

United States District Court
Northern District of California

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

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BARBIZON SCHOOL OF SAN FRANCISCO, INC., et al.,
Plaintiffs,
v.
SENTINEL INSURANCE COMPANY LTD,
Defendant.

Case No. [20-cv-08578-TSH](#)

ORDER GRANTING MOTION TO DISMISS

Re: Dkt. No. 8

I. INTRODUCTION

Plaintiffs Barbizon School Of San Francisco, Inc. and Barbizon School of Modeling Of Manhattan, Inc. bring this action against their insurance company, Defendant Sentinel Insurance Company, LTD., seeking coverage for economic losses to their businesses caused by COVID-19. Pending before the Court is Sentinel’s Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). ECF No. 8. Plaintiffs filed an Opposition (ECF No. 19) and Sentinel filed a Reply (ECF No. 22). The Court finds this matter suitable for disposition without oral argument and **VACATES** the April 1, 2021 hearing. *See* Civ. L.R. 7-1(b). Having considered the parties’ positions, relevant legal authority, and the record in this case, the Court **GRANTS** Sentinel’s motion for the following reasons.

II. BACKGROUND

Plaintiffs are independently owned and operated licensees of Barbizon International, Inc., offering modeling, acting, and studio services at locations in New York City (Barbizon-NY) and on the West Coast (Barbizon-West). Compl. ¶ 10, ECF No. 1.

United States District Court
Northern District of California

1 **A. The West Coast Policy**

2 Barbizon-West procured insurance coverage under Policy Number 57 SBA UZ9898 for the
3 policy period July 8, 2019, through July 8, 2020. The West Coast Policy was issued as of April
4 19, 2019. *Id.* ¶ 11. The basic coverage provisions of the policy are written on the “Special
5 Property Coverage Form,” Form SS 00 07 07 05, which states:

6 A. COVERAGE

7 We will pay for direct physical loss of or physical damage to Covered
8 Property at the premises described in the Declarations (also called
9 "scheduled premises" in this policy) caused by or resulting from a
Covered Cause of Loss.

10 *Id.* ¶ 12. “Covered Property” under the Special Property Coverage Form includes the “building(s)
11 and structure(s) described in the Declarations,” Special Property Coverage Form, A(1)(a). *Id.* ¶
12 13. Under the Special Property Coverage Form in the West Coast policy “Covered Cause of
13 Loss” is defined as follows:

14 B. 3. Covered Causes of Loss

15 RISKS OF DIRECT PHYSICAL LOSS unless the loss is:

- 16 a. Excluded in Section B., EXCLUSIONS; or
- 17 b. Limited in Paragraph A.4. Limitations; that follow.

18 *Id.* ¶ 15. “Section B., EXCLUSIONS” of the Special Property Coverage Form,” Form SS 00 07
19 07 05, for the West Coast Policy does not itself have a virus exclusion. An exclusion was,
20 however, added to “Section B., EXCLUSIONS” of the West Coast Policy through a “LIMITED
21 FUNGI, BACTERIA OR VIRUS COVERAGE” Endorsement, Form SS 40 93 07 05. *Id.* ¶ 16.

22 One portion of the virus endorsement removes all virus coverage from the Special Property
23 Coverage Form by adding an exclusion to Section B of the Special Property Coverage Form:

24 2. The following exclusion is added to Paragraph B.1. Exclusions of
25 the ... Special Property Coverage Form...:

- 26 i. “Fungi”, Wet Rot, Dry Rot, Bacteria And Virus

27 We will not pay for loss or damage caused directly or indirectly by
28 any of the following. Such loss or damage is excluded regardless of
any other cause or event that contributes concurrently or in any
sequence to the loss:

1 (1) Presence, growth, proliferation, spread or any activity of “fungi”,
2 wet rot, dry rot, bacteria or virus.

3 (2) But if “fungi”, wet rot, dry rot, bacteria or virus results in a
4 “specified cause of loss” to Covered Property, we will pay for the
5 loss or damage caused by that “specified cause of loss”.

6 This exclusion does not apply:

7 (1) When “fungi”, wet or dry rot, bacteria or virus results from fire or
8 lightning; or

9 (2) To the extent that coverage is provided in the Additional Coverage
10 – Limited Coverage for “Fungi”, Wet Rot, Dry Rot, Bacteria and
11 Virus with respect to loss or damage by a cause of loss other than fire
12 or lightning.

13 This exclusion applies whether or not the loss event results in
14 widespread damage or affects a substantial area.

15 *Id.* 18. The virus endorsement then adds some very limited virus coverage:

16 b. We will pay for loss or damage by “fungi”, wet rot, dry rot, bacteria
17 and virus. As used in this Limited Coverage, the term loss or damage
18 means:

19 (1) Direct physical loss or direct physical damage to Covered Property
20 caused by “fungi”, wet rot, dry rot, bacteria or virus, including the cost
21 of removal of the “fungi”, wet rot, dry rot, bacteria or virus;

22 (2) The cost to tear out and replace any part of the building or other
23 property as needed to gain access to the “fungi”, wet rot, dry rot,
24 bacteria or virus; and

25 (3) The cost of testing performed after removal, repair, replacement
26 or restoration of the damaged property is completed, provided there
27 is a reason to believe that “fungi”, wet rot, dry rot, bacteria or virus
28 are present.

