Case No. 20-17422

In the

United States Court of Appeals

for the

Ninth Circuit

CHATTANOOGA PROFESSIONAL BASEBALL LLC, d/b/a Chattanooga Lookouts; AGON SPORTS AND ENTERTAINMENT LLC; BOISE HOSPITALITY AND FOOD SERVICES LLC; BOISE PROFESSIONAL BASEBALL LLC; COLUMBIA CONCESSIONS & CATERING LLC; COLUMBIA FIREFLIES LLC, d/b/a Columbia Fireflies; EUGENE EMERALDS BASEBALL CLUB, INC., d/b/a Eugene Emeralds; FORT WAYNE PROFESSIONAL BASEBALL LLC, d/b/a Fort Wayne TinCaps; FREDERICKSBURG BASEBALL LLC, d/b/a Fredericksburg Nationals; FRISCO ROUGHRIDERS LP, d/b/a Frisco Roughriders; GREENJACKETS BASEBALL LLC; GREENJACKETS HOSPITALITY FOOD & BEVERAGE SERVICES LLC; IDAHO FALLS BASEBALL CLUB, INC., d/b/a Idaho Falls Chukars; INLAND EMPIRE 66ERS BASEBALL CLUB OF SAN BERNARDINO, INC., d/b/a Inland Empire 66ers; JETHAWKS BASEBALL LP, d/b/a Lancaster Jethawks; MYRTLE BEACH PELICANS LP, d/b/a Myrtle Beach Pelicans; PANHANDLE BASEBALL CLUB, INC., d/b/a Amarillo Sod Poodles; SAJ BASEBALL LLC; SAN ANTONIO MISSIONS BASEBALL CLUB, INC., d/b/a San Antonio Missions; 7TH INNING STRETCH LLC, d/b/a Stockton Ports; WEST VIRGINIA BASEBALL LLC, d/b/a West Virginia Power; BOWIE BAYSOX BASEBALL CLUB LLC; FREDERICK KEYS BASEBALL CLUB LLC; SWING BATTER SWING LLC, d/b/a South Bend Cubs,
Plaintiffs-Appellants,

v.

NATIONAL CASUALTY COMPANY; SCOTTSDALE INDEMNITY COMPANY; SCOTTSDALE INSURANCE COMPANY,
Defendants-Appellees.

Appeal from a Decision of the United States District Court for District of Arizona (Phoenix), Case No. 2:20-cv-01312-DLR · Honorable Douglas L. Rayes, U.S. District Judge

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiffs-Appellants Chattanooga Professional Baseball LLC d/b/a Chattanooga Lookouts; Agon Sports and Entertainment LLC; Boise Hospitality and Food Services LLC; Boise Professional Baseball LLC; Bowie Baysox Baseball Club LLC; Columbia Concessions & Catering LLC; Columbia Fireflies LLC d/b/a Columbia Fireflies; Eugene Emeralds Baseball Club Inc. d/b/a Eugene Emeralds; Fort Wayne Professional Baseball LLC d/b/a Fort Wayne TinCaps; Frederick Keys Baseball Club LLC; Frisco Roughriders LP d/b/a Frisco Roughriders; Greenjackets Baseball LLC; Greenjackets Hospitality Food & Beverage Services LLC; Idaho Falls Baseball Club Inc. d/b/a Idaho Falls Chukars; Inland Empire 66ers Baseball Club of San Bernardino Inc. d/b/a Inland Empire 66ers; Myrtle Beach Pelicans, LP d/b/a Myrtle Beach Pelicans; Panhandle Baseball Club Inc. d/b/a Amarillo Sod Poodles; SAJ Baseball LLC; Swing Batter Swing LLC d/b/a The South Bend Cubs; West Virginia Baseball, LLC d/b/a West Virginia Power; and 7th Inning Stretch LLC d/b/a Stockton Ports (hereinafter, with the three additional Appellants listed below, the "Appellants" or the "Teams") state that they have no parent corporation and no publicly held corporation owns 10% or more of any of their stock.

Appellant JetHawks Baseball LP is a limited partnership whose owners include Grand Slam Holdings, Inc. and 1015241 BC Ltd. JCK Investments, Ltd. owns 10% or more of Grand Slam Holdings, Inc. Biting Buffalo Inc. owns 10% or more of 1015241 BC Ltd.

Appellant San Antonio Missions Baseball Club Inc. d/b/a San Antonio Missions is a corporation wholly owned by Elmore Sports Group, Ltd. No parent corporation or publicly held corporation owns 10% or more of Elmore Sports Group, Ltd.'s stock.

Appellant Fredericksburg Baseball LLC is a limited liability company whose sole member is Mundek Baseball Corp. No parent corporation or publicly held corporation owns 10% or more of Mundek Baseball Corp.'s stock.

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INTRODUCTION

The Teams are small businesses that own and operate minor league baseball teams that have suffered catastrophic losses after the cancellation of the 2020 minor league baseball season. The operative Amended Complaint (hereinafter the "Complaint") alleges that this cancellation was caused by the coronavirus pandemic, the actual and/or threatened presence of COVID-19, government orders restricting access to the ballparks for their intended purpose, government action and inaction in the face of the pandemic, and Major League Baseball ("MLB") not supplying the Teams with players for the season. Without their players and ballparks, the Teams have been unable to host fans at baseball games, which is their financial lifeblood.

The Teams paid significant premiums to Defendants-Appellees ("Insurers") to cover business interruption losses arising from just such events. The Teams purchased substantially identical commercial all-risk first-party property and casualty policies (the "Policies") that 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. This includes losses and expenses caused by governmental orders restricting access to their ballparks and from failure of a supplier to supply necessary goods or services. Insurers, however, 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, Insurers moved to dismiss the Complaint, arguing principally that the Policies exclude coverage 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"). On November 13, 2020, the District Court granted Insurers' motion (the "Decision").

But the District Court was wrong to dismiss a Complaint alleging as a factual matter multiple contributing causes of the Teams' losses. The District Court incorrectly presumed as a factual matter that the Exclusion was triggered because all the Teams' losses were caused, at the outset, by the "virus." To the contrary, Insurers bear the burden to prove that the Exclusion is triggered, fully and completely, by an excluded cause of loss. They cannot do so here. At a minimum, causation is a quintessential question of fact that cannot be resolved against the Teams at this preliminary stage of the proceedings. As the Complaint pleads various other causes that must be taken as true, including government orders effectively shutting down the Teams' ballparks, and the Teams' inability to obtain their players from MLB, Insurers cannot meet their heavy burden on a motion to dismiss. Indeed, if Insurers had wanted to avoid a factual inquiry and exclude

coverage regardless of any other causes of loss, they had at their disposal widely-used "anti-concurrent causation" ("ACC") language that they could have incorporated into the Exclusion. Most cases applying an exclusion to bar coverage for COVID-19 losses contain an ACC clause, notably absent here.

The District Court also erred in refusing to estop Insurers from relying on the Exclusion to bar coverage, based on their earlier improper conduct during the regulatory approval process. As the Complaint pleads in substantial detail, to obtain regulatory approval for the Exclusion without a corresponding decrease in premiums, Insurers' agents misrepresented to state regulators that the Exclusion was a clarification, not a reduction, of existing coverage and that existing policy language did not insure against damage from disease-causing agents. But that representation was false, as courts around the country had for decades found that similar noxious agents were covered under commercial property policies, and insurance companies had paid claims for similar losses during the Severe Acute Respiratory Syndrome ("SARS") epidemic. In the landmark regulatory estoppel decision of *Morton International, Inc. v. General Accident Insurance Co. of America*, 629 A.2d 831 (N.J. 1993), insurers were barred from relying on a pollution exclusion that was obtained through the exact same type of misrepresentations to regulators — a claim that the exclusion was a clarification not a reduction of coverage for certain claims. The same result should apply here.

Contrary to the District Court's Decision, Insurers may be estopped as a matter of federal or state law. Because regulatory estoppel is a form of federally recognized judicial estoppel, *Morton*'s core principles may be applied here under federal common law. The District Court wrongly claimed that federal common law is limited only to interstate relations, ignoring that it also protects the integrity of judicial and administrative institutions from the type of misrepresentation claims alleged here. The District Court also overlooked that, under state law, 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 the other states in which the Team's ballparks are located. The Teams' claims also satisfy the elements of equitable estoppel under each states' laws. This is because, under the standard-form language approval process, the only parties "negotiating" for policyholders are regulators; a misrepresentation to a regulator is thus equivalent to a misrepresentation to the policyholder.

Finally, the District Court mistakenly held that the Teams' inability to obtain players from MLB implicated another exclusion for "[a]ny increase of loss caused by or resulting from . . . Suspension, lapse or cancellation of any license, lease or contract" (the "Cancellation Exclusion"). Not so. The Complaint does not allege any suspension, lapse or cancellation of any contract, nor any increase in loss caused thereby. Rather, the Complaint alleges only that MLB *breached* or failed to

comply with the terms of its ongoing and existing contractual obligations, which the Policies cover. Not only does the plain language of the Cancellation Exclusion not apply, but the District Court's reading of that exclusion to bar coverage for any cause of loss arising from a "contractual relationship" would render the Teams' coverage entirely illusory. Indeed, by finding this exclusion applicable (albeit incorrectly), the District Court implicitly recognized that MLB's failure to supply players is otherwise a viable cause of the Teams' losses.

Because the allegations in the Complaint raise fact-intensive causation issues that cannot be resolved at this early stage of the litigation, and because the District Court failed to apply applicable estoppel law as a matter of law and misapplied the Cancellation Exclusion, the Decision should be reversed and Insurers' motion to dismiss should be denied.[1]

JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. § 1332 because there is complete diversity of citizenship among the parties and the amount in controversy exceeds $75,000, exclusive of interest and costs. Appellants appeal from an order

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[1] In the briefs below, Insurers did not move on any alleged argument that the Teams did not incur "physical loss of or damage to" to their property. 2-ER-162 n.1. Although that argument is an issue in many of the COVID-19 insurance decisions across the country, it is not the subject of this appeal.

of the District Court, entered on November 13, 2020, granting Insurers' motion to dismiss the Teams' Amended Complaint. 1-ER-2-8. Appellants noticed this appeal on December 11, 2020 pursuant to Fed. R. App. P. 4(a)(1)(A). 13-ER-3260-66. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUE(S) PRESENTED

1. Did the District Court err in dismissing the Teams' Complaint for business interruption losses under their commercial property insurance policies as a matter of law, given that the Teams identified multiple potential insured causes of their losses in their Complaint, which allegations must be taken as true, and causation is ultimately a factual question not appropriate for resolution on a motion to dismiss?

2. Did the District Court err in refusing to estop Insurers from relying on the Exclusion as a matter of federal and state law, as the Complaint alleges that Insurers previously misrepresented to the regulators approving the Exclusion that it was merely a clarification and not a reduction in coverage for disease-causing agents?

3. Did the District Court err in applying the Cancellation Exclusion to preclude coverage for MLB's failure to supply players to the Teams, when the Complaint nowhere alleges a "suspension, cancellation or lapse" of any contract, as that provision requires?

STATEMENT OF THE CASE

A. Minor League Baseball and Cancellation of the 2020 Season

The Teams are 24 owners and/or operators of 19 Minor League Baseball ("MiLB") teams located in California, Idaho, Indiana, Maryland, Oregon, South Carolina, Tennessee, Texas, Virginia and West Virginia. 2-ER-248, 264. MiLB was a growing business through 2019, with more than 40 million fans attending games each year in the 160 MiLB ballparks throughout the country. 2-ER-246-47.

This growing attendance was essential as the entire MiLB business model, and the Teams' primary source of revenue, is dependent on attracting as many fans as possible to each ballpark to purchase game tickets, merchandise, food and beverages, and entertainment and park amenities. 2-ER-246-48, 265. The operating model for MiLB teams is thus dependent on being permitted by federal, state, and local governments to allow the admission of thousands of fans to attend each ball game *in its facilities in person*. 2-ER-246-47. It also depends on receiving players, coaches, and other team personnel from the MLB team with which they have an affiliation agreement. *Id*.

The vast majority of the Teams' operating expenses, by contrast, bear little relationship to whether the teams are able to bring fans to the ballpark. 2-ER-247. Rather, the Teams have numerous fixed or already incurred costs, including lease payments to the municipal owners of the ballparks; salaries of permanent

employees; marketing and advertising expenses; and the purchase and stocking of merchandise and food and beverage in preparation for the 2020 baseball season. 2-ER-247-48, 265.

Because of this business model, which requires variable revenue tied to attendance but significant fixed operating expenses, and the fact that most MiLB team owners are small family or community businesses, the Teams have little prospect for economic survival if the operation of their businesses is interrupted for any significant period of time. 2-ER-248. Unfortunately, in 2020, for the first time ever, the entire MiLB baseball season was cancelled. 2-ER-246, 265. The result has been catastrophic financial losses for the Teams. 2-ER-246, 265-67.

