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12
13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**

15 SIMON WIESENTHAL CENTER,
INC. and MORIAH FILMS,

16 Plaintiffs,

17 v.

18 CHUBB GROUP OF INSURANCE
19 COMPANIES/FEDERAL
INSURANCE COMPANY,

20 Defendant.
21
22

Case No. 2:20-cv-03890-ODW-JEM

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF DEFENDANT'S
MOTION TO DISMISS
PURSUANT TO FEDERAL
RULES OF CIVIL PROCEDURE
12(b)(6) AND 12(b)(1)**

Accompanying Documents:

Notice of Motion and Motion;
Declaration of Scott Shearer; Request
for Judicial Notice; Proposed Order

Date: June 22, 2020
Time: 1:30 p.m.
Judge: Otis D. Wright II
Courtroom: 5D

Complaint filed: April 29, 2020

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1 **I. INTRODUCTION**¹

2 The economic and societal disruption arising from the coronavirus pandemic
3 confronts everyone, including not-for-profit organizations dedicated to the common
4 good, with extraordinary challenges. But the exigencies and engendered
5 sympathies of the current crisis provide no basis to discard contractual language
6 and short-circuit the judicial process. Yet that is precisely what Plaintiffs² propose
7 by seeking a declaration that their property insurance policy provides coverage for
8 business interruption losses caused by a civil order restricting economic and other
9 activity.

10 While such an order may have resulted in some disruption to Plaintiffs’
11 activities, the plain language of the insurance policy at issue as applied to the
12 allegations in the Complaint precludes coverage for any related financial loss. And,
13 beyond ignoring the policy terms, Plaintiffs improperly seek hypothetical rulings
14 about (1) past events without any factual allegation that those events have caused
15 losses covered by their policy and (2) future events that would require this Court to
16 guess about the course of the pandemic and the government’s response.

17 The policy provisions cited in the Complaint expressly provide that the
18 availability of insurance turns on whether there has been “direct physical loss or
19 damage” to property. As Plaintiffs concede, however, they “do not seek any
20 determination of whether the coronavirus is physically in the Insured Premises,
21
22

23 ¹ Pursuant to 28 U.S.C. section 1407, certain plaintiffs have filed motions to transfer and
24 coordinate or consolidate several actions that “seek a finding that [] Governmental Orders
25 triggered coverage under the plaintiffs’ business interruption insurance policies.” (MDL No.
26 2942.) Federal disputes that the standards for transfer under 28 U.S.C. section 1407 are satisfied
and that a multi-district litigation should be created, but wishes to advise the Court of the pending
motions.

27 ² Plaintiffs are the Simon Wiesenthal Center, Inc. and Moriah Films. Defendant Federal
28 Insurance Company (incorrectly named as Chubb Group of Insurance Companies/Federal
Insurance Company) is referred to here as Federal.

1 amount of damages, or any other remedy other than declaratory relief.”³
2 (Complaint ¶ 56.) Indeed, there is *no* allegation of physical loss or damage to
3 Plaintiffs’ own property. Instead, Plaintiffs seek declaratory judgment that the
4 March 19, 2020 “Safer at Home Order” issued by Los Angeles Mayor Eric Garcetti
5 (the “Garcetti Order”) triggers “Civil Authority” coverage, which is based on,
6 among other things, damage to other nearby property. But Plaintiffs ignore the
7 policy’s clear requirements for Civil Authority coverage. To state a claim,
8 Plaintiffs need to allege facts establishing *all three* of the following:

9 ***Direct physical loss or damage within one mile.*** First, to trigger Civil
10 Authority coverage, there must be, among other requirements, “direct physical loss
11 or damage” to another property within one mile of the policyholder’s property.
12 Plaintiffs do not identify *any* property that actually sustained “direct physical loss
13 or damage,” much less allege that such property satisfies the proximity
14 requirements of the policy. In an attempt to sidestep the policy’s plain language,
15 Plaintiffs cite the Garcetti Order’s general statement that coronavirus “is physically
16 causing property loss or damage due to its tendency to attach to surfaces for
17 prolonged periods of time.”⁴ (Complaint ¶ 30.) But this assertion does not
18 establish the policy’s specific requirements: (a) that a property sustained direct
19 physical loss or damage; and (b) such a property was within *one mile* of the
20 policyholder’s property.