Id. ¶ 19. That limited virus coverage is limited further by the requirement that, for coverage to
apply, the loss must be due to a limited number of things. The coverage is restricted by this
language:

a. The coverage described in 1.b. below only applies when the
“fungi”, wet or dry rot, bacteria or virus is the result of one or more
of the following causes that occurs during the policy period and only
if all reasonable means were used to save and preserve the property
from further damage at the time of and after that occurrence.

(1) A “specified cause of loss” other than fire or lightning;

Id. ¶ 20. “Specified Cause of Loss” is defined in the Special Property Coverage Form as follows:

United States District Court
Northern District of California

1 19. “Specified Cause of Loss” means the following:
2 Fire; lightning; explosion, windstorm or hail; smoke; aircraft or
3 vehicles; riot or civil commotion; vandalism; leakage from fire
 extinguishing equipment; sinkhole collapse; volcanic action; falling
 objects; weight of snow, ice or sleet; water damage.

4 *Id.* ¶ 21. As a result, the virus endorsement states that Sentinel will pay for “[d]irect physical loss
5 or direct physical damage to Covered Property caused by . . . virus,” provided that such “direct
6 physical loss or direct physical damage” is caused by a virus that “is the result of” “explosion,
7 windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from
8 fire extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow,
9 ice or sleet; water damage.” *Id.* ¶ 22.

10 **B. The New York Policy**

11 Barbizon-NY procured insurance coverage under Policy Number 57 SBA BG9898 for the
12 policy period September 14, 2019, through September 14, 2020. The New York policy was issued
13 as of July 3, 2019, almost three months after the West Coast policy. *Id.* ¶ 23.

14 The New York policy, like the West Coast policy, is based upon “Special Property
15 Coverage Form,” Form SS 00 07 07 05, which states:

16 A. COVERAGE

17 We will pay for direct physical loss of or physical damage to Covered
18 Property at the premises described in the Declarations (also called
19 “scheduled premises” in this policy) caused by or resulting from a
 Covered Cause of Loss.

20 *Id.* ¶ 24. The New York policy does not include the virus endorsement. *Id.* ¶¶ 26-27.

21 Beginning on March 7, 2020, New York Governor Andrew Cuomo and New York City
22 Mayor Bill DeBlasio issued a series of executive orders. Among other things, those executive
23 orders, declared “a State disaster emergency for the entire State of New York,” closed all schools,
24 and ultimately required the closure of non-essential businesses in New York City. *Id.* ¶¶ 35-41.

25 The NY policy provides “Civil Authority Coverage” as follows:

26 q. Civil Authority

27 (1) This insurance is extended to apply to the actual loss of Business
28 Income you sustain when access to your “scheduled premises” is
 specifically prohibited by order of a civil authority as the direct result

United States District Court
Northern District of California

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

of a Covered Cause of Loss to property in the immediate area of your “scheduled premises”.

(2) The coverage for Business Income will begin 72 hours after the order of a civil authority and coverage will end at the earlier of:

- (a) When access is permitted to your “scheduled premises”, or
- (b) 30 consecutive days after the order of the civil authority.

Id. ¶ 42. The Civil Authority coverage is triggered by an “order of a civil authority as the direct result of a Covered Cause of Loss to property in the immediate area” of the NY Location. *Id.* ¶ 43. “Immediate area” is not defined.

The NY policy provides “Business Income” coverage as follows:

o. Business Income

(1) We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your “operations” during the “period of restoration”. The suspension must be caused by direct physical loss of or physical damage to property at the “scheduled premises”, including personal property in the open (or in a vehicle) within 1,000 feet of the “scheduled premises”, caused by or resulting from a Covered Cause of Loss.

* * *

(5) With respect to the coverage provided in this Additional Coverage, suspension means:

- (a) The partial slowdown or complete cessation of your business activities; or
- (b) That part or all of the “scheduled premises” is rendered untenable as a result of a Covered Cause of Loss if coverage for Business Income applies to the policy.

Id. ¶ 58. The NY policy also provides “Extended Business Income” coverage. The “Extended Business Income” coverage in the Special Property Coverage Form is entirely replaced by the following from the “Stretch for Schools” Endorsement:

r. Extended Business Income

(1) If the necessary suspension of your “operations” produces a Business Income loss payable under this policy, we will pay for the actual loss of Business Income you incur during the period that:

- (a) Begins on the date property is actually repaired, rebuilt or replaced and “operations” are resumed; and

United States District Court
Northern District of California

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

(b) Ends on the earlier of:

(i) The date you could restore your “operations” with reasonable speed, to the condition that would have existed if no direct physical loss or damage occurred; or

(ii) 30 consecutive days after the date determined in (1)(a) above. Loss of Business Income must be caused by direct physical loss or physical damage at the “scheduled premises” caused by or resulting from a Covered Cause of Loss.

(2) With respect to the coverage provided in this Additional Coverage, suspension means:

(a) The partial slowdown or complete cessation of your business activities; and

(b) That a part or all of the “scheduled premises” is rendered untenable as a result of a Covered Cause of Loss.

Id. ¶ 61. The “Stretch for Schools” endorsement increases the 30-day period of loss under the NY Policy’s “Extended Business Income” coverage to 120 days:

4. Extended Business Income

In the Extended Business Income Additional Coverage, paragraph 4.j.(1)(b)(ii) of the Standard Property Coverage Form and paragraph 5.r.(1)(b)(ii) of the Special Property Coverage Form are amended to read as follows:

(b) 120 consecutive days after the date determined in (a) above.

Id. ¶ 62. The “Stretch for Schools” endorsement also increases the limits for “Business Income and Extra Expense” coverage:

c. Business Income and Extra Expense

(1) If Business Income or Extra Expense are provided under this policy, the most we will pay in any one occurrence in subparagraph (3) is increased from \$50,000 to \$500,000 in any one occurrence at each premises.

(2) The Limit of Insurance stated above is the maximum Limit of Insurance available for this coverage under this policy.

Id. ¶ 63.

C. Plaintiffs’ Allegations

Plaintiffs filed the present complaint on December 4, 2020, alleging they were forced to close the insured locations in March 2020 due to the COVID-19 pandemic, which was caused by

1 the pervasive presence of the virus SARS-CoV-2. *Id.* ¶ 28. They allege “[t]he presence of the
2 SARS-CoV-2 virus involves a physical interaction with property, making it dangerous and less
3 valuable. This damage is direct, in that the presence of SARS-CoV-2 virus particles renders
4 property dangerous and less valuable,” *id.* ¶ 53, and that “Barbizon-NY was unable to use the NY
5 Location because of the virus.” *Id.* ¶ 54.

6 On June 26, 2020, Plaintiffs submitted claims to Sentinel for business interruption losses at
7 the insured locations. *Id.* ¶ 29. Sentinel denied the claims that same day. *Id.* ¶ 30. In a letter
8 dated that day, Sentinel denied coverage under the New York policy by stating: “We have
9 completed a review of your loss and have determined that since the coronavirus did not cause
10 property damage at your place of business or in the immediate area, this loss is not covered.” *Id.* ¶
11 31. Similarly, in separate letter dated the same day, Sentinel denied coverage under the West
12 Coast policy with identical language stating: “We have completed a review of your loss and have
13 determined that since the coronavirus did not cause property damage at your place of business or
14 in the immediate area, this loss is not covered.” *Id.* ¶ 32. The West Coast letter went on to state
15 that: “Even if the virus did cause damage, it is excluded from the policy, and the limited coverage
16 available for losses caused by virus does not apply to the facts of your loss.” *Id.* ¶ 33.

17 Barbizon-NY asserts three causes of action: (1) breach of contract; (2) breach of duty of
18 good faith and fair dealing; and (3) unfair business practices, Cal. Bus. & Prof. Code §§ 17200 et
19 seq. (“UCL”). *Id.* ¶¶ 34-88. Barbizon-West asserts a single cause of action for violation of the
20 UCL. *Id.* ¶¶ 78-88. Barbizon-West’s UCL claim rests on the theory that although the West Coast
21 Policy provides certain limited coverage for virus-related losses, Sentinel has allegedly “taken the
22 position that a virus cannot cause ‘direct physical loss of or physical damage to’ property under
23 any circumstances.” *Id.* ¶¶ 79-80 (emphasis in original). Barbizon-West thus claims Sentinel’s
24 “sale and marketing of the Limited Fungi, Bacteria Or Virus Coverage constitutes false, unfair,
25 fraudulent, and/or deceptive business practices” under the UCL. *Id.* ¶¶ 81-83.

26 Sentinel filed the present motion on February 2, 2021, seeking dismissal of all claims.

27 III. LEGAL STANDARD

28 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) “tests the legal

1 sufficiency of a claim. A claim may be dismissed only if it appears beyond doubt that the plaintiff
 2 can prove no set of facts in support of his claim which would entitle him to relief.” *Cook v.*
 3 *Brewer*, 637 F.3d 1002, 1004 (9th Cir. 2011) (citation and quotation marks omitted). Rule 8
 4 provides that a complaint must contain a “short and plain statement of the claim showing that the
 5 pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). Thus, a complaint must plead “enough facts
 6 to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
 7 570 (2007). Plausibility does not mean probability, but it requires “more than a sheer possibility
 8 that a defendant has acted unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 687 (2009). A complaint
 9 must therefore provide a defendant with “fair notice” of the claims against it and the grounds for
 10 relief. *Twombly*, 550 U.S. at 555 (quotations and citation omitted).

11 In considering a motion to dismiss, the court accepts factual allegations in the complaint as
 12 true and construes the pleadings in the light most favorable to the nonmoving party. *Manzarek v.*
 13 *St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).; *Erickson v. Pardus*, 551
 14 U.S. 89, 93-94 (2007). However, “the tenet that a court must accept a complaint’s allegations as
 15 true is inapplicable to threadbare recitals of a cause of action’s elements, supported by mere
 16 conclusory statements.” *Iqbal*, 556 U.S. at 678.

17 If a Rule 12(b)(6) motion is granted, the “court should grant leave to amend even if no
 18 request to amend the pleading was made, unless it determines that the pleading could not possibly
 19 be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en
 20 banc) (citations and quotations omitted). However, a court “may exercise its discretion to deny
 21 leave to amend due to ‘undue delay, bad faith or dilatory motive on part of the movant, repeated
 22 failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing
 23 party . . . , [and] futility of amendment.’” *Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876,
 24 892–93 (9th Cir. 2010) (alterations in original) (quoting *Foman v. Davis*, 371 U.S. 178, 182
 25 (1962)).

