GLASER WEIL, LLP
ROBERT L. SHAPIRO (CA SBN 43693)
Email: rs@glaserweil.com
PATRICIA L. GLASER (CA SBN 55668)
Email: pglaser@glaserweil.com
SEAN RILEY (CA SBN 123533)
Email: sriley@glaserweil.com
10250 Constellation Blvd 19th Floor
Los Angeles, CA 90067
Telephone: (310) 556-7886
Facsimile: (310) 556-2920

JOHNSTON & HUTCHINSON LLP
THOMAS J. JOHNSTON (CA SBN 210506)
Email: tjj@johnstonhutchinson.com
Nicholas M. Hutchinson (CA SBN 221870)
Email: nmh@johnstonhutchinson.com
Two California Plaza
350 S. Grand Avenue, Suite 2220
Los Angeles, CA 90071
Telephone: (213) 542-1978
Facsimile: (213) 542-1977

Counsel for Plaintiff, VStyles, Inc.

[ADDITIONAL COUNSEL ON FOLLOWING PAGE]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF RIVERSIDE

VSTYLES, INC.,

Plaintiffs,

v.

CONTINENTAL CASUALTY COMPANY, ARTHUR J. GALLAGHER, RONALD ZAPPELLI, ROB GAMILL, AND ANTHONY LOPEZ, AND DOES 1 THROUGH 25, INCLUSIVE,

Defendants.

Case No. RIC2003415
Unlimited Jurisdiction

PLAINTIFF VSTYLES, INC.'S OPPOSITION TO GALLAGHER DEFENDANTS' DEMURRER TO FIRST AMENDED COMPLAINT

Date: March 25, 2021
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Trial Date: None Set

THE AMMONS LAW FIRM, LLP
APRIL A. STRAHAN (CA SBN 302807)
Email: april@ammonslaw.com
3700 Montrose Blvd.
Houston, TX 77006
Telephone: (713) 523-1606
Facsimile: (713) 523-4159

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I. INTRODUCTION

In their Demurrer, Defendants Arthur J. Gallagher ("Gallagher"), Ronald Zapelli, Bob Gamill, and Anthony Lopez (collectively, "Defendants") assert that under California law they are free to lure customers with false and misleading promises and there is nothing anyone can do about it. Defendants are simply wrong.

Contrary to Defendants' mischaracterization, this is **not** a case in which an insured claims it relied on vague statements on websites or in generic brochures. Here, Defendants presented Plaintiff with a specific, detailed, multi-page, formal written analysis of Plaintiff VStyles' existing insurance policy, including a seemingly comprehensive list of coverage types, coverage limits, exclusions, coverage gaps, and recommendations. But Defendants' analysis (which was not attached to the initial Complaint, but is attached to the First Amended Complaint) has a glaring defect – it fails to mention that Plaintiff's then-existing policy lacked virus coverage, thus failing to alert Plaintiff to the need for, and availability of, such coverage. It is a fundamental principle of California law that when a party performs a service that party assumes a duty to act non-negligently. This rule applies with equal force to insurance brokers, and renders Defendants liable for their negligence in this case.

Defendants also owe Plaintiff a special duty of care because they held themselves out as experts in assessing client insurance needs (including coverage gaps) and in Plaintiff's insurance needs specifically. While Defendants contend they held themselves out as ordinary agents (not experts), this is belied by their own materials, which tout their proprietary, trademarked "CORE360" analysis, and include a detailed, multi-page, written analysis of Plaintiff's existing insurance policy and future insurance needs. And while Defendants assert that this does not give rise to a special duty of care under the "holding out" doctrine, Defendants' authorities are easily distinguishable. They involve conclusory, unsupported allegations of "holding out" (whereas here Defendants' "holding out" statements are specific to Plaintiff, in writing and part of this record), based on statements in websites and generic brochures that in some cases the insured did not even see. Defendants' authorities provide no guidance in a case, such as this, involving a bespoke, detailed, individualized coverage analysis that was presented directly to Plaintiff.

Defendants also contend that they could not be negligent because no one could have foreseen

the pandemic. But this assertion is demonstrably false. The insurance industry was well aware of, and very concerned with, this risk for well over a decade before the emergence of COVID-19. As explained in the First Amended Complaint ("FAC"), after the 2003 SARS outbreak the insurance industry crafted a virus exclusion specifically designed to avoid insurer liability in the event of future pandemics. ISO even created a circular to use in their successful efforts to obtain state regulatory approvals, and this circular specifically cites the looming "**specter of pandemic**" as a reason why this virus exclusion should be approved. FAC, at ¶¶ 88-89. And prior to the emergence of COVID-19, Lloyds of London stated in a report entitled "Pandemic Potential Insurance Impacts" that "**A Pandemic is Inevitable**." Exhibit A to RJN at PDF pg. 4 (emphasis added). In fact, the Gallagher firm was well aware of this risk. **Gallagher issued a bulletin discussing pandemic risk in 2016, and offered pandemic coverage even before then.** Exhibits B and C to RJN.

