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ATTORNEYS FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Chattanooga Professional Baseball LLC d/b/a Chattanooga Lookouts et al.,

Plaintiffs,

v.

National Casualty Co. et al.,

Defendants.

Case No. 2:20-cv-01312-DLR

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

(Oral Argument Requested)

Plaintiffs hereby oppose Defendants' Motion to Dismiss Plaintiffs' Amended Complaint (the "Motion"). [*See* ECF No. 27]. The Court should deny the Motion.

PRELIMINARY STATEMENT

Plaintiffs (the "Teams") are small businesses that own and operate Minor League Baseball teams in nineteen smaller cities and towns throughout the country. Every year, the Teams paid premiums to the Defendant Insurers to protect them from the catastrophic economic consequences they would suffer if they were unable to engage in their business of providing affordable summertime family entertainment in the form of professional baseball games. With the full cancellation of the 2020 minor league season, the Teams have suffered catastrophic losses.

The First Amended Complaint (the "Complaint") alleges a complex set of facts leading to these losses, including the coronavirus pandemic, the actual and/or threatened presence of the coronavirus at the ballparks, governmental orders restricting access to the Teams' ballparks, and the Teams' inability to secure players from Major League Baseball. Without their players, and without access to their ballparks, the Teams have been unable to host fans at baseball games, which is their financial lifeblood.

The Teams purchased substantially identical commercial all-risk first-party property & casualty policies (the "Policies") from Defendants (the "Insurers") that cover their business-interruption losses. These Policies cover "direct physical loss of or damage to Covered Property" as well as "Business Income" losses and "Extra Expense" due to suspension of the Teams' operations, including such losses and expenses caused by governmental orders restricting access to their ballparks. This has happened for each of the Teams, and each sought coverage from the Insurers under the Policies for their losses. But the Insurers denied or made clear they will deny the Teams' claims, forcing the already-struggling Teams to file this suit to obtain the coverage to which they are entitled.

Notwithstanding the fact that the Teams' claims plainly fall within the Policies' affirmative grants of coverage, the Insurers move to dismiss the Complaint. They principally point to an exclusion in the Policies for "loss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease (the 'Exclusion')." That Exclusion provides no basis to grant their Motion, however, for at least two dispositive reasons.

First, the Insurers' Motion relies upon the presumption that this Exclusion is triggered because all of the Teams' losses are caused by the "virus." But that is not something that can be presumed. The burden to prove that the Exclusion is triggered rests on the Insurers, and that includes the burden to prove a relevant cause of loss. Cause of loss is a quintessential question of fact, however, and such factual questions must be resolved against the Insurers on their Motion. Significantly, the Complaint pleads other causes of loss, including the governmental orders effectively shutting down the Teams' ballparks, and the Teams' inability to obtain their players from Major League Baseball. The Insurers ignore these dispositive causation pleadings, but it would be improper for the Court to do so. At this stage, the Complaint's allegations must be credited. Tying the relevant causes to the relevant losses is, quite simply, not something that can be accomplished on this Motion.

Second, the Insurers' Motion relies upon the further presumption that they are free to enforce this Exclusion. Again, that is not something that can be presumed. In this case, there are disputed issues relating to whether the Insurers are estopped from relying on this Exclusion to bar coverage. To receive approval for the Exclusion at issue, the Insurers represented to state regulators that existing coverage did not insure disease-causing agents. But as the Complaint pleads in substantial detail, that representation was false. And it permitted the Insurers to reduce the scope of coverage under their Policies—through the Exclusion—without a commensurate reduction in premiums. Under these

circumstances, the Insurers are estopped from relying on the Exclusion. Their arguments to the contrary raise, at best, issues of fact.

The Insurers argue that this kind of "regulatory estoppel" has been rejected in certain *state* decisions. But whether the Insurers may rely on the Exclusion in *this* case is governed principally by *federal* estoppel principles, under which the Teams must prevail. The Teams must also prevail under state law. The Insurers boldly and incorrectly state none of the ten states has accepted regulatory estoppel. That assertion is erroneous: Regulatory estoppel has been adopted by one of the subject states, has been formally supported by the attorney general of another, and is consistent with the insurance laws of each of the states. The legal landscape, moreover, suggests all subject states would follow the landmark regulatory-estoppel decision of *Morton International, Inc. v. General Accident Insurance Co. of America*, 629 A.2d 831 (N.J. 1993). Each of the cases cited by the Insurers is procedurally inapt and fails to grapple with the principles that underlie regulatory estoppel. Whether analyzed under federal or state law, therefore, the Teams' allegations are sufficient, and the underlying factual disputes mandate the Insurers' Motion be denied.

In addition to their "virus" arguments, the Insurers argue that the Teams' alleged inability to obtain players from Major League Baseball implicates another exclusion in the Policies for "[a]ny increase of loss caused by or resulting from . . . Suspension, lapse or cancellation of any license, lease or contract." The Motion should be denied because the Insurers never raised and conferred with the Teams about this issue as required by the Court's Rules. But in any case, the Complaint does not allege that Major League Baseball's decisions regarding the players reflected any suspension, lapse, or cancellation of any contract. Thus, this exclusion is inapplicable on its face.