26 IV. DISCUSSION

27 Sentinel argues Plaintiffs’ claims must be dismissed because the policies do not cover their
 28 losses. Specifically, Sentinel argues Barbizon-NY is not entitled to business income and extra

1 expense coverage because it fails to allege any direct physical loss of or damage to property, as
 2 required for all forms of coverage under the policy. Mot. at 1. Although Plaintiffs note in their
 3 complaint that Barbizon-West’s policy has a virus exclusion while Barbizon-NY’s policy does
 4 not, Sentinel argues that distinction is meaningless because, under either policy, Plaintiffs must
 5 demonstrate an entitlement to coverage in the first instance. *Id.* It maintains Barbizon-NY cannot
 6 do so because it suffered no direct physical loss of or damage to its property. *Id.* at 1-2.

7 Sentinel argues Barbizon-NY has not stated a plausible claim to “Civil Authority”
 8 coverage for the additional reason that it has not alleged facts meeting the requirements for Civil
 9 Authority Coverage. *Id.* at 2. It notes that Barbizon-NY does not allege any property in the
 10 immediate area of the scheduled premises suffered direct physical loss, and it argues Barbizon-NY
 11 has not plausibly alleged that access to its business was specifically prohibited as it fails to
 12 identify a single civil authority order doing so. *Id.* It also notes the government orders were
 13 issued to limit the spread of COVID-19, not because of property damage. *Id.*

14 Sentinel argues Barbizon-NY fails to state a plausible claim under the UCL because it has
 15 not alleged a breach of the policy or shown there is coverage. *Id.* It notes that at least nine courts
 16 in California have rejected similar UCL claims in lawsuits seeking coverage for COVID-19
 17 business interruption losses, and that Barbizon-NY “cannot manufacture a claim by attempting to
 18 assign to Sentinel a position it does not hold, and it cannot create coverage where none exists.
 19 Contrary to Barbizon-NY’s insistence, a plaintiff’s claim does not turn on a theoretical assessment
 20 of whether any virus anywhere could cause harm.” *Id.*

21 Finally, as to Barbizon-West’s UCL claim, Sentinel argues Barbizon-West premises its
 22 sole cause of action under California’s UCL on an illusory coverage argument that has been
 23 rejected. It contends that Barbizon-West asks this Court to theorize that coverage under the
 24 policy’s limited virus coverage “is an impossibility even though it has not even attempted to show
 25 entitlement to such coverage.” *Id.* at 3.

26 **A. Insurance Policy Interpretation**

27 “[I]nterpretation of an insurance policy is a question of law.” *Waller v. Truck Ins. Exch.*,

28

1 *Inc.*, 11 Cal. 4th 1, 18 (1995), *as modified on denial of reh'g* (Oct. 26, 1995).¹ “While insurance
 2 contracts have special features, they are still contracts to which the ordinary rules of contractual
 3 interpretation apply.” *Bank of the W. v. Superior Court*, 2 Cal. 4th 1254, 1264 (1992). “If
 4 contractual language is clear and explicit, it governs.” *Id.* In addition, “[t]he terms in an insurance
 5 policy must be read in context and in reference to the policy as a whole, with each clause helping
 6 to interpret the other.” *Sony Comput. Sony Computer Ent. Am. Inc. v. Am. Home Assur. Co.*, 532
 7 F.3d 1007, 1012 (9th Cir. 2008) (citing Cal. Civ. Code § 1641; *Bay Cities Paving & Grading, Inc.*
 8 *v. Lawyers’ Mut. Ins. Co.*, 5 Cal. 4th 854, 867 (1993); *Palmer v. Truck Ins. Exch.*, 21 Cal. 4th
 9 1109, 1115 (1999)). “[I]f the terms of a promise are in any respect ambiguous or uncertain, it
 10 must be interpreted in the sense in which the promisor believed, at the time of making it, that the
 11 promisee understood it.” *Bank of the W.*, 2 Cal. 4th at 1264-65 (quoting Cal. Civ. Code § 1649).
 12 “Only if this rule does not resolve the ambiguity do [courts] then resolve it against the insurer.”
 13 *Id.* at 1265. California courts have cautioned that language in a contract “cannot be found to be
 14 ambiguous in the abstract,” and courts should “not strain to create an ambiguity where none
 15 exists.” *Waller*, 11 Cal. 4th at 18-19.

16 **B. Physical Loss or Damage**

17 The parties dispute whether Plaintiffs’ allegations establish loss and/or damage within the
 18 Policies’ coverage. Sentinel argues the presence of COVID-19 does not constitute physical loss or
 19 damage because the virus does not cause physical alteration of the property. Mot. at 8-9. In
 20 response, Plaintiffs argue the phrase “direct physical loss of or physical damage to” is ambiguous,
 21 noting that different courts have interpreted this language in different ways and “the Court cannot
 22 find this language to be unambiguous without concluding that those other interpretations, adopted
 23 by other reasonable jurists, are unreasonable.” Opp’n at 12.

