

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

WATER SPORTS KAUAI, INC.,

Plaintiff,

v.

FIREMAN'S FUND INSURANCE  
COMPANY, et al.,

Defendants.

Case No. [20-cv-03750-WHO](#)

**ORDER GRANTING THE MOTION  
TO DISMISS**

Re: Dkt. No. 39

Plaintiff Water Sports Kauai, Inc., a Hawaii corporation, dba Sand People (“Sand People”), shut down its businesses (twelve stores on three islands that sell gifts, artwork, décor, jewelry, glassware, coastal furnishing, apparel, soaps, lotions, candles, and books) six months ago due both to the spread of the coronavirus and to directives from Hawaii’s Governor limiting the operation of non-essential businesses, including Sand People’s stores. Amended Complaint (“AC”), Dkt. No. 38, ¶ 56. It submitted a claim for coverage under an insurance policy (Policy) issued by defendants Fireman’s Fund Insurance Company, National Surety Corporation, and Allianz Global Risks US Insurance Co (collectively, “defendants”) under the “Lost Business Income” and “Civil Authority” provisions. AC ¶ 4. That claim was denied, and Sand People filed suit.

I agree with the vast majority of cases that have addressed materially similar policy provisions and facts. Sand People has failed to plausibly plead Business Income or Civil Authority coverage. Its claims are dismissed with limited leave to amend.

**BACKGROUND**

The Policy provides that the defendants will “pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss.” AC, Ex. 9 at 30. In relevant part, the Policy states:

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3. Covered Causes of Loss

RISKS OF DIRECT PHYSICAL LOSS unless the loss is [excluded].

*Id.* at 31.

g. Business Income

We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your **operations** during the **period of restoration**.

...

The suspension must be caused by direct physical loss of or damage to property at the described premises, including personal property in the open (or in a vehicle) within 100 feet, caused by or resulting from any Covered Causes of Loss.

*Id.* at 33.

h. Extra Expense

We will pay necessary Extra Expense you incur during the **period of restoration** that you would not have incurred if there had been no direct physical loss or damage to property at the described premises, including personal property in the open (or in a vehicle) within 100 feet of the described premises, caused by or resulting from a Covered Cause of Loss

*Id.* at 34.

i. Civil Authority

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 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. This coverage will apply for a period of up to two consecutive weeks from the date of that action.

*Id.* at 35.

15. Period of Restoration means the period of time that:

- a. Begins with the date of direct physical loss or damage caused by or resulting from any Covered Cause of Loss at the described premises; and
- b. Ends on the date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality.

*Id.* at 63.

Based on the spread of the coronavirus, directives from Hawaii’s Governor limiting the

1 operation of non-essential businesses, including Sand People’s stores, and government closure  
 2 orders issued in 49 other states/jurisdictions as a result of the coronavirus pandemic, and  
 3 defendants’ denial of requests for coronavirus coverage under similarly worded policies, Sand  
 4 People asserts the following claims on behalf of a class and a subclass: (1) Breach of Contract; (2)  
 5 Breach of Covenant of Good Faith and Fair Dealing; (3) Unfair or Deceptive Business Practices;  
 6 and (4) Declaratory Relief.

7 The class and subclass are defined as:

8 **Class**

9 All persons or entities in the United States (including its territories  
 10 and the District of Columbia) who own an interest in a business that  
 11 was insured by Defendants in March 2020 and made (or attempted to  
 12 make) a claim with Defendants arising from lost business income (or  
 13 other losses related to business interruption) at that business related  
 14 to COVID-19, and did not receive coverage for that claim.

15 **Hawaii Subclass**

16 All persons or entities in Hawaii who own an interest in a business  
 17 that was insured by Defendants in March 2020 and made (or  
 18 attempted to make) a claim with Defendants arising from lost business  
 19 income (or other losses related to business interruption) at that  
 20 business related to COVID-19, and did not receive coverage for that  
 21 claim.

