

DENTONS US LLP  
601 SOUTH FIGUEROA STREET, SUITE 2500  
LOS ANGELES, CALIFORNIA 90017-5704  
(213) 623-9300

1 JONATHAN GROSS (Bar No. 122010)  
jgross@moundcotton.com  
2 MOUND COTTON WOLLAN  
& GREENGRASS LLP  
3 2200 Powell Street, Suite 1050  
Emeryville, California 94608  
4 Tel: (510) 900-9371 / Fax: (510) 900-9381  
5 JAYME C. LONG (Bar No. 202867)  
jayne.long@dentons.com  
6 JUSTIN R. SARNO (Bar No. 229803)  
justin.sarno@dentons.com  
7 CONNOR M. SCOTT (Bar No. 321714)  
connor.scott@dentons.com  
8 DENTONS US LLP  
601 South Figueroa Street, Suite 2500  
9 Los Angeles, California 90017-5704  
Tel: (213) 623-9300 / Fax: (213) 623-9924

10 SHARI L. KLEVENS  
shari.klevens@dentons.com  
11 ALANNA G. CLAIR  
alanna.clair@dentons.com  
12 DENTONS US LLP  
1900 K Street, N.W.  
13 Washington, D.C. 20006  
Tel: (202) 496-7500 / Fax: (202) 496-7756

14 Attorneys for Defendant  
15 **ZURICH AMERICAN INSURANCE COMPANY**

16 **UNITED STATES DISTRICT COURT**

17 **CENTRAL DISTRICT OF CALIFORNIA - SANTA ANA**

18 IN-N-OUT BURGERS, a California  
corporation,

19 Plaintiff,

20 v.

21 ZURICH AMERICAN INSURANCE  
22 COMPANY,

23 Defendant.

Case No. 8:20-cv-01000-JLS-ADS

**DEFENDANT ZURICH AMERICAN  
INSURANCE COMPANY'S MOTION  
FOR JUDGMENT ON THE  
PLEADINGS; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT THEREOF**

[Fed. R. Civ. P., 12(c)]

[Filed concurrently with Declaration of  
Shari L. Klevens, Request for Judicial  
Notice, and (Proposed) Order]

DATE: June 25, 2021  
TIME: 10:30 a.m.  
COURTROOM: 10A  
JUDGE: Hon. Josephine L. Staton

Complaint Filed: May 29, 2020  
First Amended Complaint: June 6, 2020  
Trial Date: None Set

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LOS ANGELES, CALIFORNIA 90017-5704  
(213) 623-9300

1 PLEASE TAKE NOTICE that on June 25, 2021, at 10:30 a.m., or as soon  
2 thereafter as counsel may be heard in Courtroom 10-A, of the United States District  
3 Court, Central District, located at 411 West 4th Street, Santa Ana, California 92701-  
4 4750, Defendant, Zurich American Insurance Company, will and hereby does move  
5 the Court, pursuant to Fed. R. Civ. P. 12(c), for judgment on the pleadings, based upon  
6 the following:

7 1. Accepting all allegations in the First Amended Complaint as true, Plaintiff  
8 has failed to state any cognizable legal claim against Defendant, Zurich American  
9 Insurance Company.

10 2. Plaintiff has not sustained any direct physical loss of or damage to  
11 property that would trigger coverage under Defendant’s property insurance policy.

12 3. Plaintiff’s additional claims under “special coverages” similarly fail to  
13 state claims against Defendant, as there can be no direct physical loss or damage to  
14 property under the circumstances or other necessary prerequisites to coverage.

15 4. Because there is no coverage, there can be no breach of the covenant of  
16 good faith and fair dealing.

17 5. Zurich’s counter-claim, which seeks declaratory judgment of non-  
18 coverage, is additionally entitled to judgment on the pleadings.

19 This motion is made following a pre-filing conference of counsel, pursuant to  
20 United States District Court, Central District, Local Rule 7-3.

21 This motion will be based upon this notice of motion and motion, the  
22 accompanying memorandum of points and authorities in support thereof, the  
23 Declaration of Shari L. Klevens, the pleadings and records on file with this Court, any  
24 evidence of which this Court may take judicial notice, and any and all documentary or  
25 oral evidence that may be presented at the hearing of this motion.

26 ///

27 ///

28 ///

1 Dated: February 8, 2021

DENTONS US LLP  
Jayme C. Long  
Shari L. Klevens  
Alanna Clair  
Justin R. Sarno  
Connor M. Scott

2  
3  
4  
5 By: \_\_\_\_\_

  
Connor M. Scott

6  
7 Attorneys for Defendant  
**ZURICH AMERICAN INSURANCE**  
8 **COMPANY**

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DENTONS US LLP  
601 SOUTH FIGUEROA STREET, SUITE 2500  
LOS ANGELES, CALIFORNIA 90017-5704  
(213) 623-9300

DENTONS US LLP  
 601 SOUTH FIGUEROA STREET, SUITE 2500  
 LOS ANGELES, CALIFORNIA 90017-5704  
 (213) 623-9300

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 601 SOUTH FIGUEROA STREET, SUITE 2500  
 LOS ANGELES, CALIFORNIA 90017-5704  
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**MEMORANDUM OF POINTS AND AUTHORITIES**

Pursuant to Federal Rule of Civil Procedure 12(c), Defendant/Counter-Claimant Zurich American Insurance Company (“Zurich”) submits this memorandum of points and authorities in support of its Motion for Judgment on the Pleadings.

**I. INTRODUCTION**

Plaintiff seeks coverage for alleged economic losses that it has sustained as a result of the COVID-19 pandemic and the associated “Stay-at-Home” Orders. However, the property insurance policy issued by Zurich requires “direct physical loss of or damage” to property as a threshold to coverage. Plaintiff’s conclusory assertions that the COVID-19 Virus and/or the Stay-at-Home Orders caused direct physical loss of and/or damage to its property are insufficient to set forth a plausible claim. That is because it is well-settled -- as recognized by an ever-increasing number of courts nationwide that have dismissed many dozens of suits like Plaintiff’s<sup>1</sup> -- that neither the presence of the COVID-19 Virus in the community, nor the government response and closures that followed, physically damaged property.

Plaintiff’s claimed harm is purely economic. Thus, it is not covered by the property insurance policy issued by Zurich. Such deficiencies cannot be cured by amendment and this Court should dismiss the First Amended Complaint (“FAC”) with prejudice.

**II. STATEMENT OF FACTS**

**A. The Allegations of the First Amended Complaint**

Plaintiff In-N-Out Burgers<sup>2</sup> is a chain of restaurants with its principal place of business in Irvine, California. (FAC at ¶ 3.) It operates approximately 350 locations

<sup>1</sup> To date, approximately 116 courts nationwide over the last six months have dismissed actions seeking coverage for COVID-19 losses on the grounds that such actions do not allege direct physical loss or damage to property. (Klevens Decl., **Ex. E.**)

<sup>2</sup> “In-N-Out Burger, Inc.” -- *not* Plaintiff “In-N-Out Burgers” -- is the named Insured of the Zurich Policy.

