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12 Casualty Company of America

13 UNITED STATES DISTRICT COURT
14 SOUTHERN DISTRICT OF CALIFORNIA

16 FlorExpo LLC and Kendal Floral
17 Supply, LLC,

18 Plaintiffs,

19 vs.

20 Travelers Property Casualty Company of
America,

21 Defendant.

Case No.: 3:20-cv-01024-JLS-DEB

**DEFENDANT TRAVELERS
PROPERTY CASUALTY
COMPANY OF AMERICA'S
NOTICE OF MOTION AND
MEMORANDUM OF POINTS AND
22 AUTHORITIES IN SUPPORT OF
ITS MOTION TO DISMISS**

Date: August 20, 2020
Time: 1:30 p.m.
Courtroom 4D

23 TO: PLAINTIFFS AND THEIR ATTORNEYS:

24 PLEASE TAKE NOTICE that on August 20, 2020 at 1:30 p.m. or as soon
25 thereafter as this matter may be heard, before the Hon. Janis L. Sammartino,
26 United States Courthouse, Courtroom 4D, 221 West Broadway, San Diego,
27 California, defendant Travelers Property Casualty Company of America
28 (“Travelers”) will move and does hereby move to dismiss the Complaint and all

1 causes of action alleged therein, without leave to amend, pursuant to Fed.R.Civ.P.
2 12(b)(6).

3 This Motion is made on the following grounds:

- 4 • The facts alleged in the Complaint bring Plaintiffs’ loss of cut flowers
- 5 squarely within a policy exclusion for loss or damage caused by or
- 6 resulting from the acts or decisions, or the failure to act or decide, of
- 7 any governmental body; and
- 8 • Without a plausible claim for coverage under the Policy, Plaintiffs’
- 9 causes of action for declaratory judgment, breach of contract, and
- 10 breach of the covenant of good faith and fair dealing fail as a matter
- 11 of law.

12 This Motion is based upon this notice, the following Memorandum of
13 Points and Authorities, the Complaint and other papers on file, including the
14 insurance policy attached to the Complaint, and such other evidence and argument
15 as may be presented.

16
17
18 Dated: July 1, 2020

WESTON & McELVAIN LLP

s/Edmond Sung

19
20 By: _____

Randy M. McElvain
Edmond Sung

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22 Gregory P. Varga
(*pro hac vice to be sought*)

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24 J. Tyler Butts
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25 ROBINSON & COLE LLP

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27 Attorneys for Defendant
TRAVELERS PROPERTY
CASUALTY COMPANY OF
28 AMERICA

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Plaintiffs FlorExpo LLC and Kendal Floral Supply, LLC (collectively
4 “Plaintiffs”) are importers and wholesalers of fresh-cut flowers from South
5 America, with operations throughout California. They allege that in March 2020,
6 “government authorities” took action that prevented them from accessing two of
7 the California warehouses in which they stored cut flower inventory. The flowers
8 died within days, before the government authorities permitted Plaintiffs to re-enter
9 the warehouses.

10 In this insurance coverage action, Plaintiffs ask this Court to declare that an
11 insurance policy issued by Defendant Travelers Property Casualty Company of
12 America (“Travelers”) covers their loss of cut flowers. They also seek damages
13 on theories that Travelers breached express and implied terms of the policy by
14 declining to pay their claim. However, Plaintiffs disregard the material terms of
15 the policy issued by Travelers – foremost among them an explicit exclusion for
16 *any* “loss or damage caused by or resulting from...[a]cts or decisions, including
17 the failure to act or decide, of any person, group, organization or **governmental**
18 **body...**” (the “Acts or Decisions” exclusion) (emphasis added). According to the
19 factual allegations of the Complaint which, for purposes of this Motion, are
20 assumed to be true, the loss of Plaintiffs’ cut flower inventory was directly caused
21 by an act of a governmental body, thereby placing the claimed losses squarely
22 within the Acts or Decisions exclusion. Accordingly, Plaintiffs’ causes of action
23 for breach of contract and declaratory judgment should be dismissed for failure to
24 state a claim upon which relief can be granted. Plaintiffs’ claim for breach of the
25 covenant of good faith and fair dealing should meet the same fate, as it is also
26 based on Travelers’ decision not to pay Plaintiffs’ claim under the policy.