B. The Multiple Varied Causes of the Teams' Losses

As detailed in the Teams' Complaint, there are several causes of the first-ever cessation of Minor League Baseball — the SARS-CoV-2 virus, the attendant disease, the pandemic, the governmental responses to it (or lack thereof), and MLB not supplying players to their affiliated MiLB teams. 2-ER-246, 248.

The Complaint alleges that droplets of the virus may "travel and attach to surfaces and cause harm" and that it is "statistically certain that the virus has been carried into each of the stadiums" and/or that the virus is present at "nearby properties." 2-ER-257. As a result, the Teams allege that there was an "actual and imminent threat to the ballparks" and they suffered physical loss of or damage to

their property. 2-ER-252. The Complaint further alleges that the Teams' "ballparks are within one mile of locations that have also suffered direct physical loss or damage to property arising out of the pandemic." 2-ER-267.

However, the causes of the Teams' losses do not end there. The Complaint alleges that authorities around the country, and in each of the Teams' respective states, have issued stay-at-home orders to protect persons and property from loss or damage, which forced the Teams to close their stadiums for baseball games. 2-ER-258. Specifically, the Complaint cites the following orders affecting the respective Teams: 1) in California, home to the Inland Empire 66ers, Lancaster JetHawks, and Stockton Ports, Governor Gavin Newsom issued Executive Order N-33-20 on March 19, 2020; 2) in Indiana, home to the Fort Wayne TinCaps and South Bend Cubs, Governor Eric J. Holcomb issued Executive Order No. 20-08, effective March 23, 2020; 3) in Oregon, home to the Eugene Emeralds, Governor Kate Brown issued Executive Order No. 20-12, effective March 23, 2020; 4) in Virginia, home to the Fredericksburg Nationals, Governor Ralph S. Northam issued Executive Order No. 53 (2020), effective March 23, 2020, and Executive Order No. 55 (2020), effective March 30, 2020; 5) in West Virginia, home to the West Virginia Power, Governor Jim Justice issued Executive Order No. 9-20, effective March 23, 2020; 6) in Idaho, home to the Boise Hawks and Idaho Falls Chukars, Director of the Idaho Department of Health and Welfare Dave Jeppesen

issued an "Order to Self-Isolate," effective March 25, 2020; 7) in Maryland, home to the Bowie Baysox and Frederick Keys, Governor Larry Hogan issued a statewide stay-at-home order effective March 30, 2020; 8) in Tennessee, home to the Chattanooga Lookouts, Governor Bill Lee issued Executive Order No. 22, effective March 31, 2020, and Executive Order No. 23, effective April 2, 2020; 9) in Texas, home to the Amarillo Sod Poodles, Frisco RoughRiders, and San Antonio Missions, Governor Greg Abbott issued Executive Order No. GA-14, effective March 31, 2020; and 10) in South Carolina, home to the Augusta GreenJackets, Columbia Fireflies, and Myrtle Beach Pelicans, Governor Henry McMaster issued Executive Order No. 2020-17, effective April 1, 2020, and Executive Order No. 2020-21, effective April 7, 2020. 2-ER-258-61.

As alleged in the Complaint, each of these orders closed non-essential businesses, like the Teams' stadiums, and required residents to stay at home and leave only for essential services or work. *Id*. As a result, the Teams alleged, "the ballparks [were] incapable of their intended function—serving as a venue for ball games attended by fans." 2-ER-261. The Complaint elaborates: "The nature of the virus, including its continuing, damaging and invisible presence, ***and the measures required to mitigate its spread***, constitute an actual and imminent threat, and direct physical loss or damage to the ballparks (as well as the areas surrounding them)

and has contributed to the cancellations of the Teams' MiLB games." 2-ER-261-62 (emphasis added).

In addition to these civil authority orders, the Complaint also alleges that federal government inaction contributed to the Stadium's losses. The Complaint alleges that in January 2020 the federal government "failed to recognize the severity of the pandemic and did not contain the virus;" and in February 2020 the federal government "did not authorize new funds or require the production of testing kits, ventilators, or personal protective equipment for healthcare workers. 2-ER-262. This "failure of the federal government to build an effective wall preventing the continued migration of the virus" forced the states above to impose the sweeping restrictions set forth in the orders above. 2-ER-263. The Teams thus alleged: "The governmental responses to the virus are a cause of direct physical loss or damage at the ballparks (as well as the areas surrounding them) and a cause of the Teams' business interruption." 2-ER-264.

Finally, the Teams also alleged that, as a result of the same physical loss of or damage to property that affected their own properties, MLB did not supply baseball players to each Team to enable the start of their season in early April 2020, as required by their player development contracts. 2-ER-264. While the Teams manage the business aspects of their operations, including marketing and sales, MLB manages the players, including paying their salaries and assigning

them to teams. *Id*. There is no allegation in the Complaint that MLB suspended, cancelled or caused its player development contract with the Teams to lapse. Rather, the allegation is that MLB failed to fully comply with, and thus breached, the parties' ongoing, existing and continuing contractual obligations. The Complaint pleads: "MLB not supplying players to the Teams caused direct physical loss or damage at the ballparks and is a cause of the Teams' business interruption." 2-ER-265.

C. The Teams' Insurance Coverage

As prudent business owners, the Teams prepared for these risks, including cancellation of games, by purchasing business interruption insurance from one of the Defendant Insurers.[2] 2-ER-248-54. The Teams each purchased nearly identical commercial "all risk" first-party property and casualty policies with grants of coverage for "business income" losses, covering all risks unless specifically excluded. 2-ER-248. As relevant here, the Policies cover:[3]

- "[D]irect physical loss of or damage to Covered Property" caused by any "Covered Cause of Loss." 3-ER-313.

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[2] Defendants National Casualty Co., Scottsdale Indemnity Co., and Scottsdale Insurance Co. are part of the Nationwide Family of Companies, affiliated with Nationwide Mutual Insurance Company.

[3] Unless noted, the Teams' Policies are the same for the sections cited. For convenience, the Teams cite to the provisions in the Policy attached as Exhibit A to the Complaint. 3-ER-288-414.

- Business interruption losses — "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.'" 3-ER-337. The Policies state that "[t]he 'suspension' must be caused by direct physical loss of or damage" to the insured property and that the "loss or damage must be caused by or result from a Covered Cause of Loss." *Id*.
- "Extra expenses" — the "necessary expenses" the policyholder incurs that the policyholder "would not have incurred if there had been no direct physical loss or damage to property caused by or resulting from a Covered Cause of Loss." *Id*.

"Covered Cause of Loss" is defined to mean "direct physical loss unless the loss is excluded or limited in this policy." 3-ER-327.

Further, the Policies provide additional Civil Authority Coverage where access to the insured premises and the surrounding area is denied by any order of civil authority. That coverage applies:

> When a Covered Cause of Loss causes damage to property *other than property at the described premises*, 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*, provided that both of the following apply:
>
> (1) Access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage, and the described premises are within that area but are not more than one mile from the damaged property; and
> (2) The action of civil authority is taken in response to dangerous physical conditions resulting from the damage or continuation of the Covered Cause of Loss that caused the damage, or the action is taken to enable a civil authority to have unimpeded access to the damaged property.

3-ER-338 (emphasis added).

Finally, all the Policies except one (Jethawks Baseball LLP, 8-ER-1897-1976) have "Contingent Business Income" coverage, which provides coverage for loss of business income when the Teams suffer business loss due to the failure of a supplier to deliver services. That provision states:

> We will pay the actual loss of Business Income you sustain for [a] period up to ninety (90) consecutive days after the date you restore operations with reasonable speed for income loss due to premises operated by others on whom you depend to
>
> (1) Deliver materials or services to you or to others for your account (Contributing Locations) . . . .

3-ER-359. Notably, the Contingent Business Income coverage is not tied directly to any physical loss or damage, nor any Covered Cause of Loss.

The Policies purport to exclude from coverage, in the Exclusion:

> [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.

3-ER-345.

The Policies also contain a Cancellation Exclusion, relied upon by Insurers, for "[a]ny increase of loss caused by or resulting from . . . [s]uspension, lapse or cancellation of any license, lease or contract." 3-ER-331. However, the Cancellation Exclusion also states: "But if the suspension, lapse or cancellation is directly caused by the 'suspension' of 'operations,' we will cover such loss that affects your Business Income during the 'period of restoration' . . . ." *Id.*

D. The Misleading Regulatory Representations to Obtain Approval of the Exclusion

As alleged in the Complaint, the Exclusion for viruses and other disease-causing microorganisms was adopted by regulators based on misleading representations by or on behalf of the insurance companies.

In 2006, industry representatives from the Insurance Services Office ("ISO") and the American Association of Insurance Services ("AAIS") sought approval on behalf of their insurance company members and subscribers from state insurance commissioners for the ISO Virus or Bacteria Endorsement CP 01 40 07 06 — the same Exclusion as in the Teams' Policies. 2-ER-272-73. To obtain approval for this new exclusion from coverage without a corresponding reduction in premiums, the industry falsely told state insurance regulators that commercial property insurance policies had not previously covered contamination of property with "disease-causing agents" and thus the new exclusion was merely a "clarification" of existing industry coverage. 2-ER-273.

This was a misrepresentation. For many years prior to 2006, numerous courts across the country had held that the threat or actual presence of disease-causing agents on property constituted physical loss of or damage to that property. 2-ER-273-75. As the Complaint alleges, Insurers were well aware that property damage and business losses could be caused by an array of noxious and untenable

conditions that render property unusable for its intended purpose—even if the bricks or mortar of the property have not been harmed—including:

a. Infusion of a factory with radioactive dust and radon gas;
b. The presence of carbon monoxide, pollutants, asbestos or lead in buildings;
c. The addition of chemicals to a sewage plant that destroy a bacteria colony;
d. The contamination of a well with E. coli bacteria;
e. The spread of dust, soot and smoke through a law firm as a result of 9/11;
f. The production of "off-tasting" soda that had not been rendered unfit for human consumption; and
g. The impact of odor in a house from an illegal methamphetamine lab.

Id.; *see infra* n. 11 (citing cases). Like these temporary and permanent conditions that make property dangerous to use, Insurers (and their drafting agents ISO and AAIS) understood that the presence or suspected presence of a dangerous virus on insured property or in its vicinity would also constitute "direct physical loss of or damage to" property. 2-ER-273-75.

Despite this knowledge, in 2006, the ISO and the AAIS, representing thousands of members and subscribing insurers, sought state regulatory approval for new exclusions referencing "virus" and "disease-causing agents," including the Exclusion here. 2-ER-276-77. The Complaint alleges that the insurance industry sought approval for this new standard-form exclusion because courts had determined that pre-existing exclusions for pollution or contamination did not exclude disease-related causes of loss. 2-ER-277. Not only did the industry

monitor these decisions, but it paid virus-related claims during the SARS epidemic. 2-ER-87, 92, 116, 119. As a result, the industry sought to exclude coverage for virus and disease-causing agents for the first time in 2006, while incorrectly telling regulators these causes of loss had not been covered previously.

The ISO submitted a Circular to explain the newly proposed exclusion for virus and disease-causing agents on July 6, 2006. It stated:

> The current pollution exclusion in property policies encompasses contamination (in fact, uses the term contaminant in addition to other terminology). Although the pollution exclusion addresses contamination broadly, viral and bacterial contamination are specific types that appear to warrant particular attention at this point in time. . . .
>
> Disease-causing agents may render a product impure (change its quality or substance), or enable the spread of disease by their presence on interior building surfaces or the surfaces of personal property. When disease-causing viral or bacterial contamination occurs, potential claims involve the cost of replacement of property (for example, the milk), cost of decontamination (for example, interior building surfaces), and business interruption (time element) losses. . . .
>
> *While property policies have not been a source of recovery for losses involving contamination by disease-causing agents, the specter of pandemic or hitherto unorthodox transmission of infectious material raises the concern that insurers employing such policies may face claims in which there are efforts to expand coverage and to create sources of recovery for such losses, contrary to policy intent.* In light of these concerns, we are presenting an exclusion relating to contamination by disease-causing viruses or bacteria or other disease-causing microorganisms.

2-ER-277-78; *see also* 2-ER-107-08 (emphasis added).

Similarly, the AAIS Filing Memorandum stated:

> *Property policies have not been, nor were they intended to be, a source of recovery for loss, cost or expense caused by disease causing agents*. With the possibility of a pandemic, there is concern that claims may result in efforts to expand coverage to create recovery for loss where no coverage was originally intended. *In light of this possibility, AAIS is filing a Virus or Bacteria Exclusion that will specifically address virus and bacteria exposures and* ***clarify policy intent***.

2-ER-94; 2-ER-123 (emphasis added).

