

United States District Court  
Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BOXED FOODS COMPANY, LLC, et al.,  
Plaintiffs,  
v.  
CALIFORNIA CAPITAL INSURANCE  
COMPANY,  
Defendant.

Case No. 20-cv-04571-CRB

**AMENDED ORDER GRANTING  
CALIFORNIA CAPITAL INSURANCE  
COMPANY'S MOTION TO DISMISS  
THE COMPLAINT WITH PREJUDICE**

COVID-19 poses an existential threat to small businesses throughout the United States. Since March, the San Francisco Bay Area alone has seen almost 8,300 businesses close, 4,000 of which shuttered permanently. See Leonardo Castañeda, The Bay Area's small business closure crisis is already here, The Mercury News (Sept. 22, 2020 7:00 AM), <https://www.mercurynews.com/2020/09/22/the-bay-areas-small-business-closure-crisis-is-already-here/>. To survive the catastrophic effects of COVID-19, businesses have filed close to 1,300 federal lawsuits seeking coverage for business interruption losses. See Covid Coverage Litigation Tracker, University of Pennsylvania Carey School of Law, <https://cclt.law.upenn.edu/> (last visited Oct. 23, 2020). Absent government relief or assistance, these small businesses risk permanent closure. Plaintiffs are among those seeking relief through their insurance policy. But while the Court sympathizes with Plaintiffs' circumstances, the Court cannot ignore that the insurance policy excludes coverage for losses caused by viruses, like COVID-19. Thus, the Court GRANTS Defendant's motion to dismiss for the reasons outlined below.

1 **I. BACKGROUND**

2 Boxed Foods Company, LLC and Gourmet Provisions, LLC (collectively, “Plaintiffs”)  
3 seek a declaration that they are entitled to business loss coverage under the Business Income,  
4 Extra Expense, and Civil Authority coverage provisions of their insurance policy agreement with  
5 California Capital Insurance Company (“Defendant”) and Capital Insurance Group.<sup>1</sup> Compl. (dkt.  
6 1) ¶¶ 1–4, 79. The insurance policy (the “Policy”) provides coverage for business interruption  
7 losses that occurred between August 31, 2019 and August 31, 2020. Id. ¶ 11.

8 On March 4, 2020, California declared a State of Emergency in response to the outbreak of  
9 COVID-19. Id. ¶ 46. On March 11, California issued an initial order restricting large gatherings,  
10 but followed up on March 16 with an order prohibiting large gatherings altogether. Id. ¶ 47. In  
11 response to California’s March 11 order, Plaintiffs shuttered their San Francisco restaurants: B  
12 Restaurant Bar and the Pin Up All-Star Diner. Compl. ¶ 55. On March 19, California issued  
13 another order (collectively, the “Civil Authority Orders”) requiring all businesses to cease non-  
14 essential operations. Id. ¶ 48.

15 Plaintiffs allege that they were not able to operate their restaurants as a direct consequence  
16 of COVID-19 and the Civil Authority Orders. Id. ¶ 49. Plaintiffs submitted a claim to Defendant  
17 on March 7 for the losses associated with not being able to operate their restaurants. Id. ¶ 13.  
18 Defendant concluded that the Policy did not encompass COVID-19 as a covered cause of loss, and  
19 therefore denied Plaintiffs coverage. See generally, Compl. Ex. 2 (dkt. 1-2).

20 Plaintiffs filed a class action complaint against Defendant seeking declarations that:

- 21 • the Civil Authority Orders constitute a prohibition of access to Plaintiffs’  
22 properties;
- 23 • the Civil Authority Orders fall within the “prohibited access” coverage as defined  
24 in the policy;

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30 <sup>1</sup> Plaintiffs voluntarily dismissed Capital Insurance Group from the case. See Voluntary Dismissal

- 1 • the exclusion of “Loss Due to Virus or Bacteria does not apply to the business
- 2 losses incurred by Plaintiffs” because the Civil Authority Orders proximately
- 3 caused business losses;
- 4 • the Civil Authority Orders trigger coverage under the Policy;
- 5 • the Policy “provides coverage to Plaintiffs for any current and future civil authority
- 6 closures of their businesses . . . due to physical loss [sic] or damage directly or
- 7 indirectly from the COVID-19 pandemic under the Civil Authority coverage
- 8 parameters;” and
- 9 • the Policy provides “business income coverage in the event that COVID-19”
- 10 directly or indirectly caused loss or damage at or within the immediate area of
- 11 Plaintiffs’ insured properties. Compl. ¶ 79.

12 On August 31, Defendant filed a motion to dismiss Plaintiffs’ complaint. See Mot. (dkt.

13 19).<sup>2</sup>

14 The Court has jurisdiction over this putative class pursuant to 28 U.S.C. 1332(d)(2)

15 because the amount in controversy exceeds \$5 million and at least one member in the proposed

16 class is diverse from Defendant.

## 17 **II. LEGAL STANDARD**

### 18 **A. 12(b)(6) Motion to Dismiss.**

19 Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint may be

20 dismissed for failure to state a claim upon which relief may be granted. Dismissal may be based

21 on either “the lack of a cognizable legal theory or the absence of sufficient facts alleged under a

22 cognizable legal theory.” Godecke v. Kinetic Concepts, Inc., 937 F.3d 1201, 1208 (9th Cir. 2019).