1 **II. PROCEDURAL HISTORY AND ALLEGED FACTS**

2 **A. This Lawsuit**

3 Plaintiffs commenced this action against Travelers on June 3, 2020.
4 (Complaint, ECF No. 1 (“Compl.”)). In their Complaint, Plaintiffs allege that they
5 are “leading importers and distributors of fresh-cut flowers from South America.”
6 (*Id.*, ¶ 7). The Complaint also alleges that cut flowers are “physically sensitive”
7 and “have a very short window to be distributed and sold before they perish—a
8 time period measured in days.” (*Id.*, ¶¶ 7, 12). Plaintiffs further allege that any
9 loss of access to the flowers “can result in significant loss of stock.” (*Id.*, ¶ 7).

10 The Complaint alleges that as of March 16, 2020, some of Plaintiffs’ flower
11 stock was stored in a warehouse with a street address of 5860 Obata Way, Gilroy,
12 California (the “Gilroy Warehouse”). (*Id.*, ¶¶ 14, 16). As of March 20, 2020,
13 additional flowers were being stored in a warehouse located at 1960 Kellogg
14 Avenue, Carlsbad, California (the “Carlsbad Warehouse”). (*Id.*, ¶¶ 14, 17).¹
15 Plaintiffs also allege that, between March 16, 2020 and March 22, 2020, they were
16 “suddenly prevented by government authorities from accessing” the Gilroy
17 Warehouse. (*Id.*, ¶ 16). Plaintiffs further allege that, between March 20, 2020 and
18 March 22, 2020, government authorities also prevented them from accessing the
19 Carlsbad Warehouse. (*Id.*, ¶ 17). According to the Complaint, the cut flower
20 stock located in the Warehouses perished before the government permitted
21 Plaintiffs to “re-obtain” access to the Warehouses. (*Id.*, ¶ 19). Plaintiffs allegedly
22 disposed of the dead flowers. (*Id.*).

23 Plaintiffs allege that the value of the cut flowers they lost exceeded \$2
24 million. (*Id.*, ¶ 20). Plaintiffs also allege that they incurred “additional related
25 costs” for the disposal of the dead flowers and for “mitigation efforts” they
26
27

28 ¹ The Carlsbad Warehouse and the Gilroy Warehouse are collectively referred to in this Memorandum as “the Warehouses.”

1 undertook to relocate other flowers immediately *before* the government prevented
2 them from accessing the Warehouses. (*Id.*, ¶ 21).

3 As of March 2020, Plaintiffs were insured under a policy of commercial
4 property insurance issued by Travelers (the “Policy”). (*Id.*, ¶ 11; *see Exhibit A* to
5 Complaint (ECF No. 1-2)). The Policy bears policy number Y-630-7506M235-
6 TIL-20 and has effective dates of January 1, 2020 to January 1, 2021.² The
7 Complaint alleges that the Policy covers direct physical loss of or damage from a
8 Covered Cause of Loss to Plaintiffs’ stock of cut flowers at the Warehouses. (*Id.*,
9 ¶¶ 11-15).

10 Plaintiffs allege that they reported the loss of flower stock to Travelers on
11 April 21, 2020 (approximately one month after it occurred), and that Travelers
12 declined to pay for the loss nine days later, without having conducted a
13 meaningful investigation. (Compl., ¶¶ 22-23). The Complaint purports to assert
14 three causes of action, all arising from Travelers’ alleged wrongful denial of
15 coverage for Plaintiffs’ claims under the Policy. The First Cause of Action seeks
16 a declaratory judgment “as to the existence and extent of coverage for the
17 Coverage Claim...” (*Id.*, ¶¶ 28-32). In the Second Cause of Action, Plaintiffs
18 seek compensatory damages for breach of the express terms of the Policy. (*Id.*, ¶¶
19 34-37). The Third Cause of Action claims compensatory damages, exemplary
20 damages, attorneys’ fees and costs for Travelers’ alleged breach of the covenant of
21 good faith and fair dealing implied in the Policy. (*Id.*, ¶¶ 38-44).

