

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**United States District Court
Central District of California**

FEDERAL INSURANCE COMPANY,

Plaintiff,

v.

SIMON WIESENTHAL CENTER, INC.
and MORIAH FILMS,

Defendants.

Case № 2:21-cv-04069-ODW (JEMx)

**ORDER GRANTING MOTION TO
DISMISS [27]**

I. INTRODUCTION

Plaintiff Federal Insurance Company (“Federal”) initiated this action against Defendants Simon Wiesenthal Center, Inc. and Moriah Films (the “Center”) seeking declaratory judgment that the Center was not entitled to insurance coverage for COVID-19-related losses. (Compl. ¶¶ 1, 29, ECF No. 1.) The Center counterclaimed against Federal, seeking declaratory judgment for the same insurance coverage and asserting additional claims. (Am. Countercl. (“AC”) ¶ 1, ECF No. 25.) Federal, as Counter Defendant, moves to dismiss the Center’s AC. (Mot. to Dismiss (“Mot.”), ECF No. 27.) For the reasons below, the Court **GRANTS** Federal’s Motion.¹

¹ Having carefully considered the papers filed in connection with the Motion, the Court deemed the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15.

1 **II. BACKGROUND**

2 The Center is a global human rights organization with divisions that include
3 non-profit, education, and film production. (See AC ¶¶ 14–18.) The Center
4 purchased an insurance policy (“Policy”) from Federal for the period of August 1,
5 2019, through August 1, 2020, for a variety of coverage relating to the Center’s
6 operations and properties. (*Id.* ¶¶ 21–22; see Compl. Ex. A (“Policy”), ECF No. 1-1.)

7 In March 2020, due to the COVID-19 pandemic, Los Angeles Mayor Eric
8 Garcetti issued the Safer at Home Emergency Order, “ceasing operations in Los
9 Angeles County that require[d] in-person attendance . . . and prohibiting all public and
10 private gatherings.” (AC ¶ 88.) The Center alleges that, as a result of the Order, it
11 was forced to cancel or postpone events, close its businesses, and furlough or lay off
12 employees. (*Id.* ¶¶ 89–91.) The Center also alleges that “the ubiquitous and
13 inevitable presence of” COVID-19 made it “a statistical certainty” that the virus
14 “would have been present at all of” its insured properties, “caus[ing] direct physical
15 loss or damage to [its] properties by” rendering them “unfit, unusable, or unsuitable
16 for [their] intended purpose.” (*Id.* ¶¶ 103, 106, 133.)

17 The Center contends its COVID-19-related losses are covered under the Policy,
18 specifically the “Business Income,” “Extra Expense,” and “Civil Authority”
19 provisions. (*Id.* ¶¶ 22–23.) Federal denied the Center’s claim for coverage under any
20 of these provisions on the grounds that each requires “direct physical loss or damage”
21 to property, which Federal contends is missing here. (*Id.* ¶¶ 158–59.) The Center
22 sued Federal for improperly denying coverage, but voluntarily dismissed its case in
23 response to Federal’s motion to dismiss. (Compl. ¶ 1.) Federal subsequently initiated
24 this action against the Center seeking a declaration that the Center is not entitled to
25 coverage for its claims under the Policy. The Center counterclaimed against Federal
26 and asserted causes of action for declaratory judgment, breach of contract, breach of
27 the implied covenant of good faith and fair dealing, and violation of California’s
28 Unfair Competition Law (“UCL”). This Motion followed.

III. LEGAL STANDARD

A court may dismiss a complaint under Federal Rule of Civil Procedure (“Rule”) 12(b)(6) for lack of a cognizable legal theory or insufficient facts pleaded to support an otherwise cognizable legal theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988). To survive a dismissal motion, a complaint need only satisfy the minimal notice pleading requirements of Rule 8(a)(2)—a short and plain statement of the claim showing the pleader is entitled to relief. *Porter v. Jones*, 319 F.3d 483, 494 (9th Cir. 2003). The factual “allegations must be enough to raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). That is, the 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) (internal quotation marks omitted).

The determination of whether a complaint satisfies the plausibility standard is a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* at 679. A court is generally limited to the pleadings in ruling on a Rule 12(b)(6) motion but may consider “attached exhibits, documents incorporated by reference, and matters properly subject to judicial notice.” *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1051 (9th Cir. 2014); *Lee v. City of Los Angeles*, 250 F.3d 668, 688–89 (9th Cir. 2001). When considering the pleadings, a court must construe all “factual allegations set forth in the complaint . . . as true and . . . in the light most favorable” to the plaintiff. *Lee*, 250 F.3d at 679. However, a court need not blindly accept conclusory allegations, unwarranted deductions of fact, and unreasonable inferences. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

Where a district court grants a motion to dismiss, it should generally provide leave to amend unless it is clear the complaint could not be saved by any amendment. *See Fed. R. Civ. P. 15(a)*; *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). Leave to amend may be denied when “the court

1 determines that the allegation of other facts consistent with the challenged pleading
2 could not possibly cure the deficiency.” *Schreiber Distrib. Co. v. Serv-Well Furniture*
3 *Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986). Thus, leave to amend “is properly
4 denied . . . if amendment would be futile.” *Carrico v. City & County of San*
5 *Francisco*, 656 F.3d 1002, 1008 (9th Cir. 2011).