Defendants further contend that Plaintiff has not alleged injury because it has not adequately alleged that it would have obtained coverage for its COVID-19 losses had this coverage gap been identified. But Plaintiff alleges exactly that, and alleges that such policies were available in the relevant time frame. At the pleading stage, nothing more is required. But even if it were, the fact is that Lloyd's of London offered pandemic coverage prior to the emergence of COVID-19, as did Gallagher itself. This further rebuts both Defendants' "no injury" argument and Defendants' baseless assertion that no one could have foreseen the need for pandemic coverage.

Finally, Defendants recycle their prior assertion that Plaintiff has suffered no injury because in its initial Complaint it sought the same type of coverage as its existing policy (which according to Defendants contained a virus exclusion). But like the initial Complaint, the FAC unambiguously alleges that Plaintiff would have obtained coverage for its COVID-19 losses had this coverage gap been identified. Nothing more is required. And if, as Defendants contend, the prior policy actually contained a virus exclusion (which is mere attorney argument, since the prior policy is not part of this record), Defendants' failure to point out this exclusion would be an explicit example of Defendants' negligence in performing their duties.

For all of these reasons, the instant demurrer must be overruled.

II. SUMMARY OF FACTS

VStyles owns and operates multiple hair styling salons in California. FAC, ¶ 1.

In 2019, Defendants approached Plaintiff in an effort to persuade Plaintiff to retain Defendants as their insurance broker. *Id*. at ¶ 70. As part of its sales pitch, Defendants held themselves out as experts in identifying coverage gaps. *Id.* at ¶ 66 ("Gallagher affirmed to Plaintiff that its industry experts bring a wealth of experience . . . and that it had expertise in uncovering and closing coverage gaps . . ."). Defendants also specifically promised Plaintiff that they would close any gaps in Plaintiff's coverage. *Id.* at ¶ 68 (Defendants "promised Plaintiff that [they] would undertake a policy assessment to find gaps in coverage."); *see also id*. at ¶¶ 74-75, 77.

To that end, Defendants conducted multiple fact-finding meetings with Plaintiff over several months. *Id*. at ¶ 78. At one such meeting, Defendants made a detailed presentation (orally and in writing) as to why Plaintiff should hire Defendants. Among other things, Defendants promised that it would be more than an ordinary broker – it offered a "true partnership." *Id*. at ¶ 96. Defendants also purported to offer "[g]lobal access to thousands of specialists who understand your diverse exposures." *Id.* Defendants promised that they had conducted a "coverage and limit review," had analyzed "coverage gaps," and would create a "coverage checklist." *Id.*, at ¶ 81. And Defendants provided a detailed, multi-page, written analysis of Plaintiff's existing insurance policy and future insurance needs, which included a seemingly comprehensive analysis of coverages, limits, exclusions, coverage gaps, and recommendations. *Id*., Ex. A. The coverage gap analysis expressly identified a "Fungi or Bacteria" exclusion with respect to Plaintiff's then-current general liability insurance, along with "crime," "cyber" and "D&O" exclusions. *Id*. But it identified no virus exclusion with respect to Plaintiff's then-existing property coverage portion. *Id.*

Defendants' sales pitch proved successful, and in reliance on Defendants' representations Plaintiff agreed to retain Defendants as their insurance broker. *Id*. at ¶ 97. Defendants then procured an insurance policy from Defendant Continental Casualty Company, Inc. ("Continental") that included property coverage as set forth in Continental's Business Income And Extra Expense Form. *Id.* at ¶¶ 100-103. For purposes of this motion, it is assumed that said policy does not cover Plaintiff's losses caused by COVID-19. *Id.* at ¶ 120.

In 2020, VStyles was forced to suspend its business at its Insured Properties due to physical loss or damage caused by COVID-19. VStyles then made a claim for coverage to Continental, which Continental denied. *Id*. at ¶¶ 52-53, 57-59.

III. APPLICABLE LAW

Under California law, when a broker undertakes to provide a service for a client, it assumes a duty to perform that service in a non-negligent manner. *Eddy v. Sharp*, 199 Cal.App.3d 858, 866 (1988). In addition, a broker may assume a greater duty by simply "holding himself out to be more than an 'ordinary agent.'" *Wallman v. Suddock*, 200 Cal.App.4th 1288 (2011) *(citing Paper Savers, Inc. v. Nacsa*, 51 Cal. App. 4th 1090, 1096 (1996)); *see also, Moriarty v. American General Life Insurance Company*, 2020 WL 1493613 at * 2 (S.D. Cal. 2020) (same).