Finally, the Insurers assert that the Teams are not entitled to "civil authority" coverage because they supposedly have not alleged that governmental orders restricted access to areas "immediately surrounding" the ballparks. As with the previous argument,

the Insurers failed to confer on this argument too. Moreover, it is based upon a false predicate. The Complaint alleges that governmental orders prevented access to the ballparks, harmed the ballparks and "the areas surrounding them," and that the ballparks are within one mile of locations that have also suffered damage. The Complaint thus alleges that access was restricted to the ballparks and nearby businesses.

At bottom, the Insurers' Motion misconstrues or ignores applicable law and raises fact-intensive issues that cannot be resolved at this early stage of the litigation. Their Motion should be denied in its entirety.

BACKGROUND

I. Minor League Baseball and Cancellation of the 2020 Season

The Teams are owners and operators of Minor League Baseball teams. [Compl., ECF No. 23, ¶¶ 7, 67]. Minor League Baseball ("MiLB") was a growing business through 2019, with tens of millions of fans attending games each year in the 160 MiLB ballparks throughout the country. [*Id.* ¶¶ 1, 72]. This growing attendance was essential as MiLB's business model, and the Teams' primary source of revenue, is dependent on attracting fans to each ballpark to purchase tickets, merchandise, food, beverages, and use of other park amenities. [*Id.* ¶¶ 4, 6, 71].

But in 2020, the entire MiLB baseball season was cancelled. [*Id.* ¶¶ 2, 73]. This first-ever cessation of Minor League Baseball is linked to a complicated set of facts—the SARS-CoV-2 virus, the attendant disease, the pandemic, the governmental responses to the pandemic, and Major League Baseball ("MLB") not supplying players to their affiliated MiLB teams. [*Id.* ¶¶ 2, 7]. Cancellation of the MiLB season has led to catastrophic financial losses for the Teams. [*Id.* ¶¶ 3, 73–75, 77].

II. The Teams' Insurance Coverage

As prudent business owners, the Teams prepared for these risks by purchasing business-interruption insurance from Defendants National Casualty Co., Scottsdale Indemnity Co., and Scottsdale Insurance Co. ("Defendants" or the "Insurers"). [*Id.* ¶¶ 7,

10–26]. The Teams' Policies are commercial "all risk" first-party property & casualty policies with identical grants of coverage for "business income" losses, covering all risks unless specifically excluded. [*See id.*, Exs. A–L]. Relevant here, the Policies cover:

- "[D]irect physical loss of or damage to Covered Property" caused by any "Covered Cause of Loss." [*Id.* ¶ 83].
- "[T]he actual loss of Business Income [the policyholder] sustain[s] due to the necessary 'suspension' of [the policyholder's] 'operations,'" so long as the "'suspension' [is] caused by direct physical loss of or damage" to the property. [*Id.* ¶ 86].
- "[T]he actual loss of Business Income [the policyholder] sustain[s] and necessary Extra Expense caused by action of civil authority that prohibits access to the described premises." [*Id.* ¶¶ 88, 90].

The Policies purport to exclude from coverage:

- "[L]oss or damage caused by or resulting from any virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness or disease." [*Id.* ¶ 91].

III. The Insurers' Denial or Anticipatory Denial of the Teams' Claims

The Teams purchased the Policies for significant premiums. But when the 2020 season was cancelled, and the Teams' business-income losses were near total, the Insurers failed to honor their obligations under the Policies. [*Id.* ¶¶ 7, 93–104]. The Insurers denied (or made clear they will deny) each Team's claim for coverage on essentially the same grounds: that the losses (1) do not result from direct physical loss or damage to property and (2) are barred by the purported Exclusion. [*Id.* ¶¶ 92–104]. Accordingly, the Teams brought this action against the Insurers for breach of contract or anticipatory breach of contract and for a declaratory judgment that the Teams are entitled to the full amount of coverage under their Policies. [*Id.* ¶¶ 8, 129–52].

LEGAL STANDARD

In reviewing a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), a reviewing court must accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the plaintiff. *Schlegel v. Wells Fargo Bank, NA*, 720 F.3d 1204, 1207 (9th Cir. 2013).

The Insurers correctly concede that "there is no material difference between the law of each of these States with respect to the interpretation of insurance policies." [Mot. 9]. The Insurers' Motion relies principally on an exclusion, which must be construed against the insurer as drafter. *See* 17A Lee R. Russ & Thomas F. Segalla, *Couch on Insurance* § 254:12 (3d ed. 2001) [hereinafter *Couch on Insurance*].

ARGUMENT

The Insurers' core argument is that the Complaint should be dismissed because coverage is barred by the Exclusion. However, the Teams have alleged various causes of their losses, several of which would not implicate the Exclusion. The cause of loss is a quintessential question of fact. Thus, the Insurers' Motion based on the Exclusion necessarily fails out of the gate. Moreover, the Teams have alleged that the Insurers are estopped from relying on the Exclusion to bar coverage based on misrepresentations they made to insurance regulators to obtain approval of the Exclusion.

I. The Relevant Cause of the Teams' Losses Is a Question of Fact.

The Complaint properly pleads that the Exclusion may not be enforced by the Insurers. But even if they could enforce it, the Insurers would bear a heavy burden to prove that the Exclusion applied to preclude the insurance coverage otherwise available under the Policies. *Cornelius v. State Farm Fire & Cas. Co.*, No. 11-cv-269, 2012 WL 12873778, at *2 (D. Ariz. July 24, 2012). And that burden would necessarily require relevant proof of causation: that the Teams' losses were caused by the "virus" rather than by, for example, the governmental orders restricting access to the Teams' ballparks or the Teams' inability to obtain players from MLB. But such questions of causation are

questions of fact—"The majority of cases addressing causation disputes under an insurance policy hold that the causal relationship of a loss to a particular alleged instrumentality is a question of fact to be decided by the jury." 7 *Couch on Insurance* § 101:59 (cleaned up)). Here, the Teams have pled at least *five* possible causes of their loss or damage, including "the SARS-CoV-2 virus, the attendant disease, the pandemic, the governmental response to it, or the Teams' inability to obtain players." [Compl. ¶¶ 7, 36–58, 59–65, 66–71]. The Insurers ignore these allegations and obfuscate a key factual question—causation—by drawing the Court's focus to a single possible cause of loss. Yet the fact-intensive nature of causation is at its apex when multiple causes are present. *See* 7 *Couch on Insurance* § 101:59. Thus, the Court should deny the Motion.

II. Regardless, the Teams Have Sufficiently Alleged the Insurers Are Estopped from Enforcing the Exclusion.

The Insurers' Motion fails for a second, independent reason: The Teams have sufficiently alleged the Insurers are estopped from enforcing the Exclusion. In 2006, to obtain approval of the Exclusion, the Insurers told the ten state insurance commissions direct physical loss or damage did not include as insured risks disease-causing agents. [Compl. ¶¶ 122]. This representation was significant because if an insurer reduces insured risk, it must also reduce the premium. In reality, however, at the time approval for the Exclusion was sought, cases holding the policies *included* as insured risks "disease-causing agents" were "legion." [*Id.* ¶ 124]. Relying on that false representation, the commissions approved the Exclusion, and the Insurers evaded what should have been a "significant rate reduction." *See Morton*, 629 A.2d at 872. Thus, for the past fourteen years, the Insurers have collected inflated premiums based on their misrepresentation. The law, however, bars an insurer from relying on an exclusion that was obtained through misrepresentation to regulators. *Id.* at 873. The Teams have sufficiently pled that the Insurers—having profited from their misrepresentation for "more than a decade," *id.* at 851—are now estopped under federal and state law from enforcing the Exclusion.

A. State Insurance Commissions Protect Policyholders.

An insurance policy is a contract of adhesion. *Ferguson ex rel. McLeod v. Coregis Ins. Co.*, 527 F.3d 930, 933 (9th Cir. 2008). Accordingly, "the typical commercial insured rarely sees the policy form until after the premium has been paid." *Morton*, 629 A.2d at 852. To protect insureds, "the insurance industry as a whole is heavily regulated," *Campanelli v. Allstate Life Ins. Co.*, 322 F.3d 1086, 1100 (9th Cir. 2003), and the ten jurisdictions here each have state insurance commissions. The commissioners are "the only persons who can negotiate meaningfully with insurers about standard-form policy language," [Compl. ¶ 125]; *see Morton*, 629 A.2d at 874. Commissions protect policyholders principally through the form and rate approval process. The ten jurisdictions here require new forms and rates to be submitted to the commissions for approval. When setting rates for new forms, the commissions must by statute consider "all factors reasonably related to the kind of insurance involved." *Id.* at 872.

B. Having Secured the Exclusion Through Misrepresentation, the Insurers Are Estopped from Enforcing It in This Case.

In a leading insurance-coverage decision, the Supreme Court of New Jersey held that the plain text of an exclusion is unenforceable when, to avoid a reduction in legally chargeable premiums, an insurer obtains the exclusion's approval by misrepresenting the state of the law to the state insurance commission. *Morton*, 629 A.2d at 876. In *Morton*, insurers sought to enforce a now-standard pollution exclusion. Years earlier, however, the insurers had falsely represented to insurance regulators that "[c]overage for pollution or contamination [was] *not provided* in most cases under [then-]present policies" and that the proposed exclusion merely "clarifie[d] the situation." *Id.* at 851 (cleaned up and emphasis added). The reality is that this coverage *was* provided under these policies. *Id.* at 848. The insurers were thus able to restrict coverage without a commensurate decrease in insurance premiums. *Morton* thus held that the insurers were estopped from relying on the exclusion. The Exclusion here is *Morton* all over again.

In 2006, to obtain approval of the Exclusion without being required to reduce their premiums, the Insurers told insurance regulators that "property policies have not been a source of recovery for losses involving contamination by disease-causing agents." [Compl. ¶ 122 (cleaned up)]. That was false. "Before 2006, based on judicial opinions in numerous civil actions across the United States, insurers were aware insured property damage and resulting business income loss and extra expenses could be caused by an array of noxious and untenable conditions impacting property," including a "variety of claims involving disease-causing agents." [*Id.* ¶¶ 111, 124]. These cases spanned decades and came from across the country.[1] The Insurers thus misrepresented the scope of previously available coverage to the commissions in 2006. And the commissions relied

[1] *See, e.g.*, *Am. Alliance Ins. Co. v. Keleket X-Ray Corp.*, 248 F.2d 920, 925 (6th Cir. 1957) (radioactive dust and radon gas); *W. Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 54 (Colo. 1968) (en banc) (gasoline vapors); *Pillsbury Co. v. Underwriters at Lloyd's, London*, 705 F. Supp. 1396, 1399 (D. Minn. 1989) (health-threatening organisms); *Hetrick v. Valley Mut. Ins. Co.*, No. 2245 Civil 1988, 1992 WL 524309, at *2 (Com. Pl. May 28, 1992) (oil); *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332 (Or. Ct. App. 1993) (methamphetamine fumes); *Azalea, Ltd. v. Am. States Ins. Co.*, 656 So. 2d 600, 601 (Fla. Dist. Ct. App. 1995) (unknown pollutant); *Arbeiter v. Cambridge Mut. Fire Ins. Co.*, No. 9400837, 1996 WL 1250616, at *1–2 (Mass. Super. Mar. 15, 1996) (oil fumes); *Sentinel Mgmt. Co. v. N.H. Ins. Co.*, 563 N.W.2d 296, 300 (Minn. Ct. App. 1997) (asbestos); *Matzner v. Seaco Ins. Co.*, 1998 WL 566658, at *4 (Mass. Super. Aug. 12, 1998) (carbon monoxide); *Bd. of Educ. v. Int'l Ins. Co.*, 720 N.E.2d 622, 626 (Ill. App. Ct. 1999), *as modified on denial of reh'g* (Dec. 3, 1999) (asbestos); *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, No. 98-cv-434, 1999 WL 619100, at *8 (D. Or. Aug. 4, 1999) (mold or mildew); *Yale Univ. v. Cigna Ins. Co.*, 224 F. Supp. 2d 402, 413–14 (D. Conn. 2002) (asbestos and lead); *Graff v. Allstate Ins. Co.*, 54 P.3d 1266, 1269 (Wash. Ct. App. 2002) (methamphetamine vapors); *Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts*, No. CV-01-1362-ST, 2002 WL 31495830, at *8 (D. Or. June 18, 2002) (mold); *Cooper v. Travelers Indem. Co. of Ill.*, No. 01-cv-2400, 2002 WL 32775680, at *1 (N.D. Cal. Nov. 4, 2002) (coliform bacteria and E.coli); *Motorists Mut. Ins. Co. v. Hardinger*, 131 F. App'x 823, 824, 826–27, 824–26 (3d Cir. 2005) (E.coli); *de Laurentis v. United Servs. Auto. Ass'n*, 162 S.W.3d 714, 723 (Tex. App. 2005) (mold); *Schlamm Stone & Dolan LLP*. v. *Seneca Ins. Co.*, 800 N.Y.S.2d 356 (N.Y. Sup. Ct. 2005) (unpublished table decision) (dust and noxious particles).

on that misrepresentation to permit the Insurers to charge the same premiums for what was, unknown to the Teams, reduced coverage. [*See* Compl. ¶ 126]. *Cf. Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 781 A.2d 1189, 1192 (Pa. 2001) (reversing the trial court's grant of a motion to dismiss when the inquiry was whether regulatory estoppel was "properly pleaded," not whether "proof of the insurance department's reliance on the insurance industry's memorandum [w]as likely or probable").

The Insurers' only retort to the Teams' allegations is that "regulatory estoppel has not been recognized in any of the subject states and should be rejected by this Court." [Mot. 3; *see id.* at 12 (same), 12 n.4 (same)]. Not so. For starters, federal estoppel law governs this issue and, regardless, the Teams have sufficiently pled relief under both federal *and* state law.

1. Federal Common Law Controls and Recognizes the Teams' Estoppel Claim.

As several courts have recognized, regulatory estoppel is simply "a form of judicial estoppel." *Sunbeam*, 781 A.2d at 1192 (cleaned up); *see Grede v. Bank of N.Y.*, No. 08 C 2582, 2009 WL 188460, at *6 (N.D. Ill. Jan. 27, 2009); *Mueller Copper Tube Prod., Inc. v. Pa. Mfrs.' Ass'n Ins. Co.*, No. 04-2617 MA/V, 2006 WL 8435027, at *6 (W.D. Tenn. Dec. 14, 2006), *aff'd sub nom. Mueller Copper Tube Prod., Inc. v. Pa. Mfrs.' Ass'n Ins. Co.*, 254 F. App'x 491 (6th Cir. 2007). Indeed, judicial estoppel applies even when a proceeding is "administrative rather than judicial." *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 604 (9th Cir. 1996); *see id.* (citing as an example of such an administrative proceeding a "Maine Bureau of Insurance approval proceeding"). In this circuit and across the country, judicial estoppel is governed by federal common law. *Id.* at 603. And because regulatory estoppel is merely "a form of judicial estoppel," this Court should apply federal common law to regulatory estoppel—as did the Western District of Tennessee. *See Mueller Copper Tube Prod.*, 2006 WL 8435027, at *6.

Here, the Teams have pled facts that would estop the Insurers from enforcing the Exclusion under *Morton*. Because the pled facts must be taken as true, the Court should

apply *Morton* as a matter of federal common law to preclude the Insurers from relying on the Exclusion at this stage of the litigation. *Cf. Sunbeam*, 781 A.2d at 1193 (reversing and remanding, holding "it was error to dismiss the complaint without applying the doctrine of regulatory estoppel"); *Puig Martinez v. Novo Nordisk, Inc.*, 585 B.R. 655, 659 (D.P.R. 2018) (denying a motion to dismiss and deferring until summary judgment "resolution of the judicial estoppel issue until the factual record was better developed" (cleaned up)).

2. The Ten States Have Recognized or Would Recognize Regulatory Estoppel.

Even if state law governed estoppel, the Teams have sufficiently pled that the Exclusion is unenforceable. The Insurers' assertion that "regulatory estoppel has not been recognized in any of the subject states," [Mot. 3; *see id.* at 12 (same), 12 n.4 (same)], is demonstrably false. The Supreme Court of Appeals of West Virginia, applying West Virginia law—one of the "subject states"—recognized regulatory estoppel under a public policy theory in *Joy Technologies, Inc. v. Liberty Mutual Insurance Co.*, 421 S.E.2d 493 (W. Va. 1992). *Joy Technologies* was a precursor to *Morton* and involved materially identical facts. The court analyzed the *exact same exclusion* at issue in *Morton* and reached the same conclusion. *Id.* at 495. Likewise, the State of Indiana, another one of the "subject states," served as amicus for the *Morton* policyholder, arguing the insurer should be estopped from enforcing the exclusion. 629 A.2d at 855.

As for the remaining states, none has directly addressed the issue of regulatory estoppel and its application to these facts. Under *Erie*,[2] therefore, the Court must exercise its "own best judgment in predicting how the state's highest court would decide the case." *Fiorito Bros. v. Fruehauf Corp.*, 747 F.2d 1309, 1314 (9th Cir. 1984) (cleaned up).[3] The Insurers contend regulatory estoppel has been "widely rejected." [Mot. 12]. But

[2] *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

[3] For *Erie* purposes, the Insurers' contention that regulatory estoppel has been rejected by Texas is misleading. [*See* Mot. 12 n.4]. The District Court for the Northern District of

the *SnyderGeneral* case on which they rely, as well as the cases cited in *SnyderGeneral*, were all decided on summary judgment or after a trial.[4] The question here is dispositively different: Whether the pleadings, taken as true, state a cause of action. Because this Court must "guess" how the remaining nine highest courts would decide this motion-to-dismiss question on the new facts that the Teams have pled, *nothing* the Insurers cite informs the Court's *Erie* analysis at this posture of the case. Like the highest courts of New Jersey, West Virginia, and Pennsylvania, these courts would refuse to enforce the Exclusion based on allegations in the Complaint.[5]

Texas is not Texas's "highest court," so *SnyderGeneral Corp. v. Great American Insurance Co.*, 928 F. Supp. 674 (N.D. Tex. 1996), provides no authoritative statement of Texas law. And when regulatory estoppel was raised before a Texas appellate court, the court, which had cited *SynderGeneral* elsewhere in its opinion, simply declined to reach the issue. *Chickasha Cotton Oil Co. v. Houston Gen. Ins. Co.*, No. 05-00-01789-CV, 2002 WL 1792467, at *11 (Tex. App. Aug. 6, 2002). In short, *SynderGeneral* is not dispositive, and *Chickasha Cotton Oil* suggests that regulatory estoppel might be recognized in Texas given the "necessary argument and authorities." *Id.*

[4] *SnyderGeneral*, 928 F. Supp. at 676; *Federated Mut. Ins. Co. v. Botkin Grain Co.*, 64 F.3d 537, 539 (10th Cir. 1995); *Transamerica Ins. Co. v. Duro Bag Mfg. Co.*, 50 F.3d 370, 372 (6th Cir. 1995); *Cincinnati Ins. Co. v. Flanders Elec. Motor Serv., Inc.*, 40 F.3d 146, 148 (7th Cir. 1994); *Indep. Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 842 F. Supp. 575, 576 (D.D.C. 1994), *aff'd sub nom. Charter Oil Co. v. Am. Employers' Ins. Co.*, 69 F.3d 1160 (D.C. Cir. 1995); *Dimmitt Chevrolet, Inc. v. Se. Fid. Ins. Corp.*, 636 So. 2d 700, 702 (Fla. 1993); *Farm Bureau Mut. Ins. Co. v. Laudick*, 859 P.2d 410, 411 (Kan. Ct. App. 1993); *ACL Techs., Inc. v. Northbrook Prop. & Cas. Ins. Co.*, 22 Cal. Rptr. 2d 206, 208 (Cal. Ct. App. 1993), *as modified* (Sept. 21, 1993); *Smith v. Hughes Aircraft Co. Corp.*, 783 F. Supp. 1222, 1223 (D. Ariz. 1991), *aff'd in part, rev'd in part sub nom. Smith v. Hughes Aircraft Co.*, 10 F.3d 1448 (9th Cir. 1993), *opinion amended and superseded on denial of reh'g*, 22 F.3d 1432 (9th Cir. 1993), *and aff'd in part, rev'd in part sub nom. Smith v. Hughes Aircraft Co.*, 22 F.3d 1432 (9th Cir. 1993).

[5] The Insurers' citation to *Nammo Talley Inc. v. Allstate Insurance Co.*, 99 F. Supp. 3d 999 (D. Ariz. 2015), [Mot. 3, 12], is also misplaced. The Insurers argue that "this Court must apply the substantive law of each state where the insured premises are located." [Mot. 3]. But Arizona is not one such state, [Mot. 9], *Nammo* as a district-court decision lacks any precedential weight, *see NASD Dispute Resolution, Inc. v. Judicial Council of*

Indeed, state courts have analogized regulatory estoppel to other black-letter doctrines. *See Buell Indus., Inc. v. Greater N.Y. Mut. Ins. Co.*, 791 A.2d 489, 502 (Conn. 2002) (equitable estoppel); *Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 998 P.2d 856, 873 (Wash. 2000) (fraud in the inducement); *Morton*, 629 A.2d at 874 (reasonable-expectations doctrine). In particular, each of the ten states recognizes that equitable estoppel is available to policyholders.[6] "The essential elements of equitable estoppel are '(1) conduct by which one induces another to believe in certain material facts; and (2) the inducement results in acts in justifiable reliance thereon; and (3) the resulting acts cause injury.'" *Button v. Conn. Gen. Life Ins. Co.*, 847 F.2d 584, 589 (9th Cir. 1988) (cleaned up). Those three elements are met here.

First, the Insurers misled the commissions on the pre-2006 decisional law interpreting "direct physical loss or damage." [Compl. ¶¶ 118–28]. *Cf. Morton*, 629 A.2d at 875 (holding the insurers' misrepresentation to regulators must be "imputed" to policyholders themselves). Second, the commissions relied on the Insurers' representations to approve the Exclusion without requiring a corresponding reduction in premium. [*See* Compl. ¶ 128]. Third, injury resulted when, despite the Teams having paid

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State of Cal., 488 F.3d 1065, 1069 (9th Cir. 2007), and *Nammo* was also decided on summary judgment, rather than on a motion to dismiss, 99 F. Supp. 3d at 1000.

[6] *Reno Contracting, Inc. v. Crum & Forster Specialty Ins. Co.*, 359 F. Supp. 3d 944, 952 (S.D. Cal. 2019) **(California)**; *Shoup v. Union Sec. Life Ins. Co.*, 124 P.3d 1028, 1030 (Idaho 2005) **(Idaho)**; *Emmco Ins. v. Pashas*, 224 N.E.2d 314, 318 (Ind. App. 1967) **(Indiana)**; *St. Paul Mercury Ins. Co. v. Am. Bank Holdings, Inc.*, 819 F.3d 728, 739 (4th Cir. 2016) **(Maryland)**; *Spring Vegetable Co. v. Hartford Cas. Ins. Co.*, 801 F. Supp. 385, 392 (D. Or. 1992) **(Oregon)**; *Mayes v. Paxton*, 437 S.E.2d 66, 68 (S.C. 1993) **(South Carolina)**; *Henry v. S. Fire & Cas. Co.*, 330 S.W.2d 18, 31 (Tenn. Ct. App. 1958) **(Tennessee)**; *Mitchell v. State Farm Lloyds*, No. 05-08-00184-CV, 2009 WL 596611, at *3 (Tex. App. Mar. 10, 2009) **(Texas)**; *Harris v. Criterion Ins. Co.*, 281 S.E.2d 878, 881 (Va. 1981) **(Virginia)**; *Potesta v. U.S. Fid. & Guar. Co.*, 504 S.E.2d 135, 150 (W. Va. 1998) **(West Virginia)**.

a premium commensurate with the virus being an insured risk, the Insurers denied the Teams' claims, forcing the Teams to bear "catastrophic financial losses." [*Id.* ¶ 3].

The Teams have thus adequately pled relief under both regulatory and equitable estoppel. Indeed, *Buell Industries* describes regulatory estoppel as "analogous" to equitable estoppel. 791 A.2d at 502.[7] The governing estoppel principles are thus nothing new, and they are well-pled here. As *Morton* explains, regulatory estoppel is an "appropriate and compelling" application of equitable estoppel in the regulatory context, 629 A.2d at 574—equitable principles recognized by each of the ten jurisdictions. *Cf.* 17 *Couch on Insurance* § 239:93 (explaining the "doctrine of estoppel will be used liberally, as a matter of equity, to prevent fraud and to require fair dealing").

The Insurers nevertheless argue that regulatory estoppel is inconsistent with these states' jurisprudences. They contend in particular that (1) "estoppel principles cannot be used to expand the scope of coverage beyond that contained in the insurance policy" and (2) "extrinsic evidence cannot be considered when the language of the policy is clear and unambiguous." [*See* Mot. 12 n.4]. Even if these general maxims are true, they neither address nor undermine the Teams' allegations.

First, the Insurers wrongly conflate the non-enforcement of an exclusion with an expansion of coverage. Although "the insured bears the burden to establish coverage under an insuring clause," the insurer "bears the burden to establish the applicability of

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[7] *Buell Industries* ultimately declined to estop the insurer, but it reached this conclusion only on summary judgment based on a lack of record evidence that Connecticut insurance regulators were misled. At this posture, however, the Teams' allegations the Insurers misled regulators must be accepted as true. [*Cf.* Compl. ¶ 126 ("As a result of the ISO and other insurers' deception and misrepresentations, state insurance regulators approved the [Exclusion] for use on commercial property and business income policies, and the [Exclusion] was attached to the Policies issued to the Teams.")]; *Joy Techs.*, 421 S.E.2d at 499 (summarizing an affidavit by the insurance commissioner of West Virginia indicating he was misled).

any exclusion." *Cornelius*, 2012 WL 12873778, at *2. *Cf. Ward-Davis v. JC Penney Life Ins. Co.*, 446 F. App'x 52, 53 (9th Cir. 2011) ("[E]xclusion clauses do not grant coverage; rather, they subtract from it." (cleaned up)). For purposes of this Motion, the Insurers have not challenged the Teams' allegations that the Teams' losses come within the insuring clause—here, "all risks of direct physical loss or damage."[8] Therefore, were the Teams to prove the elements of estoppel, thereby rendering the Exclusion unenforceable, judgment for the Teams would not be an expansion of coverage but the provision of coverage that would otherwise be excluded. *Cf. Bituminous Fire & Marine Ins. Co. v. Izzy Rosen's, Inc.*, 493 F.2d 257, 260 (6th Cir. 1974) (holding though estoppel does not permit a policyholder to "write into an insurance policy, coverage that was not specified in the contract," it does bar the insurer from "assert[ing] an exclusionary clause, thereby permitting the insured to rely on the coverage provisions in the policy").

Second, the Teams do not seek to admit parol evidence to clarify the meaning of the Exclusion. They argue, rather, the Exclusion is unenforceable whatever its meaning. Parol evidence is generally admissible to establish defenses to enforcement, like negligent and intentional misrepresentation.[9] And regulatory estoppel springs from such

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[8] Accordingly, though the Insurers purport to reserve the right to challenge the Teams' claims for coverage "at a later time," [Mot. 4 n.1], they have waived it for purposes of this Motion. *See, e.g.*, *Leair v. Comm'r of Soc. Sec. Admin.*, No. 17-cv-02834, 2019 WL 1349716, at *2 (D. Ariz. Mar. 26, 2019) (Rayes, J.) (enforcing this circuit's waiver rule and holding a party waived an issue by arguing it for the first time in a reply brief).

[9] *Thrifty Payless, Inc. v. The Americana at Brand, LLC*, 160 Cal. Rptr. 3d 718, 727 (Cal. Ct. App. 2013) **(California)**; *Gillespie v. Mountain Park Estates, L.L.C.*, 56 P.3d 1277, 1280 (Idaho 2002) **(Idaho)**; *Downs v. Radentz*, 132 N.E.3d 58, 64 (Ind. Ct. App. 2019) **(Indiana)**; *Pease v. Wachovia SBA Lending, Inc.*, 6 A.3d 867, 888–89 n.11 (Md. 2010) **(Maryland)**; *Teague Motor Co. v. Rowton*, 733 P.2d 93, 96 (Or. Ct. App. 1987) **(Oregon)**; *Bradley v. Hullander*, 249 S.E.2d 486, 499 (S.C. 1978) **(South Carolina)**; *Accredo Health Grp. Inc. v. GlaxoSmithKline LLC*, No. W201501970COAR9CV, 2016 WL 4137953, at *7 (Tenn. Ct. App. Aug. 3, 2016) **(Tennessee)**; *Tracy v. Annie's Attic, Inc.*, 840 S.W.2d 527, 532 (Tex. App. 1992), *writ denied* (Tex. Feb. 24, 1993) **(Texas)**;

misrepresentation, not from ambiguity in the policy language. *Morton* underscores this point, reaching its holding "notwithstanding the literal terms of the standard pollution-exclusion clause." 629 A.2d at 875; *see also id.* at 847–48; *Sunbeam*, 781 A.2d at 1194–95 (partitioning analysis of an ambiguity claim from the "regulatory estoppel claim").

In summary, one of the ten states has recognized regulatory estoppel, the attorney general of another has supported the doctrine as amicus, no state has rejected it, and it is plainly consistent with the law of each state. Further, the evidence of the Insurers' misrepresentation would be admissible not to expand coverage or to rewrite unambiguous language but to estop the Insurers from denying coverage that would otherwise be available but for an Exclusion procured through inequitable conduct. The Insurers' Motion predicated on the Exclusion should thus be denied.

III. The Insurers' Decisions Addressing the Exclusion Are Non-Precedential and Distinguishable.

The Insurers cite four COVID-19 business-interruption decisions that analyzed the Exclusion. [*See* Mot. 11]. None is precedential; each is distinguishable. *Turek Enterprises, Inc. v. State Farm Mutual Automobile Insurance Co.*, No. 20-cv-11655, 2020 WL 5258484 (E.D. Mich. Sept. 3, 2020), and *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 20-cv-461, 2020 WL 4724305 (W.D. Tex. Aug. 13, 2020), do not analyze regulatory estoppel. 2020 WL 5258484, at *9 n.13; 2020 WL 4724305, at *6–7. And *Mauricio Martinez, DMD, P.A. v. Allied Insurance Co. of America*, No. 20-cv-00401, 2020 WL 5240218 (M.D. Fla. Sept. 2, 2020), and *Gavrilides Management Co. LLC v. Michigan Insurance Co.*, No. 20-258-CB, 2020 WL 4561979 (Mich. Cir. Ct. July 21, 2020), address neither causation nor regulatory estoppel, only, in *Gavrilides*, an

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Shevel's, Inc.-Chesterfield v. Se. Assocs., Inc., 320 S.E.2d 339, 343–44 (Va. 1984) **(Virginia)**; *Lowe v. Albertazzie*, 516 S.E.2d 258, 265 (W. Va. 1999) **(West Virginia)**.

argument not advanced here, that the Exclusion is ambiguous. 2020 WL 5240218, at *2; 2020 WL 4561979.

