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CERTAIN UNDERWRITERS AT LLOYD'S, LONDON

SUPERIOR COURT OF CALIFORNIA

COUNTY OF VENTURA

MARTHA VINCENT, and individual; BILLY RIDGE, an individual,

Plaintiffs,

v.

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON; Defendants an Unincorporated Association; and DOES 1 to 100, inclusive,

Defendants.

Case No. 56-2012-00421417-CU-BC-VTA
Assigned For Law and Motion Purposes To:
Judge: Hon. Matthew Guasco
Dept.: 20

Assigned For Case Management Purposes To:
Attorney: Genalin Riley, Esq.
Dept.: 22B

DEFENDANT CERTAIN UNDERWRITERS AT LLOYD'S, LONDON'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION

DATE: June 11, 2021
TIME: 8:30 a.m.
DEPT.: 20

RESERVATION NO. 2555011

Action Filed: July 26, 2012

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TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on June 11, 2021, at 8:30 a.m., or as soon thereafter as the matter may be heard, in Department 20 of the above-captioned Court, located at 800 South Victoria Avenue, Ventura, California 93009, Defendant **CERTAIN UNDERWRITERS AT LLOYD'S, LONDON'S** ("Defendant") will and hereby does move this Court for summary judgment or, in the alternative, summary adjudication, and request the Court order the following:

1. Defendant is entitled to summary judgment as to the entire Complaint, because there is no triable issue of material fact with regard to any of Plaintiffs **MARTHA VINCENT** and **BILLY RIDGE's** claims against them.

2. Alternatively, if for any reason summary judgment cannot be hand, for an order adjudicating that there is no merit to the following causes of action and/or claims for damages in Plaintiffs' Complaint:

ISSUE ONE: As to the First Cause of Action (Breach of Written Contract), Defendant is entitled to summary adjudication as a matter of law, because there is no triable issue of fact that Plaintiffs' claimed loss was barred by lack of fortuity.

ISSUE TWO: As to the Second Cause of Action (Breach of the Implied Covenant of Good Faith and Fair Dealing), Defendant is entitled to summary adjudication as a matter of law, because there is no triable issue of fact that Plaintiffs' claimed loss was barred by lack of fortuity.

ISSUE THREE: As to the Third Cause of Action (Declaratory Relief), Defendant is entitled to summary adjudication as a matter of law, because there is no triable issue of fact that Plaintiffs' claimed loss was barred by lack of fortuity.

This Motion is based on this Notice of Motion and Motion; the accompanying Memorandum of Points and Authorities; the Declarations of Sue Weeks and Grace Park, with exhibits; the Separate Statement of Undisputed Facts; all papers and pleadings on file in this matter; and any evidence and argument the Court may require or allow before the hearing on this matter.

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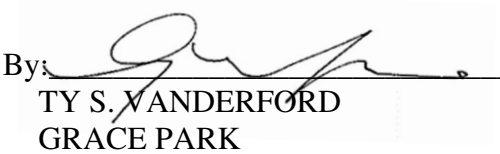
DATED: March 26, 2021

VANDERFORD & RUIZ, LLP

By: 

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CERTAIN UNDERWRITERS AT LLOYD'S, LONDON

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The crux of this Motion is that the fortuity doctrine bars recovery for Plaintiffs Martha Vincent and Billy Ridge's (the "Vincent-landlords") claimed loss. Here, the underlying parties were embroiled in a contentious and litigated history, which culminated in an eviction. The claimed loss involved allegations that, immediately following the eviction, the Vincent-landlords had violated and converted the personal property of the underlying plaintiffs—Dawn Christie, Johnny Pequignot, and Togetherness Productions, LLC (the "Christie-tenants")—left at the premises. The uncontroverted facts, however, show: (1) the personal property was violated and converted well before the August 3 effective date of the premises liability endorsement; and (2) the Vincent-landlords' demand for payment of storage and moving costs was negligently made before the August 3 effective date of the premises liability endorsement. Moreover, once the Vincent-landlords became aware of the Christie-tenants' claimed damage to property, they immediately (within minutes!) sought an endorsement for premises liability coverage. The instant case thus represents a textbook case of a non-fortuitous loss, warranting summary judgment for Defendant.

This matter arises out of a soured landlord-tenant relationship between the Christie-tenants and the Vincent-landlords. In December 2008, the Christie-tenants rented the subject premises from the Vincent-landlords to operate a spa and retreat, with the intention of filming a reality television show related to such operations. From almost the outset of the lease, however, the Christie-tenants were in default in payments to the Vincent-landlords, which eventually led to their filing three separate unlawful detainer actions (the last of which resulted in an April 2010 judgment). The underlying parties thereafter entered into various written agreements staying enforcement of the judgment, but all such agreements fell through and the Christie-tenants were evicted on July 27, 2010. This then immediately led to an ongoing and litigated dispute regarding the contents left at the premises.