However, as alleged in the Complaint, it was false for ISO or AAIS to assert in 2006 that property insurance policies were not sources of recovery for losses involving disease-causing agents. 2-ER-273-77. As noted above, by 2006, cases were legion finding that property policies covered such claims, including E. coli bacteria; radioactive dust; noxious air particles; asbestos; mold; mildew; health-threatening organisms; pesticides; and other harmful conditions that impact property or make it unfit for use. 2-ER-275-77, 279; *see infra* n. 11 (citing cases). Moreover, the Complaint notes that certain individual insurers filed their own submissions seeking ***not*** to use the exclusion in all their policies, on the grounds that the newly-excluded coverage was part of the risks property insurers previously contemplated when writing coverage. 2-ER-277-78; 2-ER-103-14.

The Complaint alleges that the insurance industry made such representations to induce the state regulators to allow the insurance companies to continue to charge the same and not reduced premiums when using the Exclusion. 2-ER-279. In fact, state regulators are the only ones that can negotiate meaningfully with

insurers about standard-form policy language which, when approved, is sold on a take-it-or-leave-it basis to policyholders. *Id*. As a result of the ISO's and AAIS's misrepresentations on behalf of the insurance industry (including Insurers), state insurance regulators approved the ISO Virus and Bacteria Endorsement, and the Exclusion was included in the Team's Policies. 2-ER-279-80.

E. The Insurers' Denial of the Teams' Claims

The Teams purchased their insurance policies for significant premiums, but when the 2020 season was cancelled, and the Teams' business-income losses were near total, Insurers failed to honor their obligations under the Policies. 2-ER-248, 269-72. Insurers denied each Team's claim for coverage on the same grounds: that the losses (1) do not result from direct physical loss of or damage to property; and (2) are barred by the purported Exclusion for viruses. 2-ER-269-72.

Facing catastrophic losses without their insurance coverage, on July 2, 2020, the Teams brought this action against Insurers for breach of contract or anticipatory breach of contract and for a declaratory judgment that they are entitled to the full amount of coverage under their Policies. 13-ER-3228-59. On August 21, 2020, the Teams filed the operative Amended Complaint. 2-ER-243-87.

F. The Motion to Dismiss

On September 11, 2020, Insurers filed a motion to dismiss the Teams' Complaint, arguing that the Exclusion precluded coverage for the Teams' losses.

2-ER-159-76. Insurers disputed the Teams' argument that the Exclusion is unenforceable because the insurance industry made misrepresentations to insurance regulators when seeking its approval. 2-ER-169-72. Insurers argued that regulatory estoppel is not recognized in the states in which the Teams operated a ballpark, and that, despite the evidence above, the Teams had not identified any inconsistent positions taken by the insurance industry when seeking approval from the regulators. 2-ER-170-71. Insurers also suggested that the Teams' claims were barred by the inapplicable Cancellation Exclusion. 2- ER-172-73.

The Teams responded on October 14, 2020, countering that the Exclusion does not apply, for two reasons. 2-ER-136-58. First, the Complaint pleads multiple causes of the Teams' losses, other than the COVID-19 virus, all of which must be credited on a motion to dismiss. 2-ER-143-44. The Teams alleged that any question as to causation here is a fact question not proper for resolution at this stage. *Id*. Second, the Teams argued, there are disputed issues as to whether Insurers should be estopped from relying on the Exclusion to bar coverage, since they obtained approval for the Exclusion by misrepresenting to regulators that existing coverage did not insure disease-causing agents. 2-ER-144-47. The Teams contended that this kind of regulatory estoppel is not only permissible under federal common law applicable here, but also under the laws of the states where the Teams' ballparks reside. 2-ER-147-53. The Teams also made clear that the

Cancellation Exclusion was irrelevant, as MLB never cancelled or suspended any contracts, but merely failed to comply with its ongoing contractual obligation to provide players. 2-ER-154-55.

G. The District Court's Erroneous Decision

Nonetheless, on November 13, 2020, the District Court erroneously granted Insurers' motion to dismiss. 1-ER-2-8. The court wrongly contended that a factual dispute did not exist on causation, even at the preliminary pleading stage, because the Complaint "explicitly attributes their losses to the virus" and alleges that "the government orders in question were issued as a direct result of the virus." 1-ER-5. The court incorrectly stated, contrary to the Teams' many pleaded contentions and the law on multiple contributing factual bases of causation, that: "Plaintiffs' amended complaint does not allege any fact supporting an alternative theory for the issuance of government orders. There is no allegation in the complaint that absent the pandemic, the government would have been prompted to issue stay-at-home orders or otherwise inhibit access to the ballparks." *Id*.

Notably, the District Court did not reject the Teams' claim that MLB's failure to provide players was a cause of their loss, further supporting that the Exclusion does not unambiguously preclude coverage, as it must for dismissal at this stage of the proceedings. Instead, the court conceded that, "even if Plaintiffs' losses were caused by such failure," the Cancellation Exclusion would apply. 1-

ER-5-6. Ignoring the fact that nothing in the Complaint alleged or even hinted at the required "suspension, lapse or cancellation" of a contract, the court instead applied this Exclusion in an overbroad manner based solely on the "contractual nature of MLB and MiLB's relationship." 1-ER-6.

Finally, the District Court improperly rejected the Teams' estoppel arguments. The court wrongly held that federal common law only applied to disputes involving rights of the United States, the individual states or foreign nations. 1-ER-7. It further contended that two states, Texas and Indiana, had refused to follow the preeminent New Jersey authority on regulatory estoppel, but said nothing about the other states that had either adopted that authority or would likely adopt it if presented with the issue. 1-ER-6-7. Instead, the court concluded, without support, that the regulatory estoppel argument advanced by the Teams is not cognizable under general equitable estoppel principles. 1-ER-7. The court held that estoppel is not available to bring within the coverage of a policy risks not covered or excluded by its terms. *Id*. Misunderstanding how standard-form policies are negotiated (solely between regulators and ISO and AAIS) and the consequences of misrepresentations to regulators, the court dismissed the Teams' claim because "Plaintiffs have not alleged that Defendants made representations to

them that the virus exclusion did not apply, or that coverage otherwise differed from that represented in the printed materials."[4] *Id*.

SUMMARY OF THE ARGUMENT

The District Court dismissed the Complaint on the erroneous view that the Exclusion applied solely and exclusively to the Teams' losses. Not so. On the face of their Complaint, the Teams have alleged various causes of their losses, several of which would not implicate the Exclusion, and all of which must be accepted as true at the pleading stage. Insurers bear the heavy burden of proving that the Exclusion unambiguously precludes coverage for their loss, which they cannot do here. Further, as the cause of a loss is a quintessential question of fact, the court erred in dismissing the Complaint on a motion to dismiss. Indeed, if Insurers had wanted to avoid further inquiry into the cause of their loss, they could have included in the Exclusion anti-concurrent causation (or ACC) language used

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[4] In their briefs below, Insurers also asserted that the Teams are not entitled to "civil authority" coverage because they supposedly have not alleged that government orders restricted access to areas "immediately surrounding" the ballparks. 2-ER-29. This is wrong. The Complaint sufficiently alleges that governmental orders prevented access to and harmed the ballparks and "the areas surrounding them," and that the ballparks are within one mile of locations that have also suffered damage. 2-ER-264, 266. The District Court did not address this argument in its decision.

by insurers nationwide (and elsewhere in the Policies) to explicitly preclude coverage for losses regardless of any other contributing cause.

The District Court also erred in dismissing the Teams' regulatory estoppel defense. Even if the Court could attribute the Teams' losses entirely to the COVID-19 virus (on the face of the pleadings, it cannot), under federal common law or state law, Insurers should be estopped from relying on the Exclusion to bar coverage based on the misrepresentations they made to insurance regulators to obtain approval of the Exclusion. Federal courts routinely apply judicial estoppel in these scenarios and can do so here under federal common law. And even if state law applied, in the states where the Teams are located, one state has explicitly adopted the doctrine of regulatory estoppel, one has advocated for its application as an *amicus*, and the others have not rejected it in similar circumstances. At a minimum, under basic principles of equitable estoppel, recognized by all ten states and federal courts, Insurers should not be allowed to benefit at the Teams' expense for their improper conduct and corresponding failure to reduce premiums when seeking regulatory approval of the Exclusion.

Finally, the District Court's reliance on the Cancellation Exclusion to dismiss the Teams' Complaint was entirely misplaced. The Cancellation Exclusion precludes coverage for losses relating solely to the "suspension" or "cancellation" of a contract, not, as here, to MLB's breach or inability to comply

with its existing or continuing contractual obligations. In fact, the Teams' business losses arising from failure of a supplier to provide needed goods or services is exactly what the Teams' Policies were designed to cover. Ignoring this, the District Court wrongly suggests that the Cancellation Exclusion applies merely because the Teams and MLB have a "contractual . . . relationship." But such a reading of the Cancellation Exclusion renders coverage entirely illusory, contrary to longstanding contract interpretation principles, as every aspect of the Teams' business is governed by some sort of contractual relationship.

STANDARD OF REVIEW

The Ninth Circuit reviews *de novo* a district court's dismissal of a complaint pursuant to Rule 12(b)(6). *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 911 (9th Cir. 2012) (citations omitted). In reviewing a motion to dismiss for failure to state a claim, 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, N.A.*, 720 F.3d 1204, 1207 (9th Cir. 2013). Put another way, this Court "inquire[s] whether the complaint's factual allegations, together with all reasonable inferences, state a plausible claim for relief." *Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 (9th Cir. 2011). "If there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to

dismiss under Rule 12(b)(6)." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). A court must not grant the motion unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle him or her to relief." *Iolab Corp. v. Seaboard Sur. Co.*, 15 F.3d 1500, 1504 (9th Cir. 1994).

ARGUMENT

I. CHOICE OF LAW

As the District Court stated, to the extent there is a conflict, a federal court must apply the choice-of-law of law rules of the state in which it sits. *Global Thermoforming Inc. v. Auto-Owners Ins. Co.*, No. CV-20-01614-PHX-SMB, 2021 WL 65981, at *2 (D. Ariz. Jan. 7, 2021). In Arizona, courts apply the Restatement (Second) of Conflict of Laws § 193 (Am. Law Inst. 1971) to hold that insurance contract disputes are governed by "the principal location of the insured risk," *i.e.*, the state in which the insured property is located. *Id*. (citations omitted). Even where a policy insures property located in multiple states, Arizona courts apply the law of each state to the insured property located within it. *Id*. Here, as the court noted, the insured Teams' ballparks are located in the following ten states — California, Idaho, Indiana, Maryland, Oregon, South Carolina, Tennessee, Texas, Virginia and West Virginia.

II. THE DISTRICT COURT IMPROPERLY APPLIED THE EXCLUSION TO A COMPLAINT ALLEGING MULTIPLE CONTRIBUTING CAUSES OF THE TEAMS' LOSSES

A. Insurers Cannot Meet Their Heavy Burden of Proving the Exclusion Applies Solely and Exclusively to the Teams' Losses

At its core, Insurers' motion to dismiss centers on the scope and application of the Exclusion, which applies to loss "caused by or resulting from" certain disease-causing agents. Even assuming for purposes of this appeal that the COVID-19 virus was one cause of the Teams' loss, that language, on its face, does not clearly and unambiguously preclude all coverage when such virus is not the sole cause, but one of many contributing causes of an insured's loss.

Under black letter insurance contract interpretation rules, Insurers bear a heavy burden to prove that the Exclusion applies fully and completely to preclude the insurance coverage otherwise available under the Policies.[5] Moreover, in the

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[5] *See, e.g.*, *Cornerstone Title & Escrow, Inc. v. Evanston Ins. Co.*, 555 F. App'x 230, 235 (4th Cir. 2014) (Maryland) (insurer burden on exclusions); *Owners Ins. Co. v. Clayton*, 614 S.E.2d 611, 614 (2005) (South Carolina) ("[P]olicy exclusions are construed most strongly against the insurance company, which also bears the burden of establishing the exclusion's applicability."); *Asbury v. Ind. Union Mut. Ins. Co.*, 441 N.E.2d 232, 242 (Ind. Ct. App. 1982) (exclusion given effect "only if it clearly and unmistakably brings within its scope the particular act or omission that will effectuate the provision"); *Gastar Expl. Ltd. v. U.S. Specialty Ins. Co.*, 412 S.W.3d 577, 583 (Tex. App. 2013) (for exclusions, "court must adopt the construction urged by the insured as long as that construction is not unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent"); *Chartrand v. Ill. Union Ins. Co.*,

states at issue, if there exist two reasonable interpretations of how the exclusion should be applied, it must be interpreted liberally in favor of coverage for the insured.[6]

Following these principles, some courts have rejected an insurer's reliance on a so-called "virus" exclusion when the policyholder asserted an alternate cause of its loss or had a reasonable explanation for a different application of the exclusion. *See Elegant Massage, LLC v. State Farm Mut. Auto. Ins. Co.*, No. 2:20-cv-265, 2020 WL 7249624, at *11-13 (E.D. Va. Dec. 9, 2020) (virus exclusion did not apply where plaintiffs alleged that loss of business occurred as result of civil

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No. C 08-05805 JSW, 2009 WL 2776484, at *3 (N.D. Cal. Aug. 28, 2009); *Unigard v. McCarty's, Inc.*, 756 F. Supp. 1366, 1368 (1988) (Idaho) ("The alleged exclusion cannot be extended by interpretation or implication, and must be accorded a strict and narrow construction."); *Allstate Ins. Co. v. Watts*, 811 S.W.2d 883, 886 (Tenn. 1991).

