’s language is clear and
16 unambiguous. (See *Williams v. Cal. Physicians’ Serv.* (1999) 72 Cal.App.4th 722, 738
17 [“[W]here contractual language is clear and unequivocal, the subscriber may only reasonably
18 expect the coverage afforded by the plain language of the contract.”]; *Ananda Church of Self-*
19 *Realization v. Mass. Bay Ins. Co.* (2002) 95 Cal.App.4th 1273, 1279 n.2 [“The [reasonable
20 expectations] doctrine is triggered only where a policy provision or exclusion is uncertain or
21 ambiguous, in which case the court’s inquiry would turn to what a reasonable purchaser of the
22 policy would expect.”]; *Lyons v. Fire Ins. Exch.* (2008) 161 Cal.App.4th 880, 885 [“[W]here
23 there is no ambiguity or uncertainty in the coverage provisions, the insured cannot reasonably
24 expect a defense.”].)

25 Plaintiffs’ remaining claims also fail to state a claim. (Code Civ. Proc. sec.
26 430.10(e).) Sentinel did not engage in an unfair or unlawful business practice because it
27 properly interpreted the Policy and no coverage was due. The policy does not contain an “absurd
28 coverage requirement.” (Amended Complaint, par. 129.) Therefore, the demurrer to cause of

1 action 4 [UCL] is sustained without leave to amend. The demurrers to causes of action 5 [fraud]
2 and 6 [constructive fraud] are also sustained without leave to amend. Plaintiffs do not meet the
3 heightened pleading requirements for those claims and fails to explain how they can amend to
4 cure the defects. (See *Reeder v. Specialized Loan Servicing LLC* (2020) 52 Cal.App.5th 795,
5 803 [fraud must be pleaded specifically]; *Knox v. Dean* (2012) 205 Cal.App.4th 417, 434
6 [constructive fraud must be pleaded specifically].)

7 **IT IS SO ORDERED.**

8
9 Dated: Feb. 10, 2021


The Honorable Ethan P. Schulman
California Superior Court Judge