The Christie-tenants, unable to retrieve their personal property left at the premises, immediately claimed a wrongful taking or "violation" of their property; and demanded their property back on four separate occasions, even resorting to *ex parte* process to try and obtain possession of

their property on August 2, 2010. The Vincent-landlords vehemently disputed the Christie-tenants' claim and asserted that any item of value left at the premises, including the spa and exercise equipment, should be subject to levy on execution to satisfy the April 2010 judgment. What the undisputed facts will show is that once the Vincent-landlords learned of the August 2, 2010 Ex Parte Application, they immediately sought coverage for bodily injury and property damage arising out of the premises—on literally the same afternoon of August 2, 2010.

"The concept of 'fortuity' is basic to insurance law." *Chu v. Canadian Indem. Co.*, 224 Cal. App. 3d 86, 94 (1990). As applied, the fortuity doctrine prevents insurers from having to pay for losses arising from undisclosed events that existed prior to coverage. The undisputed facts will show that when the Vincent-landlords applied for the subject Endorsement, they were already involved in a pre-existing, ongoing dispute with the Christie-tenants over the alleged wrongful taking or "violation" of their personal property held at the premises. Such loss, therefore, was not fortuitous and not covered.

The Vincent-landlords' remaining claims similarly fail.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *Relevant Policy Language*

Defendant issued a homeowners' insurance policy to the Vincent-landlords for the policy period of March 2, 2010 to March 2, 2011. (Declaration of Sue Weeks ("Weeks Decl.") ¶ 3, attached as **Exhibit A** to Defendant's Evidence in support of Motion for Summary Judgment/Summary Adjudication ("Def. Evidence")). The Policy was a Dwelling Property 3- Special Form policy which insured the Dwelling, Other Structure, Personal Property, and Fair Rental Value on a Perils Insured Against basis. (Weeks Decl. ¶ 4, attached as **Exhibit A** to Def. Evidence.) This Policy did not include a coverage endorsement for premises liability. (*See* Undisputed Material Fact ("**UMF**") **1**.)[1]

The Vincent-landlords were insured under a policy endorsed by Chartis Insurance immediately preceding the term of the Policy issued to them by Defendant. (Weeks Decl. ¶ 5, attached as **Exhibit A** to Def. Evidence.) Specifically, the Chartis policy provided coverage from

[1] Many of the facts are repeated more than once in the Separate Statement of Undisputed Material Facts, pursuant to California Rules of Court, Rule 3.1350(b) and (d). For brevity's sake, the memorandum's Factual And Procedural Background section will refer only to the first citation for each fact in the separate statement.

May 14, 2009 to May 14, 2010, but was cancelled March 2, 2010 "for business exposure." (Weeks Decl. ¶ 5, attached as **Exhibit A** to Def. Evidence.) Chartis Insurance has been defending the Vincent-landlords under a reservation of rights throughout the underlying action.[2]

B. *The Underlying Parties' Contentious Litigation History Culminated in a July 27, 2010 Eviction, Immediately after which the Underlying Parties Become Embroiled in a Heated Dispute Regarding the Contents Left at the Premises*

The relevant timeline is as follows:

Date	Event
12/23/08	The underlying parties allegedly entered into a lease agreement to rent the subject premises. (**UMF 2**.) Mr. Ridge specifically attests that soon after the Christie-tenants "defaulted on the Lease," the relationship between the parties soured. (**UMF 3**.)
03/02/10	The Vincent-landlords' policy endorsed by Chartis (immediately preceding the term of the Policy issued to them by Defendant) was cancelled.
	Effective date of the Vincent-landlords' Underwriters' Policy ("Dwelling Property 3- Special Form"), which **did not include a coverage endorsement for premises liability.**
03/10/09–04/01/10	The Vincent-landlords filed three separate unlawful detainer actions—on March 10, 2009,[3] October 7, 2009,[4] and December 15, 2009—the last such action resulting in an April 1, 2010 judgment. (**UMF 4**.)[5]
04/13/10	The underlying parties entered into the first written agreement staying enforcement of the judgment. (**UMF 5**.) Mr. Ridge attests: "This turned out to be a mistake. The [Christie-tenants] continued to breach their rental obligations." (**UMF 6**.)
04/20/10	The Christie-tenants filed a civil Complaint based on the April 13, 2010 agreement.[6] (**UMF 7**.)
04/29/10–05/04/10	The underlying parties entered into two more written agreements staying enforcement of the judgment. (**UMF 8**.)
05/05/10	The Christie-tenants dismissed the April 20, 2010 Complaint with prejudice. (**UMF 9**.)
07/06/10	The Vincent-landlords served the Christie-tenants with a Notice to Perform Covenant or Quit. (**UMF 10**.)
07/27/10	The Christie-tenants were evicted, immediately after which a heated dispute

[2] The Vincent-landlords only seek coverage here for the fees beyond the amount that Chartis Insurance paid, which they are not entitled to under California law. *See* Cal. Civ. Code § 2860(c) (stating that an insurer is required to pay only the rates actually paid by that insurer for the defense of similar actions).