21 ***Prohibition of access.*** Second, Plaintiffs also do not allege facts establishing
22 that the Garcetti Order prohibited access to the insured premises as opposed to
23 regulating certain business operations.

24 ***Prohibition of access as a direct result of direct physical loss or damage***
25 ***within one mile.*** Third, to trigger Civil Authority coverage, it is not enough that a
26

27 ³ Plaintiffs also have not answered Federal’s repeated requests for information, such as a request
28 to describe any physical damage to the insured premises or to any surrounding areas.

⁴ Federal disputes that coronavirus can cause physical loss or property damage.

1 civil authority issued *an* order prohibiting access (which was not done here). The
2 order must also be the *direct result* of *direct* physical loss or damage to another
3 property within one mile of the policyholder’s property. Plaintiffs allege no facts to
4 satisfy this additional policy requirement. Indeed, the Garcetti Order was not
5 issued directly because of any property damage but to “limit the spread of COVID-
6 19.” (Request for Judicial Notice in Support of Motion to Dismiss (“RJN”), Ex. B
7 at 6, Ex. C at 13.) Courts have routinely found no coverage for claims involving
8 civil authority orders—from post-9/11 airport closures to hurricane evacuations to
9 civil unrest curfews—where policyholders failed to establish a causal link between
10 the civil order and damage to adjacent property. *See, e.g., United Air Lines, Inc. v.*
11 *Ins. Co. of State of PA*, 439 F.3d 128, 134-35 (2d Cir. 2006).

12 As courts have explained, “Civil Authority” coverage was intended to apply,
13 for example, when a fire has caused physical damage to someone else’s property
14 nearby and the authorities have, as a direct result of that damage, prohibited access
15 to the insured’s property to allow for the safe repair of the nearby damage. *See*
16 *Syufy Enters. v. Homes Ins. Co. of Indiana*, No. 94-0756 FMS, 1995 WL 129229, at
17 *2 n.1 (N.D. Cal. Mar. 21, 1995). Plaintiffs’ allegations, even if accepted as true,
18 come nowhere close to satisfying the policy’s requirements for stating a claim for
19 Civil Authority coverage. Under Federal Rule of Civil Procedure 12(b)(6), the
20 disconnect between Plaintiffs’ allegations and the plain language of the property
21 insurance policy under which they seek coverage requires dismissal of the
22 Complaint in its entirety.

23 ***Declarations relating to future civil authority closures and hypothetical***
24 ***events are not ripe.*** Plaintiffs also purport to seek declarations over “future civil
25 authority closures” (Complaint ¶ 55, *Prayer for Relief*), but declarations based on
26 contingent future events are not ripe for adjudication. Moreover, even though they
27 “do not seek any determination of whether the coronavirus is physically in the
28 Insured Premises,” (*id.* ¶ 56), Plaintiffs nonetheless seek a declaration of coverage

1 “in the event that coronavirus has caused a loss or damage at the Insured Premises
2 or immediate area of the Insured Premises.” (*Id.* ¶ 55, *Prayer for Relief.*) Under
3 Rules 12(b)(1) and 12(b)(6), declaratory relief cannot be based on such hypothetical
4 scenarios.

5 **II. BACKGROUND**

6 **A. The Federal Policy**

7 Federal Insurance Company issued policy 3519-19-79 ILL (the “Federal
8 Policy” or the “Policy”) to Plaintiffs for the period from August 1, 2019 to August
9 1, 2020. The Federal Policy provides several types of business property coverage,
10 including (as relevant here) Civil Authority coverage.⁵

11 To invoke Civil Authority coverage under the Policy, a policyholder must
12 establish more than the existence of a civil authority order:

13 We will pay for the actual:

- 14 • **business income** loss; or
15 • **extra expense,**

16 you incur due to the actual impairment of your **operations**, directly caused by the prohibition of
17 access to:

- 18 • your premises; or
19 • a **dependent business premises,**

20 by a civil authority.

