JOHN P. PHILLIPS (CA Bar No. 154412)
john.phillips@us.dlapiper.com
GREGORY G. SPERLA (CA Bar No. 278062)
greg.sperla@us.dlapiper.com
DLA PIPER LLP (US)
555 Mission Street, Suite 2400
San Francisco, California 94105-2933
Tel: 415.836.2500
Fax: 415.836.2501

ROB HOFFMAN (*pro hac vice*)
rob.hoffman@us.dlapiper.com
DLA PIPER LLP (US)
1900 N. Pearl St., Suite 2200
Dallas, Texas 75201-2482
Tel: 214.743.4530
Fax: 972.813.6271

Attorneys for Defendants
FIREMAN'S FUND INSURANCE COMPANY,
NATIONAL SURETY CORPORATION, and
ALLIANZ GLOBAL RISKS INSURANCE CO.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO

Water Sports Kauai, Inc., a Hawaii corporation, dba Sand People, on behalf itself and all others similarly situated,

Plaintiff,

v.

Fireman's Fund Insurance Company, a California corporation, National Surety Corporation, an Illinois Corporation, and Allianz Global Risks US Insurance Co., an Illinois Corporation,

Defendants.

CASE NO. 3:20-CV-03750-WHO

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFF'S COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Date: September 23, 2020
Time: 2:00 p.m.
Judge: Hon. William H. Orrick
Room: Courtroom 2

Complaint Filed: June 5, 2020

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on Wednesday, September 23, 2020 at 2:00 p.m., or as soon thereafter as the matter may be heard, in the courtroom of the Honorable William H. Orrick, United States District Judge, Northern District of California, located at 450 Golden Gate Avenue, San Francisco, CA 94102-3489, in Courtroom 2 on the 17th Floor, or by remote conferencing as directed by the Court, the undersigned Defendants Fireman's Fund Insurance Company, National Surety Corporation and Allianz Global Risks Insurance Company will, and hereby do, move the Court for an order dismissing the Complaint, ECF No. 1, of Plaintiff Water Sports Kauai, Inc., a Hawaii corporation, dba Sand People, on behalf itself and all others similarly situated, for failure to state a claim upon which relief can be granted.

This Motion is made pursuant to Federal Rule of Civil Procedure 12(b)(6) and related authority. This Motion is based on this Notice of Motion and Motion; the accompanying Memorandum of Points and Authorities; the pleadings and evidence on file in this matter; oral argument of counsel; and such other materials and argument as properly may be presented in connection with the hearing.

Dated: August 17, 2020

DLA PIPER LLP (US)

By: */s/ John P. Phillips*
John P. Phillips
Rob Hoffman (admitted *pro hac vice*)
Gregory G. Sperla
Attorneys for Defendants
FIREMAN'S FUND INSURANCE COMPANY, NATIONAL SURETY CORPORATION, and ALLIANZ GLOBAL RISKS INSURANCE CO.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff operates twelve specialty stores in Hawaii that sell souvenirs and related goods to tourists and other visitors. In March 2020, Plaintiff's stores were forced to close temporarily and restrict operations for several months as a result of the Shelter in Place Orders issued by the Governor and other local authorities because of the Covid-19 pandemic ("COVID-19 Orders"). Plaintiff alleges that the COVID-19 Orders caused it (and the proposed class) to suffer economic harm, and it has sued to recoup those losses under a commercial property insurance policy it purchased from Fireman's Fund. As explained below, each cause of action in the Complaint should be dismissed because Plaintiff has failed to plead—and cannot plead—the elements required to trigger coverage.

First, Plaintiff failed to plead "direct physical loss or damage" to property. The two coverage provisions specifically invoked in the Complaint, the "Lost Business Income" or "Civil Authority" coverages, explicitly require that the claimed loss be caused by, or the result of a government order itself caused by, "direct physical loss or damage" to property. Perils that typically satisfy this requirement include property damage from hurricanes or fires, or evacuation orders following such disasters. Despite acknowledging this important prerequisite to coverage, Plaintiff attempts to plead this condition as a conclusion without the support of a single fact. Put simply: no amount of artful pleading can convert a Covid-19 "droplet" resulting from a sneeze or a conversation (*see* Compl. ¶¶ 38, 39) into the "direct physical loss or damage" to property the Policy requires. Analyzing similar claims under similar, if not identical, policies, courts around the country have uniformly held that dismissal is warranted for this reason alone.

Second, as to the Lost Business Income coverage, Plaintiff also fails to plausibly plead how its losses could have been caused by direct physical loss or damage. In fact, Plaintiff acknowledges that its lost income results entirely from its understandable decision to suspend operations in response to COVID-19 Orders. (Compl. ¶¶ 62, 81-82.) Yet, the COVID-19 Orders required Plaintiff to temporarily close its stores, resulting in a loss of income, regardless of the existence or absence of COVID-19 at any of the insured's properties. Such Orders do not create direct physical

loss or damage to property, but they are the cause of Plaintiff's losses.

Third, the Civil Authority provision fails to provide coverage for an additional reason: at no time was Plaintiff barred from accessing its premises—a necessary condition distinct from the "direct physical loss or damage" requirement. In fact, the COVID-19 Orders attached to the Complaint expressly allow use of and access to non-essential business premises like Plaintiff's under various circumstances, and Plaintiff confirmed that its "twelve stores [were closed to customers only] for a period of several months." (Compl. ¶ 62.)

Fourth, beyond the pleading deficiencies that pervade each cause of action, Plaintiff's second claim for breach of the covenant of good faith and fair dealing should be dismissed because it, too, is predicated on coverage that does not exist. Additionally, merely because the only insurer on the Policy, Fireman's Fund, took two months to provide a final determination on coverage during a global pandemic, without more, does not support a claim for breach of the duty of good faith and fair dealing. Moreover, when asked to provide proof of any "direct physical loss or damage" to its property, Plaintiff went silent. Plaintiff cannot plausibly claim that Fireman's Fund failed to timely inspect the property when Plaintiff failed to identify any damage to inspect.

Finally, Plaintiff's third and fourth causes of action fail as a matter of law for additional, independent reasons. The unfair or deceptive business practices claim based on Hawaii law (Count Three) is only available for claims of "unfair competition," yet the Complaint lacks any facts required to support this theory of liability. Count Four for Injunctive Relief fails because it merely seeks the same relief as Count One for Breach of Contract. Both Counts Three and Four fail for failure to plead an inadequate remedy at law.

Ultimately, Plaintiff's failure to allege facts that demonstrate "direct physical loss or damage" to any property connected to its stores—which are open for business today during the pandemic—disposes of its claims. Courts around the country have been unanimous in reaching similar conclusions under similar circumstances. For the reasons explained in more detail below, Plaintiff's Complaint should be dismissed.