IV. ARGUMENT

A. Defendants Owed Plaintiff A Duty To Identify And Cure Coverage Gaps

Under California law, Defendants clearly owed a duty to advise Plaintiff that their existing policy, and the Policy it procured for Plaintiff, lacked virus coverage.

1. Defendants Had A Duty To Perform Their Coverage Review Non-Negligently

It is a fundamental rule of California law that one who elects to perform a service for another, even as a "volunteer," assumes a duty to act non-negligently. For example, the Court in *Granone v. County of Los Angeles*, 231 Cal.App. 2d 629, 649 (1965), in a case involving waterflows in a waterway, stated the general rule: "A duty of care may arise from a voluntary undertaking, since one who affirmatively assumes a duty, though a mere volunteer, must use reasonable care in discharging it. (citations omitted)." *See also Van Zyl v. Spiegelberg*, 2 Cal.App.3d 367, 375 (1969) (*citing* rule). *Bloomberg v. Interinsurance Exchange,* 162 Cal.App.3d 57 (1984) (same); *Johnston v. Orlando*, *Brockett v. Kitchen Boyd Motor Co*., 264 Cal.App.2d 69, 71 (1968) (same).

This rule applies with equal force in the insurance context. Under California law, when a broker undertakes to provide a service for a client it assumes a duty to perform that service in a non-negligent manner. *Eddy v. Sharp*, 199 Cal.App.3d at 866 (1988) (finding fact issue as to broker's negligence when broker's policy review omitted mention of an exclusion: "In this case Sharp's duty

to the Eddys arose because Sharp undertook to prepare an insurance proposal for the Eddys to review prior to purchasing a policy of insurance. Sharp thus came under a duty of due care to accurately inform the Eddys of the policy's provisions."); *see also Valdez v. Taylor Auto. Co*., 129 Cal.App.2d 810, 817 ("[I]t is argued that since the jury impliedly found there was no contract to obtain public liability and property damage insurance for plaintiff, defendant had no duty to procure that insurance; and in the absence of a contractual duty, plaintiff cannot recover for defendant's negligent failure to do so. The argument is fallacious. It is well established that a person may become liable in tort for negligently failing to perform a voluntarily assumed undertaking even in the absence of a contract so to do. A person may not be required to perform a service for another but he may undertake to do so—called a voluntary undertaking. In such a case the person undertaking to perform the service is under a duty to exercise due care in performing the voluntarily assumed duty, and a failure to exercise due care is negligence.").

Here, Defendants performed a specific, detailed, multi-page, formal written analysis of Plaintiff's existing insurance policy, including a purportedly comprehensive list of coverage types, coverage limits, exclusions, coverage gaps, and recommendations. This analysis was prominently featured in Defendants' presentation to Plaintiff. It was prefaced by a page-size colored graphic heralding Defendants' proprietary, trademarked "CORE360 Client Experience," which touted Defendants' expertise in assessing "potential costs from any gaps in existing policies" and "potential or actual costs of any risks you knowingly or unknowingly leave uninsured or uninsurable." FAC, Exh. A at PDF pg. 33.

And this graphic was followed by a 10-page analysis of Plaintiff's existing policies, including the following detailed analysis of Plaintiff's existing Commercial Property policy purporting to identify the various types of coverage provided in Plaintiff's existing policy, the limits applicable to each type, and suggested modifications ("Total Insured Value Adequate? Workplace Violence and Crisis Management? Pollution?):

Policy	Date	Carrier	Limit / Deductible	Premium	AJG Notes
General Liability	3/01	Amco Ins.	$4,000,000 – Aggregate Limit $4,000,000 – Products Completed $2,000,000 – Personal and Advertising $2,000,000 – Each Occurrence Limit, Any one person or Organization $300,000– Fire Damage Limit $5,000 – Medical Expense Limit $0– Employee Benefits Aggregate and per claim Exclusions- Fungi or Bacteria Violation of Consumer Protec	$23,433	Employee Benefits?
Commercial Property	3/01	Amco Ins.	$1,000,000– Total Insured Value - Blanket $10,000 – Personal Property of Others $10,000 – Money and Securities Each Premise 360 days - Business Income & Extra Expense 60 days – Business Income - Payroll $0 - Tenant Improvements $0 - Removal of debris $25,000 – Accounts Receivable $ New Building $0 – New Building Personal Property $0 – Pollution Clean-up & Removal $25,000 – Valuable Papers $0 – Crisis Management $15,000 – Property Off Premises $0 – Workplace Violence $25,000/$5,000 – Backup of Sewers & Drains $10,000– Data & Media $25,000 – Employee Dishonesty Deductible - $500	Included	Total Insured Value adequate? Tenant Improvements Included? Responsibility amount per location Removal of Debris? Workplace Violence and Crisis Management? Ordinance & Law Pollution?
Professional Liability	3/01	Amco Ins.	$6,000,000 – Aggregate Limit $2,000,000 – Per Occurrence	Included	E&O Retroactive date

(FAC, Ex. A at PDF pg. 34.)