22 **B. Contract Language At Issue**

23 As noted above, Plaintiffs’ alleged losses include the damage to their stock
24 of cut flowers, expenses incurred “for the disposal of the perished stock,” and for
25

26 ² “A court may consider documents external to the pleadings in a motion to dismiss under the
27 incorporation by reference doctrine, where the contents of the documents are alleged in the
28 complaint and neither party questions the authenticity of the documents.” *Camp Richardson
Resort, Inc. v. Philadelphia Indem. Ins. Co.*, 150 F. Supp. 3d 1186, 1189 (E.D. Cal. 2015)
(assessing insurance policy attached to complaint on a motion to dismiss).

1 the “mitigation efforts.” (*Id.*, ¶¶ 20-21). The reference to “mitigation efforts”
2 relates to the efforts Plaintiffs allegedly undertook to transfer flowers from the
3 Warehouses to other storage facilities before the government authorities’ actions
4 prevented Plaintiffs from accessing the Warehouses. (*Id.*, ¶ 18).

5 The Policy’s principal grant of coverage for loss of or damage to property is
6 contained in the Deluxe Property Coverage Form and provides:

7 **A. COVERAGE**

8 We will pay for direct physical loss of or damage to Covered
9 Property caused by or resulting from a Covered Cause of Loss.

10 (ECF No. 1-2 at pg. 24 of 190; Compl., ¶ 13).

11 The Policy defines the term “Covered Cause of Loss” as “RISKS OF
12 DIRECT PHYSICAL LOSS *unless the loss is: 1. Excluded in Section C.,*
13 *Exclusions; 2. Limited in Section D., Limitations; or 3. Excluded or limited in the*
14 *Declarations or by endorsement.”*

15 (ECF No. 1-2 at pg. 41 of 190 (italics emphasis added); Compl., ¶ 13).

16 Section C, Exclusions, of the Deluxe Property Coverage Form includes the
17 Acts or Decisions Exclusion, which concisely states in plain terms that:

18 **C. EXCLUSIONS**

19 ***

20 **3.** We will not pay for any loss or damage caused by or
21 resulting from any of the following, **3.a.** through **3.c.**, but
22 if an excluded cause of loss that is listed in **3.a.** and **3.b.**
23 below results in a Covered Cause of Loss, we will pay
24 for the loss or damage caused by that Covered Cause of
25 Loss.

24 ***

25 **b.** Acts or decisions, including the failure to act or
26 decide, of any person, group, organization or
27 governmental body except as provided in the
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Additional Coverage - Ordinance or Law Coverage.³

(ECF No. 1-2 at pg. 48 of 190).

The Complaint alleges that the Policy’s “Preservation of Property” additional coverage (also set forth in the Deluxe Property Coverage Form) applies to expenses Plaintiffs allegedly incurred for mitigation efforts before they were denied access to the Warehouses. (Compl., ¶ 21). This Additional Coverage applies to certain expenses to temporarily move and store Covered Property “[i]f it is necessary to temporarily move Covered Property from the described premises to preserve it from the threat of imminent loss or damage by a *Covered Cause of Loss.*” (ECF No. 1-2 at pg. 32 of 190). This Additional Coverage does not apply to expenses incurred to move property in response to the threat of imminent damage from an *excluded* cause of loss.