II. FACTUAL BACKGROUND

A. Overview of Plaintiff's Commercial Property Insurance Policy

1. Plaintiff's Insurance Policy Provides Lost Income Coverage and Civil Authority Coverage Resulting from Direct Physical Loss or Damage to Property

Plaintiff is a corporation based in Hawaii that owns Sand People—a chain of 12 stores located on various islands that sells "souvenirs and other related goods." (Compl. at ¶¶ 6, 54.) Defendants are separate but affiliated corporations. (*Id*. at ¶ 7.) Defendant Fireman's Fund Insurance Company alone issued the relevant commercial property insurance policy to Plaintiff. (*Id.* at ¶ 75, Ex. 9 ("Policy").)

In its Complaint, Plaintiff specifically seeks relief under the Policy's "Lost Business Income" coverage and the "Civil Authority" coverage. (*Id.* at ¶ 79 ("Lost Business Income"); ¶ 83 ("Civil Authority coverage").) As with most commercial property insurance, Lost Business Income coverage and Civil Authority coverage both require "*direct physical loss or damage*" to trigger coverage. (*Id.* at ¶ 78, Ex. 9 at p. 31 (emphasis added).)[1] The relevant sections of Plaintiff's Property/Liability Policy (Form AB 90 00 12 93) at "Section I – Property Coverages," reads as follows:[2]

> A. Coverage [ ]
>
> We will pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss. [ ]
>
> 3. Covered Causes of Loss
> RISKS OF DIRECT PHYSICAL LOSS unless the loss is:
>
> a. Excluded in Part B., Exclusions; or

---

[1] *See* Scott Johnson, *What Constitutes Physical Loss Or Damage In A Property Insurance Policy?,* 54 TORT TRIAL & INS. PRAC. L. J. 96 (2019) ("Most property insurance policies require "physical loss or damage" to insured property as a threshold requirement for coverage.") (citing ISO Standard Property Policy (CP 00 99 10 12), ISO Building and Personal Property Coverage Form (CP 00 10 10 12)).

[2] Unless otherwise indicated, all **bold** emphasis is contained in the Policy itself. *Italics* emphasis to quotes from the Policy is added.

> b. Limited in Paragraph A.4., Limitations; that follow. [ ]
>
> g. Business Income
>
> We 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 damage to property at the described premises, including personal property in the open (or in a vehicle) within 1000 feet, caused by or resulting from any Covered Causes of Loss. [ ]

(Compl., Ex. 9 at p. 31-34.)

> i. Civil Authority
>
> We will pay for the actual loss of Business Income you sustain and necessary Extra Expense [summarized below] caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss [*i.e.,* direct physical loss or damage]. This coverage will apply for a period of up to two consecutive weeks from the date of that action.

(Compl., Ex. 9 at p. 36.)

"Extra Expense" coverage is included as part of the "Business Income" and "Civil Authority" coverages and is also predicated on the requirement of "direct physical loss or damage." The Extra Expense coverage identified in the Complaint at paragraphs 82 and 83 specifically states: "We will pay necessary Extra Expense you incur during the **period of restoration** that you would not have incurred *if there had been no direct physical loss or damage to property at the described premises*, including personal property in the open (or in a vehicle) within 1000 feet of the described premises, caused by or resulting from a Covered Cause of Loss.…" (Compl., Ex. 9 at p. 35.)

The phrase "Period of Restoration" means the period of time that "[b]egins with the date of **direct physical loss or damage caused by or resulting from any [risk of direct physical loss]** at the described premises" and "[e]nds on the date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality." (Compl., Ex. 9

at p. 64 (emphasis added).)

2. To Obtain Coverage, the Policy Requires Plaintiff To Present Proof of Direct Physical Loss or Damage to the Covered Property:

E. Property Loss Conditions [ ]

3. Duties in the Event of Loss or Damage [ ]

a. You must see that the following are done in the event of **loss or damage** to Covered Property: [ ]

(7) Send us a signed, sworn proof of loss containing the information we request to investigate the claim. You must do this within 60 days after our request. [ ]

5. Loss Payment [ ]

g. We will pay for **covered loss or damage** within 30 days after we receive the sworn proof of loss, if:

(1) You have complied with all of the terms of this policy; and

(2) (a) We have reached agreement with you on the amount of loss; or

(b) An appraisal award has been made.

(Compl., Ex. 9 at p. 46-49 (emphasis added).)

B. Plaintiff Alleges Losses Caused by Covid-19 Stay-at-Home Orders

In response to the Covid-19 pandemic and in order to promote social distancing guidelines implemented on a state-wide basis, the Governor of Hawaii issued various orders and proclamations, beginning on March 4, 2020, "limiting the operation of non-essential businesses," "requiring all visitors to Hawaii to self-quarantine for 14 days upon arrival (except for visitors involved in critical emergency response or infrastructure functions)," and "requiring 'all persons within the State of Hawai'i . . . to stay at home or in their place of residence' unless involved in essential activities . . . [which] does not include stores targeting visitors and/or selling souvenirs and other related goods." (Compl. ¶¶ 50-54.) "Similar orders" were also adopted by local authorities, all of which were subsequently extended (collectively, "the COVID-19 Orders"). (*Id.* at ¶¶ 55-56.)

Throughout the Complaint, Plaintiff admits that solely "[i]n anticipation of and response

to the orders, Sand People closed its stores." (*Id.* at ¶ 62.) Further, "[t]he Orders prohibited the physical access to, use of, and operations at and by Sand People, its employees, and its customers." (*Id.* at ¶81.) Plaintiff further concedes that *because of the Civil Orders* "Sand People suspended operations, lost business income, and suffered other related covered losses (including but not limited to extended business income and extra expenses)." (*Id.* at ¶ 82.) Plaintiff also claims that as a result of the Civil Orders the "physical components of Sand People's stores became unusable, damaged, and/or lost the ability to generate income," but fails to plead any facts to support its conclusory claim that this generic allegation triggers coverage. (*Id.* at ¶ 81.)

Later in the Complaint, Plaintiff alleges that "components of Sand People's stores became unusable and/or lost the ability to generate income," but once again fails to provide any supporting facts and fails to explain how that claim triggers coverage or how it can be reconciled with the facts actually pled in the Complaint. Plaintiff's stores re-opened months later (*see id.* at ¶¶ 62, 86 and 130 (confirming stores closed for "months")), and the Complaint is devoid of facts that permit any plausible inference that Plaintiff's property suffered "direct physical loss or damage" before, during, or after the time when the stores were closed to the public.