22 AC ¶ 123.

23 **LEGAL STANDARD**

24 In Hawaii, “‘because insurance policies are contracts of adhesion and are premised on  
 25 standard forms,’” the contracts must be “‘construed liberally” in favor of the insured and based on  
 26 the reasonable expectations of a layperson, with any ambiguities being resolved against the  
 27 insurer. *Hart v. Ticor Title Ins. Co.*, 126 Hawai’i 448, 456 (2012) (quoting *Dairy Road Partners v.*  
 28 *Island Ins. Co., Ltd.*, 92 Hawai’i 398, 411- 414 (2000)); *see also Great Divide Ins. Co. v. AOA*  
*Maluna Kai Estates*, 492 F. Supp. 2d 1216, 1226–27 (D. Haw. 2007) (“A policy provision is not  
 ambiguous just because the insurer and insured disagree over the interpretation of the terms of a  
 policy. . . . Ambiguity exists only when the policy ‘taken as a whole, is reasonably subject to  
 differing interpretation.’” (quoting *Oahu Transit Servs., Inc. v. Northfield Ins. Co.*, 107 Hawai’i  
 231, 236 n. 7 (Haw.2005)).

1 **DISCUSSION**

2 Defendants move to dismiss Sand People’s claims because the mere threat of coronavirus  
 3 is insufficient to show a “direct physical loss of or damage to” its covered property and the  
 4 government closures orders are likewise insufficient to show the same. Defendants note that  
 5 district courts around the country – including ones in this District and throughout the Ninth Circuit  
 6 – have rejected identical claims under similar policies and that the only two federal cases Sand  
 7 People identifies in support of their claims – both from the Western District of Missouri – are  
 8 distinguishable or wrongly decided. Sand People responds that this case is different from the bulk  
 9 of district court cases relied on by defendants because (i) it specifically alleges that it had to close  
 10 its properties due directly to the coronavirus’ rapid spread and imminent threat to its businesses,  
 11 and (ii) the vast majority of district court cases dismissing for lack of coverage also had virus  
 12 exclusions limitations in their policies.

13 As described below, I will follow the overwhelming majority of courts that have  
 14 determined that the mere threat of coronavirus cannot cause a “direct physical loss of or damage  
 15 to” covered property as required under the Policy. That resolves the issue of coverage under the  
 16 Business Income and Civil Authority provisions as a result of both the spread of coronavirus and  
 17 the government closure orders.

18 **I. LOST BUSINESS INCOME**

19 Sand People contends that “lost business income” coverage was triggered by both the  
 20 “physical” spread of the coronavirus and, independently, the government closure orders. I will  
 21 address each argument in turn.

22 **A. Spread of Coronavirus**

23 Sand People asserts that it adequately alleged closure because of the “imminent” threat of  
 24 coronavirus at their properties. AC ¶ 69 (“The Coronavirus and its pernicious spread created  
 25 inherently dangerous conditions where the stores and property within them were at immediate and  
 26 imminent risk of exposure to the Coronavirus. This caused them to suspend operations and lose  
 27 access to the stores, which rendered them untenable.”); ¶ 76 (“Because, inter alia, the spread of  
 28 Coronavirus rendered Sand People’s facilities no longer usable for their intended purpose(s), and

1 in many cases impossible to operate safely, it directly caused them to suffer physical damage and  
2 loss.”). It claims that the explosive spread of coronavirus and the imminence of the threat it  
3 presented is sufficient to show a “direct physical loss” because the closure is alleged to have  
4 resulted from a physical event “the spread of the virus” and potential exposure to a disease.

5 Sand People relies on a series of cases where courts found coverage because asbestos,  
6 arsenic, and e-coli contamination were present on covered property. For example, in *Port Auth. of*  
7 *New York and New Jersey v. Affiliated FM Ins. Co.*, 311 F.3d 226 (3d Cir. 2002), the Third Circuit  
8 interpreted a “physical loss or damage” policy with respect to asbestos and concluded, “[w]hen the  
9 presence of large quantities of asbestos in the air of a building is such as to make the structure  
10 uninhabitable and unusable, then there has been a distinct loss to its owner. However, if asbestos  
11 is present in components of a structure, but is not in such form or quantity as to make the building  
12 unusable, the owner has not suffered a loss.” *Id.* at 236. The court explained, “‘physical loss or  
13 damage’ occurs only if an actual release of asbestos fibers from asbestos containing materials has  
14 resulted in contamination of the property such that its function is nearly eliminated or destroyed,  
15 or the structure is made useless or uninhabitable, or if there exists an imminent threat of the release  
16 of a quantity of asbestos fibers that would cause such loss of utility. The mere presence of  
17 asbestos, or the general threat of future damage from that presence, lacks the distinct and  
18 demonstrable character necessary for first-party insurance coverage.” *Id.*

19 That case confirms that there must be sufficient evidence of the *presence* of the  
20 contaminant at the property plus an imminent threat from it. *Id.* at 236 (“We thus find ourselves in  
21 agreement with the District Court’s ruling that plaintiffs’ inability ‘to produce evidence  
22 concerning the manifestation of an imminent threat of asbestos contamination’ forecloses the  
23 existence of a viable claim. Although the plaintiffs demonstrated that many of its structures used  
24 asbestos-containing substances, those buildings had continuous and uninterrupted usage for many  
25 years. The mere presence of asbestos or the general threat of its future release is not enough to  
26 survive summary judgment or to show a physical loss or damage to trigger coverage under a first-  
27 party ‘all risks’ policy.”); *see also In Assn. of Apt. Owners of Imperial Plaza v. Fireman’s Fund*  
28 *Ins. Co.*, 939 F. Supp. 2d 1059, 1069 (D. Haw. 2013) (“direct physical loss or damage” to property

1 satisfied where plaintiff demonstrates “that an event had a direct impact and proximately caused a  
2 loss related to the physical matter of the Property” and arsenic seeping into the “concrete slab,  
3 carpet, and interior objects are physical matter within the ordinary use of those words.”); *Motorists*  
4 *Mut. Ins. Co. v. Hardinger*, 131 Fed. Appx. 823, 826–27 (3d Cir. 2005) (unpublished) (“we  
5 believe there is a genuine issue of fact whether the functionality of the Hardingers’ property was  
6 nearly eliminated or destroyed, or whether their property was made useless or uninhabitable” by  
7 presence of e-coli in well). For that reason, it does not help Sand People.

8 Defendants do not dispute that actual presence of a contaminant at a covered property  
9 might trigger coverage. They argue that what is alleged here – the “mere threat” of exposure – is  
10 categorically insufficient to trigger coverage as a direct physical loss of or damage to Sand  
11 People’s property. They contend that there must be an incident of a direct physical impact to  
12 covered property to trigger coverage and a mere threat does not suffice. That distinction is  
13 supported by *Port Authority*, 311 F.3d at 236, where even though asbestos was in the property –  
14 and thus there was some threat of exposure in the future – plaintiff’s claims failed because there  
15 was insufficient “evidence concerning the *manifestation* of an imminent threat of asbestos  
16 contamination.” *Id.* at 236 (emphasis added). Sand People pleads that coronavirus was rapidly  
17 spreading and feasibly in Hawaii but fails to allege both its *presence* in any of its properties and a  
18 *manifestation* of imminent threat of contamination in any of its properties.

19 That manifestation is significant because the Policy requires a “direct physical loss of or  
20 damage to” property that has not been alleged. *See, e.g., Mudpie, Inc. v. Travelers Cas. Ins. Co. of*  
21 *Am.*, 20-CV-03213-JST, 2020 WL 5525171, at \*5 (N.D. Cal. Sept. 14, 2020) (dismissing claim for  
22 failure to allege COVID-19 or any other physical impetus caused the loss of functionality “where  
23 plaintiff “does not allege that ‘Covid-19 entered the [property] through any employee or  
24 customer” and did not allege that store was closed “because its employees became sick or  
25 coronavirus was discovered on the property”). For this reason alone, Sand People’s reliance on  
26 *Studio 417, Inc. v. Cincinnati Ins. Co.*, 20-CV-03127-SRB, 2020 WL 4692385, at \*2 (W.D. Mo.  
27 Aug. 12, 2020) and *Blue Springs Dental Care, LLC v. Owners Ins. Co.*, 20-CV-00383-SRB, 2020  
28 WL 5637963, at \*6 (W.D. Mo. Sept. 21, 2020), is unhelpful. Unlike in those cases – where a hair