The Complaint also alleges that Plaintiffs’ mitigation expenses are covered by the Policy’s Extra Expense provision. (Compl., ¶ 21). The Extra Expense coverage is set forth in the Deluxe Business Income (And Extra Expense) Coverage Form and provides, in relevant part, as follows:

A. COVERAGE

2. Extra Expense

Extra Expense means reasonable and necessary expenses described in **a.**, **b.** and **c.** below that you incur during the “period of restoration” that you would not have incurred if there had been no direct physical loss of or damage to property *caused by or resulting from a Covered Cause of Loss.*

³ The Additional Coverage - Ordinance or Law Coverage is contained in the Policy’s Deluxe Property Coverage Form and grants certain additional coverage for costs resulting from enforcement of certain ordinances or law, but it applies only “[i]n the event of covered direct physical loss or damage *to a building* that is covered property....” (ECF No. 1-2 at pg. 30 of 190) (emphasis added). The Ordinance or Law Coverage is inapplicable here because the Complaint does not allege that any building sustained any direct physical loss or damage.

1
2 (ECF No. 1-2 at pg. 62 of 190) (*italics added*).

3 Thus, all coverages at issue in the Complaint are triggered by direct
4 physical loss of or damage to property caused by a *Covered Cause of Loss*. As
5 demonstrated below, according to the facts alleged in the Complaint which, for
6 purposes of this Motion are assumed to be true, the property damage and expenses
7 claimed by Plaintiffs were caused by an excluded risk, which by definition, is not
8 a Covered Cause of Loss.

9 **III. LEGAL STANDARDS**

10 **A. Dismissal Pursuant to Fed. R. Civ. P. 12(b)(6)**

11 A complaint should be dismissed under Federal Rule of Civil Procedure
12 12(b)(6) when it fails to allege enough facts to state a claim to relief that is
13 plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see*
14 *also Lazy Y Ranch Ltd. v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). A claim
15 has facial plausibility “when the plaintiff pleads factual content that allows the
16 court to draw the reasonable inference that the defendant is liable for the
17 misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). A plaintiff
18 “must plead more than labels and conclusions,” and “[f]actual allegations must be
19 enough to raise the right to relief above the speculative level” *Twombly*, 550
20 U.S. at 555. “Where a complaint pleads facts that are ‘merely consistent with’ a
21 defendant’s liability, it stops short of the line between possibility and plausibility
22 of entitlement to relief.” *Iqbal*, 556 U.S. at 678. When reviewing a motion to
23 dismiss, a district court “must take all allegations of material fact as true and
24 construe them in the light most favorable to the nonmoving party; but ‘conclusory
25 allegations of law and unwarranted inferences are insufficient to avoid a Rule
26 12(b)(6) dismissal.’” *Turner v. City & Cty. of San Francisco*, 788 F.3d 1206,
27 1210 (9th Cir. 2015), *quoting Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir.
28 2009).

1 **B. California Law Regarding Insurance Policy Interpretation**

2 Under California law,⁴ the terms of an insurance policy must be construed
 3 in their “ordinary and popular sense,” and if the policy language is “clear and
 4 explicit,” it governs. *Palmer v. Truck Ins. Exch.*, 21 Cal. 4th 1109, 1115 (1999);
 5 Cal. Civ. Code § 1638 (“The language of a contract is to govern its interpretation,
 6 if the language is clear and explicit, and does not involve an absurdity.”). Indeed,
 7 an “insurance policy is but a contract, and, like all other contracts it must be
 8 construed from the language used; when the terms are plain and unambiguous, it is
 9 the duty of courts to enforce the agreement.” *Roug v. Ohio Sec. Ins. Co.*, 182 Cal.
 10 App. 3d 1030, 1035 (1986). Moreover, courts may not “rewrite a policy to bind
 11 the insurer to a risk that it did not contemplate and for which it has not been paid.”
 12 *Safeco Ins. Co. v. Gilstrap*, 141 Cal. App. 3d 524, 533 (1983); *see also Certain*
 13 *Underwriters at Lloyd’s of London v. Superior Court*, 24 Cal. 4th 945, 968 (2001)
 14 (“[W]e do not rewrite any provision of any contract, including the [insurance
 15 policy at issue], for any purpose.”). If a complaint “place[s] a clearly erroneous
 16 construction upon the provisions of the contract,” that construction should be
 17 rejected and the complaint dismissed. *Marzec v. California Pub. Employees Ret.*
 18 *Sys.*, 236 Cal. App. 4th 889, 909 (2015).