DENTONS US LLP  
601 SOUTH FIGUEROA STREET, SUITE 2500  
LOS ANGELES, CALIFORNIA 90017-5704  
(213) 623-9300



DENTONS US LLP  
 601 SOUTH FIGUEROA STREET, SUITE 2500  
 LOS ANGELES, CALIFORNIA 90017-5704  
 (213) 623-9300

1 in California, Arizona, Nevada, Utah, Oregon, and Texas. (FAC at ¶ 8.) Plaintiff  
 2 alleges that it has suffered economic losses as a result of the SARS-CoV-2 virus and  
 3 resulting ongoing COVID-19 pandemic. In an effort to slow the spread of the virus,  
 4 and in accordance with CDC guidelines, certain state and local governments issued  
 5 “Stay-at-Home” Orders. (*Id.* at ¶¶28-40.) Those Orders generally limited in-person  
 6 activities at businesses deemed to be “non-essential” and required all restaurants and  
 7 other establishments that serve food to close dining rooms for a period of time. (*Id.*)  
 8 The Orders did not restrict Plaintiff’s drive-thru or take-out services. (*Id.* at ¶31,  
 9 referencing the March 19, 2020 City of Los Angeles “Safer at Home” order and ¶35,  
 10 referencing the March 16, 2020 City and County of San Francisco “Order of the Health  
 11 Officer No. C19-07.”) Likewise, the Orders generally did not prohibit owners or  
 12 employees from entering insured premises as needed to help with drive-thru and take-  
 13 out services, provide security and maintenance, or perform other needed administrative  
 14 tasks. (*Id.*)

15 In-N-Out Burgers contends that as a non-essential business, it was required to  
 16 comply with these Orders, and, therefore, was forced to close all of its restaurant  
 17 dining rooms. (FAC at ¶¶40-41.) Plaintiff alleges that it is still not fully able to  
 18 resume normal operations at many of its locations and that it has suffered significant  
 19 losses from the closures of its dining rooms. (*Id.* at ¶41.)

20 Zurich denied coverage on the grounds, *inter alia*, that In-N-Out Burger, Inc.  
 21 had not stated a claim for direct physical loss of or damage to property. (*Id.* at ¶¶61,  
 22 63-65.) On May 29, 2020, In-N-Out Burgers filed its Complaint asserting two causes  
 23 of action: breach of contract (Count I) and declaratory relief that its claim is covered  
 24 (Count II). Plaintiff filed a First Amended Complaint on June 9, 2020, adding an  
 25 additional count for breach of the covenant of good faith and fair dealing related to  
 26 Zurich’s handling of the claim. Zurich has filed its own counter-claim seeking a  
 27 declaration of non-coverage under the plain terms of the Policy.

28

DENTONS US LLP  
601 SOUTH FIGUEROA STREET, SUITE 2500  
LOS ANGELES, CALIFORNIA 90017-5704  
(213) 623-9300

1           **B.     Terms of Zurich Policy**<sup>3</sup>

2           Zurich issued Policy No. MLP9137890-13, effective from June 1, 2019 to June  
3 1, 2020 to In-N-Out Burger, Inc. (Klevens Decl., **Ex. C**, the “Policy,”). The Insuring  
4 Agreement of the Policy states that:

5           This Policy Insures against *direct physical loss of or damage* caused by a  
6 **Covered Cause of Loss**<sup>4</sup> to Covered Property, at an Insured Location...all  
subject to terms, conditions and exclusions stated in this Policy.

7 Policy, §1.01. (emphasis added).

8           The Policy also covers certain Time Element losses, *i.e.*, the loss of business  
9 income resulting from the suspension of the policyholder’s business activities, subject  
10 to terms and conditions. Specifically, the Time Element provision states:

11           The Company will pay for the actual Time Element loss the Insured sustains, as  
12 provided in the Time Element Coverages, during the Period of Liability. The  
13 Time Element loss must result from the necessary **Suspension** of the Insured’s  
14 business activities at an Insured Location. The **Suspension** *must be due to*  
15 *direct physical loss of or damage to Property (of the type insurable under this*  
*Policy other than **Finished Stock**) caused by a **Covered Cause of Loss** at the*  
*Location...*

16 Policy, §4.01.01. (emphasis added).

17           The Policy also includes the following business interruption “Special  
18 Coverages” (Civil or Military Authority, Contingent Time Element, Ingress/Egress,  
19 Decontamination Costs) under which Plaintiff has asserted claims. Each of these  
20 coverages requires direct physical loss of or damage to third party property:

21  
22 \_\_\_\_\_  
23 <sup>3</sup> In a motion for judgment on the pleadings, the Court may review the documents  
24 incorporated by reference in the complaint, such as the relevant insurance Policy, the  
25 cited “Stay-at-Home” orders, as well as any other matters of public record of which the  
26 Court can take judicial notice. *Quality Home Transp., LLC v. Wilshire Ins. Co.*, No.  
EDCV20278JGBKKX, 2020 WL 5260487, at \*2 n.2 (C.D. Cal. May 15, 2020); *D.*  
*Gibbs Policy, LLC, v. AXA Equitable Life Ins. Co.*, No. CV204006DSFRAOX, 2020  
WL 6875180, at \*4 n.5 (C.D. Cal. Sept. 21, 2020).

27 <sup>4</sup> The Policy uses bold type for defined terms. Covered Cause of Loss is defined as  
28 “[a]ll risks of direct physical loss of or damage from any cause unless excluded.”  
Policy, §7.11.

DENTONS US LLP  
601 SOUTH FIGUEROA STREET, SUITE 2500  
LOS ANGELES, CALIFORNIA 90017-5704  
(213) 623-9300

1 CIVIL OR MILITARY AUTHORITY

2 The Company will pay for the Actual Time Element loss sustained by the  
3 Insured, as provided by this Policy, resulting from the necessary **Suspension** of  
4 the Insured’s business activities at an Insured Location if the **Suspension** is  
5 caused by order of a civil or military authority that prohibits access to the  
6 **Location**. *That order must result from a civil authority’s response to a direct  
7 physical loss of or damage caused by a Covered Cause of Loss to property not  
8 owned, occupied, leased or rented by the Insured or insured under this Policy  
9 and located within the distance of the Insured’s Location as stated in the  
10 Declarations.*

11 *Id.* at §5.02.03. (emphasis added).