[6] *See, e.g.*, *Berman v. Amex Assur. Co.*, No. SACV 08-01051 DOC (RNBx), 2008 WL 11339649, at *6 (C.D. Cal. Nov. 14, 2008) ("Because the exclusions at issue are susceptible to more than one reasonable interpretation and in light of California's strict construction of provisions excluding coverage against the insurer, the Court cannot at this stage in the proceedings find that Plaintiffs have failed to state a claim."); *Allied Prop. & Cas. Ins. Co. v. Zenith Aviation, Inc.*, 336 F. Supp. 3d 607, 611 (E.D. Va. 2018) ("[W]here two interpretations equally fair may be made, the one which permits a greater indemnity will prevail.") (citations omitted); *Asbury*, 441 N.E.2d at 236 (Indiana) ("An insurance contract must be construed to prevent the defeat of the insured's indemnification for a loss when the general language of the contract is susceptible to two equally fair constructions."); *First Mercury Ins. Co., Inc. v. Russell*, 806 S.E.2d 429, 436 (2017) (West Virginia).

closure orders, not presence of COVID-19 on property); *Henderson Road Rest. Sys., Inc. v. Zurich Am. Ins. Co.*, No. 1:20 CV 1239, 2021 WL 168422, at *14-15 (N.D. Ohio Jan. 19, 2021) (finding microorganism exclusion did not apply because cause of plaintiff's loss was government closure orders and not COVID-19 on premises); *see also JGB Vegas Retail Lessee, LLC v. Starr Surplus Lines Ins. Co.*, No. A-20-816628-B, 2020 WL 7190023, at *3 (Nev. Dist. Ct. Nov. 30, 2020) (finding it reasonable to interpret pollution and contamination exclusion barring coverage for viruses to apply only to "instances of traditional environmental and industrial pollution and contamination," and not to exclude "naturally-occurring, communicable disease"); *Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co., Ltd.*, No. 6:20-cv-1174-Orl-22EJK, 2020 WL 5939172, at *4 (M.D. Fla. Sept. 24, 2020) (noting denying coverage for Covid-19 losses "does not logically align with the grouping of the virus with other pollutants" in virus exclusion).

Here, Insurers bear the burden of proving the Teams' losses were caused exclusively by the "virus" rather than by, for example, the governmental orders restricting access to the Teams' ballparks, government inaction in the face of the pandemic or the Teams' inability to obtain players from MLB. The District Court failed to recognize that, based on the many causation allegations in the Complaint, Insurers simply cannot meet their heavy burden to preclude all coverage here, let alone at the motion to dismiss stage.

B. Alternatively, the Cause of the Teams' Losses Is a Fact Question Not Properly Decided on a Motion to Dismiss

It is undisputed that the Complaint pleads multiple non-excluded causes of the Teams' loss, other than the COVID-19 virus. At this stage of the proceedings, those alternate factual bases of causation — including that governmental orders restricted access to the Teams' ballparks, that MLB failed to provide players to MiLB, and government inaction — must be fully credited and taken as true.

The District Court's suggestion that, because the Complaint "explicitly attributes their losses to the virus," the existence of a factual dispute is "not plausible" (1-ER-4-5) is incorrect based on a plain reading of the Complaint. It also ignores fundamental and longstanding authority on the issue of causation. Specifically, the Teams alleged multiple, alternative and/or contributing causes for their losses. As courts around the country have held, including in the states at issue, questions of causation are questions of fact.[7] "The majority of cases

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[7] *See, e.g.*, *Cramer v. Slater*, 204 P.3d 508, 515 (Idaho 2009) ("The question of proximate cause is one of fact and almost always for the jury."); *Cont'l Ins. Co. v. Kouwehoven*, 218 A.2d 11, 18–19 (Md. 1966) (whether damage was caused by wind or water "was one of fact to be determined upon a consideration of all the circumstances proved"); *Naumes, Inc. v. Landmark Ins. Co.*, 849 P.2d 554, 55 (Or. 1993); *Bailey v. Segars*, 550 S.E.2d 910, 914 (S.C. 2001); *Dorman v. State Indus., Inc.*, 787 S.E.2d 132, 138 (Va. 2016); *Tenn. Farmers Mut. Ins. Co. v. Greer*, 682 S.W.2d 920, 923 (Tn. Ct. App. 1984) (directed verdict for insurer inappropriate where there was a dispute as to the cause of the property damage); *Murray v. State Farm Fire and Cas. Co.*, 509 S.E.2d 1, 12 (W.Va. 1998).

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.

Further, although the different states' laws vary, it is generally understood that when covered and uncovered risks together cause a loss, the loss is covered if, at minimum, the covered risk was the efficient or predominant, or in some cases merely concurrent, cause of the loss.[8] As a federal court in Virginia, one of the subject states, held: "[I]n applying the Virus Exclusion there must be a direct connection between the exclusion and the claimed loss and not . . . . a tenuous connection anywhere in the chain of causation." *Elegant Massage*, 2020 WL 7249624, at *12. Thus, whether the virus was the predominant cause of the

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[8] *See, e.g.*, *King v. North River Ins. Co.*, 297 S.E.2d 637, 638 (S.C. 1982) ("Turning to the causation issue, it is generally sufficient to prove the event insured against was the efficient cause of the loss, even though not the sole cause."); *Naumes*, 849 P.2d at 556 (Oregon) (fact question existed as to whether damage arose from excluded rainstorm or later ensuing mix of mud, rock and debris, a covered cause of loss); *Murray*, 509 S.E.2d at 12 (W. Va.) (efficient proximate cause is "not necessarily the last act in a chain of events, nor is it the triggering cause," rather it is the "predominating cause of the loss"); *Union Sav. Bank v. Allstate Indem. Co.*, 830 F. Supp. 2d 623, 630 (S.D. Ind. 2011). Texas courts allow for coverage when there are two concurrent causes, but unlike other states, the insured must segregate damages between the two causes of loss. *Travelers Indem. Co. v. McKillip*, 469 S.W.2d 160, 162 (Tex. 1971).

Teams' losses is a quintessential question of fact that cannot be resolved on a motion to dismiss.

Here, the Teams have pleaded at least five possible causes of their loss, including "the SARS-CoV-2 virus, the attendant disease, the pandemic, the governmental response to it, or the Teams' inability to obtain players." 2-ER-248, 255-65. Of these alleged risks, only the virus is potentially excluded from coverage. Recognizing this fatal fact, Insurers ignore these alternative allegations and obfuscate a key factual question—causation—by focusing on 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 ("[The need for a factfinder] is especially true in those instances in which more than one cause contributes to the subject injury, and reasonable persons could draw different conclusions regarding the question of which of the contributing causes is the proximate cause of the injury."). Thus, the question of causation is improper for resolution at this time and the District Court erred in dismissing the Complaint.

Notably, the District Court did not contest that MLB's failure to provide players is an alternate cause of the Teams' losses, instead suggesting only, and wrongly (as set forth below) that the Cancellation Exclusion precludes coverage for that cause of loss. 1-ER-5-6. Nor did the District Court address the many allegations regarding the federal government's failure to prevent or curtail the

spread of the virus, which is distinct from losses caused by the virus itself. Moreover, the District Court failed to distinguish between the virus and the pandemic generally. This is critical because the insurance industry had promulgated exclusions that encompassed pandemics, rather than simply viruses, yet Insurers here chose to include a narrower exclusion limited only to viruses. *See e.g.*, *Meyer Nat. Foods, LLC v. Liberty Mut. Fire Ins. Co.*, 218 F. Supp. 3d 1034, 1037–38 (D. Neb. 2016) (highlighting exclusion for loss or damage from "[t]he actual or suspected presence or threat of any virus, organism or like substance that is capable of inducing disease, illness, physical distress or death, whether infectious or otherwise, *including but not limited to any epidemic, pandemic, influenza, plague, SARS, or Avian Flu*") (emphasis added).

And, regarding the government's civil authority orders, the court wrongly concluded that the Exclusion applies simply because the virus was part of the causal chain of the Teams' other alleged causes of loss. 1-ER-5 ("There is no allegation in the complaint that absent the pandemic, the government would have been prompted to issue stay-at-home orders or otherwise inhibit access to the ballparks."). But as noted above, under proximate causation rules, the virus can be part of the causal chain without vitiating coverage, or at least, this is a fact issue. *See Elegant Massage*, 2020 WL 7249624, at *12 ("[A]lthough the Virus Exclusion

does require that the virus be the cause of the policyholder's loss, the connection must be the immediate cause in the chain.").

Because the Teams have pleaded causes of loss other than the virus that, if accepted by a jury, would require Insurers to cover the Teams' losses, the Court should reverse and remand to the District Court.

C. Insurers Chose Not to Use Exclusionary Language That Would Have Barred Coverage Regardless of Other Contributing Causes

If the Insurers had wanted to avoid a factual inquiry, they had at their disposal, but chose not to use, a widely available tool: the ACC clause. An ACC clause precludes coverage for an excluded risk "regardless of any other cause or event that contributes concurrently or in any sequence to the loss." Because the Insurers failed to include such language in the Exclusion, they may not exclude coverage as if they did. *See, e.g.*, 3-ER-345. Indeed, the Insurers did use ACC language elsewhere in their Policies, in a section excluding coverage for earth movement, war and nuclear hazards (3-ER-460-61); this underscores the District Court's error.

The significance of an insurer's decision to include an ACC clause in an exclusion barring coverage for viruses is reflected in recent COVID-19 coverage decisions, including in some of the states at issue. *See Hajer v. Ohio Sec. Ins. Co.*, No. 20-cv-00283, 2020 WL 7211636, at *4 (E.D. Tex. Dec. 7, 2020) ("[T]he exclusion applies . . . 'regardless of any other cause or event that contributes

concurrently or in any sequence to the loss.' . . . Here, the COVID-19 pandemic fits neatly 'in the chain of causation.'"). In fact, in most COVID-19 related cases in other jurisdictions finding that a virus exclusion was applicable as a matter of law, the exclusion contained an ACC clause.[9] Those courts have made clear that, unlike the basic language in the Exclusion here, ACC clauses are intended to replace the standard law on proximate causation.[10]

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[9] *See, e.g.*, *Border Chicken AZ LLC v. Nationwide Mut. Ins. Co.*, No. 20-cv-00785, 2020 WL 6827742, at *4 (D. Ariz. Nov. 20, 2020) (enforcing virus exclusion in COVID-19 case because of ACC clause and language stating exclusion applied "directly or indirectly"); *Seifert v. IMT Ins. Co.*, No. 20-cv-1102, 2020 WL 6120002, at *4 (D. Minn. Oct. 16, 2020) ("Pursuant to the anti-concurrent loss provision, if a virus is any part of the causal chain causing a loss, then the loss is not covered."); *Turek Enters., Inc. v. State Farm Mut. Auto. Ins. Co.*, No. 20-cv-11655, 2020 WL 5258484, at *8 (E.D. Mich. Sept. 3, 2020) (noting that plaintiff "disregards the [ACC Clause], which extends the Virus Exclusion to all losses where a virus is part of the causal chain"); *Wilson v. Hartford Cas. Co.*, No. 20-cv-3384, 2020 WL 5820800, at *8 (E.D. Pa. Sept. 30, 2020) ("Even assuming that the governmental closure orders are a separate cause of loss, the virus exclusion would still bar coverage because of the [ACC] clause."); *Santo's Italian Café LLC v. Acuity Ins. Co.*, No. 1:20-cv-01192, 2020 WL 7490095, at *15 (N.D. Ohio Dec. 21, 2020).

[10] *See, e.g.*, *N&S Rest. LLC v. Cumberland Mut. Fire Ins. Co.*, No. 20-cv-05289, 2020 WL 6501722, at *3–4 (D.N.J. Nov. 5, 2020) (ACC language "demonstrates the parties' intent to contract around the efficient proximate cause doctrine"); *LJ New Haven LLC v. Amguard Ins. Co.*, No. 20-cv-00751, 2020 WL 7495622, at *17 (D. Conn. Dec. 21, 2020) (statement that exclusion applies "'regardless of any other cause or event that contributes concurrently or in any sequence to the loss,' displaces the 'efficient proximate cause' analysis that would ordinarily apply when construing an insurance policy.").

A Texas federal court that applied a virus exclusion recently recognized that the types of losses alleged by the Teams here are all distinct causes of loss that would not ordinarily be excluded absent an ACC clause:

> The Court does not agree with Defendant's conflation of COVID-19 and the "virus." And in fact the Court might be receptive to the argument that a policy excluding damage caused by a virus might not exclude damages caused by having to (a) close one's business to sanitize after learning that someone with a disease caused by a virus came in, or (b) close one's business because of government orders intended to stop the spread of a disease caused by a virus. In other words, the Court might be receptive to arguments that SARS-CoV-2, COVID-19, the COVID-19 Pandemic, and government shutdowns related to the COVID-19 Pandemic are four separate things.

Indep. Barbershop, LLC v. Twin City Fire Ins. Co., No. A-20-cv-00555, 2020 WL 6572428, at *3 (W.D. Tex. Nov. 4, 2020) (emphasis added). However, unlike here, the court emphasized that it could not "in good faith hold that the SARS-CoV-2 virus is not even a contributing cause to these other terms . . . ***when the policy contained an ACC clause***." *Id*. (emphasis added).

By contrast, in *Lombardi's Inc. v. Indemnity Insurance Co. of North America*, No. DC-20-05751-A (Tex. Dist. Ct. October 13, 2020), the exclusion was identical to that at issue here—and the court denied the insurer's motion to dismiss. Although the court did not issue a written opinion, one of the policyholder's principal arguments, implicitly accepted by the court, was that the insurer failed to include a "comprehensive pandemic exclusion, excluding all conceivable virus

implications irrespective of sequence. . . . and cannot have the Court rewrite its Policy after the fact." *See* attached Addendum (Decision; Brief at 24).

The distinction between an exclusion with an ACC clause and one without was explained by the Supreme Court of Idaho, one of the subject states, in a pre-COVID ruling: "[W]hen anti-concurrent causation language is used in an insurance policy, an insurer need only show an excluded cause is *a* cause of the damage, not *the only or sole* cause." *ABK, LLC v. Mid-Century Ins. Co*., 454 P.3d 1175, 1182 (Idaho 2019) (emphasis in original).

By contrast, the District Court below failed to consider the significance of the Insurers' failure to include an ACC clause in the Exclusion. The court cited two decisions, *Diesel Barbershop* and *Franklin EWC*, for the proposition that "[s]imilar COVID-19 causation arguments have been consistently rejected." 1-ER-5. Yet those cases each relied on the presence of an ACC clause and thus are not "similar" to this case at all. *See Diesel Barbershop, LLC v. State Farm Lloyds*, No. 20-cv-461, 2020 WL 4724305, at *6 (W.D. Tex. Aug. 13, 2020) ("The language in the lead-in of the Virus Exclusion expressly states that [the insurer] does not insure for a loss regardless of 'whether other causes acted concurrently or in any sequence within the excluded event to produce the loss.'"); *Franklin EWC, Inc. v. Hartford Fin. Servs. Grp.*, Inc., No. 20-cv-04434, 2020 WL 5642483, at *2

(N.D. Cal. Sept. 22, 2020) ("*Franklin I*") (exclusion contained ACC clause and stated that it applied "directly or indirectly").

Notably, those cases that have granted coverage to policyholders for COVID-19 claims despite a virus-related exclusion sometimes did so ***even with an exclusion that contained an ACC clause***. *See Henderson*, 2021 WL 168422, at *14-15; *JGB Vegas Retail Lessee*, 2020 WL 7190023, at *3 (Nev. Dist. Ct. Nov. 30, 2020); *Elegant Massage*, 2020 WL 7249624, at *11-12 (noting that Virginia, one of the subject states here, does not recognize ACC clauses in its jurisdiction).

In short, Insurers' failure to include a standard-form ACC clause in the Exclusion should have been fatal to their Motion. Put differently, because the Teams alleged multiple causes of their losses and the Exclusion does not include an ACC clause, Insurers cannot use the Exclusion as a basis for dismissal without further factual development below. Moreover, Insurers' use of ACC clauses elsewhere in their Policies (*see* 3-ER-460-61) shows that they knew how to use that language when they wanted to; they should not be able to "rewrite" the Policies to benefit from a provision they chose not to include in the Exclusion here.

III. THE DISTRICT COURT FAILED TO RECOGNIZE THAT THE EXCLUSION IS UNENFORCEABLE UNDER APPLICABLE ESTOPPEL PRINCIPLES

Even if the Exclusion applied here (it does not), the District Court erred in dismissing the Complaint for a second, independent reason — the Teams have

sufficiently alleged that Insurers are estopped from enforcing the Exclusion based on misrepresentations in 2006 to state regulators to obtain approval of the Exclusion. To reduce their exposure without reducing premium, Insurers misleadingly told the commissioners that the Exclusion was a "mere 'clarification' of existing coverage," when, in reality, cases holding that commercial property policies covered "disease-causing agents" as insured risks were "legion" at the time. 2-ER-273, 276, 279. Relying on that false representation, the state insurance departments approved the Exclusion, and Insurers profited for years by avoiding a rate reduction. Federal and state law bars an insurer from relying on an exclusion that was obtained through such misrepresentations, either under principles of regulatory, judicial and/or equitable estoppel.

A. Under Leading Authority, Insurers Are Estopped from Relying on Exclusions Obtained Through Regulatory Misrepresentation

An insurance policy is a contract of adhesion. *Ferguson ex rel. McLeod v. Coregis Ins. Co.*, 527 F.3d 930, 933 (9th Cir. 2008). In fact, "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 state insurance commissioners – the only persons who can negotiate meaningfully with insurers about standard-form policy language –

protect policyholders principally through the form and rate approval process. *See Morton*, 629 A.2d at 872.

In *Morton*, the leading insurance coverage case on regulatory estoppel, the Supreme Court of New Jersey held that an exclusion is unenforceable when, to avoid a reduction in legally chargeable premiums, an insurer obtains approval of the exclusion by misrepresenting the state of the law to the state insurance commission. *Id*. at 876. In *Morton*, insurers sought to enforce a now-standard pollution exclusion. Years earlier, however, they had falsely represented to insurance regulators that "coverage 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 852. The reality is that this coverage *was* provided under historic policies. *Id*. at 848. Because the insurers were able to restrict coverage without a commensurate decrease in insurance premiums — by lying to regulators — *Morton* held that they were estopped from relying on the literal terms of the exclusion.

This case is *Morton* all over again. In 2006, to obtain approval of the Exclusion without being required to reduce their premiums, Insurers told insurance regulators that "property policies have not been a source of recovery for losses involving contamination by disease-causing agents." 2-ER-278; 2-ER-107-08. That was false. As alleged in the Complaint, before 2006, based on judicial

opinions in numerous civil actions across the United States,[11] "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." 2-ER-274-75, 279. Insurers thus misrepresented the scope of previously available coverage to the commissions in 2006. And the commissions relied on this

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[11] *See, e.g.*, *Am. All. 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); *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332, 1336 (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.*, No. CIV. A. 96-0498-B, 1998 WL 566658, at *4 (Mass. Super. Aug. 12, 1998) (carbon monoxide); *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); *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 (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); *Pepsico, Inc. v. Winterthur Int'l Am. Ins. Co.*, 806 N.Y.S.2d 709, 711 (App. Div. 2005) (off-tasting soda).

representation to permit Insurers to charge the same premiums for what was, in fact, reduced coverage. *Id.* ¶ 126; *Cf. Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 781 A.2d 1189, 1192 (Pa. 2001) (reversing grant of motion to dismiss when 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").

Although not addressed by the District Court, Insurers asserted below that regulatory estoppel did not apply because the Teams have failed to allege any "inconsistent position" between that taken in the ISO Circular and in this case. That argument is without merit. Put simply, an insurer cannot escape regulatory estoppel by lying consistently, rather than inconsistently. Or put another way, two wrongs cannot make a right: An insurer's misrepresentation in a first proceeding cannot be excused simply because the insurer doubles down on that misrepresentation in a second proceeding.

In fact, in *Morton*, the insurer's misrepresentation to regulators — which is materially indistinguishable from the type of misrepresentation the Teams have alleged here — was sufficient to satisfy the elements of estoppel without a showing of inconsistency. In *Morton*, the drafting organizations said the pollution exclusion was a clarification because the policy form at issue previously did not cover certain pollution (a misrepresentation). 629 A.2d at 847-48. Here, they said the virus and

bacteria exclusion was a clarification because the policy form at issue previously did not cover loss from disease-causing agents (a misrepresentation). In both cases, the insurers consistently claimed that coverage was excluded by the exclusion at issue. In *Morton*, as here, the insurers thus did not change their position as to what the exclusion covered, but estoppel still applies based on their regulatory misrepresentations.

The District Court did not challenge any of these facts, and indeed, accepted that the Teams adequately pleaded that Insurers improperly obtained approval of the Exclusion. Instead, the District Court dismissed the case on the ground that regulatory estoppel is merely a "New Jersey state law defense," which "no state whose laws apply has adopted." 1-ER-6. This is wrong. Given the nature of the regulatory process, drafting organization misrepresentations to regulators are the equivalent of the Insurers making misrepresentations directly to the Teams, something for which no court would deny the Teams' remedy. Federal estoppel law governs this issue and, regardless, the Teams have sufficiently pleaded relief under both federal and state law.

B. Federal Common Law Controls and Supports the Teams' Estoppel Claim

As courts have recognized, regulatory estoppel is simply "a form of judicial estoppel." *Sunbeam*, 781 A.2d at 1192; *see Grede v. Bank of N.Y.*, No. 08-cv-2582, 2009 WL 188460, at *6 (N.D. Ill. Jan. 27, 2009); *Mueller Copper Tube*

Prods., Inc. v. Pa. Mfrs. Ass'n Ins. Co., No. 04-cv-2617, 2006 WL 8435027, at *6 (W.D. Tenn. Dec. 14, 2006), *aff'd*, 254 F. App'x 491 (6th Cir. 2007). In this Circuit and across the country, judicial estoppel is governed by federal common law. *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 603 (9th Cir. 1996). Because regulatory estoppel is "a form of judicial estoppel," this Court should apply federal common law to allow the application of regulatory estoppel here.

In its Decision, the District Court neglected to consider this Court's decision in *Rissetto*, instead holding "federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implications the conflicting rights of States or our relations with foreign nations, and admiralty cases." 1-ER-7. Yet federal common law is not so limited. Rather, as *Rissetto* demonstrates, federal courts also craft federal common law to protect "uniquely federal interests," *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988), including the interests of federal courts themselves, *see, e.g.*, *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001) (claim preclusive effect of judgment of federal court). In shaping the federal common law, "federal courts must be free to develop principles that most adequately serve their institutional interests," including, importantly, the "integrity of judicial institutions." *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 n.4 (6th

Cir. 1982). Those institutions include state institutions, even institutions that are "administrative rather than judicial." *Rissetto*, 94 F.3d at 604 (citing, as an example of an administrative proceeding to which judicial estoppel applies, a "Maine Bureau of Insurance approval proceeding").

The District Court's citation to *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981) is not to the contrary. 1-ER-7-8. Although noting that federal common law is most appropriate for interstate and international issues, the U.S. Supreme Court held that federal common law applies where "uniquely federal interests," are at stake, such as where "Congress has vested jurisdiction in the federal courts and empowered them to create governing rules of law." *Tex. Indus.*, 451 U.S. at 640, 642.

Here, Insurers would offend the integrity of the state insurance commissions and this Court by procuring the Exclusion through misrepresentation in the former only to enforce the Exclusion in the latter. By applying *Morton* as a matter of federal common law here, the Court can short-circuit Insurers' misconduct, encourage insurers to be honest with state regulators, and preserve the integrity of fundamental judicial and administrative institutions.

C. The States at Issue Have Recognized or Would Recognize Regulatory Estoppel Under the Facts as Pleaded Here

Even if state law governed estoppel (it does not), the Teams have sufficiently pleaded that the Exclusion is unenforceable under state law. Of the ten

subject states, one has explicitly recognized the doctrine of regulatory estoppel (West Virginia), another has advocated for its application as an *amicus* (Indiana), and the other state courts have not explicitly rejected it. Thus, as there is every reason to believe they each would apply it under the facts here, the Complaint should have survived a motion to dismiss.

Contrary to the District Court's erroneous suggestion (1-ER-6 n.5), West Virginia—one of the "subject states"—did support regulatory estoppel under a public policy theory. In *Joy Technologies, Inc. v. Liberty Mutual Insurance Co*., 421 S.E.2d 493 (W. Va. 1992), a precursor to *Morton*, the Supreme Court of Appeals of West Virginia, applying West Virginia law, analyzed the same exclusion at issue in *Morton* and reached the same conclusion. *Id*. at 495. Although, as the District Court notes, the case does not use the word "estoppel" (1-ER-6 n.5), it held that an insurer was barred from enforcing its interpretation of an exclusion because the industry had procured the exclusion by representing to regulators that it was merely a clarification of existing coverage. *Id*. at 499. Further, in choosing to apply West Virginia law, the court held that procurement of an exclusion through misrepresentation to regulators would contravene public policy. *Id.* at 497 (noting, in connection with choice of law analysis, that "an essential part of the public policy of the State of West Virginia is that the law of the State should be administered in such a way as to insure that foreign

corporations which seek to do business in West Virginia act in a manner consistent with their studied, unambiguous, official, affirmative representations to the State, its subdivisions, or its regulatory bodies."). Likewise, the State of Indiana, another one of the "subject states," served as *amicus* for the *Morton* policyholder, arguing the insurer should be regulatorily estopped. 629 A.2d at 855.