24 Under California law, the insured has the initial burden of proving that its loss is covered.
 25 *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 777

26
 27 ¹ Although Barbizon-NY’s claims pertain to property in New York, California and New York law
 28 on the coverage issues here do not conflict. See *Emps. Mut. Cas. Co. v. N. Am. Specialty
 Flooring, Inc.*, 424 F. Supp. 3d 958, 967 (E.D. Cal. 2019).

1 (2010). Once the insured has made that showing, the burden is on the insurer to prove the claim is
 2 specifically excluded. *Id.* California courts have interpreted “direct physical loss” to require a
 3 “distinct, demonstrable, physical alteration of the property” or a “physical change in the condition
 4 of the property.” *See id.* at 779-800 (simplified). Accordingly, “a detrimental economic impact,”
 5 such as limited use of property, “unaccompanied by a distinct, demonstrable, physical alteration of
 6 the property,” is insufficient to claim a “direct physical loss.” *Id.* at 779. Where a policy
 7 additionally requires “direct physical loss of or physical damage to property,” there must either be
 8 a physical change in the condition or a permanent dispossession of the property. *See Mudpie, Inc.*
 9 *v. Travelers Cas. Ins. Co. of Am.*, 2020 WL 5525171, at *4 (N.D. Cal. Sept. 14, 2020) (“finding
 10 that a more expansive interpretation of ‘direct physical loss of property’ to include dispossession
 11 of property would require a ‘permanent dispossession.’”).

12 “The overwhelming majority of courts have concluded that neither COVID-19 nor the
 13 governmental orders associated with it cause or constitute property loss or damage for purposes of
 14 insurance coverage.” *Out West Rest. Grp., Inc. v. Affiliated Ins. Co.*, 2021 WL 1056627, at *4
 15 (N.D. Cal. Mar. 19, 2021). “These decisions have reasoned that the virus fails to cause physical
 16 alteration of property because temporary loss of use of property (if any) during a pandemic and
 17 while government orders are in effect does not qualify as physical loss or damage.” *Id.* (citing
 18 *Protégé Rest. Partners LLC v. Sentinel Ins. Co., Ltd.*, 2021 WL 428653, at *4 (N.D. Cal. Feb. 8,
 19 2021) (“Every California court that has addressed COVID-19 business interruption claims to date
 20 has concluded that government orders that prevent full use of a commercial property or that make
 21 the business less profitable do not themselves cause or constitute “direct physical loss of or
 22 physical damage to” the insured property.”) (collecting cases); *Kevin Barry Fine Art Assocs. v.*
 23 *Sentinel Ins. Co., Ltd.*, 2021 WL 141180, at *3 (N.D. Cal. Jan. 13, 2021) (“Numerous courts have
 24 considered whether allegations similar to KBFA’s constitute a ‘direct physical loss of . . .
 25 property, and the overwhelming majority have concluded that temporarily closing a business due
 26 to government closure orders during the pandemic does not constitute a direct loss of property
 27 under insurance policies with the same coverage provision.”) (collecting cases); *Palmdale Est.,*
 28 *Inc. v. Blackboard Ins. Co.*, 2021 WL 25048 *2 (N.D. Cal., 2021) (“The majority view —

United States District Court
Northern District of California

1 including in this district — is that ‘direct physical loss’ provisions . . . do not cover lost business
 2 income or expenses resulting from closure orders. . . .’); *O’Brien Sales & Mktg., Inc. v. Transp.*
 3 *Ins. Co.*, 2021 WL 105772, at *4 (N.D. Cal. Jan. 12, 2021) (“‘the presence of the virus itself, or of
 4 individuals infected with the virus, at [plaintiff’s] business premises or elsewhere [does] not
 5 constitute direct physical loss of or damage to property.’”) (quoting *Pappy’s Barber Shops, Inc. v.*
 6 *Farmers*, ___ F. Supp. 3d ___, 2020 WL 5847570, at *1 (S.D. Cal. Oct. 1, 2020) (“The primary
 7 additions to the proposed amended complaint are speculative allegations that the COVID-19 virus,
 8 or individuals infected by the virus, likely had entered Plaintiffs’ premises at the time of the
 9 COVID-19 Civil Authority Orders. Even assuming the truth of these allegations, the presence of
 10 the virus itself, or of individuals infected the virus, at Plaintiffs’ business premises or elsewhere do
 11 not constitute direct physical losses of or damage to property. Moreover, even if they do
 12 constitute direct physical losses of or damage to property, they were not the cause of the business
 13 income losses for which Plaintiffs’ seek coverage here.”)); *Ba Lax, LLC v. Hartford Fire Ins. Co.*,
 14 2021 WL 144248, at *3 (C.D. Cal. Jan. 12, 2021) (collecting cases)).

15 Here, Plaintiffs concede there has been no physical damage to or alteration of their
 16 property. *See* Opp’n at 17, 19-20, 23-25. Thus, since the policies require physical loss or damage,
 17 and Plaintiffs’ claims do not constitute physical loss or damage as a matter of law, Plaintiffs
 18 cannot state a valid claim for relief.