C. Defendant's Timely Review and Response to Plaintiff's Request for Insurance Coverage

"On or around March 20, 2020," Plaintiff requested coverage under its Policy with Fireman's Fund for lost income related to its closure of its stores. (*Id.* at ¶ 99.) Roughly two months later, on May 22, 2020, Fireman's Fund notified Plaintiff in writing that its Policy did not cover the claimed losses. (*Id.* at ¶ 102.) The letter stated that Fireman's Fund had completed its "investigation and coverage analysis" and "based on current information, the Policy does not afford coverage for Sand People's claim." (*Id.*, Ex. 10 at 1.) Fireman's Fund confirmed the fact that Plaintiff failed to provide notice or proof of any direct physical loss or damage to any property or premises covered by the Policy. (*Id.* at ¶ 81, Ex. 10 at p. 2 ("We understand that, at present, Sand People has not incurred any physical loss or damage to its premises or its property."), Ex. 10 at p. 7 ("the claim does not involve any direct physical loss of or damage to property, either at Sand People's premises or, with respect to the Civil Authority Coverage, any other premises.").)

Fireman's Fund invited Plaintiff to contact its adjuster should "additional information become available concerning this matter or should the information upon which we have relied materially change." (*Id*.) To date, Plaintiff has not provided any further information or proof that the property covered by the Policy suffered "direct physical loss or damage" as the Policy expressly requires.

III. STANDARD FOR MOTION TO DISMISS

Dismissal under Rule 12(b)(6) may be based on either (1) the "lack of a cognizable legal theory" or (2) "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988), *overruled on other grounds*. To survive a Rule 12(b)(6) challenge, a plaintiff's complaint must include "enough facts to state a claim to relief that is plausible on its face." *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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). If the "complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (quotations omitted). "[T]he pleading standard [of] Rule 8 . . . demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.*

Determining whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. The "tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft,* 556 U.S. at 678. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. Further, a court's "duty to accept the facts in the complaint as true does not require [it] to ignore specific factual details of the pleading in favor of general or conclusory allegations." *Griffin Indus., Inc. v. Irvin*, 496 F.3d 1189, 1205-06 (11th Cir. 2007). Put differently, in ruling on a Rule 12(b)(6) motion, a court "need not take legal conclusions as true merely because they are cast in the form of factual allegations." *Lopez v. Stages of Beauty, LLC*, 307 F. Supp. 3d 1058, 1065 (S.D. Cal. 2018). Similarly, "conclusory allegations of law and unwarranted inferences are not sufficient to defeat a motion to dismiss." *Id.*

Additionally, since Plaintiff's Complaint is replete with allegations that Defendants acted in bad faith and with an intent to deceive and defraud through false and misleading promises, among other allegations "grounded in fraud," such allegations in the Complaint must also meet the rigorous standard of Rule 9(b). *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1125-1127 (9th Cir. 2009). "Rule 9(b) demands that the circumstances constituting the alleged fraud be specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong." *Id.* (cleaned up). "Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Id.* (citation omitted).

IV. PLAINTIFF FAILS TO PLEAD FACTS SUFFICIENT TO SUPPORT A BREACH OF CONTRACT CLAIM

A. Insurance Contract Interpretation Is a Matter of Law

Under both California and Hawaii law, "the terms of an insurance policy are to be interpreted according to their plain, ordinary, and accepted sense in common speech, unless it appears from the policy that a different meaning is intended." *Great Divide Ins. Co. v. AOAO Maluna Kai Estates,* 492 F. Supp. 2d 1216, 1226 (D. Haw. 2007) (citing *Dairy Rd. Partners v. Island Ins. Co., Ltd.,* 92 Haw. 398, 411, 992 P. 2d 93 (2000)). An insurance contract should be construed "according to the entirety of its terms and conditions as set forth in the policy." Haw. Rev. Stat. § 431:10–237. For this main reason, "[courts] do not rewrite any provision of any contract, including the standard policy underlying any individual policy, for any purpose." *Certain Underwriters at Lloyd's of London v. Superior Court*, 24 Cal. 4th 945, 968 (2001).

Furthermore, the court can apply both Hawaii and California law because no conflict exists. *See Washington Mut. Bank, FA v. Superior Court*, 24 Cal. 4th 906, 918 (2001). And to the extent necessary, Hawaii courts adopt California authority for precedent on issues not yet decided. *Great Divide Ins. Co.*, 492 F. Supp. 2d at 1227; *see also Locricchio v. Legal Servs. Corp*., 833 F.2d 1352, 1357 (9th Cir. 1987).

B. Plaintiff's Burden To Demonstrate The Existence of Coverage

In a case against an insurer based on the denial of coverage, the insured has the burden to prove that a loss is covered under the terms of the insurance policy. *Sentinel Ins. Co. v. First Ins. Co. of Hawai'i,* 76 Haw. 277 (1994); *Weil v. Federal Kemper Life Assurance Co.*, 7 Cal. 4th 125, 148 (1994). The Policy provisions invoked in the Complaint (and quoted above) obligate Fireman's Fund to pay, up to specified limits, for "the actual loss of Business Income . . . *caused by direct physical loss of or damage to property* at [the insured] premises." (Compl. ¶ 78, Ex. 9 at p. 34 (emphasis added). The Policy also provides coverage for loss of Business Income (as defined in the Policy) "caused by action of civil authority that prohibits access to the described premises *due to direct physical loss of or damage to property*, other than at the described premises, *caused by or resulting from* any [direct physical loss]." (Compl. ¶ 83, Ex. 9 at p. 35 (emphasis added).)

Accordingly, Plaintiff must plead these facts and circumstances to satisfy the essential requirements for coverage. Conclusions and labels cannot suffice for facts demonstrating direct physical (*i.e.,* tangible) damage (*i.e.*, alteration) to the property in question. This fundamental pleading requirement gives meaning to the "entirety of [the coverage] terms and conditions as set forth in the policy." Haw. Rev. Stat. § 431:10–237.