1 salon, restaurant, and dental practice alleged the *actual* presence of the coronavirus in their  
2 establishments – Sand People only pleads an “imminent threat.” *See also Mudpie, Inc.*, 2020 WL  
3 5525171 \*6 (distinguishing *Studio 417* because “Mudpie makes no similar allegation here. It does  
4 not allege, for example, that the presence of the COVID-19 virus in its store created a physical  
5 loss.”). There are no facts plausibly alleging an actual exposure at one or more Sand People  
6 stores, much less that an actual physical exposure caused them to close a particular store or set of  
7 stores.<sup>1</sup>

8 Instead of alleging actual physical exposure, Sand People broadly claims that closing the  
9 stores to avoid imminent exposure is “indistinguishable” from actual exposure in the context of an  
10 insurance contract because it was under a duty to mitigate losses. *Oppo.* at 5. But Sand People  
11 cites no cases finding that similar coverage provisions were triggered without some physical and  
12 direct occurrence on the property in the first instance. *See, e.g., Hampton Foods, Inc. v. Aetna*  
13 *Cas. and Sur. Co.*, 787 F.2d 349, 352 (8th Cir. 1986) (plaintiff suffered “direct, concrete and  
14 immediate loss due to extraneous physical damage to the building,” and because of “the  
15 unquestioned danger of reentering the building” at risk of collapse, plaintiff was entitled to attempt  
16 to mitigate its damages by “removing and salvaging as much property as it could before the  
17 building’s destruction.”); *see also Armstrong World Industries, Inc. v. Aetna Cas. & Sur. Co.*, 45  
18 Cal. App. 4th 1, 92 (Cal. App. 1st Dist. 1996) (“remedial costs incurred in cleaning up  
19 contaminated waste sites are covered by CGL policies, but ‘prophylactic’ costs-costs incurred in  
20 advance of any release of hazardous waste, to prevent threatened future pollution-are not incurred  
21 because of property damage.”).<sup>2</sup>

22 \_\_\_\_\_  
23 <sup>1</sup> During the oral argument, Sand People’s counsel admitted that it would not be able to plead facts  
24 that coronavirus actually entered or was otherwise found in one of the Sand People’s stores. I also  
25 note that at least one court has dismissed coverage claims despite plaintiff’s allegation that  
26 coronavirus had entered a property. *See, e.g. Uncork and Create LLC v. The Cincinnati Insurance*  
27 *Company, et al.*, No. 2:20-cv-00401, slip op. (S.D.W. Va. November 2, 2020) (granting motion to  
28 dismiss for lack of “physical loss” and concluding that “even when present, COVID-19 does not  
threaten the inanimate structures covered by property insurance policies, and its presence on  
surfaces can be eliminated with disinfectant. Thus, even actual presence of the virus would not be  
sufficient to trigger coverage for physical damage or physical loss to the property.”).

<sup>2</sup> Cases confirming coverage where there was physical contamination of properties, therefore, do  
not aid plaintiff. *See Oppo.* at 6-7.

1 Sand People also contends that the significant “gravity of the risk” from coronavirus, as  
2 confirmed by the March 2020 government closure orders and which they intend to prove through  
3 discovery and expert testimony, “will demonstrate how, in the midst of a global pandemic,  
4 Plaintiff’s traveler-focused Stores in touristic centers of Hawai‘i would have been exposed to  
5 Coronavirus had they not closed down.” Oppo. 8-9. But it cites no case finding coverage based  
6 only on a “would have been exposed” allegation because of a contaminant’s rapid spread.

7 Finally, Sand People asserts that coverage is independently required because of “exposure”  
8 to coronavirus on other properties in Hawaii that were in the “same tourism and supply chains” as  
9 its stores and that third party exposure establishes coverage. Oppo. at 9.<sup>3</sup> However, no specific  
10 “income support property” in Sand People’s supply chain is identified in the Amended Complaint.  
11 Even if one was, Sand People would still need to allege facts showing that the identified income  
12 support property itself suffered a direct physical loss, which then caused Sand People a specific  
13 loss.