19 **IV. ARGUMENT**

20 Plaintiffs’ First Cause of Action (Declaratory Relief) and Second Cause of
 21 Action (Breach of Contract) both are based on the allegation that the Policy
 22 obligates Travelers to pay Plaintiffs for the loss of their cut flower stock and for
 23

24 _____
 25 ⁴ California law applies here because the parties are before the Court in diversity and thus the
 26 forum state’s choice-of-law principles apply. *Welles v. Turner Entm’t Co.*, 503 F.3d 728, 738
 27 (9th Cir. 2007); *Yahoo! Inc. v. Nat’l Union Fire Ins. Co. of Pittsburgh, PA*, 255 F. Supp. 3d 970,
 28 973 n.1 (N.D. Cal. 2017). Under California law, a “contract is to be interpreted according to the
 law and usage of the place where it is to be performed; or . . . where it is made.” Cal. Civ. Code
 § 1646. Because the Policy here concerns rights and responsibilities with respect to property in
 California, California law governs. *See Cont’l Cas. Co. v. City of Richmond*, 763 F.2d 1076,
 1079 (9th Cir. 1985).

1 “the other covered losses associated with the disposal and mitigation efforts.”
 2 (Compl., ¶¶ 30, 36). To state a cause of action under those theories, a complaint
 3 must plead facts sufficient to state a plausible entitlement to coverage under an
 4 insurance policy. *See Love v. Fire Ins. Exch.*, 221 Cal. App. 3d 1136, 1152 n.10
 5 (1990) (“[A]bsent an actual withholding of benefits due, there is no breach of
 6 contract.”) (quotations omitted). Where the facts alleged in the Complaint instead
 7 support a valid contractual basis for the insurer’s denial of coverage, dismissal is
 8 warranted. *See Moss v. Infinity Ins. Co.*, 197 F.Supp.3d 1191, 1201 (N.D. Cal.
 9 2016) (granting motion to dismiss where complaint alleged facts that triggered
 10 exclusion under personal auto policy). That is precisely the case here.

11 **A. The Court Should Dismiss the First and Second Causes of Action**
 12 **Because the Acts or Decisions Exclusion Bars Coverage for the**
 13 **Alleged Damage to Plaintiffs’ Cut Flowers and the Additional**
 14 **Expenses They Claim.**

15 According to the facts alleged in the Complaint, the cut flowers Plaintiffs
 16 stored in the Warehouses “perished” before Plaintiffs could sell them because –
 17 for periods spanning 3 to 7 days – government authorities prevented access to the
 18 Warehouses. Because the alleged loss of flower stock falls squarely within the
 19 Policy’s Acts or Decisions “of any...governmental body” exclusion, the
 20 Complaint does not plead a plausible entitlement to coverage for that loss, the
 21 expense incurred to dispose of the dead flowers, or the expense associated with
 22 moving other flower stock out of the Warehouses. Accordingly, the First and
 23 Second Causes of Action should be dismissed, with prejudice, for failure to state a
 24 claim upon which relief can be granted.

25 The Policy’s Deluxe Property Coverage Form provides that Travelers will
 26 pay for “direct physical loss of or damage to Covered Property” *if* the loss or
 27 damage is “caused by or result[s] from a Covered Cause of Loss.” (ECF No. 1-2
 28 at pg. 24 of 190). Loss or damage to property from a Covered Cause of Loss is
 also an essential element of the Policy’s Extra Expense and Preservation of

1 Property Coverages. By definition, a “Covered Cause of Loss” is a risk of direct
2 physical loss that is *not* excluded in Section “C” of the Deluxe Property Coverage
3 Form.

4 Here, the facts alleged in the Complaint, if taken as true, establish that
5 Plaintiffs’ loss of cut flower inventory was the direct result of governmental
6 actions.. These allegations bring the alleged loss of flowers squarely within the
7 Policy’s Acts or Decisions exclusion, which bars coverage for all loss and damage
8 caused by or resulting from “[a]cts or decisions, including the failure to act or
9 decide, of any person, group, organization or governmental body....” (ECF No. 1-
10 2 at pg. 48 of 190) (emphasis added).

