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ROBERT GAMMILL, and  
15 ANTHONY LOPEZ

16 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
17 **FOR THE COUNTY OF RIVERSIDE**

18 VSTYLES, INC.,

19 Plaintiff

20 v.

21 CONTINENTAL CASUALTY COMPANY,  
ARTHUR J. GALLAGHER & CO. INSURANCE  
22 BROKERS OF CALIFORNIA, INC.,  
23 RONALD ZAPPELLI,  
ROBERT GAMMILL,  
24 ANTHONY LOPEZ, AND  
DOES 1 THROUGH 25, INCLUSIVE,

25 Defendants.  
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**Case No. RIC2003415**

The Honorable John W. Vineyard  
Department 7

**GALLAGHER DEFENDANTS' NOTICE  
OF DEMURRER AND DEMURRER TO  
THE AMENDED COMPLAINT; AND  
MEMORANDUM OF POINTS AND  
AUTHORITIES**

[Filed concurrently with Declaration of Brian  
Nisbet, Request for Judicial Notice, and  
Proposed Order]

Date: ~~March 18, 2021~~ 03/25/2021

Time: 8:30 am

Dept.: 7

Confirmation No.: RES243928

Action Filed: August 28, 2020

Trial Date: None Set

1 **TO THE COURT, PLAINTIFFS, AND THEIR ATTORNEYS OF RECORD HEREIN:**

2 **PLEASE TAKE NOTICE** that on March 18, 2021, at 8:30 am, or as soon thereafter as  
3 counsel may be heard, in Department 7 of the Riverside Superior Court, Riverside Historic  
4 Courthouse, located at 4050 Main Street, Riverside, CA 92501, the Honorable John W. Vineyard  
5 presiding, Defendants Arthur J. Gallagher & Co. Insurance Brokers of California, Inc., Ronald  
6 Zappelli, Robert Gammill, and Anthony Lopez will and hereby do demur to the Third Cause of  
7 Action in the amended complaint filed by Plaintiff VStyles, Inc.

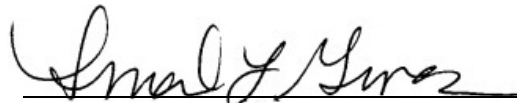
8 The demurrer to the amended complaint is brought pursuant to California Code of Civil  
9 Procedure Section 430.10(e), on the ground that the complaint fails to state facts sufficient to  
10 constitute any cause of action and that defects and objections to this cause of action appear on the  
11 face of the complaint and amended complaint.

12 The demurrer will be based on the complaint, amended complaint, this Notice of Demurrer,  
13 the Demurrer, the attached Memorandum of Points and Authorities, the concurrently filed Request  
14 for Judicial Notice, and on such Court records, pleadings, and arguments of counsel as may be  
15 presented at the hearing on this matter.

16 Dated: February 16, 2021

Respectfully submitted,

17 WINSTON & STRAWN LLP

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Attorneys for Defendants  
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Ronald Zappelli  
Robert Gammill  
Anthony Lopez

1 **DEMURRER TO THIRD CAUSE OF ACTION**

2 Defendants Gallagher, Zappelli, Gammill, and Lopez demur to the third cause of action on  
3 the ground that Plaintiff admits facts defeating its cause of action and fails to allege facts sufficient  
4 to constitute a cause of action. Cal. Code Civ. Proc. § 430.10(e).

5  
6 Dated: February 16, 2021

Respectfully submitted,

7 WINSTON & STRAWN LLP

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**Cases**

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12 *Wallman v. Suddock*,  
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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 Like businesses around the world, Plaintiff's businesses shut down due to the sudden global  
4 outbreak of COVID-19. This caused a loss of revenue that Plaintiff sought to recoup by making a  
5 claim on its property insurance policy. The insurance company denied the claim, and Plaintiff sued.

6 Plaintiff's original complaint asserted two claims. First, the insurance company breached the  
7 policy because the policy covers losses caused by a virus. Second, in the alternative, if the policy  
8 does *not* cover losses caused by a virus, then Gallagher negligently performed its duties as Plaintiff's  
9 insurance broker, by helping Plaintiff obtain a policy without that coverage.

10 The Court (Stamen, J.) sustained Defendants' demurrers, holding that the policy did not  
11 cover losses caused by a virus, and Gallagher was not responsible for advising Plaintiff to obtain a  
12 policy to cover such losses. The Court's decision recognized that brokers generally do not have a  
13 duty to advise about additional or different insurance coverage. That duty can arise in only three  
14 limited circumstances, but none were present here. One is when a broker misrepresents a policy's  
15 coverage. There was no such allegation. Another is when the insured requests a particular type of  
16 coverage, but the complaint admitted that Plaintiff and Gallagher *never* discussed coverage for  
17 viruses. The third is when the broker takes on additional duties by agreement or by holding itself out  
18 as having special expertise. Gallagher never agreed to advise Plaintiff about insuring losses a  
19 pandemic could cause, and the statements Plaintiff identified as amounting to claims of special  
20 expertise were too vague and general to create a duty to obtain coverage for pandemic losses.