[3] Ventura County Superior Court Case No. 56-2009-00339262-CL-UD-SIM.

[4] Ventura County Superior Court Case No. 56-2009-00359350-CU-UD-SIM.

[5] The April 1, 2010 judgment awarded the Vincent-landlords both possession of the premises as well as $115,708.03 in damages. *See* **Exhibit H** to Def. Evidence; Fourth Amended Complaint ("FAC") ¶ 18, attached as **Exhibit F** to Def. Evidence.

[6] The case file for the April 20, 2010 Complaint has been destroyed. (*See* Ventura Court Case No. 56-2010-00371989-CU-BC-SIM).

	developed between the underlying parties regarding the contents left at the premises. (**UMF 11**.) • The Christie-tenants alleged they made their **first demand** for the surrender of their personal property left at the premises, and that since the date of the eviction, the Vincent-landlords have "refuse[d] [the Christie-tenants'] repeated demand for return of their personal property and have exerted complete dominion and control over that personal property since July 27, 2010 such as to warrant a complete and permanent taking." (emphasis added.) (**UMF 12**.) • Mr. Ridge specifically attests he "did not personally allow the [Christie-tenants] back into the property to pick up the remaining items of their personal property" because he believed "the eviction process might potentially have to be started all over again if the [Christie-tenants] refused to leave"; and that he "attempted to make arrangements to move the personal property to a convenient location but I requested that [the Christie-tenants] pay storage and moving costs which they refused to do." (emphasis added). (**UMF 13**.)
07/28/10	Counsel for the Vincent-landlords, Barry Cohen, had his first call with Mr. Pequignot to address Mr. Pequignot's **second demand** for return of his property, during which call they agreed to have a follow-up call on July 30, 2010 to discuss such return "subject to the [Vincent-landlords'] claim that any valuable items" be subject to levy on execution to satisfy the April 1, 2010 judgment. (emphasis added.) (**UMF 14**)
08/02/10	Mr. Cohen had a second call with Mr. Pequignot, where (Mr. Cohen attests) Mr. Pequignot (for the **third time**) "demanded the return of all of his property back and refused to pay storage fees." (**UMF 15**.) Mr. Cohen further attests he informed Mr. Pequignot that he could retrieve his personal effects, such as clothing, "subject to the right of the landlord to demand payment of storage fees…." (**UMF 16**.)
	The Christie-tenants filed an Ex Parte Application seeking (for the **fourth time**) the return of their personal property left at the premises, which they alleged had been "violated" by the Vincent-landlords. (**UMF 17**.)[7]
	Once the Christie-tenants filed their Ex Parte Application, the Vincent-landlords immediately sought coverage for bodily injury and property damage arising out of the premises—on literally the same afternoon of August 2, 2010. (**UMF 18**.) • Mr. Cohen attests the Vincent-landlords learned of the Ex Parte Application at some point prior to 4:00 p.m. on the afternoon of August 2, 2010, when his assistant was attempting to schedule the Vincent-landlords' own Ex Parte

[7] In their Ex Parte Application, the Christie-tenants specifically argued, *inter alia*, that: "7 days have gone by [since the eviction], and without Billy Ridge making any type of arrangements for [the Christie-tenants] to get their possessions," and that:

> The [Vincent-landlords] have no right….Locking [*sic*] them out, and not allowing them to get possessions, and access to office (client contacts, email, computer files, credit card machines, scheduling book, etc.), refusing phone communication. Everyday [*sic*] that the [Christie-tenants] are locked out, their business is damaged, their reputation tarnished and their personal property violated.

(emphasis added.) (**UMF 20**.)