6 IV. DISCUSSION

7 The Business Income, Extra Expense, and Civil Authority provisions of the
8 Policy in this case all require “direct physical loss or damage” to property, either to
9 the insured properties or other specified properties. (See Policy at 77 (Business
10 Income; Extra Expense), 109 (Civil Authority).)² The Policy does not further define
11 “direct physical loss or damage,” (see AC ¶ 22; see generally Policy), leaving
12 interpretation of this term to the Court.³

13 Under California law,⁴ “losses from inability to use property do not amount to
14 ‘direct physical loss of or damage to property’ within the ordinary and popular
15 meaning of that phrase.” *10E, LLC v. Travelers Indem. Co. of Conn.*, 483 F. Supp. 3d
16 828, 835–36 (C.D. Cal. 2020). Rather, only a “distinct, demonstrable, physical
17 alteration” of property amounts to direct physical loss or damage. *MRI Healthcare*
18 *Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779 (2010).
19 The Ninth Circuit affirmed this distinction in a recent pair of cases, applying *MRI*
20 *Healthcare* to hold that neither an insured property’s unsuitability for its intended
21 purpose nor its economic business impairment satisfy the requirement for direct

22 _____
23 ² The Court cites the CM/ECF pagination at the top of each page of the Policy.

24 ³ The Court finds the Center’s proffered extrinsic evidence concerning insurance industry history
25 irrelevant to the definition of “direct physical loss or damage” as used in the Policy. See *Selane*
26 *Prods., Inc. v. Cont’l Cas. Co.*, No. 21-55123, 2021 WL 4496471, at *1 (9th Cir. Oct. 1, 2021).

27 ⁴ It is undisputed that California law governs this case. See *Intri-Plex Techs., Inc. v. Crest Grp., Inc.*,
28 499 F.3d 1048, 1052 (9th Cir. 2007) (“[In] a diversity action the law of the forum state, California,
applies.”). Under California law, “interpretation of an insurance policy is a question of law.” *Waller*
v. Truck Ins. Exch., Inc., 11 Cal. 4th 1, 18 (1995). When “interpreting a policy provision, [courts]
must give its 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
(1999) (internal quotation marks omitted).

1 physical loss or damage. *See Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*,
2 No. 20-16858, --- F.4th ---, 2021 WL 4486509, at *5 (9th Cir. Oct. 1, 2021); *Selane*,
3 2021 WL 4496471, at *1.

4 Federal contends that the Center is not entitled to coverage under the Policy
5 because the Center does not allege any “direct physical loss or damage” to property.
6 The Center insists that the “ubiquitous presence” of COVID-19 has rendered its
7 properties unusable for their intended purpose, thus satisfying the Policy’s
8 requirement for “direct physical loss or damage.” (Opp’n 10, ECF No. 29.) However,
9 nowhere has the Center alleged, in other than conclusory or speculative terms, any
10 “direct physical loss or damage” such as would trigger coverage under the identified
11 Policy provisions. Further, the Ninth Circuit has specifically rejected the argument
12 the Center proffers here—that “direct physical loss or damage” can be satisfied where
13 the insured properties are rendered “unusable for their intended purpose.” *See*
14 *Mudpie*, 2021 WL 4486509, at *4–5 (“We cannot endorse Mudpie’s interpretation
15 because California courts have carefully distinguished intangible, incorporeal, and
16 economic losses from physical ones.” (internal quotation marks omitted)).

17 As the Center has not alleged any “direct physical loss or damage” to property,
18 there is no “distinct, demonstrable, physical alteration” under California law, and the
19 Center is not entitled to coverage under the Policy.⁵ *See Mudpie*, 2021 WL 4486509,
20 at *4; *Selane Prods.*, 2021 WL 4496471, at *1–2. Consequently, the Center’s causes
21 of action for breach of contract, breach of implied covenant of good faith and fair
22 dealing, violation of UCL, and declaratory judgment fail. *See Mudpie*, 2021 WL
23 4486509, at *6 (affirming dismissal where the plaintiff’s “claimed losses [we]re not
24 covered by the Policy”); *Selane Prods.*, 2021 WL 4496471, at *2 (affirming dismissal
25 of all claims that required “physical loss of or damage to” property).

26
27
28

⁵ The failure to allege direct physical loss or damage is dispositive here, so the Court need not
consider the parties’ additional arguments, and declines to do so.

1 While the Court is sympathetic that the Center and many other businesses are
2 suffering economically from the unprecedented COVID-19 pandemic, a property's
3 mere unsuitability or economic business impairment does not qualify as a physical
4 loss or damage to the premises under California law. Thus, the Court **GRANTS**
5 Federal's Motion and **DISMISSES** the Center's counterclaims. The Court finds that
6 leave to amend would be futile because the Center has already had several
7 opportunities to replead these claims, including in this case and the Center's previous
8 litigation against Federal, and additional allegations consistent with the AC would not
9 cure these deficiencies. *See Schreiber Distrib. Co.*, 806 F.2d at 1401; *Carrico*,
10 656 F.3d at 1008. As such, dismissal is without leave to amend.

11 **V. CONCLUSION**

12 For the reasons discussed above, the Court **GRANTS** Federal's Motion to
13 Dismiss the Center's Amended Counterclaim without leave to amend. (ECF No. 27.)

14 As the Center's claimed losses are not covered under the Policy, declaratory
15 judgment for Federal on its Complaint may be appropriate. Therefore, the Court
16 **ORDERS** the Center to **SHOW CAUSE**, in writing only, why Judgment should not
17 be entered in favor of Federal and against the Center on Federal's sole claim for
18 declaratory judgment. The Center's response is due no later than **October 22, 2021**.
19 Failure by the Center to timely respond will be construed as concession and Judgment
20 will be entered as indicated above. Federal may respond to the Center's submission
21 no later than **October 29, 2021**. No hearing will be held.

22
23 **IT IS SO ORDERED.**

24
25 October 14, 2021

26
27 
28 _____
OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE