

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

PARK 101 LLC and LOUISIANA  
PURCHASE LLC dba LOUISIANA  
PURCHASE SD,  
  
Plaintiffs,  
  
v.  
  
AMERICAN FIRE and CASUALTY  
COMPANY and OHIO SECURITY  
INSURANCE COMPANY,  
  
Defendants.

Case No.: 20-cv-00972-AJB-BLM

**ORDER GRANTING DEFENDANTS’  
MOTION TO DISMISS PLAINTIFFS’  
FIRST AMENDED COMPLAINT**

**(Doc. No. 31)**

This action concerns claims of insurance coverage brought forth by Park 101 LLC and Louisiana Purchase LLC (doing business as Louisiana Purchase SD) (collectively, “Plaintiffs”) against American Fire and Casualty Company and Ohio Security Insurance Company (collectively, “Defendants”). Plaintiffs’ suit came in the wake of the COVID-19 public health crisis, and government emergency orders relating thereto. It is not the first of its kind. The pandemic has severely affected, and continues to affect, small businesses across the United States. COVID-19 insurance cases have been and continue to be litigated across the nation. Presently before this Court is Defendants’ motion to dismiss Plaintiffs’ First Amended Class Action Complaint (“FAC”). Plaintiffs filed an opposition, to which Defendants replied. (Doc. Nos. 37, 40). Upon careful consideration of the insurance policy

1 and applicable case law, and as more fully set forth below, the Court **GRANTS**  
2 Defendants’ motion.

3 **I. BACKGROUND**

4 Plaintiffs bring forth this action on behalf of themselves and on behalf of more than  
5 100 class members consisting of all persons and entities in California insured under a  
6 comprehensive business insurance policy by Defendants. (Doc. No. 24 ¶¶ 2, 4.) According  
7 to the FAC, Park 101 LLC entered into an insurance contract with American Fire and  
8 Casualty Company for a policy period of May 21, 2019 through May 21, 2020 (“Policy”).<sup>1</sup>  
9 (*Id.* at ¶ 12.) Louisiana Purchase LLC entered into an insurance contract with Ohio Security  
10 Insurance Company for a policy period of March 5, 2020 through March 5, 2021. (*Id.* at  
11 ¶ 13.)

12 On March 4, 2020, California Governor Gavin Newsom declared a State of  
13 Emergency in California due to the threat of COVID-19. (*Id.* ¶ 37.) On March 16, 2020,  
14 San Diego Mayor Kevin Faulconer issued an executive order prohibiting all gatherings of  
15 50 or more people. This order that also closed all bars and prohibited in-person dining at  
16 restaurants. (*Id.* ¶ 40.) Three days later, on March 19, 2020, Governor Newsom issued an  
17 executive order directing all residents to shelter-in-place. (*Id.* ¶ 41.)

18 Plaintiffs claim that the COVID-19 pandemic and related government-issued closure  
19 orders (“Closure Orders”) forced Plaintiffs to “temporarily close their businesses or restrict  
20 these businesses to delivery or serving take-out only customers,” resulting in loss of  
21 business income. (*Id.* at ¶¶ 43, 44.) More specifically, Plaintiffs contend their losses “were  
22  
23

---

24 <sup>1</sup> Defendants attached a copy of the Policies in their motion to dismiss. (Doc. No. 13 at Exhibit 1.) As  
25 Plaintiffs’ complaint refers extensively to the Policy, and because the Policy forms the basis of their  
26 insurance coverage claims, the Court may consider its contents under the incorporation by reference  
27 doctrine. *Biltmore Assocs., LLC v. Twin City Fire Ins. Co.*, 572 F.3d 663, 665 n.1 (9th Cir. 2009) (“A  
28 court may consider documents, such as the insurance policies, that are incorporated by reference into the  
complaint.”).

1 not proximately caused by SARS-CoV-2 virus, but rather by the government-issued  
2 closure orders.” (*Id.* at ¶ 54.) Accordingly, Plaintiffs allege their losses amount to covered  
3 losses under the business income, extra expense, and civil authority provisions of their  
4 Policy. (*Id.* at ¶ 70.) The Policy states, in pertinent part,

5 **1. Business Income**

6 . . .  
7 We will pay for the actual loss of Business Income you sustain due to the necessary  
8 “suspension” of your “operations” during the “period of restoration”. The  
9 “suspension” must be **caused by direct physical loss of or damage to property at  
premises** which are described in the Declarations . . . The loss or damage must be  
caused by or result from a Covered Cause of Loss.

10 . . .  
11 **2. Extra Expense**

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

14 . . .  
15 **5. Additional Coverages**

16 a. Civil Authority

17 We will pay for the actual loss of Business Income you sustain and necessary Extra  
Expense caused by action of civil authority that prohibits access to the described  
18 premises **due to direct physical loss of or damage to property, other than at the  
described premises**, caused by or resulting from any Covered Cause of Loss.

19 . . .  
20 **Exclusion of Loss Due to Virus or Bacteria**

21 B. We will not pay for loss or damage caused by or resulting from any virus,  
22 bacterium or other microorganism that induces or is capable of inducing physical  
distress, illness, or disease.

23 (Doc. No. 37 at 10–11 (emphasis added).)

24 Plaintiffs timely filed an insurance claim for coverage with Defendants, which  
25 Defendants denied. (Doc. No. 24 ¶¶ 58, 59.) Plaintiffs thereafter commenced this litigation  
26 in this Court and raised four causes of action: (1) breach of contract; (2) breach of covenant  
27 of good faith and fair dealing; (3) unfair business practices under California Business and  
28 Professions Code section 17200 *et seq.*, (“UCL”); and (4) declaratory relief. Defendants’  
motion to dismiss for failure to state a claim followed.

## II. LEGAL STANDARD

1  
2 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a plaintiff's  
3 complaint. *See Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). In reviewing a Rule  
4 12(b)(6) motion, a court "must accept as true all factual allegations in the complaint and  
5 draw all reasonable inferences in favor of the nonmoving party." *Retail Prop. Trust v.*  
6 *United Bhd. Of Carpenters & Joiners of Am.*, 768 F.3d 938, 945 (9th Cir. 2014). A  
7 complaint will survive a motion to dismiss if it contains "enough facts to state a claim to  
8 relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).  
9 "[W]hen there are well-pleaded factual allegations, a court should assume their veracity  
10 and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v.*  
11 *Iqbal*, 556 U.S. 662, 664 (2009). A claim has "facial plausibility when the plaintiff pleads  
12 factual content that allows the court to draw the reasonable inference that the defendant is  
13 liable for the misconduct alleged." *Iqbal*, 556 U.S. 678, *citing Twombly*, 550 U.S. at 556.

## III. DISCUSSION

14  
15 When deciding whether a policy provides coverage, the interpretation of that  
16 insurance policy is a question of law. *See Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th 1, 18  
17 (1995). To begin, the parties do not dispute that California law governs. *See, e.g., Intri-*  
18 *Plex Techs., Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007) ("Since this is  
19 a diversity action the law of the forum state, California, applies."). Under California law,  
20 the "interpretation of an insurance policy is a question of law" to be answered by the court.  
21 *Waller*, 11 Cal. 4th at 18. The "goal in construing insurance contracts, as with contracts  
22 generally, is to give effect to the parties' mutual intentions." *Minkler v. Safeco Inc. Co.*, 49  
23 Cal. 4th 315, 321 (2010) (quoting *Bank of the West v. Superior Court*, 2 Cal. 4th 1254,  
24 1264 (1992)). To do so, the court must "look first to the language of the contract in order  
25 to ascertain its plain meaning or the meaning a layperson would ordinarily attach to it."  
26 *Waller*, 11 Cal. 4th at 18; *see also Cont'l Cas. Co. v. City of Richmond*, 763 F.2d 1076,  
27 1080 (9th Cir. 1985) ("The best evidence of the intent of the parties is the policy  
28 language."). Generally, if the policy terms are clear and explicit, their ordinary and popular

1 interpretation governs. *Minkler*, 49 Cal. 4th at 321. But if the terms are ambiguous or  
 2 susceptible to more than one reasonable interpretation, courts “interpret them to protect the  
 3 objectively reasonable expectations of the insured.” *Id.* However, “[c]ourts will not strain  
 4 to create an ambiguity where none exists.” *Waller*, 11 Cal. 4th at 18–19.

5 In this case, Defendants primarily argue that Plaintiffs failed to allege “direct  
 6 physical loss of or damage” within the ordinary and popular meaning of that phrase to  
 7 trigger coverage under the Policy. And, moreover, Defendants claim that Plaintiffs’  
 8 claimed losses are barred by the Virus Exclusion.<sup>2</sup> (*See generally* Doc. No. 31.) Plaintiffs,  
 9 on the other hand, primarily argue that “direct physical loss” does not only mean a physical,  
 10 distinct alteration of sorts but also the inability to use the property or temporary  
 11 dispossession of the property. (*See generally* Doc. No. 37.) The Court will discuss each  
 12 argument in turn.

#### 13 **A. Business Income and Extra Expense Provisions**

14 According to the FAC, the Policy covers business income lost when business  
 15 operations are suspended due to a covered cause of loss, but the “suspension must be caused  
 16 by direct physical loss of or damage to property at the described premises.” Similarly, the  
 17 Policy covers extra expenses incurred during a period of restoration that the insured “would  
 18

---

19  
 20  
 21 <sup>2</sup> Defendants also request the Court to take judicial notice of various documents. (Doc. Nos. 13-1, 31-2.)  
 22 Federal Rule of Evidence 201 states that a “court may judicially notice a fact that is not subject to  
 23 reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2)  
 24 can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.”  
 25 Fed. R. Evid. 201(b). Here, Defendants request judicial notice of the certified copies of the Policies and  
 26 the government health orders referenced in Plaintiffs’ Complaint. Upon review of the documents, the  
 27 Court finds that its contents are either generally known or can be accurately and readily determined from  
 28 credible sources. There is no dispute as to the Policies’ authenticity, and government publications “are  
 matters of undisputed public record” of which the Court can take judicial notice. *Quan v. Smithkline  
 Beecham Corp.*, 149 F. App’x 668, 689 (9th Cir. 2005) (citing *Lee v. City of Los Angeles*, 250 F.3d 668,  
 689 (9th Cir. 2001)). Plaintiffs do not contend otherwise. Accordingly, the Court **GRANTS** Defendant’s  
 request for judicial notice.

1 not have incurred if there had been no direct physical loss of or damage to property.” (Doc.  
2 No. 31 at 18.) Plaintiffs’ arguments focus on the “direct physical loss of” property prong  
3 of the provision. While neither the Policy nor Defendants define the terms “physical” or  
4 “loss,” “[t]he fact that a term is not defined in the policies does not make it ambiguous.”  
5 *Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co.*, 18 Cal. 4th 857, 868 (1998). The terms  
6 of a contract “must be construed in the context of that instrument as a whole, and in the  
7 circumstances of that case, and cannot be found to be ambiguous in the abstract.” *Id.*  
8 (citation omitted).

9 In Plaintiffs’ view, “direct physical loss of” property includes the inability to use the  
10 property.” (Doc. No. 37 at 21.) On the other hand, Defendants maintain that there must be  
11 a “distinct, demonstrable, physical alteration” to the property. (Doc. No. 31 at 19.)  
12 However, as the district court in *10E, LLC v. Travelers Indemn. Co. of Connecticut* stated,  
13 “. . . losses from inability to use property do not amount to ‘direct physical loss of or  
14 damage to property’ within ***the ordinary and popular meaning of that phrase***. Physical  
15 loss or damage occurs only when property undergoes a distinct, demonstrable, physical  
16 alteration.” 483 F. Supp. 3d 828, 835–36 (C.D. Cal. 2020) (quoting *MRI Healthcare Ctr.*  
17 *of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779 (2010)) (emphasis  
18 added).

19 Plaintiffs attempt to distinguish *10E, LLC/MRI Healthcare* by pointing out that the  
20 language interpreted in that case was the sole phrase, “direct physical loss to” property—  
21 as opposed to the disjunctive phrase, “direct physical loss of or damage to” property, as in  
22 this case. (Doc. No. 37 at 23 n.10.) Plaintiffs contend the phrase “loss to property” could  
23 suggest an “external force” acting on the property whereas “loss of property” could suggest  
24 dispossession. The Court is not persuaded that the difference is meaningful one. For one,  
25 “[a]n insured cannot recover by attempting to artfully plead temporary impairment to  
26 economically valuable use of property as physical loss or damage.” *10E, LLC*, 483 F. Supp.  
27 3d at 836.

1 Second, the Court is further unpersuaded by Plaintiffs' reliance on *Total Intermodal*  
2 *Servs. Inc. v. Travelers Prop. Cas. Co. of Am.* for an expansive view of the phrase "direct  
3 physical loss of" property.<sup>3</sup> 2018 WL 3829767, at \*1 (C.D. Cal. July 11, 2018). In *Total*  
4 *Intermodal*, the plaintiff filed an insurance claim for cargo that was inadvertently returned  
5 to China and later destroyed. *Id.* There, the court concluded that in the absence of physical  
6 damage, "the phrase 'loss of' includes the permanent dispossession of something." *Id.* at  
7 \*4. Here, Plaintiffs do not and cannot allege that they have been permanently dispossessed  
8 of property. At most, Plaintiffs can allege that they were temporarily dispossessed of a  
9 service of their business. Thus, the Court finds *Total Intermodal* is inapplicable to this case.  
10 And, it is not just this Court that finds so. A resounding majority of decisions support an  
11 insurer's position that business losses arising out of COVID-19 do not constitute as direct  
12 physical loss or damage. See *Pappy's Barber Shops, Inc. v. Farmers Grp., Inc.*, 487 F.  
13 Supp. 3d 937, 944 (S.D. Cal. 2020); *Mark's Engine Co. No. 28 Restaurant, LLC v.*  
14 *Travelers Indemn. Co. of Conn.*, No. 2:20-cv-00423-AB-SK, (C.D. Cal. Oct. 02, 2020).

15 In fact, none of the cases Plaintiffs cited in support of their position involved  
16 COVID-19 related closures. Rather, the cited cases involved property rendered unusable  
17 from ammonia release, collapse of another part of a building, wind damage, and missing  
18 inventory. These cases additionally cut against Plaintiffs' position, as the authority  
19 emphasize that physical loss or damage relates to the ordinary and popular meaning of the  
20 phrase, a definition which requires a distinct, tangible, actual, demonstrable, or literal  
21 physical damage or loss to property. (Doc. No. 37 at 24, 25.)

22 What's more, a California Court of Appeal in *Ward Gen. Ins. Servs., Inc. v.*  
23

---

24  
25 <sup>3</sup> Plaintiffs also rely on various out-of-state cases. However, as a federal court sitting in California, this  
26 Court is bound to follow the law and precedent as established by California courts in interpreting  
27 California law for this dispute. While the parties are welcome to reference other state court's opinions  
28 as persuasive guidance, where there are California cases on point, the Court considers those  
authoritative.

1 *Employers Fire Ins. Co.* considered the very phrase “direct physical loss of or damage to”  
2 property in the context of a plaintiff who lost information stored in a computer database.  
3 114 Cal. App. 4th 548, 553–54 (2003). The *Ward* court found that the words “direct  
4 physical” modifies both “loss of” and “damage to.” *Id.* at 554. After examining the ordinary  
5 and popular sense of the word “physical,” the court held, “we say with confidence that the  
6 loss of plaintiff’s database [information] does not qualify as a ‘direct physical loss,’ unless  
7 the database has a material existence, formed out of tangible matter, and is perceptible to  
8 the sense of touch.” *Id.* at 556.

