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7 COMPANY

8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**

10 SUNSTONE HOTEL INVESTORS,
11 INC.,

12 Plaintiff,

13 v.

14 ENDURANCE AMERICAN
SPECIALTY INSURANCE
15 COMPANY, a corporation,

16 Defendant.

Case No. 8:20-cv-02185-CJC-KES

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT ENDURANCE
AMERICAN SPECIALTY
INSURANCE COMPANY'S
MOTION TO DISMISS PURSUANT
TO FEDERAL RULE OF CIVIL
PROCEDURE 12(b)(6)**

Accompanying Documents

Notice of Motion and Motion; Request
for Judicial Notice; Proposed Order

Date: March 8, 2021

Time: 1:30 p.m.

Judge: Hon. Cormac J. Carney

Courtroom: 9B

Complaint filed: November 13, 2020

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1 **I. INTRODUCTION**

2 Plaintiff¹ purchased a Site Environmental Impairment Liability policy which,
3 in the first-party context, provides coverage (subject to various requirements) for
4 **Cleanup Costs** from environmental risks such as Pollution Conditions and
5 Biological Agent Conditions. “Pollution Conditions” are defined as “the discharge,
6 dispersal, release or escape of Pollutants,” such as “smoke, vapor, soot, fumes,
7 acids, alkalis, chemicals, toxic chemicals, liquids or gases,” on Plaintiff’s
8 properties. “Biological Agent Conditions” are defined as “the presence of
9 Biological Agents,” such as fungi, pathogens, viruses, and legionella pneumophila
10 (the bacterium that causes Legionnaires’ disease), on Plaintiff’s properties.

11 Plaintiff, an investor in over 20 hotel properties, agreed to a \$100,000 Self-
12 Insured Retention before the policy provides **any** coverage for Cleanup Costs due to
13 the presence of biological agents on Plaintiff’s properties. As the Policy plainly
14 states: “Payment of the Self-Insured Retention is a condition precedent to
15 coverage.” (See Policy at § V, Dkt. 1-1 at p. 18.) And as numerous California
16 cases confirm, the Self-Insured Retention “must be satisfied before there is any
17 coverage under the policy.” See, e.g., *Forecast Homes, Inc. v. Steadfast Ins. Co.*,
18 181 Cal. App. 4th 1466, 1474 (2010). Plaintiff does not allege that it has satisfied
19 the \$100,000 Self-Insured Retention for any of its properties to trigger coverage for
20 Cleanup Costs under the Policy. Indeed, Plaintiff does not even seek coverage for
21 any Cleanup Costs. Instead, Plaintiff seeks standalone “Business Interruption and
22 Extra Expense” coverage for alleged “economic losses” due to the COVID-19
23 pandemic. But the plain language of the Policy unequivocally extinguishes
24 Plaintiff’s claim.

25
26
27 ¹ Plaintiff is Sunstone Hotel Investors, Inc. (“Sunstone”). Defendant Endurance
28 American Specialty Insurance Company is referred to as “Endurance.” Unless
otherwise specified, all emphasis is added.

1 Under Coverage D.1, the Policy provides coverage for Business Interruption
2 and Extra Expenses only if the alleged “Biological Agent Condition(s) result in
3 ***Cleanup Costs covered under this Policy.***” This Business Interruption and Extra
4 Expenses coverage is ancillary to coverage for Cleanup Costs: the former does not
5 arise absent the latter. Since Plaintiff has not satisfied the \$100,000 Self-Insured
6 Retention—a condition precedent to any coverage for Cleanup Costs under the
7 Policy—there are plainly no “Cleanup Costs covered under this Policy.” For this
8 reason alone, Business Interruption and Extra Expense coverage is not available
9 under Coverage D.1. To grant Plaintiff relief, this Court would have to strip the
10 words “result in Cleanup Costs covered under this policy” from the Policy.
11 California law prohibits such rewriting of contracts.

12 Under Coverage D.2, the Policy separately provides Business Interruption
13 and Extra Expense coverage if, among other requirements, there has been a
14 necessary suspension of business operations at a Scheduled Location as a “direct
15 result” of Biological Agent Conditions within five miles of a Scheduled Location
16 that are reported within 14 days. None of the governmental shutdown orders issued
17 to prevent the spread of COVID-19 that allegedly caused Plaintiff’s economic
18 losses were the “direct result” of the presence of SARS-CoV-2 on a property within
19 five miles of Plaintiff’s property. Following a long line of precedent from 9/11 to
20 hurricanes, courts have uniformly held that preventative shutdown orders to slow
21 the spread of COVID-19 are not the “direct result” of damage to any specific
22 property, as this language requires a close causal connection. *See, e.g., Mudpie Inc.*
23 *v. Travelers Cas. Ins. Co. of Am.*, No. 20-cv-03213-JST, 2020 WL 5525171, at *7
24 (N.D. Cal. Sept. 14, 2020).

25 Moreover, Plaintiff has not alleged that the SARS-CoV-2 virus was present
26 within five miles of any Scheduled Location and reported within 14 days. Several
27 courts, in the COVID-19 context and under similar policy provisions, have
28 dismissed claims for the failure to make such an allegation. *See, e.g., id.; 10E, LLC*

1 v. *Travelers Indem. Co. of Conn.*, No. 20-cv-04418-SVW-AS, 2020 WL 6749361,
2 at *2 (C.D. Cal. Nov. 13, 2020).