21 In short, Gallagher could not be liable for failing to predict a once-in-a-century global  
22 pandemic so unexpected and terrible that it hobbled the world economy, or for failing to advise  
23 Plaintiff to insure against it. All Plaintiff requested was a common property insurance policy, which  
24 Gallagher helped Plaintiff obtain, so there was no professional negligence.

25 Plaintiff has now re-pleaded, but the amended complaint is no better than the original. To  
26 give the appearance of change, some allegations were moved from one paragraph to another, and  
27 some words were replaced by synonyms. Other, previously insufficient allegations were simply  
28 made more prominent, or copied into the amended complaint from Plaintiff's (also insufficient)



1 opposition to Gallagher’s prior demurrer. For example, the amended complaint tries to create an  
2 additional duty by referring repeatedly to Gallagher’s generic statement to Plaintiff that it has  
3 “thousands of specialists who understand your diverse exposures.” (Am. Compl. ¶¶ 96, 92, 127.) But  
4 that allegation already appeared in the complaint (¶ 80), and its (lack of) significance was already  
5 argued by the parties in connection with Gallagher’s prior demurrer. Repeating an inadequate  
6 allegation that the Court has already considered cannot help Plaintiff overturn the Court’s ruling.

7 In the amended complaint as a whole, nothing of substance has changed to show that the  
8 Court’s ruling should change. Plaintiff never inquired about coverage for viruses, and Gallagher was  
9 not required to advise about or obtain that coverage. This second demurrer should be sustained.

10 That conclusion is reinforced by an important new decision that became available after the  
11 Court decided Gallagher’s prior demurrer. The two decisions address remarkably similar allegations  
12 in the same way. As in the present case, the plaintiffs in *Casa Colina v. Hartford Fire Ins.* sued their  
13 insurer for denying coverage of COVID-19 losses, and their broker in the alternative for not securing  
14 that coverage. And, like Plaintiff here, the plaintiffs in *Casa Colina* “never discussed” with the  
15 broker the topic of coverage for viruses. Applying California law, which also governs here, the court  
16 rejected the plaintiffs’ attempts to impose on the broker any duty beyond procuring the policy that  
17 the plaintiffs themselves requested. The present case should end with the same result.

18 Plaintiff also again tries but fails to allege that Gallagher caused Plaintiff any loss, a topic the  
19 Court’s earlier decision did not have to reach. In the original complaint, Plaintiff alleged that its prior  
20 policy, for 2019, covered losses from viruses, which Plaintiff wanted to keep, and Gallagher’s  
21 negligence was in securing a policy with *less* coverage for 2020, thereby creating a “massive fissure”  
22 in the coverage. In its first demurrer, Gallagher proved that allegation false: the prior policy had an  
23 explicit *exclusion* for losses caused by viruses. Now, in the amended complaint, Plaintiff has simply  
24 deleted all allegations about the prior policy, but that does not change the reality. Their presence in  
25 the original complaint continues to show that Gallagher caused no loss, because Plaintiff would have  
26 had the same coverage even without Gallagher’s supposed negligence.

27 In addition, Plaintiff still has never alleged that a specific policy with virus coverage was  
28 available in the marketplace and fit within Plaintiff’s insurance budget, apparently because those

1 allegations cannot truthfully be made. Without them, Gallagher cannot be faulted for failing to  
2 obtain an apparently non-existent policy. For that reason as well, the amended complaint fails to  
3 allege that Gallagher caused any loss, and the demurrer should be sustained.

4 After two tries, Plaintiff has now demonstrated beyond doubt that it cannot state a claim of  
5 negligence against Gallagher. With perfect hindsight, Plaintiff may wish that it had requested,  
6 purchased, and paid for a very different policy with very different coverage, if such a policy could  
7 even be obtained. But the amended complaint admits that never happened. As the Court’s prior  
8 decision explained, and as everyone unfortunately knows, COVID-19 was an unexpected calamity  
9 that caught the whole world unprepared. This lawsuit, contending that Gallagher should have  
10 predicted it and protected Plaintiff against it, should now come to its final end. The Court should  
11 sustain this demurrer without further leave to amend.

## 12 **II. BACKGROUND AND ALLEGATIONS**

### 13 **A. Plaintiff’s insurance coverage and claim**

14 VStyles is a corporation that owns and operates hair salons. (Am. Compl. ¶¶ 1, 12, 20.) In  
15 2019, with Gallagher as its insurance broker, Plaintiff bought property insurance from Continental  
16 Casualty. (*Id.* ¶ 2.) The policy covers business interruptions caused by “direct physical loss of or  
17 damage to property.” (*Id.* ¶ 27.) It excludes coverage for losses caused by a “microbe.” (*Id.* ¶ 62.)