11 Courts applying California law have repeatedly held that similarly-worded
12 Acts or Decisions exclusions are unambiguous and bar coverage for loss of or
13 damage to insured property that is caused by an act or omission of any person,
14 governmental body or organization, including the insured and *any* third-party. *See*
15 *Stephens v. Liberty Mut.*, No. C 05-0213 PJH, 2008 WL 480287, at *21 (N.D. Cal.
16 Feb. 19, 2008) (finding that Acts or Decisions exclusion “logically includes ‘acts
17 or decisions’ of third parties” and bars coverage for physical damage to building
18 caused by actions of contractor); *Duarte & Witting, Inc. v. Universal Underwriters*
19 *Ins. Co.*, No. C-05-1315 MHP, 2006 WL 2130743, at *11 (N.D. Cal. July 27,
20 2006), *aff’d*, 291 F. App’x 807 (9th Cir. 2008) (applying Acts or Decisions
21 exclusion and noting that “third party actions are also specifically excluded under
22 the terms of the current policy”); *Landmark Hosp., LLC v. Continental Cas. Co.*,
23 Nos. SA CV 01-0823-GLT(MLGx), SA CV 01-0691-GLT(MLGx), 2002 WL
24 34404929, at *2 (C.D. Cal. July 2, 2002) (holding that identical Acts or Decisions
25 exclusion is unambiguous and must be applied to damage caused by negligent acts
26 of policyholder).

27 The federal court’s decision in *Jernigan v. Nationwide Mut. Ins. Co.*, No. C
28 04-5327 PJH, 2006 WL 463521, at *10-11 (N.D. Cal. Feb. 27, 2006), is

1 instructive. In that case, the plaintiff hired a developer to rehabilitate and
2 redevelop its commercial property. *Id.* at *1. The developer retained a
3 subcontractor to perform selective demolition work under the guidance of a permit
4 granted by the town. *Id.* at *1-2. Without the plaintiff’s permission, the
5 contractor decided to tear down a historic building, rather than renovate it as the
6 permit had required. *Id.* at *2-3. After the building was demolished, the town
7 issued a “stop work” order and barred the project from proceeding without
8 substantial modifications to its scope. *Id.* at *3-4. Concluding that the
9 development project was economically infeasible, the plaintiff abandoned it, sold
10 the property, and submitted a claim to its property insurer for loss of the
11 demolished structure. *Id.* at *4.

12 After the owner’s insurer denied coverage, the plaintiff sued it for breach of
13 contract. In its motion for summary judgment, the insurer relied upon, among
14 other provisions, the “Acts or Decisions” exclusion of its policy, arguing that the
15 loss of the building could be attributed to any number of “acts or decisions,”
16 including the contractor’s decision not to obtain an additional permit; the
17 contractor’s act of demolishing the building when it was forbidden; the town’s
18 decision to require in its permit that the building be preserved and renovated; the
19 town’s issuance of a stop-work order when the permit conditions were violated;
20 the town’s decision to impose additional requirements on the project after
21 demolition of the building; and the plaintiff’s decision to abandon the project. *Id.*
22 at *10. Granting summary judgment for the insurer, the district court held that the
23 Acts or Decisions exclusion applied and observed that the contractor’s “act was to
24 demolish the building, and that is the loss for which plaintiffs seek coverage.” *Id.*
25 at *10-11.