21 This prohibition of access by a civil authority must be the direct result of direct physical loss or
22 damage to property away from such premises or such **dependent business premises** by a **covered**
23 **peril**, provided such property is within:

- 24 • one mile; or
25 • the applicable miles shown in the Declarations,
26 from such premises or **dependent business premises**, whichever is greater.

27 (Declaration of Scott Shearer in Support of Motion to Dismiss (“Shearer Decl.”)),
28

27 ⁵ The Court can consider the Federal Policy in ruling on this motion because the Policy was
28 referenced in the Complaint, it is central to Plaintiffs’ claim, and its authenticity cannot be
questioned. *See U.S. v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011).

1 Ex. A at 80-81.)⁶

2 Among other requirements, the prohibition of access by a civil authority
3 “must be the *direct* result of *direct* physical loss or damage” to property within *one*
4 *mile* of the insured’s premises or dependent business premises. (*Id.* at 81.)

5 **B. The Complaint**

6 1. **The Policy**

7 The Complaint⁷ alleges that policy 3519-19-79 ILL (i.e., the Federal Policy)
8 was issued to Simon Wiesenthal Center, Inc. and Moriah Films, and forms “the
9 basis of this suit.” (Complaint ¶¶ 2, 4, 9.) The Complaint notes that the Federal
10 Policy covers several properties encompassed by the Simon Wiesenthal Center (the
11 “Insured Premises”) and states that the Policy provides Civil Authority coverage
12 “when access to the scheduled premises is specifically prohibited by order of civil
13 authority as the direct result of a covered cause of loss to property within one mile
14 of Plaintiffs’ scheduled premises.” (*Id.* ¶¶ 9-10, 18.) The actual Policy language
15 has been discussed above.

16 2. **Mayor Garcetti’s Safer at Home Order**

17 On March 19, 2020, Los Angeles Mayor Eric Garcetti issued a “Safer at
18 Home Order.” (*Id.* ¶ 25.) The Garcetti Order states that “the City must adopt
19 additional emergency measures to further limit the spread of COVID-19.” (RJN,
20 Ex. B at 6, Ex. C at 13.) According to the Complaint, the Garcetti Order ceased
21 “operations in Los Angeles County”⁸ that require in-person attendance and
22 prohibited public and private gatherings. (Complaint ¶ 25.) The Complaint claims
23 that as a result of the Garcetti Order, Plaintiffs have closed their business and

24 ⁶ The Declarations in the Federal Policy do not contain a separate mileage limitation. (*See id.* at
25 18.)

26 ⁷ Plaintiffs filed their initial Complaint on April 29, 2020. (Dkt. 1.) On the same day, Plaintiffs
27 filed a notice of errata attaching a corrected Complaint. (Dkt. 6.) References in this motion are to
the corrected Complaint, but the two Complaints are substantially identical.

28 ⁸ The Mayor has authority only over the City of Los Angeles, of course, not all of Los Angeles
County.

1 canceled certain events and movie screenings. (*Id.* ¶¶ 25-28.) The Complaint notes
2 that the Garcetti Order “was given in part[] because COVID-19 is physically
3 causing property loss or damage due to its tendency to attach to surfaces for
4 prolonged periods of time,”⁹ (*id.* ¶ 30), but the Complaint does not allege that
5 COVID-19 caused physical loss or damage to any of the Insured Premises, any
6 neighboring premises, or any other specific premises. (*See id.* ¶¶ 24, 29-30, 35.)

7 3. **Declaratory Relief**

8 The Complaint asserts a single cause of action for declaratory relief. (*Id.* ¶¶
9 50-56.) It seeks (1) “a declaration that the Order by Mayor Eric Garcetti constitutes
10 a prohibition of access to Plaintiffs’ Insured Premises”; (2) “a declaration that the
11 prohibition of access by a Civil Authority is specifically prohibited access as
12 defined in the Policy”; (3) “a declaration that the Order triggers coverage because
13 the Policy does not include an exclusion for a virus or global pandemic”; and (4) “a
14 declaration that the Policy provides coverage to Plaintiffs for any current and future
15 civil authority closures of its Insured Premises due to physical loss or damage from
16 the coronavirus under the Civil Authority coverage parameters and the Policy
17 provides business income coverage in the event that coronavirus has caused a loss
18 or damage at the Insured Premises or immediate area of the Insured Premises.” (*Id.*
19 *at Prayer for Relief.*) The Complaint notes, however, that “Plaintiffs do not seek
20 any determination of whether the coronavirus is physically in the Insured Premises,
21 amount of damages, or any other remedy other than declaratory relief.” (*Id.* ¶ 56.)