18 Plaintiff closed the salons due to the COVID-19 pandemic. (*Id.* ¶ 53.) Plaintiff then made a  
19 claim under the policy for business interruption losses, but Continental denied it. (*Id.* ¶¶ 58-59.)  
20 Continental gave two reasons: (1) COVID-19 did not cause a direct physical loss of or damage to  
21 property, and (2) the microbe exclusion or other exclusions might also preclude coverage. (*Id.* ¶ 60.)

22 Plaintiff sued Continental for breach of contract. (*Id.* ¶¶ 111, 116.) Plaintiff alleges that  
23 COVID-19 *does* cause a direct physical loss of or damage to property. (*Id.* ¶ 36.) Plaintiff also  
24 alleges that the microbe exclusion does not apply. (*Id.* ¶ 117.) If Plaintiff wins its breach of contract  
25 claim against Continental, it will have the coverage it wants, and this entire case will be over. But to  
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1 hedge against a loss, Plaintiff also asserted an alternative claim against Gallagher and three of its  
2 employees<sup>1</sup> for professional negligence. (*Id.* ¶ 99.)

3 Most of Plaintiff’s allegations about Gallagher are from the period in 2019 when Plaintiff  
4 was considering whether to use Gallagher as its insurance broker. The aim of some of those  
5 allegations is to try to show their relationship was so “special” that Gallagher owed Plaintiff duties  
6 that insurance brokers ordinarily do not owe their clients. (*Id.* ¶¶ 2, 9, 98, 124.) As discussed in  
7 detail below, those allegations show nothing of the sort.

8 But most of the allegations about Gallagher are filler with no conceivable relevance to  
9 Plaintiff’s claim or this case. For example, during a presentation, “Gallagher represented to Plaintiff  
10 that its ‘Shared Values + Passion for Excellence = Promises Delivered.’” (*Id.* ¶ 76.) That is the entire  
11 allegation. No part of that innocuous equation is alleged to have been misleading or caused Plaintiff  
12 any injury. Nor does Plaintiff explain why, for example, it alleges that the same presentation says  
13 Gallagher will “be a leader in ‘Great Clips’ through a better Value proposition.” (*Id.* ¶ 77.) That is  
14 the amended complaint’s only mention of Great Clips, which is the name of the hair salon franchises  
15 Plaintiff operates. These and other irrelevant allegations fill much of the body of the complaint.

16 This blizzard of meaningless allegations appears to be designed to obscure one key fact,  
17 which lies buried on the twenty-second page of the amended complaint. There, Plaintiff *admits* that  
18 during their courtship, and during the time they worked together to secure insurance for 2020,  
19 Gallagher and Plaintiff “*never ... discussed coverage about viruses or communicable diseases.*”  
20 (*Id.* ¶ 102 (emphasis added).) They also “never discussed ... that the company should ensure it was  
21 covered for any type of shutdown.” (*Id.* ¶ 105.) In other words, Plaintiff never asked Gallagher to  
22 find coverage for business interruptions caused by a virus or pandemic and never had reason to  
23 believe that Gallagher found or was searching for that coverage.

#### 24 **B. The Court’s dismissal of Plaintiff’s claims against Gallagher**

25 Gallagher demurred to Plaintiff’s complaint. After the parties filed briefs, the Court  
26 (Stamen, J.) issued a tentative decision, heard oral argument, and then sustained Gallagher’s

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27 <sup>1</sup> For ease of reference, this Memorandum uses “Gallagher” to refer to Gallagher and the three of its  
28 employees who were named as Defendants. Plaintiff asserts the same claim against all of them.

1 demurrer. A copy of the tentative decision, later made final, is attached hereto as Exhibit A.

2 The Court recognized that, “[a]s a general rule, an insurance agent does not have a duty to  
3 advise an insured to procure additional or different insurance coverage.” (Ex. A at 4.) The agent’s  
4 sole duty is “to use reasonable care, diligence, and judgment in procuring the insurance requested by  
5 an insured.” (*Id.* at 5.) The agent takes on an additional duty in only three circumstances.

6 The first is when “the agent misrepresents the . . . coverage being offered.” But “Plaintiff  
7 does not allege that Gallagher made any misrepresentation.” (*Id.*)

8 The second is when “there is a request or inquiry by the insured for a particular type or extent  
9 of coverage.” But Plaintiff never “specifically requested that Gallagher procure coverage to protect  
10 against business income loss due to an epidemic or pandemic.” (*Id.*)

11 The third is when the parties reach an “express agreement” or the agent “hold[s] himself out  
12 as having expertise in a given field of insurance being sought by the insured.” (*Id.*) Plaintiff argued  
13 for an express agreement based on Gallagher’s sales pitch about identifying coverage gaps and the  
14 like. But “[n]othing in Gallagher’s sales pitch . . . amounts to an express agreement to assume duties  
15 greater than an insurance agent’s general duties. . . . An agreement to monitor risks and update  
16 coverage would not implicate a duty to advise Plaintiff of the potential loss that could arise out of a  
17 pandemic.” (*Id.*)