12 CONTINGENT TIME ELEMENT

13 The Policy covers the actual Time Element Loss as provided by the Policy,  
14 sustained by the Insured during the Period of Liability directly resulting from the  
15 necessary **Suspension** of the Insured’s business activities at an Insured Location  
16 *if the Suspension results from direct physical loss of or damage caused by a  
17 Covered Cause of Loss to property (of the type insurable under this Policy) at  
18 Direct Dependent Time Element Locations, Indirect Dependent Time  
19 Element Locations and Attraction Properties...*

20 *Id.* at §5.02.05. (emphasis added).

21 INGRESS/EGRESS

22 The Company will pay for the actual Time Element loss sustained by the  
23 Insured, as provided by this Policy, resulting from the necessary **Suspension** of  
24 the Insured’s business activities at an Insured Location *if ingress or egress to  
25 that Insured Location by the Insured’s suppliers, customers, or employees is  
26 prevented by physical obstruction due to direct physical loss or damage caused  
27 by a Covered Cause of Loss to property not owned, occupied, leased or rented  
28 by the Insured or insured under this Policy and located within the distance of the  
Insured’s Location as stated in the Declarations.*

*Id.* at §5.02.15. (emphasis added).

DECONTAMINATION COSTS

If Covered Property is **Contaminated** from direct physical loss of or damage  
caused by a **Covered Cause of Loss** to Covered Property and there is in force at  
the time of the loss any law or ordinance regulating **Contamination** due to the  
actual not suspected presence of **Contaminant(s)**,<sup>5</sup> then this Policy covers, as a

<sup>5</sup> “Contaminant(s)” is defined by the Policy to include: “Any solid, liquid, gaseous,  
thermal or other irritant, pollutant or contaminant, including but not limited to smoke,  
vapor, soot, fumes, acids, alkalis, chemicals, waste (including materials to be recycled,  
*{footnote continued}*”

1 direct result of enforcement of such law or ordinance, the increased cost of  
2 decontamination and/or removal of such **Contaminated** Covered Property in a  
manner to satisfy such law or ordinance...

3 *Id.* at §5.02.07.

4 **III. LEGAL STANDARDS**

5 **A. Legal Standard For Motion For Judgment On The Pleadings**

6 A motion for judgment on the pleadings is “functionally identical” to a motion  
7 to dismiss for failure to state a claim; the only difference is that a Rule 12(c) motion is  
8 filed “after the pleadings are closed—but early enough not to delay trial.” Fed. R. Civ.  
9 P. 12(c); *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989).  
10 “[A] Rule 12(c) motion is designed to provide a means of disposing of cases when the  
11 material facts are not in dispute between the parties and a judgment on the merits can  
12 be achieved” without introduction of evidence beyond the pleadings. *Quality Home*  
13 *Transp., LLC v. Wilshire Ins. Co.*, No. EDCV20278JGBKKX, 2020 WL 5260487, at  
14 \*2 (C.D. Cal. May 15, 2020) (quoting Wright & A. Miller, *5C Fed. Prac. & Proc. Civ.*  
15 § 1367 (3d ed. 2020).).

16 When a Rule 12(c) motion is based on a failure to state a claim, the Court must  
17 assume the allegations in the complaint are true. *Cahill v. Liberty Mut. Ins. Co.*, 80  
18 F.3d 336, 337-38 (9th Cir. 1996). The court need not, however, accept as true legal  
19 conclusions cast in the form of factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662,  
20 678 (2009). Where a motion for judgment on the pleadings is granted, dismissal  
21 without leave to amend is proper when “the court determines that the allegation of  
22 other facts consistent with the challenged pleading could not possibly cure the  
23 deficiency.” *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401  
24 (9th Cir. 1986).

25  
26 \_\_\_\_\_  
27 {continued from previous page}  
28 reconditioned or reclaimed), asbestos, ammonia, other hazardous substances, Fungus  
or Spores.” Policy, § 7.10.

DENTONS US LLP  
601 SOUTH FIGUEROA STREET, SUITE 2500  
LOS ANGELES, CALIFORNIA 90017-5704  
(213) 623-9300

DENTONS US LLP  
601 SOUTH FIGUEROA STREET, SUITE 2500  
LOS ANGELES, CALIFORNIA 90017-5704  
(213) 623-9300

**B. Legal Standard For Interpreting A Policy**

Under California law, interpretation of an insurance policy is a question of law that is decided under the rules of contract interpretation. *TRB Investments, Inc. v. Fireman’s Fund Ins. Co.*, 40 Cal.4th 19, 27 (2006) (“Interpretation of an insurance policy is a question of law and follows the general rules of contract interpretation.”); *U.S. TelePacific Corp. v. U.S. Specialty Ins. Co.*, No. CV185083DMGAGR, 2019 WL 2590171, at \*2 (C.D. Cal. June 18, 2019), *aff’d*, 815 F. App’x 155 (9th Cir. 2020). Like other forms of contractual interpretation, the language of a policy is interpreted in context, and courts must read the policy “as a whole with each part being read in conjunction with other portions thereof.” *Hartford Accident & Indem. Co. v. Sequoia Ins. Co.*, 211 Cal.App.3d 1285, 1298 (1989) (citation omitted); *ML Direct, Inc. v. TIG Specialty Ins. Co.*, 79 Cal.App.4th 137, 141 (2000).

An insurance policy should be enforced as written when its terms are clear. *Palmer v. Truck Ins. Exch.*, 21 Cal.4th 1109, 1115 (1999). California courts should “not engage in forced construction of insuring clauses to find coverage” nor “strain to create an ambiguity where none exists.” *Ray v. Valley Forge Ins. Co.*, 77 Cal.App.4th 1039, 1044 (1999), as modified (Jan. 27, 2000). Moreover, an insurer “has the right to limit the coverage of a policy issued by it and when it had done so, the plain language of the limitation must be respected.” *Cont’l Cas. Co. v. Phoenix Const. Co.*, 46 Cal.2d 423, 432 (1956); see also *Crusader Ins. Co. v. Burlington Ins. Co.*, No. CV195371PSGPLAX, 2020 WL 4919387, at \*6 (C.D. Cal. June 12, 2020). Accordingly, without a clear indication to the contrary, the “‘clear and explicit’ meaning of these provisions, interpreted in their ‘ordinary and popular sense,’ controls judicial interpretation.” *Montrose Chem. Corp. v. Admiral Ins. Co.*, 10 Cal.4th 645, 666 (1995).

**IV. ARGUMENT**

Because there is no coverage for Plaintiff’s alleged losses, Zurich did not breach the Policy and is entitled to judgment on Plaintiff’s breach of contract claim (Count I).

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1 Zurich is also entitled to judgment on Count II (Declaratory Relief) with a declaration  
2 that the losses claimed by Plaintiff are not covered by the Policy; this also supports  
3 judgment in favor of Zurich’s counter-claim for a declaration that there is no coverage.  
4 Finally, because Zurich owed no duty of coverage, Plaintiff’s Count III for breach of  
5 the covenant of good faith and fair dealing fails on the face of the First Amended  
6 Complaint. These deficiencies cannot be cured by amendment.

7 **A. Plaintiff Has Not Sustained Any Direct Physical Loss Of Or Damage**  
8 **To Property.**

9 To state a viable claim, the insured must demonstrate that its asserted claim falls  
10 within the scope of coverage under the Policy. *Aydin Corp. v. First State Ins. Co.*, 18  
11 Cal.4th 1183, 1188 (1998). Under the Policy’s Insuring Agreement for property  
12 coverage, Plaintiff must plead the existence of “direct physical loss of or damage  
13 caused by a **Covered Cause of Loss** to Covered Property, at an Insured Location.”  
14 Policy, § 1.01. Further, to claim business interruption losses under the Time Element  
15 Coverage in the Policy, Plaintiff must properly plead that (1) it suffered a direct  
16 physical loss of or damage to insured property; (2) any claimed suspension of business  
17 activities was due to such a direct physical loss of or damage to Insured Property; and  
18 (3) such direct physical loss of or damage to property resulted from a Covered Cause  
19 of Loss.

20 Because Plaintiff cannot conceivably allege that its losses arise from “direct  
21 physical loss of or damage to” its property, all of its claims for property and business  
22 interruption losses fail.

23 **1. The Presence of the COVID-19 Virus in the Community Does**  
24 **not Constitute Direct Physical Loss or Damage.**

25 Although Plaintiff has alleged that the pandemic has caused it to suffer  
26 economic loss, it has not alleged (nor could it) that COVID-19 has caused *physical loss*  
27 *or damage*. Plaintiff’s threadbare recitation that “[t]he novel coronavirus has caused  
28 ‘direct physical loss of or damage to’ In-N-Out property insured under the policy,”

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1 (FAC ¶ 48) is a legal conclusion that this Court need not accept. *Mesa Underwriters*  
2 *Specialty Ins. Co. v. HYDS, Inc.*, No. CV19-5792PASKX, 2020 WL 2608148 at \*3  
3 (C.D. Cal. May 14, 2020). As Judge Caproni of the Southern District of New York has  
4 stated, the COVID-19 virus does not constitute direct physical loss or damage under  
5 the Policy because the virus damages *people*, not *places*. (Klevens Decl., **Ex. D**, *Soc.*  
6 *Life Magazine, Inc. v. Sentinel Ins. Co.*, Hr’g Tr. at 5:3-4 [The Court: “What is the  
7 damage? There is no damage to your property.” Plaintiff: “Well, the virus exists  
8 everywhere.” The Court: “It damages lungs. It doesn’t damage printing presses.”].)

9 Contrary to Plaintiff’s conclusory allegations, “physical loss” or “damage”  
10 requires that a substance so permeates an insured property that it compromises its  
11 physical integrity or renders the entire structure uninhabitable. California law is clear  
12 on this point. That the “loss” must be “physical,” given the ordinary definition of that  
13 word, “is widely held to exclude alleged losses that are intangible or incorporeal and,  
14 thereby, to preclude any claim against the property insurer when the insured merely  
15 suffers a detrimental economic impact unaccompanied by a distinct, demonstrable,  
16 physical alteration of the property.” *MRI Healthcare Ctr. of Glendale, Inc. v. State*  
17 *Farm Gen. Ins. Co.*, 187 Cal.App.4th, 766, 799 (2010) (quoting Plitt et al., *Couch on*  
18 *Insurance* § 148:46 (3rd ed. 2020)); *see also Ward Gen. Ins. Servs., Inc. v. Employers*  
19 *Fire Ins. Co.*, 114 Cal.App.4th 548, 556 (2003) [Economic loss “with no loss of or  
20 damage to tangible property” is not “direct physical loss of or damage to” covered  
21 property]; *Doyle v. Fireman’s Fund Ins. Co.*, 21 Cal.App.5th 33 (2018) [“[W]hen it  
22 comes to property insurance, diminution in value is not a covered peril”]. Federal  
23 courts in California have followed and expressly relied on this authority to determine  
24 that the existence of COVID-19—whether on-site or in the community—is not direct  
25 physical loss or damage to property.<sup>6</sup>

26 \_\_\_\_\_  
27 <sup>6</sup> *See, e.g., Mark’s Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Conn.*, No.  
28 2:20-CV-04423-AB-SK, 2020 WL 5938689, at \*3 (C.D. Cal. Oct. 2, 2020)  
[“[N]othing in the FAC plausibly supports an inference that the virus physically altered  
{footnote continued}

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1 Plaintiff has not alleged, and cannot allege, that the COVID-19 virus, even if  
2 present on-site, physically changes the structural integrity of any insured location or  
3 renders any location unusable or unfit for human occupancy. *MRI Healthcare, supra*,  
4 187 Cal.App.4th at 780 [“For there to be a ‘loss’ within the meaning of the policy,  
5 some *external force* must have acted upon the insured property to cause a *physical*  
6 *change* in the condition of the property, i.e., it must have been ‘damaged’ within the  
7 common understanding of that term.” (emphasis in original)]. In fact, the Stay at  
8 Home Orders cited by Plaintiff specifically *allow the use* of restaurants’ facilities for  
9 food preparation, online fulfillment, curbside pickup, and even in-room dining in some  
10 circumstances. (See, e.g., FAC ¶¶ 33-41.) The COVID-19 Virus does not cause any  
11 physical damage to property, nor does it destroy the utility of a structure. Thus, every  
12 insured property identified by Plaintiff has not suffered the necessary “physical loss”  
13 or “damage” that would trigger coverage.

14  
15  
16 \_\_\_\_\_  
17 {continued from previous page}

18 Plaintiff’s property, however much the public health response to the virus may have  
19 affected business conditions for Plaintiff’s restaurant.”]; *Water Sports Kauai, Inc. v.*  
20 *Fireman’s Fund Ins. Co.*, No. 20-CV-03750-WHO, 2020 WL 6562332, at \*4 (N.D.  
21 Cal. Nov. 9, 2020) [Rejecting insured’s argument that closing stores “to avoid  
22 imminent exposure” to COVID-19 constituted physical loss to property]; *10E, LLC v.*  
23 *Travelers Indem. Co. of Connecticut*, No. 2:20-CV-04418-SVW-AS, 2020 WL  
24 5359653, at \*5 (C.D. Cal. Sept. 2, 2020) [COVID-19’s financial impact on insured did  
25 not constitute physical loss; “An insured cannot recover by attempting to artfully plead  
26 temporary impairment to economically valuable use of property as physical loss or  
27 damage.”]; *W. Coast Hotel Mgmt., LLC v. Berkshire Hathaway Guard Ins. Companies*,  
28 No. 220CV05663VAPDFMX, 2020 WL 6440037, at \*4 (C.D. Cal. Oct. 27, 2020)  
[Rejecting conclusory allegation that COVID-19 constituted physical damage to  
property because “[u]nder California law... a ‘detrimental economic impact’ alone—as  
Plaintiffs have alleged—is not compensable under a property insurance contract.”];  
*Roundin3rd Sports Bar LLC v. The Hartford et al.*, No. 2:20-CV-05159 (C.D. Cal. Jan.  
14, 2021) [“[W]hen interpreting policies with similar language, numerous courts have  
now held that neither the presence of COVID-19 in society nor government restrictions  
can, by themselves, constitute direct physical loss or direct physical damage under  
California law.”].



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1                   **2. The “Stay-At-Home” Orders Do Not Constitute Direct Physical**  
2                   **Loss of or Damage To Property.**

3                   As an alternative, Plaintiff pleads that “[a]s a result of those civil [Stay at Home]  
4 orders, In-N-Out has suffered loss insured under the policy.” (FAC ¶ 52.) Plaintiff  
5 makes this argument even though its properties exist today in the very same physical  
6 condition as they existed the day prior to any “Stay at Home” order. As such,  
7 Plaintiff’s claim appears to rest solely on certain temporary restrictions on in-person  
8 customer access to its properties. But, the Policy **expressly excludes** coverage for  
9 damage arising from the “loss of use” of property. (Policy, §3.03.02.01 [“This Policy  
10 excludes: Loss or damage arising from delay, loss of market, or loss of use.”].) This  
11 exclusion is binding and precludes the possibility of coverage for any purported losses  
12 resulting from the COVID-19 restrictions. *See Mudpie, Inc. v. Travelers Cas. Ins. Co.*  
13 *of Am.*, No. 20-CV-03213-JST, 2020 WL 5525171 at \*6 (N.D. Cal. Sept. 14, 2020),  
14 appeal filed, No. 20-16858 (9th Cir. Sept. 24, 2020) [Applying policy’s “loss of use”  
15 exclusion to COVID-19 losses]. Indeed, the “loss of use” exclusion reinforces the  
16 language in the coverage grant to ensure that the purely economic, non-physical “loss  
17 of use” of property -- here, the loss of use of Plaintiff’s property for dine-in service --  
18 does not by itself constitute a covered cause of loss or otherwise implicate coverage  
19 where Plaintiff’s property has suffered no tangible physical harm. Thus, Plaintiff’s  
20 claim for coverage, in the absence of “direct physical loss of or damage to” insured  
21 property, cannot survive.

22                   Plaintiff’s plea that this Court should ignore the plain language of the Policy  
23 (which requires physical loss of or damage to property and also excludes damage  
24 arising from the loss of use of property) has been rejected by “the vast majority of  
25 cases that have addressed materially similar policy provisions and facts.” *Water Sports*  
26 *Kauai, Inc. v. Fireman’s Fund Ins. Co.*, No. 20-CV-03750-WHO, 2020 WL 6562332,  
27 at \*1-\*2 (N.D. Cal. Nov. 9, 2020) [“[D]istrict courts around the country – including  
28 ones in this District and throughout the Ninth Circuit – have rejected identical claims

1 under similar policies”]. California courts, in following and citing to California law,  
 2 are additionally following the nationwide majority that government orders responding  
 3 to the pandemic do not constitute direct physical loss or damage to property.<sup>7</sup>

4 Separate from the “loss of use” exclusion, the Stay at Home Orders did not  
 5 constitute direct physical loss to insured property because they did not prevent the  
 6 Plaintiff’s access to or use of its property. Even for any restaurants that allegedly  
 7 closed *as a result of* the Orders, the lack of any physical damage to those restaurants is  
 8 dispositive. See *Mark’s Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of*  
 9 *Conn.*, No. 2:20-CV-04423-AB-SK, 2020 WL 5938689, at \*5 (C.D. Cal. Oct. 2, 2020)  
 10 [“The only individuals who could potentially claim ‘direct physical loss of’ access to  
 11 the premises would be patrons who were no longer allowed to dine in. And even then,  
 12 the Policy is between Plaintiff and Defendant, not restaurant goers and Defendant.”];  
 13 *10E, LLC v. Travelers Indem. Co. of Connecticut*, No. 2:20-CV-04418-SVW-AS, 2020

14 <sup>7</sup> See, e.g., *Pappy’s Barber Shops, Inc. v. Farmers Group, Inc.*, No. 3:20-cv-00907,  
 15 2020 WL 5500221 (S.D. Cal. Sept. 11, 2020) [“Plaintiffs are not the first policyholders  
 16 to argue in court that government orders forcing their business to stop operating as a  
 17 result of the COVID-19 pandemic triggers insurance... [M]ost courts have rejected  
 18 these claims finding that the government orders did not constitute direct physical loss  
 19 or damage to property”]; *Mudpie, supra*, 2020 WL 5525171, at \*4 [“Although Mudpie  
 20 has been dispossessed of its storefront, it will not be a ‘permanent dispossession.’ ...  
 21 When the Stay at Home orders are lifted, Mudpie can regain possession of its  
 22 storefront”]; *10E, LLC, supra*, 2020 WL 5359653, at \*5 [“Plaintiff only plausibly  
 23 alleges that in-person dining restrictions interfered with the use or value of its property  
 24 -- not that the restrictions caused direct physical loss or damage”]; *Plan Check*  
 25 *Downtown III, LLC v. AmGuard Ins. Co.*, No. CV 20-6954-GW-SKX, 2020 WL  
 26 5742712, at \*6 (C.D. Cal. Sept. 10, 2020) [Insured’s argument that the inability to  
 27 offer on-premise dining constituted a physical loss “is not a reasonable one because it  
 28 would be a sweeping expansion of insurance coverage without any manageable  
 bounds”]; *Robert W. Fountain, Inc. v. Citizens Ins. Co. of Am.*, No. 20-cv-05441, 2020  
 WL 7247207, at \*3 (N.D. Cal. Dec. 9, 2020) [Granting motion for judgment on the  
 pleadings because “[b]usiness losses resulting from the temporary inability to access  
 an unharmed property. . . are quite obviously not ‘damage to property’ given the plain  
 meaning of those words. But neither are they ‘direct physical loss of’ property.”];  
*Geragos & Geragos Engine Company No. 28, LLC v. Hartford Fire Ins. Co.*, No. 20-  
 CV-4647, 2020 WL 7350413, at \*3 (C.D. Cal. Dec. 3, 2020) [“COVID-related  
 restrictions on commercial activity and individuals’ activities do not constitute ‘direct  
 physical loss’ or ‘physical damage’ to property”].

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1 WL 5359653, at \*4 (C.D. Cal. Sept. 2, 2020) [“Under California law, losses from  
2 inability to use property do not amount to ‘direct physical loss of or damage to  
3 property’ within the ordinary and popular meaning of that phrase.”].