22 **III. LEGAL STANDARD**

23 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the
24 legal sufficiency of the plaintiff’s claims. *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1199-
25 1200 (9th Cir. 2003). To survive a motion to dismiss, “a complaint must contain
26 sufficient factual matter, accepted as true, to state a claim for relief that is plausible
27

28 ⁹ This statement was not originally in the March 19, 2020 order but was added to the order on
April 1, 2020. (*See* RJN, Ex. B at 6, Ex. C at 13.)

1 on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation and quotation
2 omitted). A complaint cannot survive a motion to dismiss under Rule 12(b)(6) if it
3 merely “tenders naked assertions devoid of further factual enhancement.” *Ashcroft*
4 *v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550
5 U.S. 544, 557) (2007)) (internal quotations omitted). The court need not accept
6 “allegations that are merely conclusory, unwarranted deductions of fact, or
7 unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th
8 Cir. 2008) (quoting *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.
9 2001)). Nor should the court credit allegations that contradict materials
10 incorporated into the complaint. *See Gonzalez v. Planned Parenthood of Los*
11 *Angeles*, 759 F.3d 1112, 1115 (9th Cir. 2014) (citations omitted).

12 Additionally, pursuant to Article III, courts may adjudicate only actual cases
13 or controversies. U.S. Const. art. III, § 2, cl.1. When presented with a claim for a
14 declaratory judgment, federal courts must ensure the presence of an actual case or
15 controversy, such that the judgment does not become an unconstitutional advisory
16 opinion. *See Pub. Serv. Comm'n v. Wycoff, Co.*, 344 U.S. 237, 244 (1952) (“The
17 disagreement [underlying the declaratory relief action] must not be nebulous or
18 contingent but must have taken on fixed and final shape so that a court can see what
19 legal issues it is deciding, what effect its decision will have on the adversaries, and
20 some useful purpose to be achieved in deciding them.”). Absent a true case or
21 controversy, a complaint solely for declaratory relief under 28 U.S.C. section 2201
22 will fail for lack of jurisdiction under Rule 12(b)(1). *See Fleck and Assocs. v. City*
23 *of Phoenix*, 471 F.3d 1100, 1103-04 (9th Cir. 2006) (noting, in a declaratory relief
24 action, that a true “case or controversy” is required to withstand a Rule 12(b)(1)
25 motion for lack of jurisdiction).

1 **IV. ARGUMENT**

2 **A. Plaintiffs Have Not Alleged that the Garcetti Order Prohibited**
3 **Access As the Direct Result of Direct Physical Loss or Damage to**
4 **Other Property Within One Mile**

5 The Complaint should be dismissed under Rule 12(b)(6) because it fails to
6 allege facts that would trigger Civil Authority coverage. The Policy, in relevant
7 part, states:

8 We will pay for the actual:

- 9 • **business income** loss; or
- 10 • **extra expense,**

11 you incur due to the actual impairment of your **operations, directly caused by the prohibition of**
12 **access** to:

- 13 • your premises; or
 - 14 • a **dependent business premises,**
- 15 by a civil authority.

16 **This prohibition of access by a civil authority must be the direct result of direct physical loss or**
17 **damage to property away from such premises or such dependent business premises by a covered**
18 **peril, provided such property is within:**

- 19 • **one mile;** or
 - 20 • the applicable miles shown in the Declarations,
- 21 **from such premises or dependent business premises,** whichever is greater.

22 (Shearer Decl., Ex. A at 80-81.)