18 Plaintiff also argued that Gallagher held itself out “as having expertise in insurance and risk  
19 management and as having expertise in uncovering and closing coverage gaps.” (*Id.*) But those  
20 allegations are “too vague to trigger a duty to procure a policy that would cover business income loss  
21 arising out of a pandemic. . . . There are no factual allegations that demonstrate Gallagher either  
22 knew that a pandemic was on the horizon or that coverage for such an eventuality was indicated for  
23 Plaintiff’s business. Thus, even to the extent that Gallagher’s alleged representations created an  
24 additional duty with respect to procuring coverage for business interruption, there are no allegations  
25 that extend that additional duty to procuring coverage for loss arising out of the pandemic.” (*Id.*  
26 at 6.) The Court cited and quoted a few of the many court decisions finding that the COVID-19  
27 pandemic is “unprecedented” and “the entire world” was unprepared for it. (*Id.*)  
28

1           **C.     The amended complaint**

2           The Court gave Plaintiff leave to amend the complaint, but most of the amendment<sup>2</sup> lacks  
3 any substance at all. Some allegations were simply moved. Other changes were meaningless word  
4 substitutions: “Gallagher boasted” became “Gallagher represented”; “Gallagher bragged” became  
5 “Gallagher affirmed”; and “Gallagher touted” became “Gallagher affirmatively stated.”

6           Plaintiffs also added vague and generic assertions about what Gallagher supposedly “should  
7 have known.” (Am. Compl. ¶¶ 91, 93.) The amended complaint alleges that in light of “Zika, Ebola,  
8 MERS, and SARS,” as well as a 2006 publication by a private insurance consultancy (the Insurance  
9 Service Organization, which is not alleged to have any connection to Gallagher), Gallagher should  
10 have known about “the potential of a pandemic causing significant losses to businesses,” including  
11 hair salons. (Am. Compl. ¶¶ 43-44, 82-83, 86-91, 93.) Gallagher also allegedly should have known  
12 that unidentified “insurance products” that covered losses due to viruses were “available.” (*Id.* ¶¶ 84-  
13 85, 120.)

14           The amendment did make one substantive change. Plaintiff’s theory of this case, as admitted  
15 in the original complaint, is that Plaintiff was pleased with its *prior* property insurance policy, which  
16 supposedly covered business interruption losses due to viruses, but Gallagher steered Plaintiff to the  
17 Continental policy and thereby “created a massive fissure in Plaintiff’s property coverage,” by  
18 providing “less coverage to Plaintiff than Plaintiff already had with its prior broker and policy.”  
19 (Compl., Ex. B, ¶¶ 56, 99.) That theory suffered from the flaw of being completely false. As  
20 Gallagher explained in its first demurrer, Plaintiff’s prior policy contained an explicit *exclusion* for  
21 losses caused by “[a]ny virus, bacterium or other microorganism that induces or is capable of  
22 inducing physical distress, illness or disease.” (Demurrer, Ex. C, at 1, 5-7.) Plaintiff was *never*  
23 covered for losses caused by viruses, so Gallagher did Plaintiff no harm by helping it obtain the  
24 Continental policy, which at least does *not* contain an explicit *exclusion* for viruses.

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26  
27 <sup>2</sup> For the Court’s convenience, the original complaint is attached hereto as Exhibit B, Gallagher’s  
28 original Demurrer is attached as Exhibit C, and Plaintiff’s Opposition to Gallagher’s original  
Demurrer is attached as Exhibit D.

1 The amended complaint does not apologize for the original complaint’s false statements to  
2 the Court. In fact, the amended complaint does not mention the prior policy at all. Plaintiff has  
3 simply deleted it. But Plaintiff is still—inexplicably—pursuing a claim against Gallagher. Even  
4 though Plaintiff did not previously have coverage for viruses, and never discussed with Gallagher  
5 any interest in obtaining new coverage for viruses, Plaintiff still contends it was Gallagher’s job to  
6 get a policy that covered viruses.

### 7 **III. ARGUMENT**

8 A plaintiff must make allegations that are “factual and specific, not vague or conclusory” to  
9 establish each element of a cause of action. *Rakestraw v. Cal. Physicians’ Serv.*, 81 Cal. App. 4th 39,  
10 43, 44 (2000). The elements of a professional negligence claim are (1) the defendant owed the  
11 plaintiff a duty of care, (2) the defendant breached it, and (3) the breach caused the plaintiff an injury  
12 and (4) damages. *Jones v. Grewe*, 189 Cal. App. 3d 950, 954 (1987). The amended complaint fails to  
13 plead both breach and causation of an injury.