As for the remaining states, few have directly addressed the issue of regulatory estoppel and its application to these facts. Under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), 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) (citations omitted). And contrary to Insurers' contentions, simply because a state may not have affirmatively adopted regulatory estoppel does not mean it would explicitly reject it.[12] To the contrary, taking all the Teams' allegations as true on this motion to dismiss, there is nothing to suggest the highest courts of the remaining states

[12] For example, the Arizona District Court below recently declined to apply regulatory estoppel in a COVID-19 case. *See Border Chicken*, 2020 WL 6827742, at *5. But that case merely noted that Arizona courts had not affirmatively "recognized" regulatory estoppel (not that they had actually rejected it) and it cited only another federal court case as support. And, unlike here, the plaintiff there had failed to plead any facts relating to regulatory estoppel in its complaint. *Id*.

would not adopt regulatory estoppel and refuse to enforce the Exclusion based on Insurers' misrepresentations to regulators here.

Nor is the District Court correct that two states — Texas and Indiana — "have refused to follow *Morton*'s guidance when given the opportunity." 1-ER-7. In *Cincinnati Insurance Co. v. Flanders Electric Motor Service, Inc.*, 40 F.3d 146, 153 (7th Cir. 1994), the Seventh Circuit, applying Indiana law, did not address regulatory misrepresentation at all, but merely held that it would not look to the "drafting and regulatory history" of a pollution exclusion to decipher the meaning of its unambiguous terms. In *SnyderGeneral Corp. v. Great American Insurance Co.*, 928 F. Supp. 674 (N.D. Tex. 1996), the Texas District Court actually stated that regulatory estoppel "has not been addressed in Texas." *Id*. at 682. It then incorrectly presumed that Texas would not adopt regulatory estoppel by citing to a state decision that refused to alter the unambiguous terms of an exclusion by parol evidence. *Id*. But in both cases, that is a different issue entirely. Under the parol evidence rule, extrinsic evidence is inadmissible to aid in construction of unambiguous text. However, it does not bar extrinsic evidence for defenses to contract formation, such as misrepresentation. The Teams' argument here is that, based on Insurers' misrepresentations, the Exclusion is unenforceable, regardless of its meaning. If Insurers had made direct misrepresentations to the Teams, the parol evidence rule would have no impact on whether there would be a viable

cause of action. *Morton* underscores this point, reaching its holding "notwithstanding the literal terms of the standard pollution exclusion clause." 629 A.2d at 875.

Moreover, under *Erie*, because neither federal court is the states' "highest court," they are not authoritative statements of that state's law. 304 U.S. at 71. To the contrary, when regulatory estoppel was raised before the Court of Appeals of Texas, the court, rather than cite to *SynderGeneral* — as it does elsewhere in the opinion —held the regulatory-estoppel argument was waived. *Chickasha Cotton Oil Co. v. Houston Gen. Ins. Co.*, No. 05-00-01789-CV, 2002 WL 1792467, at *11 (Tex. App. Aug. 6, 2002).[13]

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[13] Federal courts in a few subject states recently declined to adopt regulatory estoppel in cases decided after the District Court's Decision, but they simply repeat the same errors as above — looking to an inapplicable parol evidence rule or citing to non-authoritative law. A Texas federal court recently rejected regulatory estoppel by mistakenly following and citing the flawed analysis of *SnyderGeneral*. *See Indep. Barbershop*, 2020 WL 6572428, at *3-4. This is erroneous for the reasons above. A Tennessee federal court similarly declined to apply the doctrine based only on the uncontested proposition that "extrinsic evidence may not be introduced to modify the terms of an unambiguous contract." *1210 McGavock St. Hosp. Partners, LLC v. Admiral Indem. Co.*, No. 3:20-cv-694, 2020 WL7641184, at *6 (M.D. Tenn. Dec. 23, 2020). It then found that regulatory estoppel was not applicable because the Sixth Circuit had once declined to apply it under an entirely different state's (Kentucky's) law. *Id*. But noting that "no Tennessee court has adopted regulatory estoppel," is not the same as showing a court has rejected it. *Id.*; *see also Franklin EWC, Inc. v. Hartford Fin. Servs. Grp., Inc.*, No. 20-cv-04434-JSC, 2020 WL 7342687, at *3 (N.D. Cal. Dec. 14, 2020) ("*Franklin II*") (stating that California courts "reject" regulatory estoppel but citing one state court

D. The Teams Have Also Alleged Sufficient Claims of Equitable Estoppel Under State Law

Further, under state law, the Teams have sufficiently alleged general equitable estoppel, and thus may survive a motion to dismiss. "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) (citations omitted).[14]

Those three elements are met here. First, Insurers misled the states' commissions on the pre-2006 decisional law on coverage for disease-causing agents. 2-ER-276-80; *Cf. Morton*, 629 A.2d at 875 (holding insurers' misrepresentation to regulators must be "imputed" to policyholders themselves).

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case that merely declined to look at drafting history to determine intent of exclusion and alter unambiguous terms).

[14] *See also, e.g.*, *Black v. Jackson Nat'l Life Ins. Co.*, No. 5:15-cv-01429-CAS(DTBx), 2016 WL 3452486, at *4 (C.D. Cal. June 20, 2016); *Shoup v. Union Sec. Life Ins. Co.*, 124 P.3d 1028, 1030 (Idaho 2005); *Ashby v. Bar Plan Mut. Ins. Co.*, 949 N.E.2d 307, 312-13 (Ind. 2011); *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); *Crescent Co. of Spartanburg Inc. v. Ins. Co. of N. Am.*, 225 S.E.2d 656, 659 (S.C. 1976); *Henry v. S. Fire & Cas. Co.*, 330 S.W.2d 18, 30 (Tenn. Ct. App. 1958); *Monumental Life Ins. Co. v. Hayes-Jenkins*, 403 F.3d 304, 311 (5th Cir. 2005) (Texas); *Harris v. Criterion Ins. Co.*, 281 S.E.2d 878, 881 (Va. 1981); *Potesta v. U.S. Fid. & Guar. Co.*, 504 S.E.2d 135, 150 (W. Va. 1998).

Second, the commissions relied on Insurers' representations to approve the Exclusion without requiring a corresponding reduction in premium. 2-ER-280. Third, injury resulted when, despite the Teams having paid a premium commensurate with the virus being an insured risk, Insurers denied the Teams' claims, forcing the Teams to bear "catastrophic financial losses." 2-ER-246.

Ignoring this application of law to fact, the District Court reasoned "general equitable estoppel is 'not available to bring within the coverage of a policy risks not covered by its terms, or risks expressly excluded therefrom.'" 1-ER-7. Yet the District Court ignored both the logic of this rule and the Teams' allegations. "The underlying rationale [for the rule] is that an insurance company should not be required to pay for a loss for which it received no premium." *Saunders v. Lloyd's of London*, 779 P.2d 249, 252 (Wash. 1989). Here, however, the Teams allege that Insurers must pay for a loss for which they did charge a premium. 2-ER-280 (explaining Insurers "improperly" maintained "pre-existing premiums"). Regulatory estoppel exists to prevent insurers from improperly charging the same premium for reduced coverage, as they did here.

Further, the cases cited by the District Court to support the above proposition involved a claim of estoppel where an insurer denied coverage on one ground but failed to raise another applicable defense until a later time — an entirely different scenario. *See Reno Contracting, Inc. v. Crum & Forster*

Specialty Ins. Co., 359 F. Supp. 3d 944, 952 (S.D. Cal. 2019); *Spring Vegetable*, 801 F. Supp. at 391-93. But as other cases cited by the District Court noted, estoppel applies, even if it would expand coverage, in the exact type of circumstances at issue here – misrepresentations prior to policy inception and/or bad faith. *See Potesta*, 504 S.E.2d at 148-50; *see also Spring Vegetable*, 801 F. Supp. at 391-93 (estoppel permitted if insured relied on agent misrepresentations regarding scope of coverage); *Henry*, 330 S.W.2d at 30; *Shoup*, 124 P.3d at 1030.

The Teams have thus adequately pled relief under both regulatory and equitable estoppel. The governing estoppel principles are nothing new and they are well-pled here. As *Morton* explains, regulatory estoppel is an "appropriate and compelling" extension of equitable estoppel principles to the regulatory context. 629 A.2d at 874. Cf. 17 Couch on Insurance § 239:93 (explaining "doctrine of estoppel will be used liberally, as a matter of equity, to prevent fraud and to require fair dealing").

IV. THE DISTRICT COURT MISAPPLIED THE CANCELLATION EXCLUSION AND RENDERED COVERAGE ILLUSORY

Finally, the District Court erred in relying on the Cancellation Exclusion to grant Insurers' motion. Notably, the court did not reject the Teams' claim that MLB's failure to provide players was a valid cause of their loss. This alone supports that the Exclusion for disease-causing agents did not apply so clearly and unmistakably as to warrant dismissal at this stage. Instead, the court conceded

that, "even if Plaintiffs' losses were caused by such failure," the Cancellation Exclusion would apply. 1-ER-5-6.

However, the Cancellation Exclusion precludes coverage for any increase in losses relating solely to the "suspension" or "cancellation" of a contract, not, as here, to the Teams' losses caused by MLB's failure or inability to comply with its existing and continuing contractual obligations. Nothing in the Complaint alleged or even hinted at the required "suspension, lapse or cancellation" of a contract, nor did the District Court find otherwise. Instead, the Teams reasonably alleged a breach of their contract by MLB. This type of business loss, based upon failure of a supplier to provide needed goods or services, is exactly what the Teams' Policies, and most commercial property insurance policies, were designed to cover. Indeed, in additional to general business interruption coverage, all Policies except one provide Contingent Business Interruption coverage for "income loss due to premises operated by others on whom you depend to (1) Deliver materials or services to you or to others for your account (Contributing Locations)." 3-ER-359; *see Prmconnect, Inc. v. Drumm*, No. 15-cv-417, 2016 WL 7049049, at *5 (N.D. Ill. Dec. 5, 2016) (rejecting similar argument under materially identical exclusion because the alleged loss "caused the 'cancellation of [] business,' not the cancellation of a contract, so Plaintiff's allegation does not directly implicate this exclusion").

The District Court's opinion would suggest that the Cancellation Exclusion applies simply because the parties had a contract. As the court stated: "MLB is contractually obligated to supply [the Teams] with players but failed to do so. Any effort to ignore the contractual nature of MLB and MiLB's relationship is disingenuous." 1-ER-6. But that reasoning is flawed. Not only is the actual policy language much narrower, applying only in case of a "suspension, lapse or cancellation" of a contract, but such an overly broad reading would render coverage illusory. Every aspect of the Teams' business is governed by some sort of contractual relationship; reading the Cancellation Exclusion to apply to any loss incurred pursuant to a contract would preclude coverage for almost any of the Teams' covered commercial property losses.

Courts routinely reject interpretations of policy exclusions, like the District Court's interpretation here, that would swallow the coverage whole. *See, e.g.*, *Research Corp. v. Westport Ins. Corp.*, 289 F. App'x 989, 993 (9th Cir. 2008) ("[I]f we were to construe the exclusion as [insurer] urges we should, it would amount to impermissible illusory coverage. An insurer may not grant coverage with one provision, and then take it away with another.").[15]

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[15] *See also, e.g.*, *Nay Co. v. Navigators Specialty Ins. Co.*, No. 3:16-CV-02675-N, 2018 WL 4026346, at *3 (N.D. Tex. June 12, 2018) (Texas courts "refuse to construe insurance policies in ways that would render coverage under the policy

Further, the Cancellation Exclusion does not apply to the types of losses alleged here. In contrast to the two provisions immediately preceding it, which exclude "any loss" caused by the enumerated risks, the Cancellation Exclusion is limited to "any increase of loss." 3-ER-331 (emphasis added). The Teams do not allege that MLB's failure to supply players increased or exacerbated their alleged losses. Put differently, they do not allege any consequential losses. Instead, they allege that not obtaining players was a "cause of the Teams' business interruptions." 2-ER-265. This cause of loss is covered, and not excluded by the entirely inapplicable Cancellation Exclusion.