Moreover, this analysis devotes an entire page to "Coverage Gaps":

Key Issues

Coverage Gaps

A. Crime –

a) Provides several different types of crime coverage, such as: employee dishonesty coverage; forgery or alteration coverage; computer fraud coverage; funds transfer fraud coverage; kidnap, ransom, or extortion coverage; money and securities coverage; and money orders and counterfeit money coverage.

B. Cyber-

a) Covers your business' liability for a data breach involving sensitive customer information, such as Social Security numbers, credit card numbers, account numbers, driver's license numbers and health records.

C. D&O-

a) Directors and officers (D&O) liability insurance protects the personal assets of corporate directors and officers, and their spouses, in the event they are personally sued by employees, vendors, competitors, investors, customers, or other parties, for actual or alleged wrongful acts in managing a company. The insurance covers legal fees, settlements, and other costs.

D. Earthquake –

a) Major Exclusion that has to be bought on a separate policy. All locations are within CAT earthquake zone.

FAC, Ex. A at PDF pg. 42. Notably absent from this purported list of coverage gaps is **any mention of virus or pandemic coverage**.

By undertaking to conduct this detailed analysis of Plaintiff's existing policy, Defendants undoubtedly assumed a duty to conduct that analysis non-negligently. *Eddy v. Sharp*, 199 Cal.App.3d at 866. And Defendants breached that duty.

2. Defendants Held Themselves Out As Experts In Identifying Coverage Gaps Specifically Directed To Plaintiff's Insurance Needs

Defendants also owe Plaintiff a special duty of care because Defendants held themselves out as experts in assessing client insurance needs (including coverage gaps) and in Plaintiff's insurance needs specifically.

Under California law, "an agent 'may assume additional duties ... by holding himself or herself out as having specific expertise' . . . ." *Williams v. Hilb, Rogal & Hobbs Ins. Servs. of California, Inc.*, 177 Cal.App.4th 624, 636 (2009). In fact, a broker will assume a heightened duty by simply "holding himself out to be **more than an 'ordinary agent.**'" *Wallman v. Suddock*, 200 Cal.App.4th 1288 (2011) *(citing Paper Savers, Inc. v. Nacsa*, 51 Cal. App. 4th 1090, 1096 (1996))

(emphasis added); *see also, Moriarty v. American General Life Insurance Company*, 2020 WL 1493613 at * 2 (S.D. Cal. 2020) (same).[1]

As discussed above, Defendants provided a detailed, multi-page, written analysis of Plaintiff's existing insurance policy and future insurance needs. Defendants claimed to be able to identify "potential costs from any gaps in existing policies" and "potential or actual costs of any risks you knowingly or unknowingly leave uninsured." They also recommended numerous specific changes to Plaintiff's existing coverage. From the perspective of a reasonable customer, Defendants obviously claimed specific expertise and held themselves out as more than ordinary brokers. Unsurprisingly, that was Plaintiff's view. (FAC, ¶ 97.) Defendants even trademarked their service – the "Core360" Experience – which is a further claim of expertise, and an admission that Defendants considered this service proprietary and something that differentiated them from ordinary brokers. (*Id*., ¶¶ 74-75.) At minimum, a fact issue exists with regard to the "holding out" issue that cannot be resolved against Plaintiff at the pleading stage.

And while Defendants assert otherwise, their authorities are easily distinguishable.

Fitzpatrick v Hayes, 57 Cal App 4th 916 (1997), involved a claim that an insurance agent should have recommended umbrella policy enabling greater recovery after an accident. However, the "holding out" statements in *Fitzpatrick* were made in a generic brochure that the **Plaintiff never saw**, much less relied on. And these statements were vague, and far from the clear "holding out" statements and Plaintiff-specific conduct in this case. *Id*. at 929 ("Neither of these items of evidence is at all persuasive. In the first place, there is no evidence that the Fitzpatricks ever saw much less relied upon the brochure. Second, even a cursory reading of that brochure makes clear that it is far from a "holding out" of special expertise; rather, and in very bland terms, it suggests that the insured ask himself or herself—and perhaps then the agent—about additional insurance needs"). *Fitzpatrick* is clearly inapposite.

[1] Under California law, a broker "may assume additional duties by an agreement." *Kurtz, Richards, Wilson & Co. v. Insurance Communicators Marketing Corp*., 12 Cal.App.4th 1249, 1257 (1993). Plaintiff submits that Defendants entered into an express agreement to identify coverage gaps when they offered to do so as part of their sales pitch, and Plaintiff agreed to work with them as Plaintiff's exclusive broker.