23 Therefore, to state a claim for Civil Authority coverage, Plaintiffs must
24 allege, among other things, facts establishing *all* of the following three
25 requirements: (i) direct physical loss or damage to other property within one mile of
26 the Insured Premises; (ii) a civil authority order prohibiting access; and (iii) that the
27 order prohibiting access was “the direct result of direct physical loss or damage” to
28 property within one mile of the Insured Premises or dependent business premises.
Plaintiffs have failed to do so.

1 **1. No Direct Physical Loss or Damage Within One Mile**

2 Plaintiffs generally allege that “[t]he coronavirus creates a physical impact
3 and loss on property” (Complaint ¶ 24) and also allege that the Garcetti Order “was

1 given in part, because COVID-19 is physically causing property loss or damage due
2 to its tendency to attach to surfaces for prolonged periods of time.” (*Id.* ¶ 30). But
3 nowhere do Plaintiffs allege actual direct physical loss or damage to *any* property,
4 much less property *within one mile of the Insured Premises*. This pleading defect
5 alone is sufficient to warrant dismissal.

6 2. **The Garcetti Order Did Not Prohibit Access to the Insured**
7 **Premises**

8 Plaintiffs also allege that the Garcetti Order “ceas[ed] operations in Los
9 Angeles County that require in-person attendance by workers at a workplace and
10 prohibit[ed] all public and private gatherings of any number of people occurring
11 outside a residence except as allowed in the Order,” and “effectively shuttered all
12 income producing arms of the Simon Wiesenthal Center in Los Angeles.”
13 (Complaint ¶ 25.) Importantly, however, this clearly does not establish—nor do
14 Plaintiffs allege facts establishing—that the Garcetti Order actually prohibited
15 “access” to the Insured Premises as opposed to merely regulating the operations of
16 certain businesses.

17 3. **The Garcetti Order Was Not Issued As the Direct Result of**
18 **Direct Physical Loss or Damage to Property Within One**
19 **Mile**

20 Dismissal is also warranted because Plaintiffs do not allege, as required
21 under the Policy, that the Garcetti Order was issued as “the direct result” of any
22 direct physical loss or damage to property within one mile of the Insured Premises.
23 The term “direct” means “without intervening persons, conditions, or agencies;
24 immediate.” *MRI Healthcare Ctr. of Glendale, Inc. v. State Farm Gen. Ins. Co.*,
25 187 Cal. App. 4th 766, 779 (2010) (citations omitted). Plaintiffs cannot possibly
26 support such an allegation because they concede that the Garcetti Order is a non-
27 specific, citywide order—and thus divorced from, and not issued directly as the
28 result of, any specific physical loss or damage within one mile of the Insured
Premises. Instead, the Garcetti Order was issued to “limit the spread of COVID-

1 19.” (RJN, Ex. B at 6, Ex. C at 13.)

2 Even in civil authority cases where insureds have alleged specific property
3 damage nearby, their claims have still been rejected for failure to establish the
4 causal link between the physical loss and the civil authority order. In *Syufy*
5 *Enterprises v. Home Insurance Company of Indiana*, for example, the court held, as
6 a matter of law, that Civil Authority coverage was not triggered where local
7 governments imposed dawn-to-dusk curfews in response to citywide “rioting and
8 looting.” No. 94-0756 FMS, 1995 WL 129229, at *1-2 (N.D. Cal. March 21,
9 1995). Similar to the language here, the policy in *Syufy* required that ““as a *direct*
10 *result* of damage to or destruction of property adjacent’ to a Syufy theater, access to
11 the theater is specifically denied.” *Id.* (emphasis in original). The court held that
12 “[t]he requisite causal link between damage to adjacent property and denial of
13 access to a Syufy theater is absent. Syufy opted to close its theaters as a direct
14 result of the city-wide curfews, not as a result of adjacent property damage. In fact,
15 the curfews were imposed to *prevent* ‘potential’ looting, rioting, and resulting
16 property damage.” *Id.* (emphasis in original). The court noted the circumstances to
17 which Civil Authority coverage generally applies: “A building next door to a Syufy
18 theater is damaged by fire; for safety reasons, the civil authorities issue an order
19 closing the Syufy theater during repairs to the adjacent building.” *Id.* at *2 n.3.