9         Nevertheless, Plaintiffs here maintain that they were “unable to access and utilize  
10 their dining facilities and thus the business income therefrom,” constituting a loss. (Doc.  
11 No. 27 at 23.) The Court disagrees. Like in *Ward*, the Court finds that Plaintiffs’ loss of its  
12 on-site dining use, “with its consequent economic loss, but with no loss of or damage to  
13 tangible property, [is] not a ‘direct physical loss of or damage to’ covered property under  
14 the terms of the subject insurance policy, and, therefore, the loss is not covered.” *Ward*,  
15 114 Cal. App. 4th at 556–57.

16         Plaintiffs also argue that Defendants’ interpretation of “direct physical loss of” is, in  
17 effect, synonymous to “physical damage to,” and is both superfluous and an overly  
18 expansive interpretation of this clause. (Doc. No. 37 at 21–22.) According to Plaintiffs,  
19 “[i]f Defendants wanted the phrase to be synonymous with ‘physical damage to,’ or  
20 somehow limited to material alteration, they could have expressly defined it that way in  
21 the policy.” (Doc. No. 37 at 22.) While Plaintiffs did not expressly assert it as such,  
22 Plaintiffs appear to be alleging that Defendants’ use of the terms “loss of” property and  
23 “damage to” property is redundant. *See Shell Oil Co. v. Winterthur Swiss Ins. Co.*, 12 Cal.  
24 App. 4th 715, 753 (1993) (“The way we define words should not produce redundancy, but  
25 instead should give each word significance.”). While Plaintiffs’ position finds some  
26 support in the ordinary rules of contract interpretation, the Court does not find that the  
27 slight redundancy in this particular context to be fatal. “The whole of a contract is to be  
28



1 taken together, so as to give effect to every part, if reasonably practicable, each clause  
2 helping to interpret the other.” Cal. Civ. Code § 1641.

3 Taking the contract as a whole, here, the business income and extra expenses  
4 provisions contain terms such as “period of restoration” and “repaired, rebuilt, or replaced.”  
5 (Doc. No. 31 at 24.) The ordinary and popular definitions of these terms strongly indicate  
6 that the “physical loss” contemplated by the Policy requires, as the aforementioned  
7 California cases state, some distinct, demonstrable, physical alteration of the property. *See*  
8 *Merriam-Webster’s Online Dictionary* (2021) (defining (1) restoration as “a bringing back  
9 to a former position or condition” or “a restoring to an unimpaired or improved condition”;  
10 (2) repair as “to restore by replacing a part or putting together what is torn or broken” or  
11 “to restore to a sound or healthy state”; (3) rebuilt as “to make extensive repairs” or “to  
12 restore to a previous state”; and (4) repair as “to restore to a former place or position” or  
13 “to take the place of especially as a substitute or successor”). Interpreting the Policy in its  
14 context and with the assistance of surrounding terms, the Court finds that without some  
15 tangible physical alteration to the property, there would be no need to restore, repairs,  
16 rebuild, or replace. *See Palmer v. Truck Ins. Exch.*, 21 Cal. 4th 1109, 1115 (1999) (“When  
17 interpreting a policy provision, we must give its terms their ordinary and popular sense . .  
18 . We must also interpret these terms . . . and give effect to every part of the policy  
19 with each clause helping to interpret the other.”) (citation omitted); *Waller*, 11 Cal. 4th at  
20 18 (same).