	Application to preclude the turnover of the spa and exercise equipment. (**UMF 19**.) The same day, the Vincent-landlords' broker (Michael Jones) then immediately sought coverage for premises-based liability claims by emailing the underwriter (Sue Weeks). (**UMF 21**.) Specifically, on August 2, 2010, at 5:35 p.m., Mr. Jones sent an email to Ms. Weeks, stating: > The tenants that were conducting business out of home are no longer renting at property location. They have been evicted and are not physically at location. However, some of their personal property is still at house in the control of insured. There is a court date this Wednesday [August 4, 2010] to determine what will be done with the items still at residence. [¶] Insured is now trying to rent out property as single family private residence. I would like to add Liability ($500,000) and Medical ($10,000) coverage to existing policy as soon as possible. [¶] Please advise.. [*sic*] Thanks… (emphasis added.) (**UMF 22**.)
08/03/10	At 9:48 a.m., the underwriter (Ms. Weeks) responded, stating: "So you're telling me the house is now vacant?" (**UMF 23**.) At 1:14 p.m., Mr. Jones responded: "Per our conversation, there are no tenants currently at residence….Can you please confirm, [*sic*] when liability medical coverage have been added to policy and additional cost… [¶] Thanks!" (emphasis added.) (**UMF 24**.)
	Mr. Cohen had a third call with Mr. Pequignot "at approximately 4:30 pm…during which he confirmed that he would be proceeding with an exparte [*sic*] application August 4th at 2:00," and "generally indicated that he was seeking an order for the turnover of all of his personal property…." (**UMF 25**.)
	Effective date of the Premises Liability Endorsement (**UMF 26**), which provided: > Coverage **L** – Personal Liability and Coverage **M** – Medical Payments To Others are restricted to apply only with respect to "bodily injury" and "property damage" arising out of the ownership, maintenance, occupancy or use of the premises shown below. (**UMF 27**.)
08/09/10–12/03/10	The underlying parties' ongoing and litigated dispute over the alleged wrongful taking or "violation" of the personal property left at the premises, continued. (**UMF 28**.)[8]

[8] The Christie-tenants' position remained the same—that the Vincent-landlords "cannot charge a storage fee of 366.67 per day since the July 27th lockout"; and that they were holding the gym and spa equipment "hostage." (*See* Reply in support of Ex Parte Application, ¶ 4, attached as **Exhibit L** to Def. Evidence.) The Vincent-landlords' position also remained the same—that they were entitled to maintain possession of the gym and spa equipment in order to enforce the April 1, 2010, judgment; and also entitled to reasonable storage fees. (*See* Opposition to Ex Parte Application, pp. 3:5–22; 4:2–12, attached as **Exhibit K** to Def. Evidence.) Specifically, between August 4, 2010 and August 18, 2010, the underlying parties made further demands and filed various pleadings making the above-described arguments, as follows:

As also pertinent here, in the underlying Court's Statement of Intended Decision, the Court specifically stated: "It is what occurred after the eviction on July 27, 2010 that gives rise to the current litigation." (**UMF 30**.) The Court then proceeded to "state[ ]…in excruciating detail" the myriad of events that took place from July 27, 2010 to August 16, 2010 "because plaintiff's primary theory of recovery in this case is that of conversion." (**UMF 31**.) The Court continued:

> "…the tenant has the right to demand the return of his/her property following an eviction, and the landlord has a right to demand payment of storage fees for what the tenant did not take with him/her at the time of the eviction….The form of the landlord's notice of storage expenses shall be 'substantially' as specified in Civil Code section 1984. [¶] The question presented here is whether or not the notices given by each side to the other regarding the property are compliant with the pertinent Code sections. The court concludes that the defendants [*sic*] notice was not code compliant…."

(**UMF 32**.)

C. *The Present Action*

As pertinent here, in the underlying action, the Vincent-landlords filed their Third Amended Complaint ("TAC") on November 17, 2011. On December 23, 2011, Defendant issued a coverage denial, arguing, *inter alia*, that the allegations in the TAC did not set forth an "accident" as the term

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- on August 4, 2010, the Christie-tenants made a written demand for the return of their personal property (FAC ¶ 27, attached as **Exhibit F** to Def. Evidence); and the Vincent-Landlords also filed an Opposition to the Ex Parte Application (*see* **Exhibit K** to Def. Evidence);
- on August 9, 2010, the Vincent-Landlords filed a Supplemental Opposition to the Ex Parte Application (*see* **Exhibit I** to Def. Evidence);
- on August 10, 2010, the Christie-tenants filed a Reply in support of their Ex Parte Application (*see* **Exhibit L** to Def. Evidence);
- on August 17, 2010, the Christie-tenants filed Supplemental Papers in support of their Ex Parte Application (*see* **Exhibit M** to Def. Evidence);
- the hearing on the Christie-tenants' Ex Parte Application was ultimately continued to August 18, 2010, and on that date, the Application, including the "Request for Equipment," was denied (*see* Minute Orders, attached as **Exhibit N** to Def. Evidence);
- on August 27, 2010, the Christie-tenants filed an Ex Parte Application for Order Recalling Writ of Possession, which the Vincent-landlords opposed (and which was denied on September 1, 2020) (*see* **Exhibit O** to Def. Evidence);
- on November 8, 2010, the Christie-tenants filed a Motion to Vacate and Set Aside their dismissal of the April 20, 2010 Complaint, which the Vincent-landlords opposed (and which was denied on February 14, 2011); and
- on December 3, 2010, the Christie-tenants filed a second Complaint against Vincent-landlords and other defendants (*see* **Exhibit P** to Def. Evidence).