14 **B. Government Closure Orders**

15 Sand People also contends that the government closure orders independently triggered  
16 coverage because (i) it suffered a “loss of” its property and “material alteration” of the property is  
17 not required and (ii) deprivation of the functionality of the property triggers coverage. It argues  
18 that “loss” broadly includes a deprivation, dispossession, and impairment of property, similar to  
19 what it suffered here due to the government orders shutting down non-essential businesses like  
20 Sand People’s. It asserts that there is no need, under the “loss” prong, to show a “material  
21 alteration” of its property (that might otherwise be required under the “damage to” prong).

22 Sand People relies on *Total Intermodal Services Inc. v. Travelers Prop. Cas. Co. of Am.*,  
23 CV 17-04908 AB (KSX), 2018 WL 3829767 (C.D. Cal. July 11, 2018). There the court  
24

25 \_\_\_\_\_  
26 <sup>3</sup> The Policy provides: “j. Income Support Properties. We will pay for the actual loss of Business  
27 Income you sustain due to direct physical loss or damage at the premises of an income support  
28 Income Support Property means property operated by others on whom you depend to: (1) Deliver  
material or services to you, or to others for your account; (2) Accept your products or services; (3)  
Manufacture products for delivery to your customers under contract of sale; or (4) Attract  
customers to your business.” AC, Ex. 9 at 35.



1 recognized that the separate “loss of” property clause “contemplates that the property is misplaced  
2 and unrecoverable, without regard to whether it was damaged,” but could include the permanent  
3 dispossession of something; there the loss of a shipping container. *Id.* at \*3-4. The *Total*  
4 *Intermodal* court distinguished “loss of” from “loss to” property, where “loss to” suggests an  
5 external force acting on property, and “loss of” connotes simple dispossession or similar harm not  
6 “localized” on a segment of property. *Id.* at 3-4; *see also* *Oppo*. at 10-11.

7 In the *Mudpie* case, the Hon. Jon S. Tigar of this District accepted the distinction drawn by  
8 *Total Intermodal* and rejected the alleged requirement – suggested by defendants here – that there  
9 be some physical alteration to the covered property. *Mudpie, Inc.*, 2020 WL 5525171 at \*4.  
10 However, Judge Tigar concluded *Total Intermodal* did not help plaintiffs because while

11 Mudpie has been dispossessed of its storefront, it will not be a  
12 “permanent dispossession” as with the lost cargo in *Total Intermodal*.  
13 *See* 2018 WL 3829767, at \*4. When the Stay at Home orders are  
14 lifted, Mudpie can regain possession of its storefront. Mudpie’s  
15 physical storefront has not been “misplaced” or become  
16 “unrecoverable,” and neither has its inventory.

17 2020 WL 5525171 at \*4.

18 The same is true here. As Judge Tigar noted, applying the broader “loss of” coverage, the  
19 surrounding provisions within the policy at issue there “suggest that Mudpie’s inability to occupy  
20 its storefront does not fall within the Business Income and Extra Expense coverage of this policy”  
21 given the “period of restoration” definition limits the period of coverage to when the property is  
22 “repaired, rebuilt or replaced with reasonable speed and similar quality.” *Id.* He stated that there  
23 was “nothing to fix, replace, or even disinfect for Mudpie to regain occupancy of its property”  
24 because its loss was “caused by state closure orders and thus will last for however long those  
25 restrictions remain.” *Id.* The period of restoration provisions in this case are materially identical  
26 and likewise support a conclusion that there has been no covered disposition or “loss of” property  
27 because Sand People identifies nothing it needs to fix or replace at any of its properties.

28 Sand People takes issue with those two conclusions, arguing that a covered “disposition”  
does not have to be “permanent” and cites to multiple cases where “removeable substances” like  
asbestos and mold have been found to trigger a “direct physical loss.” But, as noted above, those

1 cases do not help Sand People because it has not alleged any *direct physical* anything that  
2 happened to or at its specific properties. Moreover, it has not been dispossessed or deprived of  
3 any specific property; its inventory and equipment remain. Instead, it complains of loss of *use*,  
4 meaning its inability to operate its stores.