#### 14 **A. Gallagher did not breach any duty.**

##### 15 **1. Gallagher procured the insurance Plaintiff requested.**

16 As the Court’s decision recognized, “Insurance brokers owe a limited duty to their clients,  
17 which is only ‘to use reasonable care, diligence, and judgment in *procuring the insurance requested*  
18 *by an insured.*” *Pac. Rim Mech. Contractors v. Aon Risk Ins. Servs. W.*, 203 Cal. App. 4th 1278,  
19 1283 (2012) (emphasis added). This limited duty of care “does *not* include the obligation to procure  
20 a policy affording the client complete liability protection.” *Jones*, 189 Cal. App. 3d at 956 (emphasis  
21 added). Here, Plaintiff asked Gallagher to procure a property insurance policy. Plaintiff admits that  
22 Gallagher did. (Am. Compl. ¶ 2.) Gallagher therefore fulfilled its limited duty under California law.

23 Plaintiff alleges that Gallagher should have known of the risk of a pandemic, and of the harm  
24 a pandemic might do to the business of a hair salon. But an insurance broker has “*no duty to*  
25 *affirmatively advise an individual seeking insurance about different or additional coverage,*”  
26 *Murray v. UPS Capital Ins. Agency*, 54 Cal. App. 5th 628, 639 (2020) (emphasis added), or to  
27 “advise insureds regarding the sufficiency of their coverage.” *Casa Colina v. Hartford Fire Ins.*,  
28 2020 WL 7388426, \*3 (Cal. Ct. App. Dec. 15, 2020). The preposterous idea that Gallagher should

1 have predicted COVID-19, which the Court’s decision already rejected, is irrelevant to Gallagher’s  
2 limited duty under the law.

3 The limits of the duty under California law can be seen clearly in the Court of Appeals’  
4 decision in *Fitzpatrick*, which held that an insurance broker “does not have a duty to volunteer to an  
5 insured that the latter should procure additional or different insurance coverage.” *Fitzpatrick v.*  
6 *Hayes*, 57 Cal App. 4th 916, 927 (1997). In *Fitzpatrick*, the plaintiffs claimed their agent had a duty  
7 to advise about umbrella coverage and uninsured motorist coverage. They had worked with the agent  
8 for 20 years, they “relied on [the agent] to advise [them] concerning adequate coverage,” and the  
9 agent said the plaintiffs’ automobile policy limits “should be about right.” *Id.* at 919, 928. In  
10 addition, the agent knew the plaintiffs qualified for an umbrella policy that would have increased  
11 policy limits without substantially increasing the premium. *Id.* at 919. But the court nonetheless held  
12 the agent had *no* duty to advise on extra coverage. *Id.* at 927-28.

13 The insurance agent in *Fitzpatrick* **knew** that cheap umbrella coverage was available and  
14 **knew** that drivers always risk accidents, but that did not alter the agent’s duties under California law.  
15 Similarly, Gallagher was not responsible for telling Plaintiff to consider *any* particular coverage,  
16 much less to recommend coverage for a pandemic that this Court’s decision acknowledges is without  
17 precedent.<sup>3</sup>

18 If a duty were placed on insurance brokers to advise about every possible risk, and brokers  
19 were then held liable for anything within human imagination that was left off the list, it would turn  
20 brokers into insurers for risks that insureds *never* thought were covered and *never* paid to cover. An  
21 unprecedented pandemic is no time to entertain a “theory of relief [that] is a major departure from  
22 established California [insurance] law.” *Plan Check Downtown III*, 2020 WL 5742712 at \*7; *see*  
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24 <sup>3</sup> If this indisputable fact requires additional citations, they are easy to find. *E.g.*, *Rowan v.*  
25 *Kirkpatrick*, 54 Cal. App. 5th 289, 296 (2020) (“we acknowledge the unprecedented nature of the  
26 circumstances presented by the COVID-19 pandemic”); *Plan Check Downtown III v. Amguard Ins.*,  
27 2020 WL 5742712, \*7 (C.D. Cal.) (recognizing COVID-19 as an “unprecedented pandemic”);  
28 *United States v. Garcia-Morales*, 2020 WL 2218955, at \*2 n.1 (S.D. Cal.) (“The Court recognizes  
that the COVID-19 pandemic presents significant and unprecedented public health concerns”); *Rao*  
*v. Apple*, 2020 WL 3616317, at \*3 (N.D. Cal.) (“The COVID-19 pandemic has had far-reaching and  
unprecedented consequences globally”).

1 also *Jones*, 189 Cal. App. 3d at 957 (rejecting a duty that “would in effect make the [broker] a  
2 blanket insurer for his principal.”). Gallagher was responsible only for helping Plaintiff secure a  
3 property insurance policy—policies that courts routinely hold do not cover business interruption  
4 losses from COVID-19<sup>4</sup>—and that is what Gallagher did. Plaintiff cannot allege Gallagher breached  
5 its limited duty, so this demurrer should be sustained.