This Complaint constitutes the Underlying Lawsuit. On January 20, 2011, Plaintiffs tendered the underlying claim to Defendant. (**UMF 29**.)

has been defined under California law. This analysis was based on the fact that the TAC alleged the Vincent-landlords intentionally converted their tenants' property and violated Civil Code section 1965. Because these were intentional acts, they did not constitute an accident.

Then, on November 12, 2013, during trial, the Vincent-landlords were served with an Amended Third Amended Complaint, which contained an additional cause of action for negligence. The Vincent-landlords, however, did not alert Defendant to the filing of the Amended Third Amended Complaint [or the operative FAC][9] until September 28, 2016, nearly five years after the coverage denial and almost three years after the Vincent-landlords were served with the Amended Third Amended Complaint in the underlying action.

Here, the Vincent-landlords filed the instant bad faith Complaint against Defendant on July 26, 2012, before the operative FAC was filed in the underlying lawsuit. They, however, did not serve their Complaint until July 22, 2015, almost three years after filing it. The bad faith Complaint, filed while the Third Amended Complaint was operative, also referenced no negligence allegations against the Vincent-landlords, and was never amended to include the negligence cause of action from the FAC.

III. LEGAL STANDARD

Summary judgment must be granted "if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Code Civ. Proc. § 437c(c). A defendant moving for summary judgment is required to show either: (1) one or more elements of the "cause of action" cannot be established; or (2) there is a complete defense to the cause of action. *Id.* § 437c(p)(2). The defendant need not conclusively negate an element of the plaintiff's cause of action, but "may point to the absence of evidence" to establish one or more of its elements. *Padilla v. Rodas*, 160 Cal. App. 4th 742, 752 (2008).

Once the defendant shows this, the burden shifts to the plaintiff to prove the existence of a triable issue of material fact regarding that element of his cause of action or that defense. Code Civ.

[9] On November 15, 2013, the clerk rejected the Christie-tenants' attempt to file what appears to have been the Amended Third Amended Complaint because "Leave of Court required for Fourth Amended Complaint." Thereafter, on March 24, 2014, the Christie-tenants filed the operative FAC (the allegations of which appear to be identical to those found in the copy of the Amended Third Amended Complaint, which Defendant received from Mr. Cohen on September 28, 2016). (*See* Ventura County Superior Court Case No. 56-2010-00386347-CU-BC-VTA.)

Proc. § 437c(p)(2). The plaintiff may not rely upon allegations or denials of the pleadings. *Union Bank v. Superior Court*, 31 Cal. App. 4th 573, 583 (1995). Instead, the plaintiff must set forth specific facts showing a triable issue of material fact exists. *Id.* If the plaintiff is unable to do so, the defendant is entitled to summary judgment as a matter of law. *Saelzler v. Advanced Group*, 25 Cal. 4th 763, 780-81 (2001).

Interpretation of an insurance policy is a question of law for the court. *Waller v. Truck Ins. Exchange, Inc.*, 11 Cal. 4th 1, 18 (1995). "Summary judgment is an appropriate means for determination of coverage under an insurance policy where there is no material issue of fact to be tried and the sole issue is one of law." *State Farm Fire & Casualty Co. v. Eddy*, 218 Cal. App. 3d 958, 964–65 (1990).

IV. THE VINCENT-LANDLORDS' FIRST CAUSE OF ACTION FAILS AS A MATTER OF LAW BECAUSE THEIR CLAIMED LOSS AROSE FROM A PRE-EXISTING, ONGOING DISPUTE REGARDING THEIR ALLEGED "VIOLATION" AND CONVERSION OF THE CHRISTIE-TENANTS' PERSONAL PROPERTY, AND WAS THEREFORE NOT FORTUITOUS AND NOT COVERED

"The concept of 'fortuity' is basic to insurance law. Insurance…is designed to protect contingent or unknown risks of harm (Cal. Ins. Code §§ 22, 250), not to protect against harm which is certain or expected….Insurance protects against risks of loss, not certainties of loss." *Chu*, 224 Cal. App. 3d at 94–95. As applied, the fortuity doctrine prevents insurers from having to pay for losses arising from undisclosed events that existed prior to coverage.

Similarly, in *Compagnie des Bauxite de Guinee v. Insurance Co. of North America*, the Third Circuit Court of Appeals referred to the definition of "fortuitous event" found in section 291, comment a of the Restatement of Contracts (1932) to explain the concept that insurance can only protect against a contingent or unknown event. 724 F.2d 369 (3d Cir. 1983). "A fortuitous event…is an event which so far as the parties to the contract are aware, is dependent on chance. It may be beyond the power of any human being to bring the event to pass; it may be within the control of third persons; it may even be a past event, such as the loss of a vessel, provided that the fact is unknown to the parties." *Id.* at 372 (internal citations omitted); *see also United Pac. Ins. Co. v. Kilroy Indus.*, 608 F. Supp. 847, 858 (C.D. Cal. 1985) (opining that California courts will adopt the Restatement

formulation as applied in *Compagnie des Bauxites*).

The undisputed facts show the Vincent-landlords' claimed loss arose from their pre-existing, ongoing dispute over whether they had violated and converted the Christie-tenants' personal property, and was therefore not fortuitous and not covered. Indeed, the facts establish that over an approximate 7-day period, from July 27, 2010 (the date of the eviction) to 5:35 p.m., on August 2, 2010 (when the Vincent-landlords sought premises liability coverage), the Christie-tenants had clearly and stalwartly demanded their personal property back on **four separate occasions**; and the Vincent-landlords had negligently demanded moving and storage costs on **three additional occasions**:

(1) On July 27, 2010, the date of the eviction, the Christie-tenants demanded their property back (**UMF 12**);

(2) On July 27, 2010, Mr. Ridge attests he "attempted to make arrangements to move the personal property to a convenient location but [he] requested that [the Christie-tenants] pay storage and moving costs which they refused to do" (**UMF 13)**;

(3) On July 28, 2010, Mr. Cohen spoke to Mr. Pequignot who again sought the return of his personal property (**UMF 14**);

(4) On August 2, 2010, Mr. Pequignot (in Mr. Cohen's own words) (for the third time) "demanded the return of all of his property back and refused to pay storage fees" (**UMF 15**);

(5) On August 2, 2010, Mr. Cohen once again informed Mr. Pequignot that he could retrieve his personal effects, such as clothing, "subject to the right of the landlord to demand payment of storage fees…." (**UMF 16**);

(6) On August 2, 2010, at some point prior to 4:00 p.m., the Vincent-landlords learned that the Christie-tenants had filed an Ex Parte Application seeking (for the fourth time) the return of their personal property left at the premises, which they alleged had been "violated" by the Vincent-landlords (**UMF 19–22**).

A. *The Personal Property Was Violated and Converted Well Before the August 3 Effective Date of the Premises Liability Endorsement*

Based on the foregoing, it is therefore undisputed that before 5:35 p.m., on August 2, 2010,

the Vincent-landlords were on notice that the Christie-tenants were alleging their personal property had been violated and converted by the Vincent-landlords; that they were demanding their property back; and that they were refusing to pay any storage fees as a condition of retrieving their property back. As stated in the underlying Court's Statement of Decision, "[the Christie-tenants'] primary theory of recovery in this case is that of conversion" (**UMF 31**); and "when Ridge prevented the Vincent-landlords from retrieving their property on the day of the lockout, and then put it into storage, he accomplished a conversion of plaintiff's property." (Statement of Intended Decision, p. 5:8–9, attached as **Exhibit Q** to Def. Evidence.) The Christie-tenants' repeated demands for return of their personal property; their Ex Parte Application; and the underlying Court's Statement of Decision demonstrates the "violation" or taking of the property held at the premises had already occurred[10] and was no longer "contingent or unknown" before the Vincent-landlords obtained the subject Endorsement.

It is also undisputed that once the Vincent-landlords learned of the Christie-tenants' Ex Parte Application, they immediately sought coverage for premises-based liability claims—literally on that same afternoon of August 2, 2010. Specifically, at 5:35 p.m., on August 2, 2010, Mr. Jones sent an email to the underwriter (Ms. Weeks), stating:

> The tenants that were conducting business out of home are no longer renting at property location. They have been evicted and are not physically at location. However, some of their personal property is still at house in the control of insured. <u>There is a court date this Wednesday [August 4, 2010] to determine what will be done with the items still at residence.</u> Insured is now trying to rent out property as single family private residence. <u>I would like to add Liability ($500,000) and Medical ($10,000) coverage to existing policy as soon as possible.</u> [¶] Please advise.. Thanks

(emphasis added.)