C. As a Threshold Matter, Plaintiff Must Plead Direct Physical Loss or Damage to Property

To claim coverage under its Policy requiring proof of "direct physical loss or damage," Plaintiff must "demonstrate that an event had a direct impact and proximately caused a loss related to the *physical matter of the Property*." *Ass'n of Apartment Owners of Imperial Plaza v. Fireman's Fund Ins. Co.*, 939 F. Supp. 2d 1059, 1068–69 (D. Haw. 2013) ("*Imperial Plaza*") (emphasis added). In *Imperial Plaza*, the insured discovered that moisture had infiltrated a layer of insulation and had carried arsenic used in the insulation layer into a cement slab sitting above the insulation, damaging the floor above. *Id*. at 1062. In considering whether the insured's property suffered "direct physical loss or damage," the court construed the terms according to their dictionary definitions: "direct loss" as "a loss that results immediately and proximately from an

event;"[3] "immediate" as "[h]aving a direct impact; without an intervening agency;" and "physical" as "of or relating to natural or material things." *Id*.[4] Applying these definitions, the court concluded that the insured had met its burden since the concrete slab, carpet, and interior objects were physical matter that were physically damaged by the leaching arsenic, which in turn caused further physical damage to the upper floor. *Id*. at 1069.

In contrast, in *Ward Gen. Ins. Servs., Inc. v. Emps. Fire Ins. Co.*, 114 Cal. App. 4th 548, 553-555 (2003), cited by the court in *Imperial Plaza*, the California Court of Appeal held that coverage for loss of business income due to a database system crash that "compromised, corrupted, or lost electronically stored data" was not due to a loss "caused by or resulting from any [risks of direct physical loss]." *Id.* at 553-54. The Court held that the term "direct physical" applies to and directly modifies both "loss" and "damage," finding that although the claimed loss, *i.e.*, loss of business income, was not itself a *direct physical* loss, the alleged loss "must be *caused* by a physical loss resulting from a risk of physical loss." In other words, the insured can only claim a loss of something of "material existence, formed out of tangible matter, and [ ] perceptible to the sense of touch." *Id*. *See also MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 780 (2010) ("For there to be a 'loss' within the meaning of the policy, some *external force* must have acted upon the insured property to cause a *physical change* in the condition of the property, i.e., it must have been 'damaged.'") (citation omitted, emphasis in original); *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, No. CIV. 98-434-HU, 1999 WL 619100, at *7 (D. Or. Aug. 4,1999) ("The recognition that physical damage or alteration of property may occur at the microscopic level does not obviate the requirement that physical damage need be distinct and demonstrable.").

Consistent with this authority, a temporary deprivation of "use" or "access" to physical property is not enough to establish a direct physical loss or damage to property. In *Newman*

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[3] *Imperial,* 939 F. Supp. 2d at 1062 (citing *Black's Law Dictionary* 1030 (9th ed. 2009)).

[4] "Material" is defined as "[o]f or relating to matter; physical." *Id*. (citing *Black's Law Dictionary* 1066 (9th ed. 2009)).

Myers, for example, the court held that the insured's property policy did not cover "expenses incurred as a result of its inability to access its office" during a power outage brought about by Hurricane Sandy. *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co.*, 17 F. Supp. 3d 323, 328 (S.D.N.Y. 2014). There, as here, the policy only covered "actual, demonstrable harm of some form to the premises itself, rather than forced closure of the premises for reasons exogenous to the premises themselves, or the adverse business consequences that flow from such closure." *Id*.

Reaching a similar result after analyzing similar policy language, the court in *Mastellone v. Lightning Rod Mut. Ins. Co.*, 884 N.E. 2d 1130, 1144–45 (Ohio 2008), held that presence of harmful mold was "temporary," "did not alter or otherwise affect the structural integrity of the siding," and therefore did not amount to "direct physical injury as required by the homeowners' policy." *See also Universal Image Prods., Inc. v. Federal Ins. Co.,* 475 F. App'x 569, 573 (6th Cir. 2012) (holding mold and bacteria, which barred use of building, did not constitute "direct physical loss because that phrase 'contemplates change in insured property' or 'tangible' damage."); *Roundabout Theatre Co., Inc. v. Continental Cas. Co.,* 302 A.D.2d 1, 3, 6-8 (N.Y. Sup. Ct. App. Div. 2002) (no coverage for cancellation of 35 scheduled performances of *Cabaret* caused by closure and restriction on access due to scaffolding that fell from nearby building).

These holdings are consistent with additional case law from around the country analyzing similar policy provisions and with well-regarded secondary authority. *See, e.g., Simon Mktg. v. Gulf Ins. Co.*, 149 Cal. App. 4th 616, 627 (2007) (property policies "insure against physical loss of or damage to property, and not against detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property"); *Mama Jo's, Inc. v. Sparta Ins. Co.,* No. 17-cv-23362-KMM, 2018 WL 3412974, at *9 (S.D. Fla. June 11, 2018) (where a policy covers "direct physical loss of or damage," a "direct physical loss 'contemplates an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so.'") (internal citations omitted); and 10A Couch on Ins. 148:46 (3d ed., June 2020 update) ("The requirement that the loss be 'physical,' given the ordinary definition of that term, is *widely held* to exclude alleged losses that are intangible or incorporeal … unaccompanied by a …

physical alteration of the property.") (citations omitted) (emphasis added).[5]

Importantly, these controlling—and dispositive—principles of property insurance law have been applied with equal force in the context of COVID-19 Orders just like those Plaintiff alleges here. In *Social Life Magazine, Inc., v. Sentinel Insurance Company Limited*, the insured sought coverage for lost business income under a property policy that required the insurer to "pay for direct physical loss of or physical damage to Covered Property at the premises." *Social Life Magazine, Inc. v. Sentinel Ins. Co.,* No. 1:20-cv-03311-VEC, 2020 WL 2904834 (S.D.N.Y. May 14, 2020) (Transcript of Injunction Hearing). Ruling for the insurer, the court explained that "what has caused the damage is that the governor has said you need to stay home. It is not that there is any particular damage to your specific property. . . You may not even have the virus in your property." *Social Life Magazine, Inc.*, 2020 WL 2904834 at p. 4.

Similarly, in a matter decided on summary judgment in July 2020, *Gavrilides Mgmt. Co., LLC v. Michigan Ins. Co.*, No. 20-258-CB 18-19 (Ingham County, Mich. July 1, 2020) (transcript regarding defendant's motion for summary disposition) (Doc. #37-2 at 18-19), a Michigan Circuit Court granted the insurer's motion for summary disposition, holding that "direct physical loss of or damage to the property has to be something with material existence. Something that is tangible. Something . . . that alters the physical integrity of property."[6] More recently, in *Rose's 1, LLC v. Erie Insurance Exchange*, the Superior Court of the District of Columbia granted summary

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[5] *See also United Air Lines, Inc. v. Ins. Co. of State of PA*, 439 F.3d 128, 134 (2d Cir. 2006) (dismissing claims because United could not show that alleged loss of earnings resulted from physical damage to its property or from physical damage to an adjacent property when the government shut down the airport after the September 11 terrorist attacks); *Hartford Ins. Co. of Midwest v. Mississippi Valley Gas Co*., 181 F. App'x 465, 470 (5th Cir. 2006) ("The requirement that the loss be "physical," given the ordinary definition of that term is widely held to exclude alleged losses that are intangible or incorporeal, and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property." (citation omitted)); *see also Ross v. Hartford Lloyd Ins. Co.,* No. 4:18-cv-00541-O, 2019 WL 2929761, at *6–7 (N.D. Tex. July 4, 2019) ("direct physical loss" requires "a distinct, demonstrable, physical alteration of the property" (citing 10A Couch on Ins. § 148:46 (3d ed. 2010)).)