6 **2. Gallagher owed Plaintiff no additional duty.**

7 Plaintiff asserts that Gallagher owed an additional duty of care beyond the limited duty that  
8 brokers ordinarily owe. “Whether a duty of care exists is a question of law for the court.” *Jones*, 189  
9 Cal. App. 3d at 954. A complaint that fails to allege facts sufficient to show that a duty of care is  
10 owed is “fatally defective.” *Id.*

11 As the Court’s decision recognized, an insurance broker owes an additional duty “when—**but**  
12 **only when**—one of the following three things happens”: (1) “the agent misrepresents the nature,  
13 extent or scope of the coverage being offered or provided”; (2) “there is a request or inquiry by the  
14 insured for a particular type or extent of coverage”; or (3) “the agent assumes an additional duty by  
15 either express agreement or by ‘holding himself out’ as having expertise in a given field of insurance  
16 being sought by the insured.” *Fitzpatrick*, 57 Cal. App. 4th at 927 (emphasis added). None of those  
17 situations are present here.

18 **(a) Gallagher made no misrepresentation.**

19 The Court held that the original complaint “does not allege that Gallagher made any  
20 misrepresentation about the coverage being offered under the subject Policy.” (Ex. A at 5.) Plaintiff  
21 did not add to the amended complaint *any* allegation about a misrepresentation. Instead, the amended  
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23 <sup>4</sup> *E.g.*, *Pappy’s Barber Shops v. Farmers Grp.*, 2020 WL 5500221, at \*6 (S.D. Cal.) (no direct  
24 physical loss or damage); *Hillcrest Optical v. Continental Ins.*, 2020 WL 6163142, at \* 6-8 (S.D.  
25 Ala.) (same); *Seifert v. IMT Ins.*, 2020 WL 6120002, at \*3 (D. Minn.) (COVID-19 losses “fail to fall  
26 within the permissible realm of ‘direct physical loss’”); *10E v. Travelers Indem.*, 2020 WL 5359653,  
27 at \*5 (C.D. Cal.) (impaired economic use of property is not physical loss or damage); *Henry’s*  
28 *Louisiana Grill v. Allied Ins.*, 2020 WL 5938755, at \*6 (N.D. Ga.) (Governor’s order closing  
restaurant did not create a direct physical loss); *Infinity Exhibits v. Certain Underwriters at Lloyd’s*  
*London*, 2020 WL 5791583, at \*5 (M.D. Fla.) (no direct physical loss or damage); *Malaube v.*  
*Greenwich Ins.*, 2020 WL 5051581, at \*9 (S.D. Fla.) (civil authority orders to close restaurant did  
not cause a direct physical loss).



1 complaint, like the original complaint, alleges that Gallagher “never provided Plaintiff with details  
2 of, or explained any aspect of coverage, limits, or exclusions” in the Continental policy, and it  
3 admits the parties “never ... discussed coverage about viruses or communicable diseases.” (Am.  
4 Compl. ¶ 102; *see also* Compl. ¶ 85.) Those are clear admissions that Gallagher never made any  
5 misleading statement of fact about the policy or its coverage. *Casa Colina*, 2020 WL 7388426, at \*3  
6 (dismissing broker negligence claim because plaintiffs admitted “they never discussed with [their  
7 broker] whether their insurance would provide coverage for a pandemic-induced closure”).

8 **(b) Plaintiff did not request coverage for viruses.**

9 Plaintiff alleges that Gallagher “failed to disclose” the policy’s lack of coverage for viruses  
10 and “failed to advise” Plaintiff about it. (Am. Compl. ¶ 123.) But for Gallagher to have an additional  
11 duty to advise, as this Court held, Plaintiff must have made “a request or inquiry ... for a particular  
12 type or extent of coverage.” *Fitzpatrick*, 57 Cal. App. 4th at 927. “[I]n the ordinary case, the onus is  
13 . . . squarely on the insured to inform the agent of the insurance he requires.” *Wallman v. Suddock*,  
14 200 Cal. App. 4th 1288, 1309 (2011).

15 In order to state a claim, Plaintiff “would need to allege that [it] specifically requested a  
16 policy that would require coverage in the event [its] business was interrupted by a viral outbreak, or  
17 directly inquired about whether their policy provided such coverage.” *Casa Colina*, 2020 WL  
18 7388426, at \*3 (dismissing because the insured and the broker “never discussed the specific topic”).  
19 Here, just as in *Casa Colina*, Plaintiff and Gallagher “never ... discussed coverage about viruses or  
20 communicable diseases.” (Am. Compl. ¶ 102.) Gallagher therefore had no duty to obtain coverage  
21 for viruses or advise about it.

22 **(c) Gallagher did not take on any additional duty.**

23 An insurance broker may also take on an additional duty by expressly agreeing to or by  
24 holding itself out as an expert in a particular, specialized field of insurance. The amended complaint  
25 fails to allege either one.