26 Like California courts, many federal and state courts throughout the country
27 have held that the Acts or Decisions exclusion is unambiguous and have applied it
28 to loss or damage caused by both the intentional acts and careless omissions of

1 third parties. The federal court’s decision in *Johnson Gallagher Magliery, LLC v.*
2 *Charter Oak Fire Ins. Co.*, No. 13 CIV. 866 DLC, 2014 WL 1041831 (S.D.N.Y.
3 Mar. 18, 2014), presents an example how the exclusion applies to loss caused by
4 the intentional act of a third party. In that case, the insured law firm submitted an
5 insurance claim for business income loss related to Superstorm Sandy. *Id.* at *1.
6 Starting in the hours before the storm struck New York City, the electrical utility,
7 Con Edison, shut down part of the City’s electrical grid as a precaution due to its
8 concern with potential flooding of its infrastructure. *Id.* at *3. The law firm
9 claimed that the electrical shutdown deprived it of the use of its Wall Street
10 offices, thereby causing a loss of business income. *Id.* at *1. The insurer denied
11 coverage based, in part, upon the Acts or Decisions exclusion. Granting the
12 insurer’s motion for partial summary judgment on that exclusion, the court agreed
13 that Con Edison’s decision to shut down power preemptively fell within the Acts
14 or Decision exclusion such that the policy did not insure any business income loss
15 attributable to that decision. *Id.* at *7; *see also Legal Servs. Plan of E. Michigan*
16 *v. Citizens Ins. Co. of Am.*, No. 278110, 2009 WL 1175514, at *4 (Mich. Ct. App.
17 Apr. 30, 2009) (Acts or Decisions exclusion barred coverage for claim of damage
18 caused by construction activities, holding that “[b]ecause the construction activity
19 constitutes ‘acts,’ any damage caused by that activity is not covered”); *Worldwide*
20 *Sorbent Prod., Inc. v. Invensys Sys., Inc.*, No. 1:13-CV-252, 2014 WL 12597394,
21 at *11 (E.D. Tex. July 31, 2014) (finding acts or decisions exclusion unambiguous
22 in the context of the possible causes alleged by the insured, which included “(1)
23 mistaken installation of an alarm unit instead of an oven controller; (2) acts or
24 omissions of a third party; and (3) sale of an altered, used device...”).

25 The foregoing decisions plainly show that the Acts or Decisions exclusion
26 bars coverage for property damage, loss, and expense that is caused by or results
27 from any decision, act or failure to act or decide, by an insured or any third
28 party—including, specifically, any “governmental body.” (ECF No. 1-2, pg. 48 of

1 190). The Complaint in this case alleges exactly that. According to Plaintiffs, cut
 2 flowers are “physically sensitive merchandise” that have a very limited shelf life.
 3 (Compl., ¶¶ 7, 12). It is for that reason that “Plaintiffs’ business requires constant
 4 access to its stock...” (*Id.*, ¶ 7). Plaintiffs allege that the cut flowers stored in the
 5 Warehouses “perished” because “governmental authorities” prevented Plaintiffs
 6 from accessing the Warehouses. (*Id.*, ¶¶ 16-17). It is difficult to imagine a clearer
 7 case for application of the Acts or Decisions exclusion.

8 Because the facts alleged in the Complaint establish that the loss of
 9 Plaintiffs’ flowers was not caused by a Covered Cause of Loss, the Policy affords
 10 no coverage for that loss. Nor does the Policy cover any expense associated with
 11 the disposal of the flowers or any costs Plaintiffs claim to have incurred in an
 12 effort to move other flowers out of the Warehouses before the government
 13 prevented them from accessing those facilities. This is because, as demonstrated
 14 above, the Policy’s Extra Expense and Preservation of Property coverages are
 15 triggered by loss or damage to property by a Covered Cause of Loss.⁵

16 **B. Dismissal of the Third Cause of Action for Breach of the**
 17 **Covenant of Good Faith and Fair Dealing is Also Warranted Due**
 18 **to Plaintiffs Inability to Plead a Loss Covered by the Policy.**

19 To establish a claim for breach of the covenant of good faith and fair
 20 dealing, a plaintiff must allege and ultimately prove that “(1) *benefits due under*
 21 *the policy* must have been withheld; and (2) the reason for withholding benefits
 22 [was] unreasonable or without proper cause.” *Love*, 221 Cal. App. 3d at 1151
 23 (emphasis added). The “threshold requirement” in such a claim is that insurance
 24 coverage exists under the plaintiff’s policy. *Id.* at 1152. Thus, a bad faith claim

25 _____
 26 ⁵ See ECF No. 1-2 at pg. 62 of 190 (“Extra Expense means reasonable and necessary
 27 expenses...that you incur...that you would not have incurred if there had been no direct
 28 physical loss of or damage to property *caused by or resulting from a Covered Cause of Loss.*”) (emphasis added); *id.* at pg. 32 of 190 (Preservation of Property covers moving and storage expenses “[i]f it is necessary to temporarily move Covered Property from the described premises to preserve it from the threat of imminent loss or damage by a *Covered Cause of Loss*”).