3 For these reasons, the Policy’s plain and unambiguous language swiftly and
4 completely disposes of Plaintiff’s claims. Defendant’s motion to dismiss should be
5 granted.

6 **II. BACKGROUND**

7 **A. The Site Environmental Impairment Liability Policy**

8 Endurance issued Site Environmental Impairment Liability Policy
9 GER10011343500 (the “Endurance Policy” or the “Policy”) to Plaintiff for the
10 period of June 22, 2017, to June 22, 2020.² The Endurance Policy provides a
11 variety of coverages for environmental risks, such as Cleanup Costs for Pollution
12 Conditions, (Policy at § I.A, Dkt. 1-1 at p. 10), Pollution Conditions at Nonowned
13 Disposal Sites, (*id.* at § I.B, Dkt 1-1 at p. 10), and Disinfection Condition Expenses
14 (*id.* at § I.E, Dkt. 1-1 at p. 12). As relevant here, the Policy contains the following
15 language.

16 **1. Coverage C – Biological Agent Condition(s)**

17 In the first-party context,³ Coverage C provides coverage for certain
18 “Cleanup Costs of the Insured” resulting from “Biological Agent Condition(s) . . .
19 at, upon or within a Scheduled Location.” (Policy at § I.C., Dkt. 1-1 at p. 11.)
20 Endurance’s obligation to pay for Cleanup Costs, however, is only “in excess of the
21 Self-Insured Retention”:

22
23
24 _____
25 ² The Policy is attached as Exhibit A to the Complaint. (Dkt. 1-1.) Plaintiff admits
26 that this is a “true and correct copy of the Policy.” (Complaint, Dkt. 1, at ¶ 23.)

27 ³ Coverage C also provides third-party coverage for “Liabilities for Property
28 Damage to property of a Third Party and Cleanup Costs of such Third Party,” and
“Liabilities for Bodily Injury to a Third Party.” (Policy at § I.C., Dkt. 1-1 at p. 11.)
Plaintiff does not allege receipt of any third-party claims.

C. COVERAGE C – BIOLOGICAL AGENT CONDITION(S)

The Company shall pay, up to the Limits of Liability and in excess of the Self-Insured Retention as specified in the Declarations, on behalf of the Insured for:

1. Cleanup Costs of the Insured:

. . .

resulting from Biological Agent Condition(s): (a) at, upon or within a Scheduled Location which commenced on or after the applicable Retroactive Date, if any, and before the Policy terminates, and (b) first Discovered and reported to the Company during the Policy Period, the Automatic Extended Reporting Period or the Optional Extended Reporting Period, if any.

(Policy at § I.C, Dkt. 1-1 at p. 11.) Plaintiff’s Self-Insured Retention for Coverage C is \$100,000. (Id. at Declarations Item 7, Dkt. 1-1 at p. 7.)

“Biological Agent Condition(s)” means “the presence of Biological Agents at, upon or within a Scheduled Location . . . provided that: (a) There is actual or alleged Bodily Injury or Property Damage due to or associated with such Biological Agents⁴; or (b) The Biological Agents affect an area greater than 25 square feet or requires Corrective Actions as determined by an Environmental Professional.” (Id. at § VIII.4, Dkt. 1-1 at p. 26.) “Biological Agents” means “any (a) Bacteria (including legionella pneumophila) or Fungi; (b) Viruses or other pathogens; or (c) Other microorganisms; whether or not such are living.” (Id. at § VIII.3, Dkt. 1-1 at p. 26.)

“Cleanup Costs” means “the reasonable and necessary costs incurred in performing Corrective Actions and/or Restorative Actions at, upon, within, under or migrating from a Scheduled Location.” (Id. at § VIII.10, Dkt. 1-1 at p. 27.)

“Corrective Actions” means actions undertaken to “investigate, test, sample, monitor, cleanup, remove, remediate, treat, dispose of, neutralize or immobilize” Pollutants or Biological Agents:

⁴ The insuring agreement only provides Third-Party coverage for Bodily Injury and Property Damage, and the definitions refer to Bodily Injury and Property Damage only of Third-Parties. (Id. at § I.C, Dkt. 1-1 at p. 11.)

1 11. **Corrective Actions** means actions undertaken with the prior written approval of the Company to
2 investigate, test, sample, monitor, cleanup, remove, remediate, treat, dispose of, neutralize or
3 immobilize **Pollutants** resulting from a **Pollution Condition(s)** or **Biological Agents** resulting
from a **Biological Agent Condition(s)**.

4 (*Id.* at § VIII.11, Dkt. 1-1 at p. 27.)⁵

5 **2. Self-Insured Retention**

6 In Section V – Self-Insured Retention, the Policy reiterates that Endurance’s
7 obligation for Cleanup Costs is only in excess of the Self-Insured Retention, and
8 makes clear that satisfaction of the Self-Insured Retention is a “condition
9 precedent” to coverage:

10 **V. SELF-INSURED RETENTION**

11 The Company’s obligation for **Liabilities, Cleanup Costs, Disinfection Expenses, Business**
12 **Interruption Losses, Extra Expenses, Public Relations Expenses, Diminution In Value and**
13 **Defense Expenses** shall only be in excess of the applicable **Self-Insured Retention** as specified in the
Declarations for the same or related **Pollution Condition(s), Biological Agent Condition(s) or**
Disinfection Condition(s). The Self-Insured Retention shall be applied as shown in the Declarations.

14 **Payment of the Self-Insured Retention is a condition precedent to coverage** and must be paid by the
15 **Named Insured** and is not insured by the Company. Further, the **Named Insured** must remain

16 (Policy at § V., Dkt. 1-1 at p. 18.)

17 **3. Coverage D – Business Interruption and Extra Expense**

18 Coverage D provides coverage for certain “Business Interruption Losses”
19 and “Extra Expenses,” and contains two parts. (*Id.* at § I.D., Dkt. 1-1 at p. 11.)
20 Under D.1, Endurance will pay for Business Interruption Losses and Extra
21 Expenses that “directly result from Pollution Condition(s) or Biological Agent
22 Condition(s) [o]n or under a Scheduled Location,” but only if, among other
23 requirements, such Biological Agent Condition(s) “result in Cleanup Costs covered
24 under this Policy”:

25
26 _____
27 ⁵ “Restorative Actions” means actions to “repair, replace or restore tangible
28 property to substantially the same condition such tangible property was in prior to
being damaged during work performed in the course of incurring Cleanup Costs.”
(*Id.* at § VIII.41, Dkt. 1-1 at p. 33).

D. COVERAGE D – BUSINESS INTERRUPTION AND EXTRA EXPENSE

The Company shall pay, up to the Limits of Liability as specified in the Declarations and after the **Waiting Period**, the **Insured’s Business Interruption Losses and Extra Expenses** during the **Interruption Period** that directly result from **Pollution Condition(s) or Biological Agent Condition(s)**:

- 1. On or under a **Scheduled Location**, provided that:
 - a. Such **Pollution Condition(s) or Biological Agent Condition(s)** result in **Cleanup Costs** covered under this **Policy**; and

(*Id.*)

Under D.2, Endurance will pay for Business Interruption Losses and Extra Expenses that, among other things, “directly result from Pollution Condition(s) or Biological Agent Condition(s) . . . [t]hat occur within five (5) miles of a Scheduled Location,” provided that the Pollution Condition(s) or Biological Agent Condition(s) are reported within 14 days of the commencement of the Interruption Period:

D. COVERAGE D – BUSINESS INTERRUPTION AND EXTRA EXPENSE

The Company shall pay, up to the Limits of Liability as specified in the Declarations and after the **Waiting Period**, the **Insured’s Business Interruption Losses and Extra Expenses** during the **Interruption Period** that directly result from **Pollution Condition(s) or Biological Agent Condition(s)**:

...

- 2. That occur within five (5) miles of a **Scheduled Location** and which commence on or after the effective date of this **Policy** and during the **Policy Period**, provided that:

...

- b. The **Pollution Condition(s) or Biological Agent Condition(s)** are reported to the **Company** within fourteen (14) days of the commencement of the **Interruption Period**;

(*Id.*)⁶ Coverage D is subject to a three-day waiting period. (*Id.* at Declarations Item 7, Dkt. 1-1 at p. 7.)

⁶ The definition of “Biological Agent Condition(s)” is discussed above. “Pollution Condition(s)” means “the discharge, dispersal, release or escape of Pollutants.” (*Id.* at § VIII.37, Dkt. 1-1 at p. 32.) “Pollutants” means “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, toxic chemicals, liquids or gases, other irritants or contaminants or any discarded materials of any kind.” (*Id.* at § VIII.36, Dkt. 1-1 at p. 32.)

1 **B. THE COMPLAINT**

2 **1. Plaintiff’s Alleged Suspension of Operations**

3 Plaintiff is a “lodging real estate investment trust that presently has, or at all
4 relevant times had, an interest in 20 hotel properties.” (Complaint, Dkt. 1, at ¶ 1.)
5 Plaintiff alleges that as a result of the COVID-19 pandemic, “civil authorities
6 throughout the world issued ‘stay-at-home,’ and ‘shelter in place,’ travel
7 restrictions, quarantine, and other orders, including orders requiring the suspension
8 of non-essential business operations.” (*Id.* at ¶ 42.) Plaintiff claims that it was
9 forced to suspend operations at its properties, (*id.* at ¶ 3), and seeks coverage for its
10 losses under Coverage D – Business Interruption and Extra Expense in the
11 Endurance Policy. (*Id.* at ¶¶ 23-35.) Plaintiff alleges that “[t]he Policy provides a
12 range of other coverages for losses, which also may apply,” (*id.* at ¶ 36), but does
13 not include any allegations about any other types of coverage.

14 Plaintiff alleges that one of its properties, the Marriott Boston Long Wharf,
15 hosted a “superspreader” event in February 2020. (*Id.* at ¶ 2.) The Complaint
16 suggests that Plaintiff is also seeking coverage for losses at other “Scheduled
17 Locations around the country,” (*id.* at ¶ 43), but it does not include any specific
18 allegations about any property other than the Marriott Boston Long Wharf. Nor
19 does it allege that any Biological Agent Condition(s) occurred within five miles of
20 a Scheduled Location and were reported within 14 days.

21 **2. Plaintiff Does Not Allege It Satisfied the Self-Insured
22 Retention for Cleanup Costs**

23 Although Plaintiff elected a \$100,000 Self-Insured Retention for Coverage C
24 Cleanup Costs, Plaintiff does not allege that this Self-Insured Retention has been
25 satisfied. Nor does Plaintiff seek any coverage for Cleanup Costs. Plaintiff claims
26 that the Self-Insured Retention does not apply to Business Interruption and Extra
27 Expense coverage, and that Endurance acted in bad faith by adopting the position
28 that payment of the Self-Insured Retention is a condition precedent to Plaintiff’s

1 claim for coverage. (*Id.* at ¶¶ 45, 65.)

2 **3. Causes of Action**

3 The Complaint asserts four causes of action: (1) breach of contract; (2)
4 anticipatory breach of contract; (3) tortious breach of the implied covenant of good
5 faith and fair dealing; and (4) declaratory relief. (*Id.* at ¶¶ 55-76.)

6 **III. LEGAL STANDARD**

7 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the
8 legal sufficiency of the plaintiff’s claims. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1199-
9 1200 (9th Cir. 2003). To survive a motion to dismiss, “a complaint must contain
10 sufficient factual matter, accepted as true, to state a claim for relief that is plausible
11 on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation and quotation
12 omitted). A complaint cannot survive a motion to dismiss under Rule 12(b)(6) if it
13 merely “tenders naked assertions devoid of further factual enhancement.” *Ashcroft*
14 *v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550
15 U.S. 544, 557 (2007)) (internal quotations omitted). The court need not accept
16 “allegations that are merely conclusory, unwarranted deductions of fact, or
17 unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th
18 Cir. 2008) (quoting *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.
19 2001)). Nor should the court credit allegations that contradict materials
20 incorporated into the complaint. *See Gonzalez v. Planned Parenthood of Los*
21 *Angeles*, 759 F.3d 1112, 1115 (9th Cir. 2014) (citations omitted).

22 Where a complaint involves an alleged breach of contract, failure to allege
23 satisfaction of all conditions precedent is grounds for dismissal. *See Orlando v.*
24 *Carolina Cas. Ins. Co.*, No. Civ F 07-0092-AWI-SMS, 2007 WL 781598, at *5
25 (E.D. Cal. Mar. 13, 2007) (“Since [the plaintiff] has not alleged that conditions
26 precedent necessary for her to recover have been performed, waived, or excused,
27 she has failed to state a claim for breach of contract.”).

1 **IV. ARGUMENT**

2 **A. Plaintiff Does Not Allege Any Cleanup Costs Covered Under the**
3 **Policy**

4 When interpreting an insurance policy, the court must “first look to the
5 language of the contract in order to ascertain its plain meaning or the meaning a
6 layperson would ordinarily attach to it.” *Waller v. Truck Ins. Exch., Inc.*, 11 Cal.
7 4th 1, 18 (1995).⁷ Policy terms should be given their “ordinary and popular usage,
8 unless used by the parties in a technical sense or a special meaning is given to them
9 by usage.” *See Palmer v. Truck Ins. Exch.*, 21 Cal. 4th 1109, 1115 (1999) (citation
10 and quotation marks omitted).

11 Here, the contractual language in the insuring agreement is unambiguous.
12 Under the Policy’s Biological Agent Condition(s) coverage, Endurance will pay for
13 Cleanup Costs “in excess of the Self-Insured Retention”:

14 **C. COVERAGE C – BIOLOGICAL AGENT CONDITION(S)**

15 The Company shall pay, up to the Limits of Liability and in excess of the Self-Insured Retention
16 as specified in the Declarations, on behalf of the Insured for:

17 **1. Cleanup Costs of the Insured:**

18 (Policy at § I.C., Dkt. 1-1 at p. 11.)

19 In a section titled “Self-Insured Retention,” the Policy makes clear that
20 “[p]ayment of the Self-Insured Retention is a condition precedent to coverage.”
21 (Policy at § V., Dkt. 1-1 at p. 18.) Plaintiff’s Self-Insured Retention for Biological
22 Agent Condition(s) coverage is \$100,000. (Policy at Declarations Item 7, Dkt. 1-1
23 at 7.)

24 Because this is a condition precedent to coverage, there is no coverage for
25 Cleanup Costs under the Policy if the Self-Insured Retention has not been satisfied.
26 *See, e.g., Am. Way Cellular, Inc. v. Travelers Prop. Cas. Co. of Am.*, 216 Cal. App.

27 ⁷ The Policy provides that California law will govern any litigation concerning or
28 relating to the Policy. (*See* Policy at Choice of Forum and Law Amended
Endorsement, Dkt. 1-1 at p. 60.)

1 4th 1040, 1054 (2013) (“A condition *precedent* refers to an act, condition or event
2 that must occur before the insurance contract becomes effective or binding on the
3 parties.”) (emphasis in original; citations omitted). Courts have repeatedly
4 confirmed that the Self-Insured Retention “is the insured’s initial responsibility and
5 must be satisfied *before there is any coverage under the policy.*” *Forecast Homes,*
6 *Inc. v. Steadfast Ins. Co.*, 181 Cal. App. 4th 1466, 1474 (2010) (emphasis added;
7 citation omitted); *see also Liberty Surplus Ins. Corp. v. Fed. Ins. Co.*, No. 11-cv-
8 02241-DSF, 2013 WL 12132024, at *5 (C.D. Cal. Dec. 12, 2013) (same).

9 Plaintiff does not allege that it has satisfied the Self-Insured Retention for
10 Cleanup Costs for any of its properties. Indeed, Plaintiff does not even seek
11 coverage for any Cleanup Costs. Plainly, there are no Cleanup Costs covered under
12 the Policy.

13 **B. Business Interruption Coverage Is Not Available Under Coverage**
14 **D.1 Because No Cleanup Costs Are Covered Under the Policy**

15 Even though there are no Cleanup Costs covered under the Policy, Plaintiff
16 theorizes it can access standalone Business Interruption and Extra Expense
17 coverage under Coverage D.1 for “economic losses” related to the COVID-19
18 pandemic. The plain language of the Policy forecloses this claim.

19 To obtain Business Interruption and Extra Expense coverage under Coverage
20 D.1, the Plaintiff must establish, among other things, that the “Pollution
21 Condition(s) or “Biological Agent Condition(s) result in Cleanup Costs covered
22 under this Policy”:

23 **D. COVERAGE D – BUSINESS INTERRUPTION AND EXTRA EXPENSE**

24 The Company shall pay, up to the Limits of Liability as specified in the Declarations and after the
25 **Waiting Period, the Insured’s Business Interruption Losses and Extra Expenses** during the
26 **Interruption Period** that directly result from **Pollution Condition(s) or Biological Agent**
27 **Condition(s)**:

28 1. On or under a **Scheduled Location**, provided that:

- a. **Such Pollution Condition(s) or Biological Agent Condition(s) result in Cleanup Costs covered under this Policy;** and

(Policy at § I.D., Dkt. 1-1 at p. 11.) By this plain language, it is clear that under

1 Coverage D.1, Business Interruption and Extra Expenses coverage is ancillary to
2 Cleanup Costs coverage: the former can arise only where the latter exists.

3 Again, under California law, insurance policies must be interpreted according
4 to their plain meaning. *See Cal. Cas. Ins. Co. v. Northland Ins. Co.*, 48 Cal. App.
5 4th 1682, 1691, 1694 (1996) (citation omitted). The insuring agreement
6 specifically uses the language “result in Cleanup Costs **covered** under this Policy”
7 and also makes clear that “[p]ayment of the Self-Insured Retention is a condition
8 precedent to **coverage**.” (Policy at § V., Dkt. 1-1 at p. 18.) Because Plaintiff does
9 not allege it has satisfied the \$100,000 Self-Insured Retention—a condition
10 precedent for coverage of Cleanup Costs—it has not incurred any Cleanup Costs
11 “covered under this Policy,” and it cannot access Business Interruption and Extra
12 Expense coverage under Coverage D.1.

13 Plaintiff’s argument appears to be that Business Interruption and Extra
14 Expense coverage is available under Coverage D.1 as long as Plaintiff satisfies the
15 three-day waiting period listed in the Declarations page. (*See* Complaint, Dkt. 1, at
16 ¶ 46.) Accommodating Plaintiff’s reading would turn policy interpretation on its
17 head. “When determining coverage under an insurance policy, we must *first* look
18 to the insuring clause, that is, to the policy language which promises coverage.”
19 *Old Republic Ins. Co. v. Superior Court*, 66 Cal. App. 4th 128, 144 (1998)
20 (emphasis in original; reversed on other grounds). “An insuring clause is the
21 foundation of the agreement and forms the basis for all obligations owed to the
22 insured.” *Dominguez v. Fin. Indem. Co.*, 183 Cal. App. 4th 388, 400 (2010)
23 (citation omitted). There is plainly no coverage under insuring agreement D.1 since
24 there are no Cleanup Costs covered under the Policy. Plaintiff seeks to sidestep the
25 insuring agreement—“the basis for all obligations”—and only analyze the
26 Declarations page.

27 To grant Plaintiff relief, this Court would have to completely rewrite the
28 unambiguous policy language. Under Plaintiff’s proposed interpretation, the words

1 “result in Cleanup Costs covered under this Policy” would need to be stricken. If
2 Plaintiff’s interpretation is that coverage is available irrespective of whether
3 covered Cleanup Costs are incurred, then the Court would need to insert the exact
4 opposite language: “result in Cleanup Costs *whether covered or not* under this
5 Policy.” California law does not permit this result. *See Certain Underwriters at*
6 *Lloyd’s of London v. Superior Court*, 24 Cal. 4th 945, 960 (2001) (“[W]e do not
7 rewrite any provision of any contract, including [an insurance policy], for any
8 purpose.”) (citation omitted).⁸

9 C. **Business Interruption Coverage Is Not Available Under Coverage**
10 **D.2 Because the Government Orders Were Not the “Direct**
11 **Result” of a Biological Agent Condition on a Property Within Five**
12 **Miles**

13 Plaintiff also fails to state a claim for Business Interruption and Extra
14 Expense coverage under Coverage D.2 because it does not allege that the
15 governmental shutdown orders—the alleged cause of suspension—were “the direct
16 result” of SARS-CoV-2 on a property within five miles of Plaintiff’s property. As
17 the Policy makes clear, under Coverage D.2, Endurance will pay only for Business
18 Interruption Losses and Extra Expenses that “*directly result* from Pollution
19 Condition(s) or Biological Agent Condition(s) . . . [t]hat occur within five (5) miles
20 of a Scheduled Location”:⁹

24 ⁸ Coverage under D.1 is also foreclosed because the government orders were not
25 the “direct result” of a Biological Agent Condition on or under a Scheduled
26 Location. *See* Part IV.C.

27 ⁹ Coverage D.2 also applies only if “[t]he Pollution Condition(s) or Biological
28 Agent Condition(s) did not result from the Insured’s operations or a Scheduled
Location.” (Policy at § I.D, Dkt. 1-1 at p. 11.)

1 D. COVERAGE D – BUSINESS INTERRUPTION AND EXTRA EXPENSE

2 The Company shall pay, up to the Limits of Liability as specified in the Declarations and after the
3 **Waiting Period**, the **Insured’s Business Interruption Losses and Extra Expenses** during the
4 **Interruption Period** that directly result from **Pollution Condition(s) or Biological Agent
5 Condition(s)**:

- 6 1. On or under a **Scheduled Location**, provided that:
- 7 a. Such **Pollution Condition(s) or Biological Agent Condition(s)** result in **Cleanup Costs**
8 covered under this **Policy**; and
 - 9 b. The **Pollution Condition(s) or Biological Agent Condition(s)** were first **Discovered**
and reported to the Company during the **Policy Period** or the Automatic Extended
Reporting Period or the Optional Extended Reporting Period, if any; or
2. **That occur within five (5) miles of a Scheduled Location** and which commence on or after
the effective date of this **Policy** and during the **Policy Period**, provided that:

10 (Policy at § I.D, Dkt. 1-1 at p. 11.)

11 The term “direct” means “without intervening persons, conditions, or
12 agencies; *immediate.*” *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen.*
13 *Ins. Co.*, 187 Cal. App. 4th 766, 779 (2010) (citations omitted) (emphasis added).
14 The preventative “stay-at-home” and “shelter in place” orders were issued to slow
15 the spread of COVID-19 and were not the “direct result” of SARS-CoV-2 at any
16 location within five miles of a Scheduled Location. *See, e.g.*, March 19, 2020
17 Executive Order N-33-20 issued by State of California, attached as **Exhibit 1** to
18 Endurance’s Request for Judicial Notice (“RJN”) (stating that order was issued “to
19 bend the curve[] and disrupt the spread of the virus”); March 23, 2020 COVID-19
20 Order No. 13 issued by Commonwealth of Massachusetts, attached as **Exhibit 2** to
21 RJN (stating that order was issued “in order to minimize all unnecessary activities
22 outside of the home during the state of emergency” and to “limit the spread of this
23 highly contagious and potentially deadly virus”).

24 For this reason, multiple courts applying California law have already granted
25 motions to dismiss in cases seeking coverage for COVID-19-related losses under
26 similar policy provisions. In *Mudpie, Inc. v. Travelers Casualty Insurance*
27 *Company of America*, for example, plaintiff alleged that it lost business income
28 when it was forced to close due to government orders issued because of COVID-19,

1 and sought coverage under a “civil authority” policy provision. No. 20-cv-03213-
2 JST, 2020 WL 5525171, at *1 (N.D. Cal. Sept. 14, 2020). That provision granted
3 coverage when a civil authority prohibited access to the insured’s premises, but
4 stated that “[t]he civil authority action must be due to direct physical loss of or
5 damage to property at locations, other than described premises, that are within 100
6 miles of the described premises” *Id.* at *6. Applying California law, the court
7 found that this requirement was not satisfied because the government closure orders
8 were not issued as a result of damage to any specific property, but instead were
9 “intended to prevent the spread of COVID-19.” *Id.* at *7. Because the government
10 orders were preventative, the complaint did not establish “the requisite causal link
11 between prior property damage and the government’s closure order.” *Id.*

12 Similarly, in *Pappy’s Barber Shops, Inc. v. Farmers Group, Inc.*, the
13 Southern District of California (applying California law) dismissed a case seeking
14 civil authority coverage for losses related to COVID-19 because the government
15 orders were intended to “prevent the spread of COVID-19” and were “not issued as
16 a result of loss or damage to property at Plaintiffs’ premises or elsewhere.” No. 20-
17 cv-00907-CAB-BLM, 2020 WL 5847570, at *1 (S.D. Cal. Oct. 1, 2020).