Conveniently, Mr. Jones's email did <u>not</u> disclose to Ms. Weeks the underlying parties' contentious and litigated history, including the three unlawful detainer actions filed against the Christie-tenants; and the civil Complaint filed against the Vincent-landlords. Nor was there any mention of the fact that Christie-tenants had demanded their personal property on four separate

[10] CACI 2100 specifies the essential factual elements of conversion and includes "That [Defendant] substantially interfered with [Plaintiff's] property by knowingly or intentionally preventing [Plaintiff] from having access to the [property]…." 1 CACI 2100 (2020).

occasions over less than a 7-day period; or that they had already resorted to *ex parte* process to try and obtain possession of their property. These facts further render Mr. Jones's description of the "court date" objectively misleading, as the unspecified "court date" was provided at the Christie-tenants' behest, not the court's.[11]

Moreover, when the underwriter (Ms. Weeks) responded the next day—on August 3, 2010, asking whether the house was now vacant, Mr. Jones merely responded: "Per our conversation, there are no tenants currently at residence….Can you please confirm, when liability medical coverage have been added to policy and additional cost…." Again, Mr. Jones failed to reveal the significant fact of the underlying parties' soured relationship and contentious litigated history, or the current status of the dispute between the underlying parties regarding the alleged conversion of the Christie-tenants' personal property.

B. *The Vincent-Landlords' Demand for Payment of Storage and Moving Costs Was Negligently Made Before the August 3 Effective Date of the Premises Liability Endorsement*

The foregoing undisputed facts further show that the Vincent-landlords' negligence in failing to properly notify their tenants under Civil Code section 1984 also occurred well before the August 3 coverage date. It is undisputed that the Vincent-landlords had made numerous non-Code compliant requests for the Christie-tenants to pay storage and moving costs before coverage attached.

Put simply, the foregoing facts demonstrate the Vincent-landlords' claimed loss—arising from: (1) their violation and conversion of the property left at the premises; and (2) their negligence in making non-Code compliant demands of moving and storage costs to the Christie-tenants—was not fortuitous. Absent a fortuitous loss, there is no coverage under the subject Endorsement. *See, e.g.*, *Easy Corner, Inc. v. State Nat'l Ins. Co.*, 154 F. Supp. 3d 151 (E.D. Pa. 2016). In *Easy Corner,*

[11] The Vincent-landlords had a duty to under California Insurance Code section 332 to disclose "all facts within his knowledge which are or which he believes to be material to the contract…." Materiality of facts is determined "solely by the probable and reasonable influence of the facts upon the party to whom the communication is due…." Cal. Ins. Code § 334. The effect on the actual insurer, not some reasonable insurer, is the focus of the inquiry. *Imperial Casualty & Indem. Co. v. Sogomonian*, 198 Cal. App. 3d 169, 181 (1988). "The purpose of the materiality inquiry is…to make certain that the risk insured was the risk covered by the policy agreed upon. If a fact is material to the risk, the insurer may avoid liability under a policy if that fact was misrepresented in an application for that policy whether or not the parties might have agreed to some other contractual agreement had the critical fact been disclosed…." *Merced County Mut. Fire Ins. Co. v. Cal.*, 233 Cal. App. 3d 765, 772 (1991) (internal citations and quotations omitted); *see also* Cal. Ins. Code § 331 ("Concealment, whether intentional or unintentional, entitles the injured party to rescind insurance.").

Inc., the insureds owned a bar and hired a third party to manage it. 154 F. Supp. 3d at 153. The third party made a number of changes and improvements to the bar with the insureds' knowledge. *Id*. When it was time for him to vacate the bar, a dispute arose as to which items he could remove, and the insureds sought coverage for damage caused to the bar. *Id.* at 153–54. The court found:

> The events at issue here began not on August 18, 2013, **but earlier in Mason's tenure as manager of the bar, when, to the knowledge of the [insureds], he began to make fairly extensive alterations to the property**. Mason installed quite a few items in the bar, some of which involved altering the very structure of the bar….[¶] The heart of this matter is ultimately a dispute about Mason's right to reverse these changes he made to the bar – which necessarily involved deconstructing portions of the space….Apparently, the [insureds] had no problem with Mason making improvements to the bar on his own dime, so long as he left them in place when he left the bar. On the other hand, Mason believed it to be fully his right to remove all items he had added to the property, regardless of whether they had become part of the structure of the bar….[¶] In effect, the [insureds] seek compensation from the insurance company because Mason did not leave his alterations in place – or, at the very least, because he did not remove them "professionally," as [the insureds] testified….**This loss is not fortuitous, because the course of events was not outside the [insureds'] "realm of control**." *Intermetal Mexicana*, 866 F.2d at 77.…Whether Mason and [the insureds] had the same understanding about what exactly Mason would be taking – or about whether Mason even had the right to remove items he had installed in the bar – is a contractual matter between the two of them. **[The insureds'] obvious misunderstanding about Mason's stated plans does not render the resulting loss fortuitous, especially where the [insureds] actively prevented Mason from "put[ting] things back in good nature**,"…by having him arrested. [¶] In short, nothing about this scenario was "dependent on chance." *Compagnie des Bauxites de Guinee*, 724 F.2d at 372. Rather, it resulted from apparent miscommunication between Mason and the [insureds], which the [insureds] had ample opportunity to correct or clarify throughout Mason's tenure at the bar. Accordingly, the loss claimed by Plaintiff is not fortuitous, and Defendant is not liable here.