20 Similarly, in *United Air Lines, Inc. v. Insurance Company of State of PA*, the
21 Second Circuit held, as a matter of law, that Civil Authority coverage was not
22 available for an airport closure ordered after the September 11 terrorist attacks,
23 even though the plaintiff pointed to specific damage to the Pentagon just a few
24 miles from the insured premises at Reagan National Airport. 439 F.3d 128, 134 (2d
25 Cir. 2006). The court held that the plaintiff had failed to “show that the Airport was
26 shut down ‘as a direct result of damage to’ the Pentagon.” *Id.* The court noted that
27 “the government’s subsequent decision to halt operations at the Airport indefinitely
28 was based on fears of future attacks,” and that “[t]he Airport was reopened when it

1 was able to comply with more rigorous safety standards; the timetable had nothing
2 to do with repairing, mitigating, or responding to the damage caused by the attack
3 on the Pentagon.” *Id.* at 134-35. The Second Circuit concluded by observing that
4 if the hijacked plane had missed the Pentagon and instead caused damage to a
5 different property outside the radius for Civil Authority coverage, “it can hardly be
6 doubted that the effect on subsequent flight operations . . . would have been
7 virtually identical.” *Id.* at 135. Thus, the closure order was not “the direct result”
8 of specific damage to adjacent property, but rather a preventative measure based on
9 “fears of future attacks.” *Id.* at 134.¹⁰

10 In *Dickie Brennan v. Lexington Insurance Co.*, the Fifth Circuit similarly
11 held, as a matter of law, that Civil Authority coverage was not available when the
12 mayor of New Orleans issued a mandatory evacuation order in response to an
13 approaching hurricane. 636 F.3d 683, 686 (5th Cir. 2011). Even though the
14 hurricane had already damaged specific property in Caribbean nations, the order
15 was not issued because of that specific property damage, and thus the “causal link”
16 between the damage and the civil authority action was missing.¹¹ *Id.* at 686-87.¹²

17 _____
18 ¹⁰ See also *The Paradies Shops, Inc. v. Hartford Fire Ins. Co.*, No. 1:03-CV-3154-JEC, 2004 WL
19 5704715, at *17 (N.D. Ga. Dec. 15, 2004) (civil authority coverage not available for closure
20 following September 11 attacks because “an order . . . that is designed to prevent, protect against,
21 or avoid future damage is not a ‘direct result’ of already existing property loss or damage”); *cf.*
22 *City of Chicago v. Factory Mut. Ins. Co.*, No. 02 C 7023, 2004 WL 549447, at *4 (N.D. Ill. Mar.
18, 2004) (“protection and preservation of property” coverage not available for closure following
September 11 attacks because the closure “was ultimately imposed to protect against any further
terrorist attacks”).

23 ¹¹ The civil authority provision in *Dickie Brennan* applied to an “action of civil authority that
24 prohibits access to the described premises due to direct physical loss of or damage to property,
other than at the described premises,” and did not include a mileage limitation. *Id.* at 685.

25 ¹² See also *Jones, Walker, Waechter, Poitevent, Carrere & Denegre, LLP v. Chubb Corp.*, No.
26 09-6057, 2010 WL 4026375, at *4 (E.D. La. Oct. 12, 2010) (civil authority coverage not
27 available for closures due to hurricane because “[t]he Policy is resoundingly clear that coverage
under the Civil Authority section requires not only an order prohibiting access but also physical
28 loss within one mile of the office and a nexus between the prohibition order and the physical
loss,” and no such nexus was present) (emphasis in original); *S. Texas Med. Clinics, P.A. v. CNA
Fin. Corp.*, No. H-06-4041, 2008 WL 450012, at *10 (S.D. Tex. Feb. 15, 2008) (civil authority
coverage not available for closures due to hurricane because evacuation order was issued due to

1 As these cases make clear, Civil Authority coverage is not triggered by
2 preventative orders such as the citywide Garcetti Order, which was not issued
3 because of specific property damage within the specified radius of the insured
4 premises, but was instead issued to “limit the spread of COVID-19.” (RJN, Ex. B
5 at 6, Ex. C at 13.)