5 Numerous courts have found that materially identical allegations do not trigger coverage  
6 under similarly worded policies as a result of government closure orders. The cases consistently  
7 conclude that there needs to be some *physical* tangible injury (like a total deprivation of property)  
8 to support “loss of property” or a *physical* alteration or active presence of a contaminant to support  
9 “damage to” property. *See, e.g., Mudpie, Inc.*, 2020 WL 5525171, at \*4 (“Although Mudpie has  
10 been dispossessed of its storefront, it will not be a “permanent dispossession” as with the lost  
11 cargo in *Total Intermodal*. . . . When the Stay at Home orders are lifted, Mudpie can regain  
12 possession of its storefront.”); *Real Hospitality, LLC d/b/a/ Ed’s Burger Joint v. Travelers*  
13 *Casualty Insurance Company of America*, No. 2:20-cv-00087, slip op. (S.W.D.Ms. November 4,  
14 2020) (interpreting “loss of” prong in “direct physical loss of or damage to” to mean total  
15 dispossession of property); *10E, LLC v. Travelers Indem. Co. of Connecticut*, 2:20-CV-04418-  
16 SVW-AS, 2020 WL 5359653, at \*4 (C.D. Cal. Sept. 2, 2020) (“Under California law, losses from  
17 inability to use property do not amount to ‘direct physical loss of or damage to property’ within  
18 the ordinary and popular meaning of that phrase. Physical loss or damage occurs only when  
19 property undergoes a ‘distinct, demonstrable, physical alteration.’ [] ‘Detrimental economic  
20 impact’ does not suffice.” (internal citations omitted)); *see also Travelers Cas. Ins. Co. of Am. v.*  
21 *Geragos and Geragos*, CV 20-3619 PSG (EX), 2020 WL 6156584, at \*4 (C.D. Cal. Oct. 19,  
22 2020) (dismissing claim under “loss of or damage to” language where insured “fails to allege that  
23 there was physical damage to the property and concedes that Coronavirus ‘has never been detected  
24 at [its] property.’”); *Henry’s Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, 1:20-CV-2939-TWT,  
25 2020 WL 5938755, at \*6 (N.D. Ga. Oct. 6, 2020) (dismissing claims because the “range of  
26 contemplated harms aligns with an understanding that ‘loss of’ means total destruction while  
27  
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1 ‘damage to’ means some amount of harm or injury.”<sup>4</sup>

2 Sand People’s “deprivation of functionality” argument – namely its inability to operate the  
3 stores during the duration of the government closure orders, triggering coverage – fares no better.  
4 There is no allegation of any direct physical contact that caused a tangible loss to their property (as  
5 in *Total Intermodal*) or the direct physical presence of a contaminant that creates an inability to  
6 use or need for remediation (like the actual presence of coronavirus, asbestos, mold, etc.). *See,*  
7 *e.g., Assn. of Apt. Owners of Imperial Plaza v. Fireman's Fund Ins. Co.*, 939 F. Supp. 2d 1059,  
8 1068 (D. Haw. 2013) (“arsenic concentrated and posed a health risk that required abatement”).

9 Finally, as in *Mudpie*, viewing the language of the Policy as a whole, the “Period of  
10 Restoration” language (during which the Policy covers lost business income and extra expenses)  
11 shows the strength of defendants’ argument and the weakness of Sand People’s. *Mudpie, Inc.*,  
12 2020 WL 5525171 at \*4; AC, Ex. 9 at 63 (defining the restoration period as beginning on the  
13 “date of direct physical loss or damage caused by or resulting from any Covered Cause of Loss at  
14 the described premises” and ending when “the property at the described premises should be  
15 repaired, rebuilt or replaced with reasonable speed and similar quality.”). As in *Mudpie*, here  
16 there is nothing on any of Sand People’s premises that allegedly needs to be repaired, rebuilt or  
17 replaced.<sup>5</sup>

