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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WATER SPORTS KAUAI, INC.,
Plaintiff,
v.
FIREMAN'S FUND INSURANCE
COMPANY, et al.,
Defendants.

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

**ORDER GRANTING THE MOTION
TO DISMISS**

Re: Dkt. No. 39

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

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

BACKGROUND

The Policy provides that the defendants will “pay for direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any

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3. Covered Causes of Loss

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

Id. at 31.

g. Business Income

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

...

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

Id. at 33.

h. Extra Expense

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

Id. at 34.

i. Civil Authority

We will pay for the actual loss of Business Income you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises due to direct physical loss of or damage to property, other than at the described premises, caused by or resulting from any Covered Cause of Loss. This coverage will apply for a period of up to two consecutive weeks from the date of that action.

Id. at 35.

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

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

Id. at 63.

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

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

7 The class and subclass are defined as:

8 **Class**

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

15 **Hawaii Subclass**

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

22 AC ¶ 123.

23 **LEGAL STANDARD**

24 In Hawaii, “‘because insurance policies are contracts of adhesion and are premised on
 25 standard forms,’” the contracts must be “construed liberally” in favor of the insured and based on
 26 the reasonable expectations of a layperson, with any ambiguities being resolved against the
 27 insurer. *Hart v. Ticor Title Ins. Co.*, 126 Hawai‘i 448, 456 (2012) (quoting *Dairy Road Partners v.*
 28 *Island Ins. Co., Ltd.*, 92 Hawai‘i 398, 411- 414 (2000)); *see also Great Divide Ins. Co. v. AOA*
 29 *Maluna Kai Estates*, 492 F. Supp. 2d 1216, 1226–27 (D. Haw. 2007) (“A policy provision is not
 30 ambiguous just because the insurer and insured disagree over the interpretation of the terms of a
 31 policy. . . . Ambiguity exists only when the policy ‘taken as a whole, is reasonably subject to
 32 differing interpretation.’” (quoting *Oahu Transit Servs., Inc. v. Northfield Ins. Co.*, 107 Hawai‘i
 33 231, 236 n. 7 (Haw.2005)).

1 **DISCUSSION**

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

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

18 **I. LOST BUSINESS INCOME**

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

22 **A. Spread of Coronavirus**

23 Sand People asserts that it adequately alleged closure because of the “imminent” threat of
24 coronavirus at their properties. AC ¶ 69 (“The Coronavirus and its pernicious spread created
25 inherently dangerous conditions where the stores and property within them were at immediate and
26 imminent risk of exposure to the Coronavirus. This caused them to suspend operations and lose
27 access to the stores, which rendered them untenable.”); ¶ 76 (“Because, inter alia, the spread of
28 Coronavirus rendered Sand People’s facilities unoperable for their intended purposes (a) and

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

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

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

28 *Ins. Co.*, 929 F. Supp. 2d 1050, 1060 (D. Nev. 2012) (“‘direct physical loss or damage’ to property”

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