1 “cannot be maintained unless policy benefits are due under a contract.” *Waller v.*
 2 *Truck Ins. Exch., Inc.* 11 Cal. 4th 1, 35 (1995); *see, e.g., Minich v. Allstate Ins. Co.*
 3 193 Cal. App. 4th 477, 493 (2011) (the “claim for tortious breach of contract (bad
 4 faith) fails as a matter of law because [the insurer] did not breach the Policy”);
 5 *Brown v. Mid-Century Ins. Co.* 215 Cal. App. 4th 841, 858 (2013) (“Because the
 6 policy did not cover the [insureds’] claims, however, the [insureds] do not have a
 7 claim for breach of the implied covenant of good faith and fair dealing.”).

8 Applying this principle, district courts routinely dispose of claims for
 9 breach of the covenant of good faith and fair dealing when plaintiffs’ allegations
 10 of coverage under their policies fail to state a claim. *Commercial Ventures, Inc. v.*
 11 *Scottsdale Ins. Co.*, No. CV1508359BROPJWX, 2017 WL 1196462, at *9 (C.D.
 12 Cal. Mar. 22, 2017) (granting summary judgment for insurer and noting that,
 13 “[u]nder California law, breach of the implied covenant is not established without
 14 first establishing that coverage exists”) (internal quotations omitted); *O’Keefe v.*
 15 *Allstate Indem. Co.*, 953 F. Supp. 2d 1111, 1116 (S.D. Cal. 2013) (dismissing bad
 16 faith claim pursuant to Rule 12(b)(6) and ruling that, “[b]ecause [plaintiffs] cannot
 17 sue for bad faith without proving that benefits were withheld under the policy ‘as
 18 written,’ and because [plaintiffs] cannot establish that coverage existed under the
 19 express terms of the contract, there is no cause of action for breach of the implied
 20 covenant of good faith and fair dealing”); *Moss v. Infinity Ins. Co.*, No. 15-CV-
 21 03456-JSC, 2015 WL 7351395, at *5 (N.D. Cal. Nov. 20, 2015) (dismissing bad
 22 faith claim where policy “excluded from coverage the particular situation for
 23 which Plaintiff sought benefits”).

24 As demonstrated in Section A, *supra*, Plaintiffs fail to allege facts sufficient
 25 to support a plausible entitlement to coverage for the loss of cut flower stock and
 26 their claimed expenses. To the contrary, Plaintiffs’ alleged losses resulted from an
 27 excluded cause of loss. Having failed to plead a claim for coverage that is
 28 plausible on its face, Plaintiffs are not entitled to relief on a theory that Travelers

1 breached the implied covenant of good faith and fair dealing. For this reason, the
2 Third Cause of Action should also be dismissed with prejudice.

3 **V. CONCLUSION**

4 For all of the reasons stated above, the Complaint fails to state a claim for
5 relief against Travelers that is plausible on its face. Accordingly, Travelers
6 respectfully requests that the Court dismiss the Complaint (including all claims for
7 relief alleged therein) with prejudice under Federal Rule of Civil Procedure
8 12(b)(6).

9
10
11 Dated: July 1, 2020

WESTON & McELVAIN LLP

12 *s/Edmond Sung*

13 By: _____

14 Randy M. McElvain
15 Edmond Sung

16 Gregory P. Varga
17 (*pro hac vice to be sought*)

18 J. Tyler Butts
19 (*pro hac vice to be sought*)

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