And even if the Teams' losses were alleged to have been caused by a suspension or cancellation of their contract with MLB (they were not), still the Cancellation Exclusion would not apply. In the portion of the Cancellation

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illusory"); *First Mercury*, 806 S.E.2d at 436 (West Virginia) (rejecting interpretation that "largely nullifies the purpose of the coverage"); *Three Blind Mice, LLC v. Colony Ins. Co.*, No. 2016-000963, 2018 WL 7500206, at *2 (S.C. Ct. App. Oct. 31, 2018) (rejecting interpretation that "would swallow the coverage"); *Monticello Ins. Co. v. Mike's Speedway Lounge, Inc.*, 949 F. Supp. 694, 699 (S.D. Ind. 1996) (policies providing illusory coverage violate public policy); *Martinez v. Idaho Ctys. Reciprocal Mgmt. Program*, 999 P.2d 902, 907 (Idaho 2000) (refusing to "allow policy limitations and exclusions to defeat the precise purpose for which the insurance is purchased"); *Lineberry v. State Farm Fire & Cas. Co.*, 885 F. Supp. 1095, 1099 (M.D. Tenn. 1995); *Safeco Ins. Co. of Am. v. Robert S.*, 28 P.3d 889, 894 (2001) (California); *Bailer v. Erie Ins. Exch.*, 687 A.2d 1375, 1380 (1997) (Maryland).

Exclusion not cited by Insurers below or the District Court, it states: "But if the suspension, lapse or cancellation is directly caused by the 'suspension' of 'operations,' we will cover such loss that affects your Business Income during the 'period of restoration' . . . ." 3-ER-331. Thus, as a factual matter, if the District Court were to find that one of the other causes of loss occurred first, such as the civil authority orders closing the Teams' stadiums, and that caused MLB not to supply players, the increase in loss therefrom would still be covered even if it were attributable to a suspension or cancellation of a contract (which it is not). *See Prmconnect*, 2016 WL 7049049, at *5 (noting exclusion "does not even preclude . . . all losses from cancelled contracts"); *HTI Holdings, Inc. v Hartford Cas. Ins. Co.*, No. 10-cv-06021-TC, 2011 WL 4595799, at *15 (D. Or. Aug. 24, 2011) (exception to cancellation exclusion applied where losses were caused by bank's cancellation of line of credit contract after fire had suspended operations).

CONCLUSION

For all the above reasons, the decision of the District Court should be reversed, and Insurers' motion to dismiss should be denied.

Date: February 8, 2021

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CERTIFICATE OF COMPLIANCE

I am the attorney for Appellants in this action. Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Circuit Rules 32-1 because the brief contains 13,926 words, excluding the parts of the brief exempted by Fed. R. App. P. 27(a)(2)(B) and 32(f). This brief complies with the type size and typeface requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 365, Times New Roman 14-point font.

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STATEMENT OF RELATED CASES

I am the attorney for Appellants in this action. Pursuant to Circuit Rule 28-2.6, I state the following:

I am aware of at least 4 related cases currently pending in this court, where moving briefs currently are scheduled to be filed by the appellant either in January or February 2021. The case number and name of each related case is:

- *Mark's Engine Co. No. 28 Rest., LLC v. Travelers Indem. Co. of Conn. et al.*, No. 20-56031
- *10E, LLC v. Travelers Indem. Co. of Conn., et al.*, No. 20-56206
- *Plan Check Downtown III, LLC v. AmGuard Ins. Co. et al.*, No. 20-56020
- *Mudpie, Inc. v. Travelers Cas. Ins. Co. of America*, No. 20-16858

Although the cases each address some distinct issues and this case relies on ten different states' law (not solely California law), the appeals all arise from recent insurance-coverage actions related to an insurer's failure to pay business-interruption losses stemming from the coronavirus pandemic. In at least two of the above appeals, *Mark's Engine* and *10E*, the court addressed the question of whether an exclusion in an insurance policy concerning viruses bars coverage for claims related to business interruption in connection with the coronavirus pandemic, which is the issue here. *See* Circuit Rule 28-2.6(b).

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ADDENDUM

CAUSE NO. DC-20-05751-A

LOMBARDI'S, INC., et al	§	IN THE JUDICIAL COURT
	§	
VS.	§	14TH DISTRICT COURT
INDEMNITY INSURANCE COMPANY OF NORTH AMERICA		DALLAS COUNTY

ORDER DENYING MOTION TO DISMISS PURSUANT TO RULE 91A

On this date came to be heard Defendant Indemnity Insurance Company of North America's Amended Motion to Dismiss Pursuant to Rule 91A. After considering the pleadings on file and arguments of Counsel the Court is of the opinion that the Motion should be **DENIED**.

IT IS SO ORDERED.

Signed this 15th day of October 2020

JUDGE ERIC MOYÉ
14TH DISTRICT COURT

FILED
10/8/2020 6:09 PM
FELICIA PITRE
DISTRICT CLERK
DALLAS CO., TEXAS
Kevin Molden DEPUTY

DC-20-05751

LOMBARDI'S INC.; LOMBARDI'S FAMILY CONCEPTS, INC.; PENNE SNIDER, LLC; PENNE PRESTON, LLC; ALBERTO LOMBARDI INTERESTS, LLC; TAVERNA DOMAIN AUSTIN, LP; CAFÉ TOULOUSE RIVER OAKS DISTRICT, LP; CAFÉ MONACO HPV, LLC; PENNE LAKEWOOD, LLC; TAVERNA BUCKHEAD, LP; TAVERNA AUSTIN, L.L.C.; TAVERNA FT. WORTH, LLC; TOULOUSE KNOX BISTRO, LLC; TAVERNA ARMSTRONG, L.L.C.; TOULOUSE DOMAIN AUSTIN, LP; BISTRO 31 LEGACY, LP; TAVERNA LEGACY, LP; AND LOMBARDI'S OF DESERT PASSAGE, INC.	§	**IN THE DISTRICT COURT OF**
PLAINTIFFS,	§	
V.	§	**DALLAS COUNTY, TEXAS**
INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,	§	
DEFENDANT.	§	**14th JUDICIAL DISTRICT**

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT'S AMENDED RULE 91A MOTION TO DISMISS

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Defendant Indemnity Insurance Company of North America ("Chubb"): (1) has not demonstrated it has proffered the only (or even most) reasonable construction of its policy of insurance; (2) invokes "exclusions" that are not part of its contractual bargain with the Lombardi Plaintiffs;[1] (3) in any event misconstrues the exclusions; and (4) otherwise attempts to exploit a series of internally inconsistent, ambiguous, and quite likely poorly drafted policy terms to facilitate *post hoc* advantage for itself. None of these tactics are proper. Chubb's *Amended Motion to Dismiss Pursuant to Rule 91A* (the "Rule 91A Motion") should be denied.

I. SUMMARY OF RESPONSE

Texas Rule of Civil Procedure 91A, coupled with controlling insurance law principles, obligate Chubb to demonstrate its policy of insurance is susceptible to *only* an interpretation conclusively supporting its rationales for denying coverage. Yet Chubb's approach has been to proffer dubious constructions of the policy, without addressing competing (and more sound) constructions that favor the Lombardi Plaintiffs.

Chubb in fact ignores words, phrases, and entire structural conventions used in its policy, as if they should not be regarded to convey meaning. None of this is remotely defensible under the Rule 91A principles or Texas insurance law.

For instance, Chubb relies almost exclusively on cases from *other* jurisdictions that construed policies covering *only* physical loss or damage "to" property, whereas Chubb drafted its

[1] Lombardi's Inc., Lombardi's Family Concepts, Inc., Penne Snider, LLC, Penne Preston, LLC, Alberto Lombardi Interests, LLC, Taverna Domain Austin, LP, Café Toulouse River Oaks District, Café Monaco HPV, LLC, Penne Lakewood, LLC, Taverna Buckhead, LP, Taverna Austin, L.L.C., Taverna Ft. Worth, LLC, Toulouse Knox Bistro, LLC, Taverna Armstrong, L.L.C., Toulouse Domain Austin, LP, Bistro 31 Legacy, LP, Taverna Legacy, LP, Taverna Buckhead LP, and Lombardi's of Desert Passage, Inc.

policy to *disjunctively* afford coverage: (1) for physical "damage *to*" covered properties, or (2) when there is a "loss *of*" the insureds' ability to physically utilize the properties.

At minimum, the Lombardi Plaintiffs have averred physical loss "of" their properties, by alleging disruptions to their ability to *physically* access and utilize portions of the properties were necessary to *prevent* the spread of "COVID-19."[2] But Chubb's response has been to flout axioms of the English language, insisting the preposition "of" has no utility to convey meaning distinct from "to," and that "loss" conveys no meaning different from "damage." But if Chubb actually believed that (it surely did not), it proffers no explanation why it drafted its policy to use *both* sets of phrases, *disjunctively*.

Chubb also ignores its proposed construction necessitates illogical tensions between provisions in *its* specific policy—which apparently were *not* at issue in the other cases Chubb cites. For instance, a "Bodily injury" provision in Chubb's policy disclaims coverage if "sickness or disease" is reasonably foreseeable, i.e., "expected," from the Lombardi Plaintiffs' perspective. A similar mitigation mandate required the Lombardi Plaintiffs to "[t]ake reasonable steps to protect the Covered Property from further damage . . . ." The practical import of these conditions is the Lombardi Plaintiffs were *obligated* to take steps to prevent foreseeable sickness or disease and property damage—lest they jeopardize entitlement to complementary coverages.

Yet now that the Lombardi Plaintiffs have lost use of their properties as necessary to preempt *precisely* such risks—Chubb responds by contending the consequences of the preventive measures fall outside of coverage. Chubb therefore proposes a paradoxical construction of its policy, whereby steps to ensure *certain* coverages, actually foreclose *pertinent* coverages. This

[2] Although *not* essential to coverage, there also are fact questions whether there was actual "damage to" the Lombardi Plaintiffs' property, *see* pp. 4 – 5, 16 – 17 *infra*, which cannot be adjudicated through Rule 91A practice.

reasoning is indicative of a policy either not written to support Chubb's internally discordant characterizations—or so poorly written that Chubb cannot exploit the confusion to its advantage.

Chubb proffers a final line of attack, contending an "Ordinance Or Law" exclusion and a "Virus" exclusion purportedly foreclose coverage. The most prominent error with Chubb's reasoning is the terms of the policy *disclaim* application of the exclusions to the coverage invoked by the Lombardi Plaintiffs. There consequently is no contractual basis for their application, but in no event were the exclusions drafted to accomplish what Chubb *now* wants them to accomplish.

All of the foregoing prevents Chubb from carrying its burden to establish it has proffered the *only* reasonable construction of the policy. It consequently is not entitled to Rule 91A dismissal.

II. PERTINENT FACTUAL AVERMENTS & POLICY PROVISIONS

A. The Averred Risk of COVID-19 Infection and Plaintiffs' Preventive Measures

In their First Amended Petition ("Pet."), the Lombardi Plaintiffs averred Chubb's policy of insurance number MCRD38196169 (the "Policy"), covered their properties from June 30, 2019 to June 30, 2020. *See* (Pet., p. 4, ¶¶ 8, 9).[3] They further averred on or about December 31, 2019, the World Health Organization ("WHO") reported a pneumonia-causing virus of unknown origin, now referred to as "COVID-19". *See* (*Id*. at p. 5, ¶ 14).

The progression of the virus, as well as understanding of its risks, have precipitated social and economic disruption of an extraordinary scale. By way of example:

[3] An excerpted and highlighted version of the Policy is attached as **Exhibit 1**, with "Appx." designations per page.

- On January 25, 2020, the WHO announced COVID-19 is a "global threat to human health . . . ." *See* (Pet., p. 5, ¶ 16).
- On March 11, 2020, the WHO formally characterized COVID-19 as the cause of a "pandemic" and lamented "alarming levels of spread and severity . . . ." (*Id*. at ¶ 18).
- The United States Centers for Disease Control followed suit, warning: "there is little to no pre-existing immunity against the new virus . . . ." (*Id*. at ¶ 21). *See also* (*id*. at p. 6, ¶ 28).
- Indeed, at least 6,546,143 Americans had been infected, *see* (*id*. at ¶ 23), and approximately 200,000 had died when the Amended Petition was filed, (*id*. at ¶ 24).
- Research moreover has substantiated the high probability of "asymptomatic" spread through transmission vectors such as "droplets from the nose or mouth" that "can land on objects and surfaces around the person such as tables, doorknobs and handrails." (*Id*. at pp. 6, 7, 8, ¶¶ 25, 29, 31, 33, 34).
- Once deposited on certain surfaces, the virus has been documented to persist for up to 17 days. (*Id*. at p. 7, ¶ 30).
- The scientific literature moreover has confirmed unique risks associated with "dining at a restaurant" where "[d]irection, ventilation, and intensity of airflow might affect virus transmission. . ."—irrespective of social distancing measures. (*Id*. at p. 9, ¶ 35).

The Lombardi Plaintiffs averred the federal government, *see* (*id*. at pp. 9 – 10, ¶¶ 36 – 38), followed by states and localities, early on recognized "the pandemic presents a clear and present danger because of the propensity of the virus to be deposited on surfaces and in the air in businesses such as the Lombardi Plaintiffs' restaurants . . .[,]" and "this situation . . . was causing *property*

damage and was presenting the danger of the virus continuing to be present in facilities such as restaurants and thus a danger to the *public health* through spread of the virus from those locations." (Pet., p. 12, ¶¶ 41, 42) (emphasis added).