18 Several courts in other jurisdictions have reached the same conclusion. *See,*
19 *e.g., Richard Kirsch, DDS v. Aspen Am. Ins. Co.*, No. 3:20-cv-11930-RHC-DRG,
20 2020 WL 7338570, at *7 (E.D. Mich. Dec. 14, 2020) (applying Michigan law and
21 granting motion to dismiss in case seeking civil authority coverage for losses
22 related to COVID-19 because the plaintiff “failed to establish that the COVID-19
23 executive order was a direct result of damage to existing property as opposed to an
24 attempt to curtail the virus’s spread and future damage”); *Sultan Hajer v. Ohio Sec.*
25 *Ins. Co.*, No. 6:20-cv-00283, 2020 WL 7211636, at *4 (E.D. Tex. Dec. 7, 2020)
26 (applying Texas law and granting motion to dismiss in case seeking civil authority
27 coverage for losses related to COVID-19 because the plaintiff failed to establish a
28 “causal link” between “damage to the neighboring property and the cited act of civil

1 authority”); *BBMS, LLC v. Continental Cas. Co.*, No. 20-cv-00353-CV-W-BP,
2 2020 WL 7260035, at *6 (W.D. Mo. Nov. 20, 2020) (applying Missouri law and
3 granting motion to dismiss in case seeking civil authority coverage for losses
4 related to COVID-19 because the government shutdown orders were not issued
5 “due to” loss or damage to surrounding property); *Toppers Salon & Health Spa,*
6 *Inc. v. Travelers Prop. Cas. Co. of Am.*, No. 20-cv-03342-JDW, 2020 WL 7024287,
7 at *4 (E.D. Pa. Nov. 30, 2020) (applying Pennsylvania law and granting judgment
8 on the pleadings for the insurer in case seeking civil authority coverage for losses
9 related to COVID-19 because the insured “did not close because of damage to a
10 nearby premise or because there was some dangerous physical condition at another
11 nearby premise”); *Whiskey River on Vintage, Inc. v. Illinois Cas. Co.*, No. 20-cv-
12 00185-JAJ, 2020 WL 7258575, at *12 (S.D. Iowa Nov. 30, 2020) (applying Iowa
13 law and granting judgment on the pleadings for the insurer in case seeking civil
14 authority coverage for losses related to COVID-19 because the government order
15 was issued to “limit the spread of COVID-19,” not because of a dangerous physical
16 condition at a nearby property); *Water Sports Kauai, Inc. v. Fireman’s Fund Ins.*
17 *Co.*, No. 20-cv-03750-WHO, 2020 WL 6562332, at *8 (N.D. Cal. Nov. 9, 2020)
18 (applying Hawaii law and granting motion to dismiss in case seeking civil authority
19 coverage for losses related to COVID-19 because there was no “causal link”
20 between the preventative government orders and damage to neighboring property);
21 *Dime Fitness, LLC v. Markel Ins. Co.*, No. 20-CA-5467, 2020 WL 6691467, at *4
22 (Fla. Cir. Ct. Nov. 10, 2020) (applying Florida law and dismissing case seeking
23 civil authority coverage for losses related to COVID-19 because the applicable
24 government order was not issued “as a result of” the purported damage to
25 neighboring property).

26 Outside the COVID-19 context, courts have also consistently rejected claims
27 that broad preventative orders were the “direct result” of damage to any specific
28 property within a certain radius. *See, e.g., Syufy Enterprises v. Home Ins. Co. of*

1 *Indiana*, No. 94-0756 FMS, 1995 WL 129229, at *1-2 (N.D. Cal. March 21, 1995)
2 (civil authority coverage was not triggered where local governments imposed
3 dawn-to-dusk curfews in response to citywide “rioting and looting” because “[t]he
4 requisite causal link between damage to adjacent property and denial of access to
5 [the insured’s] theater” was absent; the insured “opted to close its theaters as a
6 direct result of the city-wide curfews, not as a result of adjacent property damage”);
7 *United Air Lines, Inc. v. Ins. Co. of State of PA*, 439 F.3d 128, 134-35 (2d Cir.
8 2006) (civil authority coverage was not available for an airport closure ordered after
9 the September 11 terrorist attacks, even though the plaintiff pointed to specific
10 damage to the Pentagon just a few miles from the insured premises, because the
11 plaintiff had failed to show that the airport was shut down “as a direct result” of
12 damage to the Pentagon); *The Paradies Shops, Inc. v. Hartford Fire Ins. Co.*, No.
13 1:03-CV-3154-JEC, 2004 WL 5704715, at *17 (N.D. Ga. Dec. 15, 2004) (civil
14 authority coverage not available for closure following September 11 attacks
15 because “an order . . . that is designed to prevent, protect against, or avoid future
16 damage is not a ‘direct result’ of already existing property loss or damage”); *Dickie*
17 *Brennan v. Lexington Ins. Co.*, 636 F.3d 683, 686-87 (5th Cir. 2011) (civil authority
18 coverage was not available when the mayor of New Orleans issued a mandatory
19 evacuation order in response to an approaching hurricane; even though the
20 hurricane had already damaged specific property in Caribbean nations, the order
21 was not issued because of that specific property damage, and thus the “causal link”
22 between the damage and the civil authority action that caused the plaintiff’s loss
23 was missing); *Jones, Walker, Waechter, Poitevent, Carrere & Denegre, LLP v.*
24 *Chubb Corp.*, No. 09-6057, 2010 WL 4026375, at *4 (E.D. La. Oct. 12, 2010) (civil
25 authority coverage not available for closures due to hurricane because “[t]he Policy
26 is resoundingly clear that coverage under the Civil Authority section requires not
27 only an order prohibiting access but also physical loss within one mile of the office
28 *and* a nexus between the prohibition order and the physical loss,” and no such

1 nexus was present) (emphasis in original).