26 The Court’s decision explained, “[e]xpress agreements are generally associated with a  
27 broker’s agreement to service a policy by keeping coverage in force and notifying the insured of a  
28 cancellation.” (Ex. A at 5.) The amended complaint does not allege any such agreement between

1 Plaintiff and Gallagher. Instead, Plaintiff alleges that Gallagher’s sales pitch “expressly stated”  
2 Gallagher “conducted a coverage and limit review, analyzed Plaintiff’s risk retention—Coverage  
3 Gaps, and promised . . . it would create coverage checklists and conduct loss analysis.” (Am. Compl.  
4 ¶ 81.) In other words, the amended complaint simply repeats the very same failed allegations from  
5 the original complaint. (Ex. A at 5 (quoting Compl. ¶ 77).) As the Court’s decision explained, “An  
6 agreement to monitor risks and update coverage would not implicate a duty to advise Plaintiff of the  
7 potential loss that could arise out of a pandemic.” (*Id.*) Once more, Plaintiff and Gallagher “never ...  
8 discussed coverage about viruses or communicable diseases” (Am. Compl. ¶ 102), so they cannot  
9 possibly have reached an agreement on that subject.

10 The amended complaint also alleges that Gallagher “held itself out” as an expert “in business  
11 insurance and risk management” and “in ensuring there were no gaps in the coverage.” (Am. Compl.  
12 ¶¶ 63, 128; *see also id.* ¶¶ 9, 124.) But as the Court’s decision explained, “expertise in insurance and  
13 risk management and in ‘uncovering and closing coverage gaps’ is too vague to trigger a duty to  
14 procure a policy that would cover business income loss arising out of a pandemic.” (Ex. A at 5.) The  
15 Court of Appeals has likewise held that allegations about a broker’s “general superior knowledge  
16 regarding coverages” are insufficient to show that the broker can be “deemed a specialist” that owes  
17 an additional duty. *Murray*, 54 Cal. App. 5th at 648. A broker that holds itself out “as an expert in  
18 insurance matters” owes no more than the limited duty that all insurance brokers owe. *Wallman*, 200  
19 Cal. App. 4th at 1300–01; *see also Hartford Casualty Ins. v. Fireman's Fund Ins.*, 220 F. Supp. 3d  
20 1008, 1018 (N.D. Cal. 2016) (“isolated, generalized statements are not the type of ‘holding out’ for  
21 which California law imposes an elevated duty of care on insurance agents”).

22 Under California law, to create an additional duty, a broker must hold itself out as expert in a  
23 ***specialized area of insurance***. The Court of Appeals has, for example, recognized the possibility of  
24 an additional duty that arises out of claims of expertise in marine inland insurance, or in the  
25 insurance needs of dealerships that install spray-on linings for pickup truck beds. *Murray*, 54 Cal.  
26 App. 5th 628; *Williams v. Hilb, Rogal & Hobbs Ins. Servs. of Cal.*, 177 Cal. App. 4th 624, 637  
27 (2009); *see also Casa Colina*, 2020 WL 7388426, at \*4 (“customized insurance packages  
28 specifically for rehabilitative and medical-surgical facilities”). By contrast, Plaintiff does not allege

1 that Gallagher held itself as being a specialist in procuring a specific type of insurance for hair  
2 salons. Plaintiff wanted, and Gallagher agreed to help it find, an ordinary property insurance policy.

3 The amended complaint tries to distract from its inability to make the required allegations by  
4 asserting repeatedly that Gallagher said it would provide Plaintiff with “[g]lobal access to thousands  
5 of specialists who understand your diverse exposures.” (Am. Compl. ¶¶ 92, 96, 127.) But that  
6 allegation comes straight out of the original complaint (¶ 80), and Plaintiff emphasized its  
7 significance when opposing Gallagher’s demurrer (Opp., Ex. D, at 3, 5 (twice), 7), so repeating it in  
8 the amended complaint cannot overcome the Court’s ruling. In addition, that statement was made on  
9 a generic presentation slide (Am. Compl. Ex. A at second-to-last page) that had nothing to do with  
10 hair salons or particular types of insurance. It was exactly the sort of generalized statement of  
11 insurance expertise that the Court of Appeals held in *Murray* and *Wallman* could not establish a  
12 broker owed any additional duty. And even if Gallagher *had* held itself out as having expertise that  
13 created a heightened duty, “this expertise would not allow them to predict Plaintiff[] would require  
14 coverage for a once-in-a-lifetime viral pandemic.” *Casa Colina*, 2020 WL 7388426, at \*4.

15 Finally, the amended complaint alleges that Gallagher should have known the COVID-19  
16 pandemic was coming, because there have been other viral outbreaks, such as Ebola and SARS—  
17 *none* of which shut down businesses across the U.S. or around the world. The amended complaint  
18 also relies on a 2006 document by an insurance consultancy (with no alleged connection to  
19 Gallagher), which proposes that insurers use insurance policy language to explicitly exclude  
20 coverage for losses caused by viruses. *All* of those allegations, about the other diseases and the 2006  
21 document, come out of Plaintiff’s opposition to Gallagher’s prior demurrer—the demurrer the  
22 Court’s ruling sustained—so it is not new material in the amended complaint.