4 To hold otherwise would effectively treat the words “direct” and “physical” in  
5 the Policy as meaningless surplusage. *U.S. TelePacific Corp. v. U.S. Specialty Ins.*  
6 *Co.*, No. CV185083DMGAGRX, 2019 WL 2590171, at \*8 (C.D. Cal. June 18, 2019),  
7 *aff’d*, 815 F. App’x 155 (9th Cir. 2020) (quoting *Zalkind v. Ceradyne, Inc.*, 194  
8 Cal.App.4th 1010, 1027 (2011)); *Ward Gen. Ins. Servs.*, *supra*, 114 Cal.App.4th at 554  
9 [Finding that the words “direct physical” modifies both “loss of” and “damage to” in  
10 “direct physical loss of or damage to property” because to hold otherwise would be “a  
11 strained and clumsy meaning, not an ordinary and popular meaning.”]; *see also* Cal.  
12 Civ. Code § 1641 [“The whole of a contract is to be taken together, so as to give effect  
13 to every part, if reasonably practicable, each clause helping to interpret the other”].

14 **3. Plaintiff Cannot Successfully Allege that Any Suspension of**  
15 **Business Was Due to Direct Physical Loss of or Damage to**  
16 **Property.**

17 Plaintiff’s claim for business interruption losses under the Time Element  
18 Coverage suffers from yet another insurmountable deficiency. Not only must an  
19 insured demonstrate the existence of “direct physical loss of or damage to” insured  
20 property, it must also demonstrate that the suspension of business *is due to direct*  
21 *physical loss of or damage to insured property*. (Policy, § 4.01.01.) Thus, even if  
22 Plaintiff could plead some plausible physical loss or damage (which it has not done  
23 and cannot do), there is still no business interruption coverage unless its business  
24 activities were suspended *because* of such claimed physical loss or damage.

25 At the outset, the business interruption coverage only applies for the Period of  
26 Liability, which is defined as “[t]he period starting from the time of physical loss or  
27 damage ... and ending when with due diligence and dispatch [the insured property]  
28 could be repaired and replaced.” (Policy § 4.03.01.01.) Here, there could be no

1 effective “Period of Liability,” and therefore no coverage, because *there is no*  
 2 *allegation that any insured property needed to be repaired or replaced because of*  
 3 *physical loss or damage. See Mudpie, supra, 2020 WL 5525171, at \*4 [“But here,*  
 4 *there is nothing to fix, replace, or even disinfect for Mudpie to regain occupancy of its*  
 5 *property”]; Wellness Eatery La Jolla LLC v. The Hanover Insurance Group, No. 20-*  
 6 *cv-01277-AJB-RBB (C.D. Cal. Feb. 3, 2021) (Klevens Decl., Ex. E-1) [“Interpreting*  
 7 *the Policy in context and with the assistance of surrounding terms, the Court finds that*  
 8 *without some tangible physical alteration to the property, there would be no need to*  
 9 *restore, repairs, rebuild, or replace.”].*

10 Further, the FAC demonstrates that any closure of its restaurant locations was  
 11 not due to any “physical loss of or damage” to insured property, but instead was the  
 12 result of prophylactic community-wide “Stay at Home” Orders, which were issued to  
 13 curb further person-to-person transmission of the virus that causes COVID-19 and  
 14 which Orders, as noted above, do not themselves constitute direct physical loss or  
 15 damage. “The cases consistently conclude that there needs to be some physical  
 16 tangible injury (like a total deprivation of property) to support ‘loss of property’ or a  
 17 physical alteration or active presence of a contaminant to support ‘damage to’  
 18 property.” *Water Sports Kauai, supra, 2020 WL 6562332, at \*6; see also Pappy’s*  
 19 *Barber Shops, Inc. v. Farmers Grp., Inc., No. 20-CV-907-CAB-BLM, 2020 WL*  
 20 *5847570, at \*1 (S.D. Cal. Oct. 1, 2020) [“The cause of Plaintiffs’ business income*  
 21 *losses was the COVID-19 Civil Authority Orders themselves...In the absence of the*  
 22 *COVID-19 Civil Authority Orders, Plaintiffs would not have closed their business and*  
 23 *thus would not have suffered the business income losses for which they now seek*  
 24 *coverage.”]; 10E, LLC, supra, 2020 WL 5359653, at \*5 [“Plaintiff only plausibly*  
 25 *alleges that in-person dining restrictions interfered with the use or value of its property*  
 26 *– not that the restrictions caused direct physical loss or damage.”]; see also Syufy*  
 27 *Enterprises v. Home Ins. Co. of Indiana, No. 94-0756 FMS, 1995 WL 129229, at \*2*  
 28 *(N.D. Cal. Mar. 21, 1995) [Denying coverage for business interruption loss due to*

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1 curfews following the Rodney King trial because the “requisite causal link between  
2 damage to adjacent property and denial of access to a Syufy theater is absent. Syufy  
3 opted to close its theaters as a direct result of the city-wide curfews, not as a result of  
4 adjacent property damage.”]. That is consistent with the recognition by California  
5 courts that a property insurance policy does not insure against all losses, but only those  
6 losses that are caused by a direct physical loss of or damage property. *Doyle, supra*,  
7 21 Cal.App.5th at 39 [“Doyle did not buy a *provenance* insurance policy; Doyle  
8 bought a *property* insurance policy.” (emphasis in original)].

9 Because Plaintiff cannot allege cognizable facts regarding the necessary causal  
10 connection between a direct physical loss of or damage to property and its suspension  
11 of services (as required by the Time Element Coverage), Plaintiff has no plausible  
12 claim for business interruption losses.

13 **B. Plaintiff’s Additional Claims Under The Policy’s “Special Coverages”**  
14 **Similarly Fail.**

15 The “Special Coverages” pled by Plaintiff are similarly not available because  
16 they all have “direct physical loss or damage” as a foundational prerequisite. (FAC at  
17 ¶51.) Thus, the lack of “direct physical loss or damage” -- and the absence of other  
18 preconditions described below -- also prohibits Plaintiff’s ability to recover under the  
19 “Special Coverages.” These deficiencies cannot be cured by amendment

20 **1. Civil Authority Coverage is Not Triggered.**

21 Under the Civil or Military Authority Coverage provision within the “Special  
22 Coverages,” coverage may be triggered when an insured’s business is suspended upon  
23 claimed “direct physical loss of or damage” to certain *third-party* property. Moreover,  
24 an insured must show that the civil order suspending its business was *in response to*  
25 direct physical loss or damage caused by a covered cause of loss to that third-party  
26 property. It is insufficient to simply plead that Plaintiff was prohibited from operating  
27 its business at its premises. *Pappy’s Barber Shops, Inc. v. Farmers Group, Inc.*, No.  
28 3:20-cv-00907, 2020 WL 5500221 at \*6 (S.D. Cal. Sept. 11, 2020) [“The government

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1 orders alleged in the complaint prohibit the operation of Plaintiff’s business; they do  
2 not prohibit access to Plaintiffs’ place of business.”]; *Mudpie, supra*, 2020 WL  
3 5525171, at \*6 [plaintiff cannot establish that the Stay at Home Orders were issued  
4 “due to direct physical loss of or damage to” any property]; *10E, LLC, supra*, 2020  
5 WL 5359653, at \*5-\*6 [Finding plaintiff’s attempt to plead civil authority coverage  
6 were simply “conclusory allegations of law”].

7 Plaintiff’s naked assertion here, without factual support, that “state and local  
8 governments issued orders closing In-N-Out’s dining rooms in order to control spread  
9 of the virus and specifically because the virus is causing property loss or damage  
10 everywhere, including many places within one mile of In-N-Out locations” does not  
11 plausibly state a viable claim under the federal pleading standards. (FAC at ¶52.) A  
12 plaintiff made similar allegations in *W. Coast Hotel Mgmt., LLC v. Berkshire*  
13 *Hathaway Guard Ins. Companies*, including that “the properties that are damaged are  
14 in the immediate area of the [insured hotels],” but in that case this Court concluded  
15 that “[p]laintiffs simply have recited the coverage criteria set forth in the Policy, and  
16 such bare allegations cannot support Plaintiffs’ request for declaratory relief  
17 [confirming civil authority coverage].” No. 220CV05663VAPDFMX, 2020 WL  
18 6440037 at \*4 (C.D. Cal. Oct. 27, 2020). A similar outcome is warranted here.

19 Further, as demonstrated above, the mere presence of the virus at some  
20 unspecified third-party location (even if that were true) does not constitute the requisite  
21 direct physical loss or damage to trigger Civil Authority Coverage. *See Pappy’s*  
22 *Barber Shops, supra*, 2020 WL 5500221, at \*6 [Dismissing claim for civil authority  
23 coverage because “[j]ust as complaint does not plausibly allege any direct physical loss  
24 of Plaintiff’s property, it also does not allege any direct physical loss or damage to  
25 property not at Plaintiffs’ places of business”].

26 Even the most cursory review of the Orders issued by state and local  
27 governments (and cited by Plaintiff) indicates that those Orders were not issued in  
28 “response” to any specific physical loss or damage to any identified property. Rather,

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1 they were issued in response to a broad public health crisis and aimed at limiting  
2 person-to-person interactions so that communities could “flatten the curve” with  
3 respect to COVID-19 cases. (See FAC at ¶28 [“[T]hese states issued orders  
4 suspending or severely limiting business operations of non-essential businesses where  
5 people could potentially contract COVID-19 from others or the property itself.”].)  
6 *Mudpie, supra*, 2010 WL 5525171, at \*7 [The “allegations establish that the  
7 government closure orders were intended to prevent the spread of COVID-19”].  
8 However, there is no coverage for community-wide orders meant to *prevent potential*  
9 *future* harm or injury. See *Syufy Enterprises, supra*, 1995 WL 129229, at \*2 (N.D.  
10 Cal. Mar. 21, 1995) [Denying claim for civil authority coverage where city-wide  
11 “curfews were imposed to *prevent* ‘potential’ looting, rioting, and resulting property  
12 damage”] (emphasis in original); see also *United Airlines, Inc. v. Ins. Co. of State of*  
13 *Penn.*, 439 F.3d 128 (2d Cir. 2006) [No Civil Authority coverage for temporary  
14 shutdown of Reagan International Airport after September 11 terrorist attacks because  
15 the Government’s “decision to halt operations at the Airport indefinitely was based on  
16 the fear of future attacks,” not because of damage to the Pentagon].

17 Plaintiff’s cherry-picking of orders that make a cursory unsupported reference to  
18 “property loss or damage” does not alter that reality, the undeniable impetus for the  
19 orders, or the fact that courts have consistently recognized that the COVID-19 Virus,  
20 while harmful to people, does not physically harm or damage building structures.

21 **2. Contingent Time Element Coverage Is Not Triggered.**

22 Contingent Time Element Coverage only applies where a policyholder must  
23 suspend its business activities at an Insured Location, provided that the “Suspension  
24 results from direct physical loss of or damage... to property (of the type insurable  
25 under this Policy) at Direct Dependent Time Element Locations, Indirect Dependent  
26 Time Element Locations and Attraction Properties.” (Policy, § 5.02.05.) Plaintiff has  
27 not identified any third-party properties that would trigger this coverage, let alone any  
28

1 direct physical loss of or damage to those properties that resulted in a necessary  
2 suspension of business.

3 **3. Ingress/Egress Coverage Is Not Triggered.**

4 Plaintiff’s suggestion that it is entitled to “Ingress/Egress Coverage” is similarly  
5 unsupported. (FAC at ¶51.) For one, Plaintiff fails to state with any precision how or  
6 why this coverage would apply; Plaintiff simply alleges that “[t]he policy also contains  
7 what are described as ‘Special Coverages.’ These include items such as...  
8 ‘Ingress/Egress.’” (*Id.*)

9 Zurich is entitled to judgment because Plaintiff cannot plausibly allege that it is  
10 entitled to Ingress/Egress Coverage. That is because this provision requires not just  
11 “direct physical loss or damage” to a relevant third-party location (which, again,  
12 Plaintiff cannot show), but also a resultant “physical obstruction” that prevented access  
13 to an insured location. (Policy § 5.02.15, *supra.*) No such physical obstruction exists,  
14 nor was any alleged.

15 **4. Decontamination Costs Coverage Is Not Triggered**

16 Plaintiff’s conclusory allegation that it “has incurred and will incur  
17 ‘Decontamination Costs’ under the policy” is also not actionable. (FAC at ¶58; Policy  
18 §§ 5.02.07, 7.10, *supra.*) The Decontamination Costs Coverage is designed to cover  
19 costs for decontamination and/or removal of Contaminated Covered Property in a  
20 manner required to satisfy a law or ordinance regulating Contamination in light of “the  
21 actual not suspected presence of Contaminant(s).” The contamination must have  
22 resulted from “direct physical loss of or damage caused by a Covered Cause of Loss to  
23 Covered Property.” (Policy §§ 5.02.07, 7.10.) Plaintiff cannot allege that insured  
24 property was contaminated as a result of “direct physical loss of or damage caused by a  
25 Covered Cause of Loss,” nor can it plausibly allege that any of the Stay-at-Home  
26 Orders were in place to regulate the decontamination and/or removal of Contaminated  
27 Covered Property. As Plaintiff has pled, the Stay-at-Home Orders were designed to  
28 limit the spread of COVID-19, and addressed the *suspected* presence of the virus in the

DENTONS US LLP  
601 SOUTH FIGUEROA STREET, SUITE 2500  
LOS ANGELES, CALIFORNIA 90017-5704  
(213) 623-9300



1 community. (See, e.g., FAC ¶¶ 35, 38, 52.) Ultimately, Plaintiff cannot state any facts  
2 that any Contaminant was present on-site by virtue of “direct physical loss of or  
3 damage caused by a Covered Cause of Loss.” For this reason, judgment on the  
4 pleadings should be granted.