Wallman, 200 Cal.App.4th at 1309, is similarly distinguishable. In *Wallman*, the court found that the plaintiff had failed to provide sufficient evidence **at the summary judgment** stage to support its allegation that the agent had held himself out as an "expert in insurance matters." *Id*. at 1312 (finding plaintiff's evidence "too conclusory to raise a triable issue of fact" because "**missing from these statements are what [the broker] said** to give rise to the [plaintiff's] purported belief that he was an expert in insurance matters.") (emphasis added). The instant case is at the pleading stage, and thus (unlike in *Wallman*) Plaintiff's allegations regarding "holding out" must be accepted as true for purposes of this motion. And in any event, unlike in *Wallman*, the presentation materials attached to the FAC show exactly what Defendants said and did to induce Plaintiff to rely on their claims of expertise.

Hartford Casualty Insurance Company v. Fireman's Fund Insurance Company, 220 F.Supp.3d 1008 (N.D. Cal. 2016), is, if anything, even further afield. The alleged "holding out" statements in *Hartford Casualty* were vague, generalized statements – *e.g*., "Burns & Wilco can help"— found on a website five years after the alleged holding out.

> Hartford provides screenshots from Burns's website—captured in October, 2013—displaying marketing statements such as: "When you need to meet your clients' commercial umbrella and excess needs, Burns & Wilcox can help[,]" and "Partner with Burns & Wilcox, and you're partnering with an international network of experts with the ability to cover virtually any hard-to-place risk." *Id*. . . . Hartford's screenshots from 2013 are not helpful in demonstrating how Burns presented itself in 2008 when O'Hadi requested the insurance policies in question . . . ."

Id. at 1018. To state the obvious, *Hartford* provides no guidance here because the "holding out" evidence in the instant case is far more specific, comes from materials prepared specifically for Plaintiff, and is contemporaneous with the "holding out" at issue here.

In *Jones v. Grewe*, 189 Cal.App 3d 950, 956 (1987), the plaintiff alleged that the defendant broker had a special duty to procure a policy with a limit high enough to satisfy any potential judgment. But the only support for this claim of "holding out" was that the insured had purchased insurance from the agent for several years and followed his advice on certain insurance matters. And the Plaintiff had not alleged that the broker possessed the information required to perform the special duty. *Id* at 957 ("All we have is a vague and conclusory allegation that "financial information" regarding appellants was made available to respondents."). Here, Defendants' special

duty is based on specific written materials provided directly to Plaintiff, and detailed allegations of Defendants' conduct. *Jones* is further distinguishable because here Defendants performed due diligence work regarding Plaintiff's business to ensure that they identified and addressed all "coverage gaps." FAC ¶¶ 77-78.

Finally, *Casa Colina v. Hartford Fire Ins*. 2020 WL 7388426, *3 (C.D. Cal. Dec. 15, 2020), is another website "holding out" case. *Id*., at *4 ("the only 'example' Plaintiffs allege of [the broker] holding itself out as an expert is its general promotion of business interruption insurance on its website."). Here, Defendants' special duty is based on Plaintiff-specific written materials provided directly to Plaintiff, and detailed allegations of Defendants' conduct. *Casa Colina* is thus inapposite.

In sum, none of Defendants' "holding out" authorities provide any reason to sustain the instant Demurrer.[2]

B. Defendants Cannot Escape Liability By Asserting That The COVID-19 Pandemic Was Unforeseeable

Defendants argue that they "could not be liable for failing to predict a once-in-a-century global pandemic so unexpected and terrible that it hobbled the world economy, or for failing to advise Plaintiff to insure against it." (Demurrer, p. 5.) This argument fails for multiple reasons.

First, Plaintiff alleges that Defendants were or should have been aware of the risk of pandemic, and the insurance industry's efforts to account for this risk. FAC at ¶ 90 ("As "industry

[2] Similarly unavailing is Defendants' argument that, for "holding out expertise" to create a heightened duty of care, that expertise must be in a specialized area of insurance. Demurrer at 15. As discussed above, **California cases have expressly recognized that a heightened duty of care is created whenever a broker holds him or herself out to be more than an "ordinary agent.'"** *See, e.g., Paper Savers, Inc. v. Nacsa*, 51 Cal. App. 4th at 1096; *Moriarty v. American General Life Insurance Company*, 2020 WL 1493613 at * 2 (S.D. Cal. 2020) ("A broker may also assume a 'special duty' either 'by express agreement or by the agent holding himself out to be more than an "ordinary agent." ' "). In fact, one of Defendants' own authorities, *Wallman*, recites and applies this very rule. *Wallman*, 200 Cal.App.4th at 1309 ("An insurance agent may assume a greater duty to the insured by 'holding himself out to be more than an 'ordinary agent . . . .' "). And, in any event, in their sales pitch Defendants claimed to have expertise in Plaintiff's specific insurance needs. FAC, ¶ 96 (pitch excerpt stating that Defendants would provide"[g]lobal access to thousands of specialists who understand your diverse exposures.") (emphasis added); id., at ¶ 97 (Defendants purported to provide services tailored to meet Plaintiff's specific needs). In fact, this presentation contains page-after-page of detailed analyses regarding Plaintiff's existing policy and future insurance needs.

experts," Gallagher, Zappelli, Gammill, and Lopez were or should have been aware of these developments that occurred years prior to their engagement to assess and obtain coverage for Plaintiff's insurance needs."). At the pleading stage, these allegations must be accepted as true.