Id. at 156–57 (emphasis added); *see also Morrisville Pharm, Inc. v. Hartford Cas. Ins. Co.*, 2010 U.S. Dist. LEXIS 116607, at *10–12 (E.D. Pa.) (pharmacy owner did not suffer a fortuitous "loss" of inventory when the building owner locked her out in a business dispute, an event that was foreseeable after the owner sent her a letter directing her to surrender the premises, remove her belongings, and return her keys); *Stars & Bars, LLC v. Travelers Cas. Ins. Co. of Am.*, 2018 U.S. Dist. LEXIS 228006, *17–18 (C.D. Cal.) (fortuity concept mandated disposition in favor of insurer where "[b]y July 17, 2014, loss due to a sewage flood was no longer contingent, but certain and known," and that "although the *extent* of the damage may have been uncertain, the fortuitous event had already occurred")

(emphasis in original).

Similarly, here, the Vincent-landlords "could not seek insurance coverage for any loss directly related to" the Christie-tenants' claimed damage to their property and/or their alleged negligence in failing to properly notify the Christie-tenants under Civil Code section 1984, because such loss was already known to them before they sought an endorsement for premises liability. *Stars & Bars, LLC*, 2018 U.S. Dist. LEXIS 228006, at *20. The underlying parties' dispute directly resulted from the intentional decision of the Vincent-landlords to try and hold onto the spa and gym equipment to satisfy the April 1, 2010, judgment and also to insist (albeit negligently) on payment of storage fees. The Vincent-landlords' intentional refusal to turn over the property and negligent demands for storage and moving costs, despite repeated demands otherwise from the Vincent-tenants, was not fortuitous.

V. BECAUSE DEFENDANT IS ENTITLED TO SUMMARY JUDGMENT ON THE BREACH OF CONTRACT CLAIM, THE DERIVATIVE CLAIMS ALSO FAIL

The Vincent-landlords bring several claims that are derivative of his breach of contract claim—i.e., the claims for breach of the implied covenant of good faith and fair dealing and declaratory relief. Because the Vincent-landlords' predicate claim does not present triable issues of fact, these derivative claims are not viable. *See, e.g.*, *Love v. Fire Ins. Exchange*, 221 Cal. App. 3d 1136, 1153 (1990) (the "conclusion that a bad faith claim cannot be maintained unless policy benefits are due is in accord with the policy in which the duty of good faith is rooted"); *City of Cotati v. Cashman*, 29 Cal. 4th 69, 79 (2002) ("The fundamental basis of declaratory relief is the existence of an actual, present controversy over a proper subject.") (internal quotations omitted). Accordingly, Defendant is entitled to summary judgment on these causes of action.

VI. CONCLUSION

For these reasons, Defendant respectfully requests the Court grant summary judgment or, in the alternative, summary adjudication as enumerated herein, in favor of Defendant and against the Vincent-landlords.

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DATED: March 26, 2021

VANDERFORD & RUIZ, LLP

By: _____

TY S. VANDERFORD
GRACE PARK
Attorneys for Defendants,
CERTAIN UNDERWRITERS AT LLOYD'S, LONDON

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is 221 E. Walnut Street, Suite 106, Pasadena, CA 91101.

On March 26, 2021, I served the document(s) described as DEFENDANT CERTAIN UNDERWRITERS AT LLOYD'S, LONDON'S NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION on the interested party(s) in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Barry E. Cohen, Esq.
Barry E. Cohen, a Professional Corporation
10866 Wilshire Boulevard, Suite 890
Los Angeles, CA 90024
Tel: (310) 247-8711
Fax: (310) 441-0808
Email: barry@bcohenlaw.com

☐ **(BY MAIL)** I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Pasadena, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☒ **(BY E-MAIL)** Based on an agreement of the parties to accept service by e-mail or electronic transmission, I caused the above document(s) to be sent to the person(s) at the e-mail addresses listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

☐ **(BY FEDERAL EXPRESS)** By placing a true and correct copy of the above document(s) in a sealed envelope addressed as indicated above and causing such envelope(s) to be delivered to the FEDERAL EXPRESS delivery service and to be delivered by the next business day to the address(s) designated.

☐ **(BY PERSONAL DELIVERY)** I caused the document(s) listed above to be personally delivered to the person(s) at the address(es) set forth above.

Executed on March 26, 2021, at Pasadena, California.

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

SANDY ARANGIO
Print Name


Signature