[6] The Transcript and Order are attached as Exhibits B and C to Defendants' Appendix of Certain Authorities in Support of Defendants' Motion to Dismiss Plaintiff's Complaint ("Appendix").

judgment to an insurer finding that the plaintiffs offered "no evidence that COVID-19 was actually present on their insured properties at the time they were forced to close" and that the shutdown orders "did not have any effect on the material or tangible structure of the insured properties." No. 2020 CA 002424 B, slip op. at 4-5 (D.C. Sup. Ct. Aug. 6, 2020) (Appendix, Exhibit A). And just last week, the court in *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20–CV–461–DAE, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020) (Dkt. 29) granted the insurer's Rule 12 motion to dismiss breach of contract and bad faith claims because Covid-19 shelter-in-place orders were insufficient to establish, as a matter of law, a direct physical loss to plaintiff's property as expressly required by the policy.

D. Plaintiff Fails To Plead Facts Required To Establish Direct Physical Loss or Damage to Property Therefore Dismissal is Warranted

Applying the clear language of Plaintiff's insurance policy to the legal framework summarized above warrants dismissal of Plaintiff's claims. A review of Plaintiff's Complaint demonstrates that it has not—and cannot—plead the facts required to trigger property coverage simply because it complied with COVID-19 Orders. Fundamentally, Plaintiff admits that "[i]n anticipation of and response to the orders, Sand People closed its stores." (Compl. ¶62.) It is from these actions *alone*—the COVID-19 Orders and Plaintiff's understandable decision to close in response to them—that all of Plaintiff's claimed losses derive, not from any direct physical loss or damage to the stores themselves. (*Id.* at ¶¶ 63-68.)

In contrast to the insured whose building was physically compromised in *Imperial Plaza*, but like the plaintiffs whose claims for equitable relief were denied in *Social Life Magazine* (government ordered shutdown), Plaintiff does not allege that it "ha[s] the virus in [its] property." *Social Life Magazine, Inc.*, 2020 WL 2904834 at p. 4. Instead, the Complaint makes clear that the chain of events leading to its alleged loss of income are directly traceable to the COVID-19 Orders designed to ensure proper social distancing requirements, which neither cause nor result from physical loss or damage to Plaintiff's property. (Compl. ¶81-82.) Simply alleging that "[t]he Orders prohibited the physical access to, use of, and operations at and by Sand People, its employees, and its customers," Compl. ¶81, is insufficient to invoke property coverage and does

not support any extra-contractual cause of action predicated on the denial of coverage. *See Diesel Barbershop*, 2020 WL 4724305, *5 (citing extensive case law and dismissing claims).

Furthermore, like the insured shut out of its business by the power outage in *Newman Myers*, the regulatory prohibition on "access to" Plaintiff's stores is not tantamount to, nor resulting from, *direct physical* loss or damage, nor does the temporary, or even total, hinderance of the "use of" Plaintiff's stores equate to "direct physical loss or damage" as the court found in *Mastellone*. The conclusory claim in Plaintiff's Complaint that "physical components of Sand People's stores became . . . damaged" (Compl. ¶81) does not suffice. This allegation is too vague, too unsubstantiated, and too implausible to establish, by itself, the necessary conditions for coverage. The Complaint readily admits that store contents were supposedly "damaged" "[a]s a result of the [COVID-19] Orders," (*id.*) not from a direct physical loss or damage as the Policy and case law require. And simply labeling something as "damaged" does not explain what was actually damaged, when the damage was sustained, how it was sustained, or to what degree it required "repair[], rebuil[ding], or replac[ment]." (*Id.*)

Moreover, Defendant's letter denying coverage attached to the Complaint makes clear that Plaintiff did not provide any notice to Defendants of any physical damage to any property or premises covered by the Policy. (*Id.* at ¶81, Ex. 10 at p. 2 ("We understand that, at present, Sand People has not incurred any physical loss or damage to its premises or its property."), Ex. 10 at p. 7 ("the claim does not involve any direct physical loss of or damage to property, either at Sand People's premises or, with respect to the Civil Authority Coverage, any other premises.").)

Finally, Plaintiff's alleged losses cannot reasonably be called the result of *direct* loss or damage, physical or otherwise. *See Imperial Plaza*, 39 F. Supp. 2d at 1062 ("direct loss" means "a loss that results immediately and proximately from an event"). In *Rose's 1,* the Superior Court of the District of Columbia held that the insured's alleged losses stemming from closures caused by COVID-19 orders were not "direct" because they were "governmental edicts that commanded individuals and businesses to take certain actions" and that "[s]tanding alone and absent intervening actions by individuals and businesses, the orders did not effect any direct changes to the properties." No. 2020 CA 002424 B, slip op. at 3-4 (D.C. Sup. Ct. Aug. 6, 2020.) (Appendix, Ex. A.) For the

same reasons, the Complaint's allegations of *potential* viral contamination of some property somewhere in Hawaii that leads to quarantine that in turn is alleged to cause temporary loss of use or access is the epitome of an *indirect* loss, and comes nowhere close to the actual, direct physical loss or damage to property that the Policy requires.

Taken together, the express coverage provisions in Plaintiff's Policy are clear and harmonize with persuasive case law from Hawaii, California, and numerous other jurisdictions. Plaintiff suffered economic loss because it had to temporarily close its stores to customers in response to numerous COVID-19 Orders—the condition of Plaintiff's physical property was not a factor. The Complaint concedes that dispositive point many times. Before, during, and after the COVID-19 Orders were issued, the physical condition of Plaintiff's stores remain unchanged. There was no physical damage to Plaintiff's property or surrounding properties, as the Policy expressly requires. No expense was incurred to repair or replace direct physical damage in order to open the stores for business—further confirming the absence of facts that trigger coverage. Insurance contracts like the one at issue here must be construed "according to the entirety of its terms and conditions as set forth in the policy." Haw. Rev. Stat. § 431:10–237. Doing so here comports with the consistent and persuasive authority discussed above and mandates dismissal of Plaintiff's claims.