Second, this argument is a straw man, based on the fallacy that a high risk of worldwide pandemic is the only reason to purchase virus coverage. That is obviously not the case. Viruses can cause all kinds of damage short of a worldwide pandemic that could justify the purchase of virus coverage. Thus, the question is not whether Defendants should have predicted a worldwide pandemic of this scope, but whether Defendants should, in the exercise of reasonable care, have identified the lack of virus coverage as a gap in Plaintiff's existing policy and the one procured by Defendants. And the answer to that question is unquestionably "yes."

Third, Defendants are simply wrong when they assert that this pandemic was unforeseeable. The insurance industry was well aware of, and very concerned with, this risk over a decade ago and this same concern has existed to date. As explained in the FAC, after the 2003 SARS outbreak the insurance industry crafted a virus exclusion specifically designed to avoid insurer liability in the event of future pandemics. On July 6, 2006, the Insurance Service Organization ("ISO") issued a circular introducing a new endorsement CP 01 40 07 06 – Exclusion Of Loss Due To Virus Or Bacteria, which excludes coverage 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. (FAC at ¶ 43.) As part of their successful efforts to obtain state regulatory approvals, ISO cited the SARS outbreak and the looming "specter of pandemic" as "Industry Concerns" that supported approval. (*Id*. at ¶¶ 88-89.)

In their Motion, Defendants make no substantive counterargument. They argue that "the point of proposing an explicit exclusion for viruses was to prevent policies from being misread to cover losses that they were never intended or understood to cover." This is a *non sequitur*. The issue is whether, before COVID-19, the insurance industry was aware of, and concerned about, pandemics. The ISO virus exclusion shows it was.

Moreover, Plaintiff has located additional evidence demonstrating the insurance industry's concerns regarding the pandemic risk. For example, prior to the emergence of COVID-19 Lloyds of

London stated in a report entitled "Pandemic Potential Insurance Impacts" that "**A Pandemic is Inevitable**." RJN, Exhibit A at PDF pg. 4 (emphasis added). In fact, the Gallagher firm itself was well aware of this risk. In 2016, **Gallagher issued a bulletin discussing pandemic risk,** and in 2014 an insurance broker (the William Gallagher firm, which Defendant Gallagher acquired in 2015) [3] began offering pandemic coverage. RJN, Exhibit B (Gallagher Bulletin dated January 27, 2016 entitled "Risk Insight – Infectious Diseases"); RJN, Exhibit C (October 15, 2014 Business Insurance article entitled "Brokers launch business interruption cover for Ebola, other pandemics"). Nothing Defendants say can rebut Plaintiff's clear documentary evidence that before the COVID-19 pandemic the insurance industry, including the Gallagher firm itself, was well aware of the well-known pandemic risk, and very concerned.

C. Defendants Injured Plaintiff

Contrary to Defendants' assertion, Plaintiff has clearly alleged injury.

A "complaint ordinarily is sufficient if it alleges ultimate rather than evidentiary facts." *Doe v. City of Los Angeles*, 42 Cal.4th 531 (2007); *Doheny Park Terrace Homeowners Assn. Inc. v. Truck Ins. Exchange*, 132 Cal.App.4th 1076, 1099 (2005) ("[A] plaintiff is required only to set forth the essential facts of his case with reasonable precision and with particularity sufficient to acquaint a defendant with the nature, source and extent of his cause of action."). Plaintiff's injury allegations easily meet this standard.

Plaintiff unequivocally alleges that it would have obtained coverage[4] for its COVID-19 losses had this coverage gap been identified. FAC, ¶ 105 ("Had it known there was a gap in coverage, Plaintiff would have requested and purchased the coverage required to fill that gap."). And Plaintiff alleges that such coverage would have been available to Plaintiff in the relevant time frame. *Id.* at ¶ 121 ("Insurance coverage for the types of losses complained of herein was generally available in the insurance industry in 2019 and 2020, and such coverage would have been specifically available to Plaintiff in that time frame."). These allegations provide Defendant with the

[3] https://www.insurancejournal.com/news/east/2015/08/03/377360.htm

[4] For purposes of this Motion, we must assume that Plaintiff's policy does not include coverage for Plaintiff's losses caused by COVID-19.

nature, source and extent of Plaintiff's cause of action. Nothing more is required. *Doheny Park Terrace Homeowners Assn.,* 132 Cal.App.4th at 1099.