19 Plaintiffs cite *Mudpie* in support of their position that COVID-19 on property would be
 20 capable of causing damage to property. Opp’n at 13. However, although the *Mudpie* court noted
 21 the phrase “direct physical loss of” property alone does not require physical alteration to property,
 22 it nevertheless held that where, as here, an insurance policy requires “direct physical loss of or
 23 damage” and provides for coverage through a “period of restoration” that ends when the property
 24 at the premises “should be repaired, rebuilt or replaced with reasonable speed and similar quality,”
 25 the “damage contemplated by the [p]olicy is *physical* in nature.” *Mudpie*, 2020 WL 5525171 at *4
 26 (citation omitted; emphasis added). Plaintiffs also fail to acknowledge that the court held that a
 27 “loss of functionality” does not constitute a direct physical loss of property absent an external
 28 physical force that “induced a detrimental change in the property’s capabilities” beyond the

1 government closure orders. *Id.* at *4-6. *Mudpie* thus rejected the same argument Plaintiffs
2 advance here.

3 Plaintiffs also rely on *Crisco v. Foremost Insurance Company Grand Rapids, Michigan*,
4 2020 WL 7122476 (N.D. Cal. Dec. 4, 2020). However, in *Crisco*, the court found there was
5 physical damage to property, which triggered coverage. A fire had destroyed the essential
6 infrastructure upon which mobile homes depended resulting in a “distinct, demonstrable, physical
7 alteration” to the insureds’ property. *Id.* at *4-5 (quoting *MRI*, 187 Cal. App. 4th at 779). Thus,
8 the court’s reasoning in *Crisco* is consistent with *MRI* and other decisions holding “direct physical
9 loss” contemplates a distinct, demonstrable, physical alteration of the property. *See Robert W.*
10 *Fountain, Inc. v. Citizens Ins. Co. of Am.*, 2020 WL 7247207, at *3 (N.D. Cal. Dec. 9, 2020)
11 (citing *Crisco*).

12 Plaintiffs cite to *Hughes v. Potomac Insurance Company of District of Columbia*, a case in
13 which a landslide swept away the sub adjacent and lateral support essential to the stability of the
14 insured dwelling. 199 Cal. App. 2d 239, 248-49 (1962). That case is also distinguishable because
15 the insurer had argued the “dwelling building” overhanging a steep cliff was not damaged
16 because, while the building was still intact, the court disagreed, holding the building had suffered
17 “real and severe damage when the soil beneath it slid away and left it overhanging a 30-foot cliff”
18 and was thus rendered uninhabitable. *Id.* at 248-49. In such situations, the court held that
19 “tangible injury to the physical structure itself” is not necessary to trigger coverage. *Id.* at 249.
20 Here, Plaintiffs’ property has not been rendered completely useless or uninhabitable. For this
21 reason, multiple courts faced with COVID-19-related business interruption claims have found
22 *Hughes* inapposite. *See Kevin Barry Fine Art Assocs.*, 2021 WL 141180, at *5; *Long Affair*
23 *Carpet & Rug, Inc. v. Liberty Mut. Ins. Co.*, 2020 WL 6865774, at *3 (C.D. Cal. Nov. 12, 2020);
24 *Musso & Frank Grill Co., Inc. v. Mitsui Sumitomo Ins. USA Inc.*, 2020 WL 7346569, at *3 (Cal.
25 Super. Ct. Nov. 9, 2020).²

26
27 ² Plaintiffs also cite to two recent state court decisions – *P.F. Chang’s China Bistro, Inc. v.*
28 *Certain Underwriters at Lloyd’s of London*, No. 20STCV17169 (Cal. Super. Ct. Feb. 4, 2021) and
Goodwill Industries of Orange Cty., Cal. v. Philadelphia Indemnity Ins. Co., 2021 WL 476268
(Cal. Super. Ct. Jan. 28, 2021) – but these two trial court decisions are outliers and stand in stark

1 The cases Plaintiffs cite are also distinguishable because this case involves a virus, which
 2 “can be disinfected and cleaned” from surfaces. *See, e.g., O’Brien*, 2021 WL 105772, at *4 (no
 3 physical loss or damage because surfaces contaminated with the novel coronavirus “can be
 4 disinfected and cleaned”) (citing *Mama Jo’s, Inc. v. Sparta*, 2018 WL 3412974, *9 (S.D. Fla.,
 5 2018), *aff’d*, 823 F. App’x 868 (11th Cir. 2020) (presence of construction debris and dust from
 6 road work did not constitute physical loss of or damage to covered property; “[t]he fact that the
 7 restaurant needed to be cleaned more frequently does not mean Plaintiff suffered a direct physical
 8 loss or damage”)); *Kevin Barry Fine Art Assocs.*, 2021 WL 141180, at *6 (“Even if KBFA had
 9 included allegations regarding the virus being present on and damaging the property, they would
 10 not be plausible.”; citing cases in which there was no coverage because COVID-19 can be
 11 disinfected and cleaned from surfaces); *Terry Black’s Barbecue, LLC v. State Auto. Mut. Ins. Co.*,
 12 2020 WL 7351246, at *7 (W.D. Tex. Dec. 14, 2020) (“Even assuming that the virus that causes
 13 COVID-19 was present at Plaintiffs’ properties, it would not constitute the direct physical loss or
 14 damage required to trigger coverage under the Policy because the virus can be eliminated. The
 15 virus does not threaten the structures covered by property insurance policies, and can be removed
 16 from surfaces with routine cleaning and disinfectant”); *Promotional Headwear Int’l v. Cincinnati*
 17 *Ins. Co.*, 2020 WL 7078735, at *8 (D. Kan. Dec. 3, 2020) (“even assuming that the virus
 18 physically attached to covered property, it did not constitute the direct, physical loss or damage
 19 required to trigger coverage because its presence can be eliminated. Much like the dust and debris
 20 at issue in *Mama Jo’s*, routine cleaning and disinfecting can eliminate the virus on surfaces”);
 21 *Rococo Steak, LLC v. Aspen Spec. Ins. Co.*, 2021 WL 268478, at *4 (M.D. Fla. Jan. 27, 2021)
 22 (“like the coating of dust and debris in *Mama Jo’s*, the surfaces allegedly contaminated by
 23 COVID-19 seem to only require cleaning to fix.”).