6 **4. Leave to Amend Should be Denied**

7 Since Plaintiffs cannot amend the Complaint to allege *all* of the above
8 requirements to state a claim for Civil Authority coverage, the Complaint should be
9 dismissed with prejudice and leave to amend should be denied. *See Loughney v.*
10 *Allstate Ins. Co.*, 465 F. Supp. 2d 1039, 1042 (S.D. Cal. 2006) (granting motion to
11 dismiss without leave to amend because allegations did not establish that plaintiff
12 was entitled to coverage under insurance policy); *Granite Outlet, Inc. v. Hartford*
13 *Cas. Ins. Co.*, 190 F. Supp. 3d 976, 986 (E.D. Cal. 2016) (granting motion to
14 dismiss declaratory relief claim without leave to amend because allegations did not
15 demonstrate that plaintiff’s claims were covered under the insurance policy);
16 *Shroyer v. New Cingular Wireless Services, Inc.*, 622 F.3d 1035, 1041 (9th Cir.
17 2010) (“[T]o survive a motion to dismiss, a complaint must contain sufficient
18 factual matter to state a facially plausible claim for relief.”) (citing *Ashcroft v.*
19 *Iqbal*, 566 U.S. 662 (2009)).

20 **B. Declarations Relating to Future Civil Authority Closures and**
21 **Hypothetical Events Are Not Ripe**

22 Plaintiffs’ request relating to future conduct—a declaration that the Federal
23 Policy “provides coverage to Plaintiffs for any . . . future civil authority closures of
24 its Insured Premises due to physical loss or damage from the coronavirus under the
25 Civil Authority coverage parameters”¹³ (Complaint ¶ 55, *Prayer for Relief*)—is not

26 “anticipated threat of damage” rather than specific property damage that had occurred in Florida
27 and the Gulf of Mexico).

28 ¹³ Plaintiffs also seek a declaration based on “current” civil authority closures, but the only order
alleged in the Complaint is the Garcetti Order. For reasons discussed previously, Plaintiffs fail to
state a claim under Rule 12(b)(6) based on the Garcetti Order.

1 ripe. Neither is their request for a declaration of coverage “in the event that
2 coronavirus has caused a loss or damage at the Insured Premises or immediate area
3 of the Insured Premises.” (*Id.* ¶ 55, *Prayer for Relief*.) Both requests fail under
4 Rules 12(b)(1) and 12(b)(6).

5 Because the Declaratory Judgment Act permits declaratory relief only “[i]n a
6 case of actual controversy,” 28 U.S.C. § 2201(a), a party seeking declaratory relief
7 must establish that the case is ripe for judicial determination. *See City of Colton v.*
8 *Am. Promotional Events, Inc.-West*, 614 F.3d 998, 1004-05 (9th Cir. 2010). To
9 demonstrate ripeness, the plaintiff must show that there is a controversy of
10 “sufficient immediacy and reality to warrant the issuance of a declaratory
11 judgment.” *Id.* (quoting *In re Coleman*, 560 F.3d 1000, 1005 (9th Cir. 2009)).
12 Where a dispute hangs on “contingent future events that may not occur as
13 anticipated, or indeed may not occur at all,” there is no justiciable controversy.
14 *Clinton v. Acequia, Inc.*, 94 F.3d 568, 572 (9th Cir. 1996) (quotations and citations
15 omitted).

16 Plaintiffs have not pleaded any facts supporting their request for a broad
17 declaration that the Federal Policy provides coverage for “future civil authority
18 closures.” The Complaint contains no allegations suggesting that any future civil
19 authority orders will be issued at all, let alone facts about the timing, scope, or
20 terms of any such orders. Because their request relates to “contingent future events
21 that may not occur as anticipated, or indeed may not occur at all,” it is not ripe for
22 consideration. *Clinton*, 94 F.3d at 572; *see also Garcia v. Brownell*, 236 F.2d 356,
23 358 (9th Cir. 1956) (“Mere possibility, even probability, that a person may in the
24 future be adversely affected by official acts not yet threatened does not create an
25 ‘actual controversy’ which is a prerequisite created by the clear language of the
26 [Declaratory Judgment Act.]”); *Laguna Pub. Co. v. Employers Reins. Corp.*, 617 F.
27 Supp. 271, 273 (C.D. Cal. 1985) (declaratory relief action relating to excess
28 insurer’s liability was not ripe because it was uncertain whether an excess claim

1 would ever actually arise).