And while Defendants allege that Plaintiff is required to identify and describe the specific policy it would have purchased, this is at odds with the above-cited California Supreme Court authority requiring that a pleading allege ultimate, not evidentiary, facts. Moreover, the cases cited by Defendants are clearly inapposite.

Defendants cite *Rakestraw v. California Physicians' Service*, 81 Cal.App. 4th 39, 43-44 (2000), for the proposition that Plaintiff is required to identify and describe the specific policy it would have purchased. But *Rakestraw* is easily distinguishable, because it involved the issue of "whether a private health care service plan contract requiring a $1,000 copayment for inpatient hospital services in connection with pregnancy and child delivery violates the prohibition against the use of copayments 'because of sex.'" *Id*. at 42. And *Rakestraw*'s boilerplate assertion that "[a]llegations must be factual and specific, not vague or conclusionary" provides no guidance as to the level of detail required in a pleading generally, let alone the level of detail sufficient to allege injury in the instant case. *See id.* at 44.

George v. Auto. Club of S. Cal., 201 Cal.App.4th 1112, 1120 (2011), cited by Defendants, is also inapposite. In *George*, the plaintiff alleged that extrinsic evidence rendered the contract at issue ambiguous, and asserted that this allegation required that the Court overrule the pending demurrer. *George,* 201 Cal.App.4th at 1120. *George* thus involved the question of whether the Court was somehow bound to accept a plaintiff's characterization of the legal effect of extrinsic evidence. To state the obvious, *George*, like *Rakestraw*, has no relevance to the sufficiency of Plaintiff's injury allegations. Defendants' reliance on such clearly inapposite authority speaks volumes.[5]

Moreover, it is clear that **pandemic coverage was available during the relevant time period**. In 2014, an insurance broker (the William Gallagher firm, acquired by Defendant in 2015) launched pandemic coverage, long before the emergence of COVID-19. RJN, Exhibit C ("Brokers

[5] Defendants' citation to *Soundview Cinemas v. Great Am. Ins. Group*, Slip Op. at 13 (N.Y. Sup. Ct. 2021) (attached to Defendants' Request for Judicial Notice, Ex. A), an out-of-state unpublished trial court decision is truly baffling. This case provides no guidance concerning California pleading requirements.

launch business interruption coverage for Ebola, other pandemics"). As did Lloyd's of London. RJN, Exhibit D (10/17/2014 CNBC article entitled "Ebola: Insurance's new way to deal with an outbreak."); RJN, Exhibit E (Law360 article stating that Lloyds offered pandemic coverage in 2016). In fact, pandemic policies issued prior to the emergence of COVID-19 have been the subject of recent litigation. *See* RJN, Exhibit F (excerpt of Complaint from Texas federal court action showing Pandemic Event Endorsement issued by Lloyd's of London); RJN, Exhibit G (excerpt of Complaint from Minnesota federal court action showing Interruption By Communicable Disease Endorsement issued by Zurich Insurance).

Finally, it is simply absurd for Defendants to contend that the purported presence of a virus exclusion in Plaintiff's prior policy means Plaintiff has not been injured. While Defendants assert that the prior policy had an explicit virus exclusion, this is mere attorney argument. The prior policy is not part of the record before the Court,[6] leaving Defendants' "no injury" argument with no factual support whatsoever. And even if Defendants' assertions regarding the prior policy had support in the record (which they do not), Defendants' "no injury" argument would still be nonsensical. As discussed above, the FAC (like the Complaint) repeatedly states that Plaintiff hired Defendants based, in part, on Defendants' promise to review Plaintiff's prior policy, identify and cure any gaps, and thus obtain a better policy than Plaintiff's existing policy. Plaintiff would not have hired Defendants if it was satisfied with its prior policy. And the FAC (like the Complaint) repeatedly and unequivocally states that Defendants failed to identify the virus coverage gap that has injured Plaintiff. *See, e.g.*, FAC, ¶ 106 ("Had it known there was a gap in coverage, Plaintiff would have purchased the coverage required to fill that gap.").

And, in any event, even if the initial Complaint mistakenly states that Plaintiff's prior policy lacks a virus exclusion, any potential pleading mistake has been remedied by amendment.[7] What

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[6] In support of its initial Demurrer, Defendants requested judicial notice of what it claimed was the prior policy (which it claimed to have cobbled together from online copies of various policy forms). The Court denied this Request, and Defendants have not renewed that request in connection with the instant Demurrer.