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18  
19 <sup>4</sup> Sand People argues that these cases (and the dozens of other cases that have been similarly  
20 decided by district courts) are not persuasive because some of them also addressed virus  
21 exclusions in the policies at issue. The majority of these courts reasonably determined, first, that  
22 coverage was not implicated given the lack of a direct physical event causing loss of or damage to  
23 property. *See, e.g., Mudpie, Inc. v. Travelers Cas. Ins. Co. of Am.*, 20-CV-03213-JST, 2020 WL  
24 5525171, at \*7 n. 9 (N.D. Cal. Sept. 14, 2020) (“Because Mudpie is not entitled to Civil Authority  
25 coverage, the Court need not consider Travelers’s additional argument that the virus exclusion  
26 bars such coverage.”); *10E, LLC v. Travelers Indem. Co. of Connecticut*, 2:20-CV-04418-SVW-  
AS, 2020 WL 5359653, at \*6 (C.D. Cal. Sept. 2, 2020) (“Plaintiff’s FAC does not articulate a  
theory of Civil Authority coverage clearly enough to allow the Court to adjudicate at this stage  
whether and how the Policy’s virus exclusion applies.”); *Henry’s Louisiana Grill, Inc. v. Allied*  
*Ins. Co. of Am.*, 1:20-CV-2939-TWT, 2020 WL 5938755, at \*6 n. 3 (N.D. Ga. Oct. 6, 2020)  
 (“Because the Plaintiffs have not pleaded sufficient facts to support a claim for coverage here, this  
Court will not proceed to analyze the parties’ arguments regarding the Virus or Bacteria  
exclusion.”). These courts’ initial coverage determinations are persuasive here.

27 <sup>5</sup> In post-briefing submissions, plaintiff submits a pair of North Carolina Superior Court decisions  
28 from October 9, 2020, granting summary judgment to plaintiffs on policies that require only a  
“direct loss” to Property. Dkt. No. 45. Those decisions are not persuasive. Defendants provide  
four additional district court cases as supplemental authority, including two that are very similar to

1 Therefore, Sand People has failed to allege a plausible basis for Lost Business Income  
 2 coverage under either of its theories (the threat of rapidly spreading coronavirus or the Hawaii  
 3 government closure orders). This claim is DISMISSED. Sand People is given limited leave to  
 4 amend. It is unlikely to be able to allege the physical presence of coronavirus in any of its covered  
 5 properties, but it may be able to allege the physical presence of coronavirus and additional facts in  
 6 support of its “supply chain” theory.

## 7 **II. CIVIL AUTHORITY LOSS**

8 Sand People also argues that under the plain language of the Policy, it is entitled to  
 9 coverage under the Civil Authority provision because the closure orders in Hawaii “prohibited”  
 10 access to its stores and the orders themselves were issued “in response” to physical loss and  
 11 damage elsewhere. Numerous judges, including Judge Tigar in *Mudpie*, have addressed and  
 12 rejected this argument in this identical posture:

13 Mudpie’s allegations establish that the government closure orders  
 14 were intended to prevent the spread of COVID-19. *See* ECF No. 1 ¶  
 15 24 (California’s Safer at Home Order was issued “to control the  
 16 spread of COVID-19.”). Because the orders were preventative – and  
 absent allegations of damage to adjacent property – the complaint  
 does not establish the requisite causal link between prior property  
 damage and the government’s closure order.

17 *Mudpie, Inc.*, 2020 WL 5525171, at \*7.