24 _____
 25 contrast to the weight of California decisions, including other state court decisions, that have
 26 rejected the argument that temporary deprivation of loss of use of property as a result of
 27 government closure orders is sufficient for direct physical loss. *See Musso*, 2020 WL 7346569, at
 28 *3. The Court also notes that, since Sentinel filed its motion, California courts have issued
 additional decisions dismissing similar claims brought in the COVID-19 context for failure to
 plausibly allege direct physical loss. *See Protégé*, 2021 WL 428653, at *3-4; *Selane Prods., Inc v.*
Cont’l Cas. Co., 2021 WL 609257, at *4-5 (C.D. Cal. Feb. 8, 2021).

1 In sum, the Court finds that Plaintiffs have not plausibly alleged “direct physical loss of or
2 damage to” property, as required by the policies, and their alleged losses are not covered as a
3 matter of law. Because the Court finds that Plaintiffs cannot allege direct physical loss or damage,
4 it need not address the scope of the Barbizon-West policy’s virus exemption. *See Kevin Barry*
5 *Fine Art Assocs.*, 2021 WL 141180, at *3, 6 (court determined it did not need to address the virus
6 exclusion in a policy because the plaintiff had failed to allege direct physical loss); *Out West*, 2021
7 WL 1056627, at *6 (same); *Geragos & Geragos Engine Co. No. 28, LLC v. Hartford Fire Ins.*
8 *Co.*, 2020 WL 7350413, at *4 (C.D. Cal. Dec. 3, 2020) (“Because the Court finds that G&G has
9 not suffered any ‘direct physical loss of or physical damage to’ its property, the Court . . . does not
10 reach the issue of whether the virus exclusion applies.”); *Stanford Ranch, Inc. v. Maryland Cas.*
11 *Co.*, 89 F.3d 618, 626-27 (9th Cir. 1996) (If there is no coverage, the inquiry ends as “[t]here is no
12 need to look to the exclusions because they cannot expand the basic coverage granted in the
13 insuring agreement.”); *Glavinich v. Commonwealth Land Title Ins. Co.*, 163 Cal. App. 3d 263, 270
14 (1984), *as modified* (Jan. 15, 1985) (“There are literally hundreds of problems that may affect real
15 property . . . and it would be a limitless task for the insurer to specifically enumerate each of them
16 as being excluded from coverage. Coverage is defined in the first instance by the insuring clause,
17 and when an occurrence is clearly not included within the coverage afforded by the insuring
18 clause, it need not also be specifically excluded.”).

19 **C. Civil Authority**

20 As noted above, the New York policy also provides coverage for when access to a premise
21 is prohibited by order of a civil authority. Compl. ¶¶ 42-43. Plaintiffs argue entitlement to civil
22 authority coverage because “[t]he Complaint alleges that the losses were caused by the “pervasive
23 presence of the virus SARS-Cov-2 in the cities where the Insured Locations are located.” Opp’n
24 at 23 (quoting Compl. ¶ 28). However, coverage under this provision is limited to “when access
25 to your ‘scheduled premises’ is specifically prohibited by order of a civil authority as the direct
26 result of a Covered Cause of Loss to property in the immediate area of your ‘scheduled
27 premises.” Compl. ¶ 42. Here, Plaintiffs concede that “access” to Barbizon-NY’s property was
28 not “specifically prohibited by” civil authority orders. Opp’n at 28. Barbizon-NY claims only

1 that it was prohibited “from using its insured property,” *id.*, but it does not point to any factual
 2 allegations that it was specifically prohibited from accessing its property. That is because the civil
 3 authority orders on which Barbizon-NY relies reduced the in-person workforce; they did not deny
 4 access to property. *See Food for Thought Caterers Corp. v. Sentinel Ins. Co., Ltd.*, 2021 WL
 5 860345, at *6 (S.D.N.Y. Mar. 6, 2021) (Governor Cuomo’s Executive Order “does not amount to
 6 denial of access to the property” as the “owner of the property could continue to access the
 7 property despite the total reduction in the workforce”).

8 Second, the government orders were issued to prevent the spread of COVID-19, not in
 9 response to property damage. *See Mudpie*, 2020 WL 5525171, at *7 (finding no coverage under
 10 civil authority provision because government closure orders were intended to prevent the spread of
 11 COVID-19 and thus plaintiff failed to establish requisite causal link between damage to adjacent
 12 property and denial of access to its store); *Pappy’s*, 2020 WL 5847570, at *1 (civil authority
 13 provision did not apply because orders were precautionary measures taken to prevent the spread of
 14 COVID-19 and not issued as a result of loss or damage to property); *Mortar and Pestle Corp. v.*
 15 *Atain Specialty Ins. Co.*, ___ F.Supp.3d ___, 2020 WL 7495180, at *5 (N.D. Cal. Dec. 21, 2020)
 16 (finding it was “apparent from the plain language of the cited civil authority orders that such
 17 directives were issued to stop the spread of COVID-19 and not as a result of any physical loss of
 18 or damage to property”).