E. Civil Authority Coverage Does Not Preclude Dismissal Because the Extension Does Not Apply

Beyond the dispositive point established above, any argument that the Civil Orders cited in the Complaint are tantamount to or caused by "direct physical loss or damage" is equally unavailing. Civil Authority coverage insures against losses caused by (a) "action of civil authority" that "(b) prohibits access to" Plaintiff's retail locations (c) "**due to direct physical loss of or damage** to property . . . resulting from a **risk of direct physical loss**" other than at the described locations. Again, Plaintiff has failed to plead facts that satisfy the second and third requirements of this coverage.

Plaintiff's failure to plead a complete prohibition to access independently warrants dismissal, and this result cannot be circumvented by claiming that the Civil Orders restricted

access or made it more difficult to enter the stores. *See Paradies Shops, Inc. v. Hartford Fire Ins. Co.*, 1:03-CV-3154-JEC, 2004 WL 5704715, at *7 (N.D. Ga. Dec. 15, 2004) (with respect to civil authority coverage, "the term 'prohibit' is unambiguous" and means "to forbid by authority or command."); *St. Paul Mercury Ins. Co. v. Magnolia Lady, Inc.*, No. CIV.A. 297CV153BB,1999 WL 33537191 (N.D. Miss. Nov. 4, 1999) (civil authority coverage did not apply where access to hotel and casino was limited but possible during bridge repair); *Schultz Furriers, Inc. v. Travelers Cas. Ins. Co. of Am.*, No. A-0170-15T1, 2017 WL 1731005 (N.J. Super. Ct., App. Div., May 3, 2017) (civil authority coverage did not apply where access to property was still possible).

Setting aside the absence of any direct physical loss or damage, Plaintiff's access to its stores was not completely barred. In fact, the COVID-19 Orders that Plaintiff relies on reduced foot traffic to be sure, but they expressly allowed certain access for specific purposes. *See, e.g.,* Compl., Ex. 2 at 6 (allowing "[t]ravel to engage in minimum basic operations of non-essential businesses, including the minimum necessary activities to maintain the value of the business's inventory, ensure security, process payroll and employee benefits, and related functions as well as the minimum necessary activities to facilitate employees of the business being able to continue to work remotely from their residences.").

As to the third condition for coverage, which again is both necessary and missing from the Complaint, actual physical damage must be the cause of the government-mandated prohibition, not possible or anticipated damage. For example, in *Washington Mut. Bank v. Commonwealth Ins. Co.*, an insured claimed losses for its prophylactic closure of an office building deemed unsafe. 133 Wash. App. 1031 (2006). Ruling for the insurer, the court noted that the policy "requires a direct physical loss of or damage to insured property . . . [and] [w]hen [the first engineer] recommended evacuation, there was no actual physical loss to the property and no actual damage to the property." *Id.* at *3; *see also Bros., Inc. v. Liberty Mut. Fire Ins. Co.*, 268 A.2d 611, 612 (D.C. 1970) (insured's business interruption losses resulting from curfew and municipal regulations in response to rioting were not covered where there was no physical damage to premises); *Dickie Brennan & Co., Inc. v. Lexington Ins. Co.*, 636 F.3d 683 (5th Cir. 2011) (losses incurred by restaurants during mandatory evacuation orders issued *prior* to arrival of hurricane

and not connected to prior property damage did not trigger coverage); and *Not Home Alone, Inc. v. Philadelphia Indem. Ins. Co.*, No. 1:10-CV-54, 2011 WL 13214381, at *6 (E.D. Tex. Mar. 30, 2011), *report and recommendation adopted*, No. 1:10-CV-54, 2011 WL 13217067 (E.D. Tex. Apr. 8, 2011) ("[C]ourts uniformly interpret this [policy] as requiring that such loss or damage *precede* the action of a civil authority.") (emphasis added).

Once again, Plaintiff fails to plead how the prophylactic social distancing Orders were "due to direct physical loss of or damage to property"—nor could it. The Complaint merely concludes, without the pleading of a single supporting fact, that the "Orders were issued as a result of physical loss, physical damage, and dangerous physical conditions occurring in properties outside Sand People's stores and all around cities and business districts." (Compl. ¶85.) But nowhere in the Complaint or its twelve exhibits does Plaintiff specify a single example of actual physical loss or damage to any of its property.

Finally, Plaintiff acknowledges the pandemic's devastating effects *on people.* (Compl. ¶59.) This allegation, however, does not equate to direct physical damage *to property* or that the social distancing Orders resulted from that physical property damage, both of which are specifically required for coverage and to state a valid cause of action. Unlike an order prohibiting access to an area or building damaged in an earthquake or tornado, the relevant Orders do not cite physical property damage of any kind as their genesis or purpose. Understandably, the Orders focus on reducing the risk of spread of Covid-19 in the human population in specific communities. (Compl. Ex. 2 at 1 ("to protect the health, safety, and welfare of the people, I, DAVID Y. IGE, Governor of the State of Hawai'i, hereby determine, designate and proclaim . . .").)

F. The "Extra Expense" Extension in Both the Lost Business Income and Civil Authority Coverages Does Not Apply and Further Supports Dismissal

As described in the Complaint, both the Lost Business Income and Civil Authority coverages contain an extension that covers "Extra Expense." (Compl. ¶¶ 82, 83.) The express terms of this coverage require that covered "expense" must be sustained during the "period of restoration," for which direct physical loss or damage is a prerequisite. *Id*. That period "[b]egins with the **date of direct physical loss or damage** caused by or resulting from any Covered Cause

of Loss at the described premises; and … [e]nds on the date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality." (Compl., Ex. 9 at 64.) Any other interpretation encompassing speculative, unestablished, or non-physical losses would render the policy language relating to "repair[], rebuil[ding], or replac[ment]" mere surplusage and render the temporal period of the coverage described in the Policy never-ending and nonsensical. *See Colony Ins. Co. v. Nicholson*, No. 10-60042-CIV, 2010 WL 3522138, at *3 (S.D. Fla. Sept. 8, 2010) ("[A]ll portions of a policy are to be given meaning so as to avoid surplusage or superfluity.").

Accordingly, to the extent Plaintiff's claim that the "Extra Expense" Extension provides an independent basis for coverage, that theory conflicts with the express terms of the Policy and controlling authority, providing further support for dismissal of Plaintiff's claims.

V. PLAINTIFF FAILS TO ALLEGE FACTS SUFFICIENT TO SUPPORT BREACH OF THE DUTY OF GOOD FAITH AND FAIR DEALING

Plaintiff's second cause of action—that Fireman's Fund breached the duty of good faith and fair dealing by denying coverage, Complaint ¶¶ 131–137 ("Bad Faith Claim")—suffers from the same pleading deficiencies as Plaintiff's breach of contract claim and should be dismissed for several independent reasons.