2 Indeed, it would be impossible for the Court to determine whether the Policy
3 provides coverage for “future civil authority closures” without knowing the exact
4 details of the unformulated orders that have yet to lead to the closures. The Federal
5 Policy provides civil authority coverage only for “actual impairment” of the
6 insured’s operations “directly caused by the prohibition of access” to covered
7 premises. (Shearer Decl., Ex. A at 80-81.) And, as previously discussed, there
8 must be a prohibition of access (not just an order regulating operations) that must
9 also be the direct result of direct physical loss or damage to property away from
10 such premises by a covered peril, and the property must be within one mile of the
11 covered premises. (*Id.* at 81.) In addition, the insured is entitled to coverage only
12 for loss sustained during the policy period:

Policy Period:	From: AUGUST 1, 2019 12:01 A.M. standard time at the Named Insured's mailing address shown above.	To: AUGUST 1, 2020
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15 (*Id.* at 18.) Without knowing the precise terms and timing of any future civil
16 authority orders, the Court would be left to make coverage determinations by
17 crystal ball. *See Smith v. World Savings and Loan Ass’n*, No. 2:10-CV-02855
18 JAM-JFM, 2011 WL 338495, at *4 (E.D. Cal. Jan. 31, 2011) (“Declaratory relief
19 must be based on an actual controversy with known parameters. If the parameters
20 are as yet unknown, the controversy is not yet ripe for declaratory relief.”)
21 (quotations and citations omitted); *Alcoa, Inc. v. Bonneville Power Admin.*, 698
22 F.3d 774, 793 (9th Cir. 2012) (explaining that claims resting on contingent future
23 events are not ripe because the facts are not “concrete and particularized” enough to
24 adjudicate the claim).

25 Likewise, Plaintiffs’ request relating to hypothetical damage of the Insured
26 Premises is not ripe. Plaintiffs state that they “do not seek any determination of
27 whether the coronavirus is physically in the Insured Premises,” (Complaint ¶ 56),
28 but nonetheless seek a declaration of coverage “in the event that coronavirus has

1 caused a loss or damage at the Insured Premises or immediate area of the Insured
2 Premises.” (*Id.* ¶ 55, *Prayer for Relief.*) As with “future civil authority closures,” it
3 would be impossible for the Court to determine whether the Federal Policy provides
4 coverage “in the event” coronavirus has caused loss or damage without knowing
5 the precise details of the loss or damage—details that Plaintiffs specifically note
6 they do not seek to adjudicate. Case law is clear that declaratory relief cannot be
7 based on such hypothetical scenarios. *See Calderon v. Ashmus*, 523 U.S. 740, 749
8 (1998) (declaratory relief must “completely resolve[] a concrete controversy”); *18*
9 *Unnamed John Smith Prisoners v. Meese*, 871 F.2d 881, 883 (9th Cir. 1989)
10 (“theoretical or abstract disagreements that do not yet have a concrete impact on the
11 parties” are not ripe).

12 Plaintiffs’ requests for declarations based on future orders and hypothetical
13 events should be dismissed pursuant to Rules 12(b)(1) and 12(b)(6). *See Fleck and*
14 *Assocs., Inc. v. City of Phoenix*, 471 F.3d 1100, 1103-04 (9th Cir. 2006) (noting, in
15 a declaratory relief action, that a true “case or controversy” is required to withstand
16 a Rule 12(b)(1) motion for lack of jurisdiction).

17 **V. CONCLUSION**

18 For all the foregoing reasons, Federal’s motion to dismiss should be granted
19 under Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1). Because it will be
20 impossible for Plaintiffs to cure their deficiencies by alleging “other facts consistent
21 with the challenged pleading,” *Schreiber Distr. Co. v. Serv-Well Furniture Co.,*
22 *Inc.*, 806 F.2d 1393, 1401 (9th Cir. 1986), Federal’s motion to dismiss should be
23 granted without leave to amend.

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Dated: May 22, 2020

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