23 A complaint must plead “sufficient factual matter, accepted as true, to ‘state a claim to relief that

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25 <sup>2</sup> Defendant asks the Court to take judicial notice of various government documents, pleadings,

26 and hearing transcripts. Def. Requests for Judicial Notice (dkt. 19-2, 26-2). That is appropriate. A

27 court can take judicial notice of documents properly submitted with the complaint or upon which

28 “matters of public record.” Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001)

29 overruled on other grounds by Galbraith v. Cnty. of Santa Clara, 307 F.3d 1119 (9th Cir. 2002)

1 is plausible on its face.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp.  
 2 v. Twombly, 550 U.S. 544, 570 (2007)). A claim is plausible “when the plaintiff pleads factual  
 3 content that allows the court to draw the reasonable inference that the defendant is liable for the  
 4 misconduct alleged.” Id. When evaluating a motion to dismiss, the Court “must presume all  
 5 factual allegations of the complaint to be true and draw all reasonable inferences in favor of the  
 6 nonmoving party.” Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987). “[C]ourts  
 7 must consider the complaint in its entirety, as well as other sources courts ordinarily examine  
 8 when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the  
 9 complaint by reference, and matters of which a court may take judicial notice.” Tellabs, Inc. v.  
 10 Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007).

### 11 **B. Insurance Policy Interpretation.**

12 Under California law, the interpretation of an insurance policy is a question of law for the  
 13 courts to determine. See Waller v. Trucks Ins. Exch., Inc., 11 Cal. 4th 1, 18 (1995). “The insurer  
 14 bears the burden of proving . . . the applicability of an exclusion . . . .” State Farm Fire & Cas. Co.  
 15 v. Martin, 872 F.2d 319, 321 (9th Cir. 1989). The court must “look first to the language of the  
 16 contract in order to ascertain its plain meaning or the meaning a layperson would ordinarily attach  
 17 to it.” Waller, 11 Cal. 4th at 18 (citation omitted). The plain language of the insurance policy  
 18 governs its interpretation. See Bank of the W. v. Superior Ct., 2 Cal. 4th 1254, 1264–65 (1992).  
 19 A policy provision is ambiguous if it is “capable of two or more constructions, both of which are  
 20 reasonable.” Waller, 11 Cal. 4th at 18. If the language is ambiguous or unclear, “it must be  
 21 interpreted in the sense in which the promisor believed, at the time of making it, that the promisee  
 22 understood it.” Bank of the W., 2 Cal. 4th at 1264–65. Courts should “not strain to create an  
 23 ambiguity where none exists.” Waller, 11 Cal. 4th at 18–19.

### 24 **III. DISCUSSION**

25 Defendant argues that the Pathogenic Organisms Exclusion (hereinafter “Virus  
 26 Exclusion”)<sup>3</sup> excludes coverage for the losses alleged in the complaint, which necessitates  
 27

1 dismissing the complaint in its entirety. Mot. at 1–2.<sup>4</sup> The Virus Exclusion states:

2 We do not insure for loss or damage caused by, resulting from,  
3 contributing to or made worse by the actual, alleged or threatened  
4 presence of any pathogenic organism, all whether direct or indirect,  
5 proximate or remote, or in whole or in part caused by, contributed to  
6 or aggravated by any physical damage insured by this policy . . . .

7 Policy at 43.

8 The Court agrees that the Virus Exclusion bars Plaintiffs’ claim. Plaintiffs’ arguments fail  
9 to persuade the Court that: (1) the Virus Exclusion does not apply to the Civil Authority coverage  
10 provision, Opp. (dkt. 22) at 7–8; (2) the Virus Exclusion is ambiguous and does not apply to  
11 pandemics, *id.* at 8–9; (3) denying coverage under the Virus Exclusion would be contrary to the  
12 reasonable expectation of the parties, *id.* at 10–11; and (4) Defendant’s motion is not ripe because  
13 the case requires discovery to ascertain the scope and validity of the Virus Exclusion. *Id.* at 12–  
14 13.

15 **A. The Virus Exclusion Precludes Plaintiffs’ Claim under the Civil Authority  
16 Coverage Provision.**

17 An insured entity must allege the following in order to trigger coverage under a  
18 policy’s Civil Authority provision: (1) civil authority prohibits access to the insured  
19 property, (2) due to physical loss of or damage to other property, and (3) a Covered Cause  
20 of Loss, *i.e.*, “a covered risk of physical loss or damage,” caused the loss or damage to the  
21 property. Santa Monica Amusements, LLC v. Royal Indem. Co., B155253, 2002 WL  
22 31429795, at \*2 (Cal. Ct. App. Oct. 31, 2002)).

23 Plaintiffs’ claim collapses under the third requirement because the Policy’s Virus  
24 Exclusion excludes viruses as a Covered Cause of Loss, thereby precluding Plaintiffs’  
25 claim for business income losses and extra expenses under the Civil Authority provision.  
26 Plaintiffs argue that the exclusion does not apply to the Civil Authority provision because  
27 “the payout for civil authority coverage comes from business income or extra expense  
28

<sup>4</sup> Defendant separately argues that the losses in the complaint fall outside the scope of the Policy’s Business Income, Extra Expenses, and Civil Authority coverage provisions. *See* Mot. at 1. The Court does not address Defendant’s second argument, because the first argument is sufficient to

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