First, as a critical, threshold matter, Plaintiff's Bad Faith Claim is predicted on the existence of coverage for Lost Income caused by social distancing Orders. As shown above, however, coverage does not exist because (among other reasons) Plaintiff did not suffer direct physical loss or damage to property as the Policy expressly requires. Yet, to recover on a "claim of bad faith," it is "necessary . . . to first establish a basis for coverage." *Jordan v. Allstate Ins. Co.*, 148 Cal. App. 4th 1062, 1078 (2007); *see also Brown v. Mid–Century Ins. Co.*, 215 Cal. App. 4th 841, 858 (2013) ("Because the policy did not cover the [policyholders'] claims . . . [they] do not have a claim for breach of the implied covenant of good faith and fair dealing.").

Additionally, an insurer's duty is to "fully inquire into *possible* bases that might support the insured's claim"; it has no duty to investigate the impossible, imagined, or futile. *Egan v. Mutual of Omaha Ins. Co.*, 24 Cal. 3d 809, 819 (1979) (emphasis added). As discussed above,

even if Defendants had investigated Plaintiff's claim to the degree Plaintiff would deem appropriate—what that might involve, Plaintiff does not say—there is still no coverage under Plaintiff's Policy, and no breach of duty by Defendants, even accepting all of Plaintiff's allegations. For these reasons alone, Plaintiff's bad faith claim should be dismissed.

Second, despite Plaintiff's conclusory allegations to the contrary, the law does not obligate an insurer to indulge every hypothetical or even every plausible basis for coverage, especially where the facts are originally known only to the insured. In *Frommoethelydo v. Fire Ins. Exch.*, 42 Cal. 3d 208 (1986), for example, the California Supreme Court overturned the lower court's finding of a breach of the duty to investigate where the only potentially relevant evidence the insurer could have uncovered was either "mere speculation" or known only to the insured, but undisclosed until well after the claim was denied. Even though the insurer theoretically could have discovered evidence relevant to the claim had it investigated, the Court nonetheless held that the insurer's actions "cannot be viewed as a failure to adequately investigate." *Id.* at 219–20.

Here, Plaintiff does not plead with any specificity the circumstances that created Defendant's alleged duty to further investigate Plaintiff's claim. Rather, it only alleges in conclusory fashion that Defendants "fail[ed] and refus[ed] to perform a fair, objective, good faith, and thorough investigation of the claim." (Compl. ¶ 134.) Unlike the undisclosed but potentially discoverable witnesses in *Frommoethelydo*, which even there was insufficient to find a breach of the duty to investigate, Plaintiff's Complaint is devoid of even a suggestion as to what possible or hypothetical evidence relevant to Plaintiff's claim would have been uncovered had the premises been inspected after closure, particularly when Plaintiff failed to identify any surface area that sustained direct physical loss or damage. (Compl., Ex. 10 at 1 (confirming no "direct physical loss or damage" to examine).)

For all these reasons, Plaintiff's second cause of action for breach of the duty of good faith and fair dealing should be dismissed.

VI. PLAINTIFF FAILS TO ALLEGE FACTS SUFFICIENT TO SUPPORT ITS CLAIMS FOR DECEPTIVE TRADE PRACTICES AND UNFAIR COMPETITION

In its third cause of action, Plaintiff seeks restitution of paid premiums and injunctive relief barring the collection of future premiums based on an alleged violation of Hawaii's Unfair and Deceptive Acts or Trade Practices Act ("UDAP" or "Act"), Hawaii Revised Statutes ("HRS") § 480-1, *et seq*. (Compl. ¶ 138.) This cause of action should be dismissed for several reasons.

A. Plaintiff's Claim Is Barred Because the Complaint Lacks Facts Supporting a Claim for Deceptive Trade Practices

First, Plaintiff fails to allege with "particularity the who, what, when, where, and how of the" alleged unfair competition caused harm as required. *See Ryan v. Salisbury*, 382 F. Supp. 3d 1031, 1054 (D. Haw. 2019) (discussing requirements). Where the Complaint is "devoid of any allegations [ ] of misrepresentations, omissions, or deceptive practices," a plaintiff cannot sustain a UDAP action grounded in allegedly fraudulent or deceptive acts. *Id*.

In purported support of its claim, Plaintiff merely repeats the same conclusory factual basis in ostensible support of its first cause of action for breach of contract. Furthermore, Defendants' alleged false "promises" and "misleading" indications to Plaintiff lack any of the required detail as to when, where, by whom, and to whom such statements were made. (*See* Compl. ¶ 147.) Such generalized and conclusory pleading falls markedly short of what the law requires; dismissal is warranted for this reason alone. *Ryan,* 382 F. Supp. 3d at 1054.

B. Plaintiff's Claim Is Barred Because It Fails To Identify Any Anti-Competitive Act Causing Any Alleged Harm

Second, under Hawaii's Unfair and Deceptive Acts or Trade Practices Act ("UDAP"), Hawaii Revised Statutes ("HRS") § 480-1, et seq., a business (as opposed to a "natural person") may only bring a claim for "unfair methods of competition," *not* unfair or deceptive practices. HRS § 480-2(d) (""[n]o person *other than a consumer*, the attorney general or the director of the office of consumer protection may bring an action based upon unfair or deceptive acts or practices."), HRS § 480-1 (defining "Consumer" as "a natural person"), HRS § 480=13 ("any person who is injured in the person's business or property *by reason* of anything forbidden or

declared unlawful by this chapter ... [m]ay sue for damages.") (emphasis added).

While allegations of "unfair or deceptive acts or practices" under § 480-2(d) may overlap and support a claim for unfair methods of competition under § 480-2(e), "the nature of the competition" must be "sufficiently alleged in the complaint." *Hawaii Med. Ass'n v. Hawaii Med. Serv. Ass'n, Inc.*, 113 Haw. 77, 113 (2006). Otherwise, "the distinction between claims of unfair or deceptive acts or practices and claims of unfair methods of competition that are based upon such acts or practices would be lost." *Id*.