21 Moreover, as the district court in *Plan Check Downtown III, LLC v. AmGuard Ins.*  
22 *Co.* persuasively explained in the context of COVID-19, Plaintiffs’ interpretation “is not a  
23 reasonable one because it would be a sweeping expansion of insurance coverage without  
24 any manageable bounds.” 485 F. Supp. 3d 1225, 1226 (C.D. Cal. 2020). For example, the  
25 court illuminated that the following scenarios would trigger insurance coverage under the  
26 plaintiff’s expansive view: (1) a city changes its maximum occupancy codes to lower the  
27 caps, meaning that a particular restaurant can no longer seat as many customers as it used  
28 to; (2) a city amends an ordinance requiring restaurants located in residential zones to cease

1 operations between 1:00 a.m. and 5:30 a.m. to expand the window to 12:00 a.m. to 6:00  
2 a.m.; (3) a city issues a mandatory evacuation order to all of its residents due to nearby  
3 wildfires (a consequence of this is that all businesses must suspend operations), but lifts  
4 the order three weeks later when the wildfires are extinguished without, fortunately, any  
5 destruction of property. The Court here agrees that to adopt Plaintiffs' view would be to  
6 reach an overbroad view of "physical loss."

7 Thus, for the foregoing reasons, the Court finds that the resulting redundancy is not  
8 fatal and the Business Income and Extra Expense Provisions have not been triggered. *See*  
9 *Flintkote Co. v. General Acc. Assur. Co.*, 410 F. Supp. 2d 875, 890 (N.D. Cal. 2006) (noting  
10 that "[t]he fact that some redundancy results is not fatal" where the "the court has adopted  
11 the only reasonable construction of the contract").

#### 12 **B. Civil Authority Provision**

13 Plaintiffs also allege that they have established coverage under the "Civil Authority"  
14 coverage extension of the Policy because they have alleged that the Closure Orders caused  
15 the restaurants to close down, and as a result, they lost business income. (Doc. No. 24  
16 ¶¶ 43–45.) The Civil Authority coverage kicks in when the insured incurs loss of business  
17 income and extra expenses as a result of civil authority action. Defendants argue that Civil  
18 Authority coverage does not apply for four reasons: (1) Civil Authority provision only  
19 comes into play when there is "direct physical loss of or damage to" the covered property,  
20 and, just like the Business Income provision, Plaintiffs have failed to demonstrate a  
21 "physical loss;" (Doc. No. 31 at 17); (2) Plaintiffs fail to establish the causal link required  
22 by the Civil Authority provision, (*id.*); (3) Civil Authority provision requires prohibition  
23 of access to the premises (*id.* at 18); and (4) the Civil Authority actions are not triggered  
24 from "fear of future harm." (*Id.* at 18–19.)

25 First, as discussed above, the Court agrees with Defendants in that Plaintiffs have  
26 failed to demonstrate a physical loss to even warrant a discussion regarding the Civil  
27 Authority provision. Second, as to Plaintiffs' contention about the causal link, Plaintiffs  
28 fail to show the government closure *caused* the alleged physical loss. According to the

1 FAC, “the COVID-19 pandemic and the related and government issued closure orders”  
2 caused Plaintiffs to temporarily close or restrict their businesses, resulting in a loss of  
3 income. (Doc. No. 24 ¶¶ 43, 44.) For Plaintiffs, “[C]ivil Authority measures were enacted  
4 as a result of the need for the government to enact measures to flatten the curve and slow  
5 down the spread.” (Doc. No. 37 at 29.) And, accordingly, Plaintiffs argue that “determining  
6 the predominating cause and/or causes of the Closure Orders involve complex issues that  
7 should be decided by the trier of fact and cannot be decided here on a motion to dismiss.”  
8 (Doc. No. 37 at 29.) Plaintiffs, however, overlook the fact that the Civil Authority provision  
9 is triggered if civil authority “prohibits access” to the premises. (Doc. No. 31 at 15.)

10 Taking the language of the provision as is, the Court finds that Plaintiffs have not  
11 plausibly alleged that the Closure Orders prohibited access to their property. In fact, the  
12 FAC indicates that the March 16 order prohibited merely “in-person” dining, (Doc. No. 24  
13 ¶ 40), but allowed for permitted patrons to access the property to purchase food and  
14 beverages for delivery or take-out services. (Doc. No. 24 ¶¶ 43, 44.) On that same token,  
15 the Court notes that the Civil Authority coverage provision provides coverage only to the  
16 extent that access to Plaintiffs’ physical premises is prohibited—not if Plaintiffs are simply  
17 prohibited from operating the on-site consumption aspect of their business.<sup>4</sup>