18 The same result is required here. The preventative closure orders cannot support a causal  
 19

20  
 21 this case and highly persuasive. In the first, *W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway*  
 22 *Guard Ins. Cos.*, No. 2:20-cv-05663-VAP-DFMx, slip op. (C.D. Cal. Oct. 27, 2020), a Central  
 23 District judge granted defendants’ motion to dismiss on a policy requiring a “direct physical loss  
 24 of or damage to property” for Business Income coverage and Civil Authority coverage. Similarly,  
 25 *in Uncork and Create LLC v. The Cincinnati Insurance Company, et al.*, No. 2:20-cv-00401, slip  
 26 op. (S.D.W. Va. November 2, 2020), the district court dismissed with prejudice claims materially  
 27 identical to the ones asserted here. *Id.* (rejecting Business Income and Civil Authority coverages  
 28 under a “direct physical damage or loss to property” policy despite plaintiffs’ assertions of closure  
 due to (1) a direct threat/exposure to coronavirus and (2) government closure orders). *See also In*  
*Raymond H. Nahmad DDS PA v. Hartford Cas. Ins. Co.*, No. 1:20-cv-22833-BB, slip op. (S.D.  
 Fla. Nov. 2, 2020) (dismissing Business Income and Civil Authority claims under a “direct  
 physical damage or loss to property” policy); *Real Hospitality, LLC d/b/a/ Ed’s Burger Joint v.*  
*Travelers Casualty Insurance Company of America*, No. 2:20-cv-00087, slip op. (S.W.D.Ms.  
 November 4, 2020) (“When all of the provisions are read together it makes logical sense that the  
 property that is insured, i.e., the building and/or personal property in or on the building, must first  
 be lost or damaged before Business Income coverage kicks in.” . . . “Plaintiff never specifically  
 alleges that the virus is/was present on the restaurant premises.” ).

1 link of direct physical loss of or damage to property for the reasons discussed above. In the  
 2 absence of any allegation that any specific neighboring property to a Sand People property *in*  
 3 *Hawaii* had actual coronavirus exposure, this coverage has not plausibly been triggered. *See*  
 4 *Sandy Point Dental, PC v. Cincinnati Ins. Co.*, 20 CV 2160, 2020 WL 5630465, at \*3 (N.D. Ill.  
 5 Sept. 21, 2020) (“the policy’s civil authority coverage applies only if there is a Covered Cause of  
 6 Loss, meaning a direct physical loss, to property other than the plaintiff’s property. Even then,  
 7 there is coverage only if the civil authority order, (1) prohibits access to the premises due to (2)  
 8 direct physical loss to property, other than plaintiff’s premises, caused by or resulting from any  
 9 Covered Cause of Loss.”); *In Raymond H. Nahmad DDS PA v. Hartford Cas. Ins. Co.*, No. 1:20-  
 10 cv-22833-BB, slip op. (S.D. Fla. Nov. 2, 2020) (same).

11 This claim is likewise dismissed with limited leave to amend.

### 12 **III. REMAINING CLAIMS**

13 Given the failure to plead plausible coverage under any of the provisions of the Policy, I  
 14 need not reach plaintiff’s remaining claims (Unfair or Deceptive Trade Practices, under HI Rev  
 15 Stat § 480-1 et seq., Breach of Covenant of Good Faith and Fair Dealing, and declaratory relief)  
 16 because they all fail if the underlying breach of contract claim based on coverage fails.

17 An unfair conduct claim could be premised on defendants’ alleged “misrepresentation” of  
 18 the scope of coverage. *Oppo*. at 22. However, there are no “how and what and where” facts  
 19 alleged identifying any alleged misrepresentations in the Amended Complaint. The only time  
 20 “misrepresent” is used is in paragraph 155 (alleging unfair conduct as “promising coverage to  
 21 Plaintiffs and the Subclass that was not provided, and that Defendants had no intention of  
 22 providing”). No specific facts regarding alleged fraudulent acts or misrepresentations are  
 23 provided.<sup>6</sup> Sand People is given limited leave to amend this claim to identify the specific  
 24 misrepresentations it allegedly received regarding the coverage provided by defendants.

### 25 **CONCLUSION**

26 For the foregoing reasons, defendants’ motion is GRANTED. Sand People is given  
 27

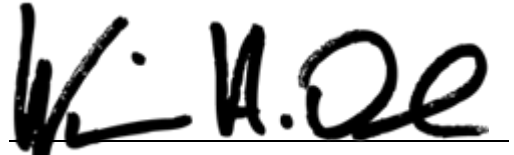
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28 <sup>6</sup> The other unfair acts – categorically denying claims and failing to investigate claims – fail if no coverage has been plausibly triggered.

1 limited leave to amend as described above. Any amended complaint should be filed within twenty  
2 days of the date of this Order.

3 **IT IS SO ORDERED.** Dated:

4 November 9, 2020

A handwritten signature in black ink, appearing to read "W. H. Orrick", written over a horizontal line.

William H. Orrick  
United States District Judge

United States District Court  
Northern District of California

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