Accordingly, to state a claim for unfair competition under the UDAP, the Plaintiff must allege, but has not here, a loss that "stems from a competition-reducing aspect or effect of [defendants'] behavior." *Davis v. Four Seasons Hotel Ltd.*, 122 Haw. 423, 445–46 (2010) (citing *Glen Holly Ent., Inc. v. Tektronix Inc.*, 343 F.3d 1000, 1005 (9th Cir. 2003)). In *Hawaii Medical Ass'n*, the Supreme Court of Hawaii held that the plaintiff, an association of physicians which "provide medical services directly," had adequately stated a claim for unfair competition under HRS section § 480-2(e) against the defendant, its business partner that "facilitates access to the dispensing of medical services." 113 Haw. 77, 112–13 (2006). The defendant's anti-competitive acts, including "increasing the costs of rendering healthcare services in Hawaii" through "market dominance," allegedly "impede or interfere with physicians' ability to provide effective healthcare services" and "can, if proven, constitute unfair methods of competition." *Id*.

In contrast, the Court in *Davis* reached the opposite conclusion in a case brought by employees against employers for unpaid wages, holding that their complaint "clearly does not contain any allegations concerning the nature of the competition." 122 Haw. at 437–38 (explaining that "[t]he requirement that the plaintiff allege the 'nature of the competition' in an unfair methods of competition claim is distinct from the requirement that a defendant's conduct constitute an unfair method of competition"). The employees later conceded to the district court "that they cannot prove that Defendant's violation of section 481B-14 had a negative effect on competition," and the court entered summary judgment on the claims under HRS § 480-2(e). *Davis v. Four Seasons Hotel Ltd.*, No. CIV. 08-00525 HG-BMK, 2011 WL 5025521, at *4 (D. Haw. Oct. 20, 2011).

Here, Plaintiff's Complaint falls noticeably short of these well-established pleading requirements and fails to specify any type of competition that has been undermined by Defendant's mere denial of an insurance claim. *See Davis v. Four Seasons Hotel Ltd.*, 122 Haw. at 438, n.27 (the deferential standard on a pleadings motion "does not relieve plaintiffs from the requirement of pleading the nature of the competition in the complaint itself."). In the Complaint, Plaintiff alleges in generic fashion that "Defendants' conduct directly harmed the people of the state of Hawaii." (Compl. ¶ 144.) But the "nature of the competition" is not described at all, let alone in the detail required. And even if it were, Plaintiff has not—and cannot—allege that Defendants' denial of coverage had an "anticompetitive effect" on an actual competitor. *Davis* at 446. For this independent reason, Plaintiff's third cause of action based on alleged "unfair competition" is barred as a matter of law and should be dismissed. *Id.* (rejecting unfair competition claims because the complaint "clearly does not contain any allegations concerning the nature of the competition.").

To the extent Plaintiff bases its HRS § 480-2(e) claim on an alleged injury distinct from the denial of coverage, this theory is flawed as well because the Complaint fails to allege any injury in fact *caused by* the anti-competitive behavior. *See Flores v. Rawlings Co., LLC*, 117 Haw. 153, 171 (2008) ("without an 'injury,' enforcement of the [UDAP] is in the hands of the Attorney General and the Director of the Office of Consumer Protection.") (citation omitted). *See also* HRS § 480-11 ("this chapter shall not apply to any transaction in the business of insurance that is in violation of any section of this chapter if the transaction is expressly permitted by the insurance laws of this State.").

C. Plaintiff Fails To Plead An Inadequate Remedy at Law

Finally, to support its claim for restitution based on an alleged violation of Hawaii's statute, Plaintiff "must establish that [it] lacks an adequate remedy at law before securing equitable restitution for past harm." *Sonner v. Premier Nutrition Corp.*, 962 F.3d 1072, 1081 (9th Cir. 2020). Here, Plaintiff merely alleges that "there exists no adequate remedy at law" without explanation. (Compl. ¶ 162.) Furthermore, the requested relief mirrors Plaintiff's alleged damages and seeks "premiums they have paid to Defendants and the non-receipt of insurance benefits that

are owed to them by Defendants." (*Id.* at ¶ 153.) Accordingly, Plaintiff's equitable claim in Count Three should also be dismissed for failure to plead and establish an inadequate remedy at law.[7]

VII. PLAINTIFF'S DECLARATORY JUDGMENT CLAIM IS DUPLICATIVE OF THE BREACH OF CONTRACT CLAIM AND SHOULD BE DISMISSED

Plaintiff seeks "Declaratory Relief" in its fourth and final cause of action. Compl. ¶¶ 158–167. "Declaratory relief is not intended to redress past wrongs," however. *Vascular Imaging Prof'ls, Inc. v. Digirad Corp.*, 401 F. Supp. 3d 1005, 1010 (S.D. Cal. 2019). Rather, "its purpose is to resolve uncertainties or disputes that may result in *future* litigation." *Id.* (emphasis added). For this main reason, "[v]arious courts have held ... that, where determinations of a breach of contract claim will resolve any question regarding interpretation of the contract, there is no need for declaratory relief, and dismissal of a companion declaratory relief claim is appropriate." *Id.* (quoting *StreamCast Networks, Inc. v. IBIS LLC,* No. CV05-04239MMM(EX), 2006 WL 5720345, at *3-4 (C.D. Cal. May 2, 2006) (collecting cases)).

The same is true here. In its declaratory judgment cause of action, Plaintiff seeks a declaration that *(a)* Civil Authority Coverage (Compl. ¶ 136) and *(b)* Business Income Coverage (Compl. ¶ 164) are owed Plaintiff, both of which are necessary determinations for the three preceding counts. Accordingly, resolution of Plaintiff's other causes of action necessitates an adjudication of all of Defendants' relevant duties under the Policy, which is precisely the declaratory relief requested separately. Plaintiff's Declaratory Relief claim is therefore inherently duplicative of Plaintiff's Breach of Contract Count and should be dismissed.

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[7] As to Plaintiff's demand for additional relief under HRS § 480-13.5, which authorizes up to $10,000 in statutory penalties for "for consumer frauds committed against elders," the Complaint again fails to provide the required specificity. Plaintiff does not claim that it, a corporation, is a "Hawaiian elder," only that "[o]ne or more Hawaii Subclass members" are. *C.f. Ryan v. Salisbury*, 380 F. Supp. 3d 1031, 1039 (D. Haw. 2019) (noting that plaintiff asserting claim under HRS § 480-13.5 was older than the age of 62). There is nothing in the Complaint that justifies this allegation.

VIII. CONCLUSION

For the reasons discussed above, Defendants respectfully request the Court dismiss Plaintiff's Complaint in its entirety.

Dated: August 17, 2020

DLA PIPER LLP (US)

By: */s/ John P. Phillips*
John P. Phillips
Rob Hoffman (admitted *pro hac vice*)
Gregory G. Sperla
Attorneys for Defendants
FIREMAN'S FUND INSURANCE COMPANY, NATIONAL SURETY CORPORATION, and ALLIANZ GLOBAL RISKS INSURANCE CO.