IV. Defendants' Remaining Arguments Also Fail.

The Insurers assert additional grounds for dismissal based on Policy provisions separate from the Exclusion. [Mot. 14–15]. The Motion should be rejected under Local Rule 12.1(c) and this Court's July 6, 2020 Order because the Insurers did not raise these issues in the Parties' pre-motion conference. Rather, the Parties discussed only the Exclusion. *Cf., e.g.*, *Mays v. Wal-Mart Stores, Inc.*, 330 F.R.D. 562, 583 n.15 (C.D. Cal. 2019), *rev'd on other grounds and remanded*, 804 F. App'x 641 (9th Cir. 2020) ("Courts have summarily denied a party's motion for failure to comply with [a local meet-and-confer requirement]."); *Sowinski v. Cal. Air Res. Bd.*, 720 F. App'x 615, 618 (Fed. Cir. 2017) (upholding same in this circuit). These additional grounds also fail on the merits.

First, the Insurers contend MLB's failure to provide players to the Teams, and the losses flowing therefrom, cannot support a claim because the Policies "exclude coverage for 'any increase of loss caused by or resulting from . . . Suspension, lapse or cancellation of any license, lease or contract.'" [Mot. 14 (cleaned up)]. But the Teams nowhere allege that MLB suspended, cancelled, allowed to lapse, or otherwise breached any agreements with the Teams. Rather, the Complaint alleges only that MLB informed the Teams that it will not provide players for the 2020 season, and as a result, MiLB's 2020 season was cancelled. [Compl. ¶ 69]. *Cf. Prmconnect, Inc. v. Drumm*, 2016 WL 7049049, at *5 (N.D. Ill. Dec. 5, 2016) (rejecting a similar argument under a materially identical exclusion because the alleged loss "caused the 'cancellation of . . . *business*,' not the cancellation of a contract, so [the plaintiff's] allegation [did] not directly implicate th[e] exclusion" (emphasis in original)).

This exclusion also does not apply to the alleged losses. In sharp contrast to the two provisions immediately preceding it, which exclude "any loss" caused by the enumerated risks, this exclusion is limited to "any *increase* of loss." [*See* ECF No. 23-1

at 44 (emphasis added)]. The Teams, however, do not allege that not obtaining players *increased* or exacerbated any of their alleged losses. Instead, they allege that not obtaining players was a "cause of the Teams' business interruptions." [Compl. ¶ 70].

The Insurers next make a passing reference to the Policy's physical-loss requirement. [Mot. 14–15]. This is not a serious argument for dismissal: The Insurers cite no legal authority on the point and elsewhere explain they are *not* asserting this issue now but are merely reserving the right to raise it at a later time. [*See id.* 4 n.1]. In any event, this argument is unavailing as the Complaint contains ample allegations that the Teams suffered direct physical losses. [Compl. ¶¶ 69–74, 77].

Finally, the Insurers contend that the Teams are not entitled to civil authority coverage because the Complaint does not allege that access was prohibited to the insured premises or the surrounding areas. [Mot. 15]. The Insurers are wrong. The Teams allege authorities in each state issued statewide stay-in-place orders "pursuant to which all non-essential businesses were closed" and all citizens "were ordered to stay home and permitted to leave only for" essential reasons. [Compl. ¶¶ 46–55]. The Teams further allege that these orders "forced [them] to close their stadiums for baseball games" and that their "ballparks have been closed to the public for baseball since March 2020." [*Id.* ¶¶ 43, 46–55]. The Teams also allege that the coronavirus and governmental responses have harmed the ballparks "as well as the areas surrounding them," and that the "ballparks are within one mile of locations that have also suffered" damages. [*Id.* ¶¶ 58, 65, 76]. These sweeping orders restricted all nonessential businesses and nonessential activities across every state in which the Teams operate. This plainly alleges that access was restricted to the ballparks and nearby businesses within each of those states.

That some Team employees were permitted in ballparks and some Teams later hosted limited, non-baseball events, [Mot. 15], does not undermine this claim. The Policy requires an "action of civil authority that prohibits access" to the premises. [Doc. 23-1 at 51]. It does not require the prohibition of "all access" or "any access." *Cf. Blue Springs*

Dental Care, LLC v. Owners Ins. Co., 2020 WL 5637963, at *8 (W.D. Mo. Sept. 21, 2020) (upholding a similar claim even though the policyholder continued offering limited services on the premises because "the insurance policy did not specify that 'all access' or 'any access' to the insured property had to be prohibited"). Here, the Teams allege access to their premises was "closed to the public for baseball." [Compl. ¶ 43]. That is sufficient to state a claim for civil authority coverage. *Cf. Blue Springs Dental Care*, 2020 WL 5637963, at *8 (holding, when a dental office was closed but continued offering emergency services, "access to the clinics was prohibited to such a degree that the Civil Authority provision could be invoked"); *Studio 417*, 2020 WL 4692385, at *7 (holding, when a restaurant was closed with limited exceptions, "access was prohibited to such a degree as to trigger the civil authority coverage").

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny in its entirety Defendants' Motion to Dismiss Plaintiffs' Amended Complaint.

Date: October 14, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 14, 2020, I electronically transmitted the attached documents to the court clerk's office using the CM/ECF system for filing and thereby transmitted a notice of electronic filing to the following CM/ECF registrants:

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