23 Plaintiff also misunderstands the significance of the 2006 document. It states that “insurers  
24 employing such [property insurance] policies may face claims [for losses caused by viruses] in  
25 which there are efforts to expand coverage and to create sources of recovery for such losses,  
26 ***contrary to policy intent.***” (Am. Compl. ¶ 89 (emphasis added).) The point of proposing an explicit  
27 exclusion for viruses was to prevent policies from being misread to cover losses that they were never  
28 intended or understood to cover. For all of these reasons, this demurrer should be sustained.

1           **B.       Gallagher caused Plaintiff no injury.**

2           The amended complaint also fails to plead that Gallagher caused any injury. As explained  
3 above, Plaintiff admitted in its original complaint that it was pleased with its prior insurance policy,  
4 and it attempted to pin liability on Gallagher for creating a “massive fissure” in coverage by not  
5 obtaining that same great coverage. (Compl. ¶ 56.) But the truth is now known: the prior policy was  
6 clearly worse for Plaintiff than the Continental policy on the subject of viruses, because it had an  
7 explicit exclusion for losses they cause. Thus, in helping Plaintiff obtain the Continental policy,  
8 Gallagher cannot have harmed Plaintiff. The amended complaint tries to hide this massive fissure in  
9 Plaintiff’s case by simply deleting all of the original complaint’s admissions.

10           Although an amended pleading may supersede a prior pleading, “a well-established  
11 exception to this general rule applies ‘where an amended complaint attempts to avoid defects set  
12 forth in a prior complaint by ignoring them.’” *Foxen v. Carpenter*, 6 Cal. App. 5th 284, 295 (2016).  
13 That is exactly what happened here. The Court may therefore “examine the prior complaint to  
14 ascertain whether the amended complaint is merely a sham” because “[a] pleader may not attempt to  
15 breathe life into a complaint by omitting relevant facts which made his previous complaint  
16 defective.” *Id.*; see also *Gallegos v. Pacific Lumber*, 158 Cal. App. 4th 950, 957 (2008) (“A plaintiff  
17 may not discard factual allegations of a prior complaint, or avoid them by contradictory averments,  
18 in a superseding, amended pleading.”). Even though Plaintiff now prefers to forget its admissions  
19 from the original complaint, this Court should recognize that they show Gallagher caused no injury.

20           The lack of injury is also shown by Plaintiff’s failure to allege facts showing that even if  
21 Gallagher had suggested coverage for viruses, there were identifiable, affordable policies that would  
22 have covered Plaintiff’s losses. Gallagher made this argument in its demurrer to the original  
23 complaint, which alleged only that “such coverage would have been specifically available to  
24 Plaintiff.” (Compl. ¶ 108.) The Court did not need to reach the issue in its decision, and the amended  
25 complaint adds just one allegation: “Such products include, but are not limited to, specific pandemic  
26 coverage policies, communicable disease coverage extensions, and crisis event management  
27 coverage extensions.” (Am. Compl. ¶ 84.) That still vague and conclusory assertion cannot help  
28

1 Plaintiff state a claim. *Rakestraw*, 81 Cal. App. 4th at 43-44 ; *George v. Auto. Club of S. Cal.*, 201  
2 Cal. App. 4th 1112, 1120 (2011).

3 The amended complaint still does not identify a single specific property insurance policy that  
4 would have covered Plaintiff's losses, much less one that fit within Plaintiff's insurance budget. If  
5 one existed, it should be easy to find, but as explained above numerous courts have found that  
6 ordinary property insurance policies simply do not cover business interruption losses from COVID-  
7 19. Plaintiff's continued failure to "allege that any such insurance coverage for pandemic-related  
8 government closures existed prior to March 2020" is fatal to its claim. *Soundview Cinemas v. Great*  
9 *Am. Ins. Group, Slip Op.* at 13 (N.Y. Sup. Ct. 2021) (attached to Gallagher's Request for Judicial  
10 Notice, Ex. A). Without that allegation, the amended complaint fails to plead that Gallagher caused  
11 Plaintiff any injury by not securing a specific, affordable policy, and this demurrer should be  
12 sustained.

13 **C. Plaintiff should not be given leave to amend.**

14 Plaintiff has already amended the complaint, after the Court's clear ruling identifying the  
15 defects in the original. As explained above, the amended complaint is no better. Plaintiff has now  
16 proved it cannot state any claim against Gallagher, so this demurrer should be sustained without  
17 further leave to amend. *Heckendorn v. City of San Marino*, 42 Cal. 3d 481, 486 (1986).


18 **IV. CONCLUSION**

19 The Court should sustain this demurrer and enter final judgment for Gallagher.

20 Dated: February 16, 2021

Respectfully submitted,

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