18 Second, even assuming that the Closure Orders prohibited access to Plaintiffs’  
19 premises, the orders were not were not issued “due to direct physical loss of or damage to  
20 property, other than at the described premises.” As Defendants correctly noted, the FAC is  
21 void of any allegations that (at the very least) virus particles were on surfaces on the  
22

---

23  
24 <sup>4</sup> Plaintiffs in their opposition argue that “while Plaintiffs’ employees might not have been prohibited from  
25 accessing the premises, customers were prohibited. Since customers are necessary for business income,  
26 ‘access’ under the terms of the Policies should encompass access by customers.” (Doc. No. 37 at 29.) As  
27 repeatedly emphasized throughout the Court’s opinion, the basic rule of contract interpretation requires  
28 the Court to not create ambiguity where none exists. *Waller*, 11 Cal. 4th at 18–19. Here, the Court does  
not find the word “access” is ambiguous in that it refers to customers’ access because the contract was  
entered between the insurer and insured; therefore, “access” in its most obvious sense would refer to the  
insured’s access to the property, not customers’ access to the property.

1 property. Additionally, the FAC does not plausibly allege a direct physical loss of or  
2 damage to property *other* than Plaintiffs’ premises. The text of the Closure Orders makes  
3 clear that they were issued as general precautionary measures “to stem the spread of the  
4 virus and protect public safety and welfare,” (Doc. No. 31-2 at 11), and to “slow the pace  
5 of community spread and avoid unnecessary strain on our medical system.” (*Id.*). Nowhere  
6 is the presence of COVID-19 in the *surrounding areas* of Plaintiffs’ premises cited as the  
7 impetus for the Closure Orders. Accordingly, for the reasons stated, the Court finds that  
8 Plaintiffs have not alleged a covered loss under the Civil Authority provision.

### 9 **C. Viability of Plaintiffs’ Causes of Action**

10 While the Court is sympathetic to Plaintiffs’ situation, it must find, as a matter of  
11 law, that their insurance claims are not covered by the Policy.<sup>5</sup> And as Plaintiffs’ causes of  
12 action for breach of contract, breach of covenant of good faith and fair dealing, unfair  
13 business practices, and declaratory relief all rely upon the existence of coverage under the  
14 Policy, they will be dismissed. *See, e.g., Waller*, 11 Cal. 4th at 36 (“It is clear that if there  
15 is no *potential* for coverage and, hence, no duty to defend under the terms of the policy,  
16 there can be no action for breach of the implied covenant of good faith and fair dealing  
17 because the covenant is based on the contractual relationship between the insured and the  
18 insurer.”).

19 In light of the foregoing, the Court **GRANTS** Defendant’s motion to dismiss  
20 Plaintiffs’ FAC. (Doc. No. 31.) The Court notes that the overwhelming majority of  
21 California courts to have considered the issues raised in Plaintiffs’ FAC have concluded  
22 that temporarily closing a business due to government closure orders during the pandemic  
23


---

24 <sup>5</sup> Defendant also argues that the virus exclusion provision also precludes coverage in this case. On the  
25 other hand, Plaintiff argues that the terms “virus” and “cause” in the virus exclusion provision are  
26 ambiguous, and, therefore, should not be decided at the pleading stage. (Doc. No. 37 at 14.) Even if  
27 Plaintiffs are correct, considering the Court’s finding that the business income, extra expenses, and  
28 civil authority provisions were not met, the Court need not address the Virus Exclusion provision.

1 does not constitute a direct loss of property under insurance policies. *See supra* § III.A.  
2 Any amendment is therefore likely to be futile. As such, the FAC is **DISMISSED**  
3 **WITHOUT LEAVE TO AMEND**. The Clerk of Court is **DIRECTED** to **CLOSE THE**  
4 **CASE**.

5  
6 **IT IS SO ORDERED.**

7 Dated: June 29, 2021

8   
9 Hon. Anthony J. Battaglia  
United States District Judge

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28