5 **C. Because Zurich Was Correct To Deny Coverage, There Can Be No**  
6 **Breach Of The Covenant Of Good Faith And Fair Dealing.**

7 A claim for breach of the implied covenant of good faith and fair dealing (also  
8 known as a “bad faith” claim) “cannot be maintained unless policy benefits are due  
9 under a contract.” *Waller v. Truck Ins. Exch., Inc.*, 11 Cal.4th 1, 35 (1995); see also  
10 *Minich v. Allstate Ins. Co.*, 193 Cal.App.4th 477, 493 (2011) [The “claim for tortious  
11 breach of contract (bad faith) fails as a matter of law because [the insurer] did not  
12 breach the Policy”]; *Brown v. Mid-Century Ins. Co.*, 215 Cal.App.4th 841, 858 (2013)  
13 [“Because the policy did not cover the [insureds’] claims, however, the [insureds] do  
14 not have a claim for breach of the implied covenant of good faith and fair dealing.”].

15 Here, because Zurich does not owe any duty of coverage to In-N-Out for its  
16 claimed losses arising from the COVID-19 pandemic, judgment in Zurich’s favor on  
17 In-N-Out’s Third Claim for Relief is appropriate. See, e.g., *10E, LLC, supra*, 2020  
18 WL 5359653, at \*6 [Dismissing bad faith claim where Plaintiff claiming COVID-19  
19 losses was not entitled to coverage under the policy]; *O’Keefe v. Allstate Indem. Co.*,  
20 953 F.Supp.2d 1111, 1116 (S.D. Cal. 2013) [Dismissing bad faith claim pursuant to  
21 Rule 12(b)(6) “[b]ecause [plaintiffs] cannot sue for bad faith without proving that  
22 benefits were withheld under the policy ‘as written,’ and because [plaintiffs] cannot  
23 establish that coverage existed under the express terms of the contract”]; *Moss v.*  
24 *Infinity Ins. Co.*, No. 15-CV-03456-JSC, 2015 WL 7351395, at \*5 (N.D. Cal. Nov. 20,  
25 2015) [Dismissing bad faith claim where policy “excluded from coverage the  
26 particular situation for which Plaintiff sought benefits”].

DENTONS US LLP  
601 SOUTH FIGUEROA STREET, SUITE 2500  
LOS ANGELES, CALIFORNIA 90017-5704  
(213) 623-9300

DENTONS US LLP  
601 SOUTH FIGUEROA STREET, SUITE 2500  
LOS ANGELES, CALIFORNIA 90017-5704  
(213) 623-9300

**D. Further Amendment Would be Futile.**

In dismissing similar cases, California courts have recognized that the insured could not reasonably allege that COVID-19 caused “direct physical loss” to their property and that amendment would be futile. See *Pappy’s Barber Shops, supra*, 2020 WL 5847570, at \*1 [“No amount of artful pleading by Plaintiffs can state a plausible claim that they suffered any business income losses due to direct physical loss of or damage to property at their premises, or due to civil authority orders prohibiting access to Plaintiffs’ premises due to direct physical loss or damage to property elsewhere, as required for coverage under the Policy.”]; *Roundin3rd Sports Bar LLC v. The Hartford*, No. 2:20-cv-05159-SVW-PLA (C.D. Cal. Jan. 14, 2021) (Klevens Decl., Ex. E-7 ) [“[L]eave to amend is futile because the instant ruling is based on the Court’s interpretation of the policy and the allegation of additional facts would not be helpful”]; *Jonathan Oheb MD, Inc. v. Travelers Cas. Ins. Co. of Am.*, No. 2:20-CV-08478 (N.D. Cal. Dec. 30, 2020); *Kevin Barry Fine Art Assocs. v. Sentinel Ins. Co., Ltd.*, No. 20-CV-04783-SK, 2021 WL 141180, at \*7 (N.D. Cal. Jan. 13, 2021) [“While the Court is sympathetic to the situation facing KBFA and other businesses, KBFA could not plausibly allege that its premises, or that nearby properties, have been physically damaged or lost due to COVID-19 or the Stay-at-Home Orders. Accordingly, the Court dismisses KBFA’s claims with prejudice.”] This Court should follow suit and dismiss Plaintiff’s claims with prejudice.

**V. CONCLUSION**

Because Plaintiff cannot state a plausible claim for coverage, its First Amended Complaint should be dismissed with prejudice. This Court should similarly enter an Order granting judgment on Zurich’s declaratory relief counter-claim, finding based on the allegations that the Policy does not obligate Zurich to provide coverage for Plaintiff’s claimed losses under the Policy.

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1 Dated: February 8, 2021

DENTONS US LLP  
Jayme C. Long  
Shari L. Klevens  
Alanna Clair  
Justin R. Sarno  
Connor M. Scott

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4  
5 By:   
6 Connor M. Scott

7 Attorneys for Defendant  
8 **ZURICH AMERICAN INSURANCE**  
9 **COMPANY**

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DENTONS US LLP  
601 SOUTH FIGUEROA STREET, SUITE 2500  
LOS ANGELES, CALIFORNIA 90017-5704  
(213) 623-9300

**CERTIFICATE OF SERVICE**

*In-N-Out Burgers v. Zurich American Insurance Company, et al.*  
*USDC Case No.: 8:20-cv-01000-JLS-ADS*

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-titled action. My business address is **601 South Figueroa Street, Suite 2500, Los Angeles, California 90017.**

On February 8, 2021, I served the **“DEFENDANT ZURICH AMERICAN INSURANCE COMPANY’S MOTION FOR JUDGMENT ON THE PLEADINGS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF”** on the counsel listed and by the methods indicated below:

The following CM/ECF participants were served by electronic means through the Court's CM/ECF system on February 8, 2021.

***SEE COURT’S SERVICE LIST***

I declare under penalty of perjury that the foregoing is true and correct, and that I am employed in the office of a member of the bar of this Court at whose direction the service was made. Executed on February 8, 2021, at Los Angeles, California.

*/s/ Ermelita P. Gonzalez*

\_\_\_\_\_  
Ermelita P. Gonzalez

DENTONS US LLP  
601 SOUTH FIGUEROA STREET, SUITE 2500  
LOS ANGELES, CALIFORNIA 90017-5704  
(213) 623-9300