2 As these cases make clear, the preventative “stay-at-home” and “shelter in
3 place” issued to slow the spread of COVID-19 were not the “direct result” of
4 SARS-CoV-2 at any location within five miles of a Scheduled Location.

5 **D. Plaintiff Does Not Allege Any Biological Agent Conditions Within**
6 **Five Miles That Were Reported Within 14 Days**

7 Coverage D.2 also only applies if, among other things, “Biological Agent
8 Condition(s)” occur within five miles of a Scheduled Location and are reported
9 within 14 days of commencement of the Interruption Period. (Policy at § I.D, Dkt.
10 1-1 at p. 11.) There is no allegation that COVID-19 was even present within five
11 miles of any Scheduled Location, let alone that it was reported within 14 days.
12 This separately forecloses coverage under D.2. *See Mudpie Inc. v. Travelers Cas.*
13 *Ins. Co. of Am.*, No. 20-cv-03213-JST, 2020 WL 5525171, at *7 (N.D. Cal. Sept.
14 14, 2020) (granting motion to dismiss in case seeking coverage for losses related to
15 COVID-19 “absent allegations of damage to adjacent property,” as required under
16 the policy); *10E, LLC v. Travelers Indem. Co. of Conn.*, No. 20-cv-04418-SVW-
17 AS, 2020 WL 6749361, at *2 (C.D. Cal. Nov. 13, 2020) (granting motion to
18 dismiss in case seeking coverage for losses related to COVID-19 because the
19 complaint did not allege that the virus caused loss or damage to property within 100
20 miles of the insured property, as required under the policy); *Pappy’s Barber Shops,*
21 *Inc. v. Farmers Group, Inc.*, No. 20-cv-00907-CAB-BLM, 2020 WL 5500221, at
22 *6 (S.D. Cal. Sept. 11, 2020) (granting motion to dismiss in case seeking coverage
23 for losses related to COVID-19 because the complaint did not allege “any direct
24 physical loss of or damage to property, other than at Plaintiffs’ premises,” as
25 required under the policy); *West Coast Hotel Mgmt., LLC v. Berkshire Hathaway*
26 *Guard Ins. Cos.*, No. 2:20-cv-05663-VAP-DFM, 2020 WL 6440037, at *4 (C.D.
27 Cal. Oct. 27, 2020) (granting motion to dismiss in case seeking coverage for losses
28 related to COVID-19 because the complaint included only conclusory allegations of

1 damage to properties in the “immediate area” of the insured premises); *Henry’s*
2 *Louisiana Grill, Inc. v. Allied Ins. Co. of Am.*, No. 20-cv-02939-TWT, 2020 WL
3 5938755, at *6 (N.D. Ga. Oct. 6, 2020) (granting motion to dismiss in case seeking
4 coverage for losses related to COVID-19 because the complaint did not identify any
5 particular property in the area around the insured premises that was damaged by
6 COVID-19, as required under the policy).

7 **E. There Can Be No Bad-Faith Liability Where There Is No**
8 **Predicate Coverage**

9 Because the complaint fails to state a claim for coverage under any part of
10 the Policy, Plaintiff’s causes of action for breach of contract, anticipatory breach of
11 contract, and declaratory relief must be dismissed. And in the absence of a breach
12 of the Policy, Plaintiff cannot maintain a claim for breach of the implied covenant
13 of good faith and fair dealing. The purpose of bad-faith liability is to protect the
14 insured from an unreasonable withholding of covered policy benefits. *See Silberg*
15 *v. California Life Ins. Co.*, 11 Cal. 3d 452, 460-61 (1974). It is well settled that
16 without any predicate coverage, there can be no liability for bad faith. *See Everett*
17 *v. State Farm General Ins. Co.*, 162 Cal. App. 4th 649 (2008) (“Because there was
18 no breach of contract, there was no breach of the implied covenant.”); *Minich v.*
19 *Allstate Ins. Co.*, 193 Cal. App. 4th 477, 493 (2011) (“In light of our conclusion . . .
20 that the trial court properly granted judgment as a matter of law in favor of Allstate
21 on the Minichs’ breach of contract claim, the Minichs’ claim for tortious breach of
22 contract also fails as a matter of law.”); *Waller v. Truck Ins. Exch., Inc.*, 11 Cal. 4th
23 1, 36 (1995) (“[The] conclusion that a bad faith claim cannot be maintained unless
24 policy benefits are due is in accord with the policy in which the duty of good faith
25 is firmly rooted.”) (citations omitted). Without a viable claim for breach of
26 contract, Plaintiff’s cause of action for tortious breach of the implied covenant of
27 good faith and fair dealing must be dismissed as well.
28

1 **V. CONCLUSION**

2 For all the foregoing reasons, Endurance’s motion to dismiss should be
3 granted under Federal Rules of Civil Procedure 12(b)(6). Because it will be
4 impossible for Plaintiff to cure its deficiencies by alleging “other facts consistent
5 with the challenged pleading,” *Schreiber Distr. Co. v. Serv-Well Furniture Co.,*
6 *Inc.*, 806 F.2d 1393, 1401 (9th Cir. 1986), Endurance’s motion should be granted
7 without leave to amend.

8
9 Dated: January 8, 2021

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11
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