19 Finally, Barbizon-NY fails to identify any property in the immediate area of its property
 20 that experienced direct physical loss. Instead, it asserts the “Complaint alleges that the losses were
 21 caused by the ‘pervasive presence of the virus SARS-Cov-2 in the cities where the Insured
 22 Locations are located.’” *Opp’n* at 9:22-24 (quoting *Compl.* ¶ 28). But such general allegations
 23 are not enough. As the *Food for Thought* court noted, “generalized statements” and “speculative
 24 assertions” based on state and local government closure orders, including Mayor DeBlasio’s
 25 executive orders, “cannot serve as a substitute for a specific allegation that any property near the
 26 insured’s premises was in fact damaged.” 2021 WL 860345, at *7.

27 **D. Viability of Plaintiffs’ Causes of Action**

28 While the Court is sympathetic to Plaintiffs’ situation, as discussed above, they have not

1 shown they are entitled to coverage under the policies. And, to the extent Barbizon-NY's breach
2 of the covenant of good faith and fair dealing claim and Plaintiffs' UCL claim rely upon the
3 existence of coverage under the policies, they must also be dismissed. *See, e.g., Waller*, 11 Cal.
4 4th at 36 ("It is clear that if there is no potential for coverage and, hence, no duty to defend under
5 the terms of the policy, there can be no action for breach of the implied covenant of good faith and
6 fair dealing because the covenant is based on the contractual relationship between the insured and
7 the insurer."); *Krantz v. BT Visual Images*, 89 Cal. App. 4th 164, 178 (2001) (UCL claims "stand
8 or fall depending on the fate of the antecedent substantive causes of action"); *Travelers Cas. Ins.*
9 *Co. of Am. v. Geragos & Geragos*, 2020 WL 6156584, at *5 (C.D. Cal. Oct. 19, 2020) ("Because
10 G&G is not entitled to coverage under the Policy, it cannot state a claim for breach of contract,
11 breach of the implied covenant of good faith and fair dealing, or a UCL violation."); *Wellness*
12 *Eatery La Jolla LLC v. Hanover Ins. Grp.*, 2021 WL 389215, at *8 (S.D. Cal. Feb. 3, 2021)
13 (dismissing breach of covenant of good faith and fair dealing and UCL claims where there was no
14 physical loss or damage under insurance policy); *Mark's Engine Co. No. 28 Rest., LLC v.*
15 *Travelers Indem. Co. of Connecticut*, 2020 WL 5938689, at *6 (C.D. Cal. Oct. 2, 2020) (same);
16 *Karen Trinh, DDS, Inc. v. State Farm Gen. Ins. Co.*, 2020 WL 7696080, at *6-7 (N.D. Cal. Dec.
17 28, 2020) (same); *Selane Prod., Inc.*, 2020 WL 7253378, at *6 (C.D. Cal. Nov. 24, 2020) ("Since
18 Selane has not adequately alleged a predicate violation of law as explained above, its UCL claim
19 fails.").

20 In addition to Plaintiffs' claim under the unlawful prong of the UCL, the complaint seems
21 to allege two other bases for the UCL claim. Compl. ¶¶ 79-86. Paragraphs 79-85 allege that
22 Sentinel's sale and marketing of its limited fungi, bacteria or virus coverage is a false, unfair,
23 fraudulent and deceptive business practice because the coverage is worthless. In addition,
24 paragraph 86 alleges that Sentinel's marketing and sale of the New York policy without clearly
25 and unmistakably stating its view that a virus can never be a covered cause of loss is a false,
26 unfair, fraudulent, and deceptive business practice. However, the allegations in the complaint with
27 respect to these theories of UCL liability are threadbare. As to the limited virus coverage, the
28 complaint does not plead sufficient factual information that would allow the Court to infer that the

United States District Court
Northern District of California


1 promised coverage is worthless. As to the New York policy, the complaint does not allege any
2 facts to show how the marketing and sale is deceptive. In their opposition, Plaintiffs devote only
3 two paragraphs to their UCL claim, which simply assert that the complaint states a claim. In the
4 very next paragraph, Plaintiffs state that if the Court determines additional allegations are
5 necessary, Plaintiffs request leave to amend. The Court does believe additional allegations are
6 necessary, as the current allegations underlying the UCL claim do not allege enough factual
7 information to make the claim plausible under *Iqbal* and *Twombly*. And the Court will grant leave
8 to amend.

9 **V. CONCLUSION**

10 For the reasons stated above, the Court **GRANTS** Sentinel’s motion to dismiss **WITH**
11 **LEAVE TO AMEND.**³ The amended complaint shall be filed by April 21, 2021.

12 **IT IS SO ORDERED.**

13
14 Dated: March 31, 2021

15 
16 THOMAS S. HIXSON
17 United States Magistrate Judge

18
19
20
21
22
23
24
25
26
27
28 ³ As the Court did not consider any documents contained therein, the parties’ requests for judicial notice (ECF Nos. 9, 20, 23) are denied as moot.