[7] Defendants argue that the original Complaints' allegations concerning the AMCO policy's virus coverage should be imported into the FAC under the sham pleading exception. But the sham pleading doctrine does not apply where the allegation in the prior pleading was made as a result of mistake. *Reichert v. General Ins. Co.*, 68 Cal.2d 822, 836 ("a party should be allowed to correct a

could not be remedied would be Defendants' failure to identify this virus exclusion in their 2019 "coverage gap" analysis of Plaintiff's prior policy, which would simply underscore their negligence in performing their duties. Defendants' "no injury" argument is self-defeating.

V. IF THE COURT SUSTAINS THE INSTANT DEMURRER, PLAINTIFF SHOULD BE AFFORDED LEAVE TO AMEND

Even if this Court determines that Defendants' demurrer should be sustained (which it should not do), the Court should allow Plaintiff leave to further amend its pleading. Indeed, under California law, "it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment." *Gutkin v. Univ. of S. California*, 101 Cal. App. 4th 967, 976 (2002). To the extent the Court deems any aspect of Plaintiff's allegations insufficient, Plaintiff can remedy such insufficiency. For example, Plaintiff has recently identified (and sought judicial notice of) new evidence that pandemic coverage has been continuously available for years and is exploring the extent of other pandemic/virus coverage available and its dissemination within the insurance industry. Such evidence can be added to a subsequent pleading, if necessary.

VI. CONCLUSION

For the foregoing reasons, VStyles respectfully requests that the Court overrule Defendants' Demurrer.

DATED: March 12, 2021

GLASER WEIL FINK HOWARD AVCHEN & SHAPIRO LLP

By: */s/ Sean Riley*
ROBERT L. SHAPIRO
PATRICIA L. GLASER
SEAN RILEY
Attorneys for Plaintiff VSTYLES, INC.

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pleading by omitting an allegation which, it appears, was made as the result of mistake or inadvertence.'"). And, in any event, for the reasons set forth above Plaintiff's allegations in the initial Complaint regarding the scope of coverage under the AMCO policy (whether mistaken or not) do not change the fact that Plaintiff has adequately alleged injury.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California; I am over the age of 18 and not a party to the within action; my business address is 10250 Constellation Boulevard, 19th Floor, Los Angeles, California 90067.

On March 12, 2021, I served the foregoing document(s) described as **PLAINTIFF VSTYLES, INC.'S OPPOSITION TO GALLAGHER DEFENDANTS' DEMURRER TO FIRST AMENDED COMPLAINT** on the interested parties to this action by delivering thereof in a sealed envelope addressed to each of said interested parties at the following address(es):

SEE ATTACHED LIST

☐ **(BY MAIL)** I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service. This correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business at our Firm's office address in Los Angeles, California. Service made pursuant to this paragraph, upon motion of a party served, shall be presumed invalid if the postal cancellation date of postage meter date on the envelope is more than one day after the date of deposit for mailing contained in this affidavit.

☒ **(BY E-MAIL SERVICE)** Pursuant to California Code of Civil Procedure section 1010.6(e), I caused such document to be delivered electronically via e-mail to the e-mail address of the addressee(s) set forth in the attached service list.

☐ **(BY OVERNIGHT DELIVERY)** I served the foregoing document by FedEx, an express service carrier which provides overnight delivery, as follows: I placed true copies of the foregoing document in sealed envelopes or packages designated by the express service carrier, addressed to each interested party as set forth above, with fees for overnight delivery paid or provided for.

☐ **(BY PERSONAL SERVICE)** I caused such envelope to be delivered by hand to the offices of the above named addressee(s).

☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on March 12, 2021 at Los Angeles, California.

/s/ Steve Basileo
Lisa Jung

SERVICE LIST

G. David Godwin
Thomas J. Lloyd
Melanie P. Cockrum
SQUIRE PATTON BOGGS
275 Battery Street, Suite 2600
San Francisco, CA 94111
Telephone: 415-954-0200
Facsimile: 415-393-9887
Email: david.godwin@squirepb.com
thomas.lloyd@squirepb.com
melanie.cockrum@squirepb.com

Attorneys for Counsel for Defendant
CONTINENTAL CASUALTY COMPANY

Amanda L. Groves
Shawn R. Obi
WINSTON & STRAWN LLP
333 South Grand Avenue, 38th Floor
Los Angeles, CA 90071-1543
Telephone: 213-615-1700
Facsimile: 213-615-1750
Email: agroves@winston.com
sobi@winston.com

Attorneys for Defendants
ARTHUR J. GALLAGHER & CO.
INSURANCE BROKERS OF CALIFORNIA, INC., RONALD ZAPPELLI, ROBERT GAMMILL, AND ANTHONY LOPEZ

Stephen V. D'Amore
Scott P. Glauberman
Brian Nisbet
Katherine D. Hundt
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601-9703
Telephone: 312-558-5600
Facsimile: 312-558-5700
Email: sdamore@winston.com
sglauber@winston.com
bnisbet@winston.com
khundt@winston.com