The common theme of these averred findings has been in the absence of population immunity, limitations on physical activity and movement have been the only practical means to suppress COVID-19 spread. The Lombardi Plaintiffs therefore implemented restrictions regarding physical use and access to their properties "to *prevent* the ongoing danger of the virus." *See* (*Id*. at 22, ¶ 92) (emphasis added).

And although these preventative measures align with various governmental directives, they *independently* were necessary and implemented by the Lombardi Plaintiffs to mitigate the well-documented risk of "property damage" and "danger to the public health." Yet despite these averments, Chubb consistently has attempted to recast the Lombardi Plaintiffs' claims as if they have alleged "governmental edict[s], *standing alone*, constitute[d] a direct physical loss . . . ." to the Lombardi Plaintiffs' properties. *Cf*. (Rule 91A Motion, p. 11, n.16 & p. 9) (emphasis added).

The characterization is inaccurate (indeed disingenuous), given Chubb *concedes* the Lombardi Plaintiffs "identify *no* orders or restrictions in [certain] jurisdictions that restrict restaurant operations. *Nor* do [they] reference provisions that would affect *operation* of their restaurants in [still other jurisdictions]." (*Id*. at p. 4) (emphasis added). It consequently cannot be the case the Lombardi Plaintiffs have conditioned their claims on allegations governmental directives *standing alone* constituted the physical loss—when in many respects Chubb concedes the Lombardi Plaintiffs pled *no such* governmental directives.

Chubb's characterization of the Lombardi Plaintiffs' averments moreover is illogical, because the tactic makes superfluous the Lombardi Plaintiffs' comprehensive averments regarding

the documented risks of COVID-19 from sources *in addition to* governmental directives. Those averments would be denied required affect if the premise of the Lombardi Plaintiffs' claims had been governmental directives "standing alone" were dispositive.

Chubb even mischaracterizes the fundamental character of the directives, by referring to them as "ordinances" or "laws". *Cf.* (Rule 91A Motion, pp. 2, 7, 14, 18 – 19). Yet the Lombardi Plaintiffs have not averred the states or localities where their restaurants are located responded to COVID-19 risks by convening their legislatures or city councils to pass legislative directives of the kind. And within the averred jurisdictions, *only* the state legislatures are authorized to pass regulatory laws, and *only* the city councils may pass ordinances. *Cf.* TEX. CONST., Art. III, § 29; Dallas Code of Ordinances, Charter Chpt. XVIII, §§ 1, 3; Houston Code of Ordinances, Charter Art. II, § 2(a); Fort Worth Code of Ordinances, Charter Chpt. XXV, § 4; Austin Code of Ordinances, Charter Art. II, § 14; Plano Code of Ordinances, Pt. 1, Art. 3, § 3.10; GA. CONST., Art. III, § VI, ¶ I; Atlanta Code of Ordinances, Pt. 1(A), Art. 1, § 1-103(a), (b); NEV. CONST., Art. 4, § 23; Las Vegas Municipal Code, Charter Art. II, § 2.090(1).[4]

By contrast, the exigent risks presented by COVID-19 were the subject of executive (not legislative) directives, *see* (Pet., pp. 12 – 20, ¶¶ 43 – 77), which do not qualify as laws or ordinances. The Lombardi Plaintiffs averred, by way of example, the directives issued in Texas derived from authority in Texas Government Code Section 418.108, *see e.g.*, (*id.* at p. 12, ¶ 43), which delegates to "the *presiding officer* of the governing body of a political subdivision" authority to "declare a local state of disaster." TEX. GOV. CODE § 418.108(a) (emphasis added). Chubb has not cited any authority whereby those "presiding officers" are empowered to pass "laws" or

[4] Highlighted excerpts of the respective municipal code provisions are attached hereto as **Exhibit 2** – **Exhibit 8**.

"ordinances"; and more critically, Chubb's Policy does not *define* the term "law" or "ordinance" to be inclusive of the types of executive mandates averred by the Lombardi Plaintiffs.

B. Pertinent Policy Provisions

1. The Business Income Coverage

The losses the Lombardi Plaintiffs have alleged fall within the Policy section titled "BUSINESS INCOME (AND EXTRA EXPENSE) COVERAGE FORM," sometimes herein, the "Business Income Coverage". *See* (Appx. 003). Pursuant to the principal coverage in the provision, Chubb contracted to:

> 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 premises which are described in the Declarations and for which a Business Income Limit of Insurance is shown in the Declarations. The loss *or* damage must be caused by or result from a Covered Cause of Loss.

(Business Income Coverage, § A(1); Appx. 003) (emphasis added).

Pursuant to the plain language of this provision, there are four considerations pertinent to coverage: 1) whether there was "physical loss of" property; (2) whether there *alternatively* was physical "damage to" property; (3) whether there was an operational "suspension" at properties described in the "Declarations" with a "Limit of Insurance"; and 4) whether a "Covered Cause of Loss" provision operated to restrict coverage.

The concept "physical loss of" (consideration # 1) is *not* defined in the Policy, nor is the concept of "damage to" the properties (consideration # 2). Accordingly, the ordinary meanings of the phrases are pertinent to the coverage analysis, and as discussed herein, Chubb proposes a

construction that plainly is at odds with ordinary meaning—indeed basic logic. *See* pp. 21 – 23 *infra*.

With respect to operational suspensions at properties described in the "Declarations" (consideration # 3), a "SCHEDULE OF LOCATIONS" in the Policy lists all such properties. *See* (Appx. 001 – 002). All of the locations in turn are subject to coverage pursuant to sections of the Policy titled "COMMERCIAL PROPERTY COVERAGE PART SUPPLEMENTAL DECLARATIONS," (hereafter, the "Supplemental Declarations"), which include, *inter alia*, a section that applies to "BLANKET BUS. INCOME BY VALUE," with an $18,952,419 "Limit of Insurance." *See* (Appx. 006). By its plain language, the *first* sub-section in the Supplemental Declarations includes the covenant: "LOCATIONS: SEE BLANKET SCHEDULE", which is a reference *back* to the "SCHEDULE OF LOCATIONS" identifying all properties that are the focus of this litigation. (*Id*.).

That sub-section also is important, because it reflects there are *no* applicable "Covered Cause of Loss" restrictions regarding the recovery the Lombardi Plaintiffs seek (consideration # 4). The "Covered Cause of Loss" construct indeed is one of the more hopelessly confused artifices in Chubb's Policy, because the term does not (as a literal reading might suggest) convey discrete causality risks distinct from the "loss of *or* damage to" coverage term in the actual Business Income Coverage section.

To appreciate why, a reader must endure a series of "steps," *cf*. (Rule 91A Motion, p. 12)—each of which burdens the reader with confusing conventions Chubb utilized in the Policy. The reader must begin with section A(3) in the Business Income Coverage form, which is titled "COVERED CAUSES OF LOSS, EXCLUSIONS AND LIMITATIONS." *See* (Appx. 004). That

section provides: "See Applicable Cause of Loss form *as shown in the Declarations*." (Appx. 004) (emphasis added).

The referenced "Declarations" are the aforementioned Supplemental Declarations, which include a series of columns titled "Covered Causes of Loss." *See, e.g.*, (Appx. 006 – 009). None of those columns themselves, or through cross reference, identify conventional causality risks; for instance, wind, water, flooding, theft, or even more generic references such as accident or occurrence. The columns consequently do not in any conventional way identify "a Covered *Cause* of Loss." Chubb instead used the columns to cross-reference yet another section of the Policy that apparently was intended to specify whether any loss restrictions *circumscribed* the scope of coverage contractually covenanted in the Business Income Coverage section.

This is so, because "Applicable Cause of Loss form" is a reference to a separate Policy section titled "CAUSES OF LOSS – SPECIAL FORM," which contains, *inter alia*, exclusions that in certain specific instances limit coverages. *See* (Appx. 011). Chubb consequently assumed the duty through these Policy conventions to conspicuously designate in the "Covered Causes of Loss" columns whether or not an "Applicable Cause of Loss form" applied to specific coverages.

Accordingly, the *absence* of a designation in a "Covered Causes of Loss" column must be construed to convey the *absence* of restrictions that otherwise could have been conveyed by Chubb. And for purposes of the pertinent Business Income Coverage, there is *no* such designation, because the "Covered Causes of Loss" column that applies to the "BLANKET BUS. INCOME BY VALUE" sub-section of the Supplemental Declarations was left *blank*. (Appx. 006).

Chubb nonetheless has proffered an exceptionally convoluted, conflicting rationale for why it omitted a restricting designation from the "Covered Causes of Loss" column that applies to the "BLANKET BUS. INCOME BY VALUE" sub-section. It invites the Court to focus on a

different convention Chubb used in the Policy, whereby it identified certain specific physical *features* of properties (as opposed to the properties collectively, or even a single property in its entirety) and qualified coverage with respect to *only* those specific features. *Cf.* (Rule 91A Motion, p. 12). For instance, for the respective properties, Chubb identified physical features such as "JOISTED MASONRY," "AWNINGS OR CANOPIES," certain "FIRE-RESISTIVE" construction, or "NON-COMBUSTIBLE" construction. *See, e.g.*, (Appx. 006 – 009). And for *those* specific features, the "Covered Causes of Loss" designations read: "SPECIAL." (*Id.*).

That "SPECIAL" designation in turn directs the reader to the aforementioned "CAUSES OF LOSS – SPECIAL FORM, which by its terms applies only: "*When* Special is shown in the Declarations . . . ." (§ A; Appx. 011) (emphasis added). But *none* of the physical features for which Chubb made a "SPECIAL" designation in the Supplemental Declarations have been averred to relate to the "physical loss of"—or even "damage to"—property at issue in *this* litigation.

Chubb nevertheless insists this multi-step, internally inconsistent, and frankly confusing Policy structure, somehow *eliminates* confusion regarding why it made the peculiar choices to: 1) make unqualified reference to the "BLANKET BUS. INCOME BY VALUE" coverage for *all* of the Lombardi Plaintiffs' properties collectively, 2) make separate references to specific physical *features* of specific properties, but 3) *now* insist it intended no difference between the two sets of references. In so doing, Chubb proffers no explanation regarding what possibly could have been the logic of differentiating between all properties collectively, compared to specific features of separate properties, if Chubb intended uniform treatment of coverage restrictions. And more critically, Chubb has made no attempt to explain how these byzantine policy conventions *eliminate* confusion.

2. Operation of the Civil Authority Coverage

Within the Business Income Coverage, Chubb contracted to provide an "Additional Coverage" regarding business losses caused by "Civil Authority." *See* (Business Income Coverage, § A(5)(a); Appx. 004). Notably, "Civil Authority" is *not* defined by the Policy to equate with "laws" or "ordinances." Whereas laws and ordinances are formal legislative enactments in the pertinent jurisdictions—the Policy uses Civil Authority as a distinct concept, inclusive of emergency directives to eliminate imminent risks of "dangerous" conditions.

For instance, the Civil Authority coverage addresses a scenario in which governmental intervention is necessary to address exigent dangers caused by *surrounding* property damage (as opposed to damage at the Lombardi Plaintiffs' properties):

> When a *Covered Cause of Loss* causes damage to property other than property at the described premises, we will pay for *the actual loss of Business Income* you sustain . . . caused by action of civil authority that *prohibits access to* the described premises, provided that both of the following apply: (1) Access to the area immediately surrounding the damaged property is *prohibited by civil authority* as a result of the damage, and the described premises *are within that area* but are not more than one mile from the damaged property; and (2) The action of civil authority is taken in response to *dangerous physical conditions* resulting from the damage . . . .

(Appx. 004) (emphasis added).[5]

[5] Here as well, the coverage is conditioned on a "Covered Cause of Loss," although that concept yet again is incoherent relative to Policy structure. The "CAUSES OF LOSS – SPECIAL FORM" explains "Covered Causes of Loss *means direct physical loss* . . . ." *See* (§ A, Appx. 011) (emphasis added). It would be illogical to read this language to modify the language in the Civil Authority provision, because: 1) the Civil Authority provision uses the term "damage," whereas the SPECIAL FORM uses the term "loss"; and 2) the Civil Authority provision refers to *offsite* property damage that indirectly leads to business losses, whereas the SPECIAL FORM refers to "direct physical loss". Chubb nevertheless contends the two provisions can be reconciled if "direct physical loss" means "damage" wherever the phrases are used throughout the Policy, *cf.* (Rule 91A Motion, pp. 8 – 10, 12); but if that were so, it is not at all clear why Chubb used *different* language, in *separate* sections, to redundantly convey what it insists is the *same* concept.

The import of the governmental directives averred by the Lombardi Plaintiffs are that they are jurisdiction-wide declarations that COVID-19 "was causing *property damage* and was presenting the danger of the virus continuing to be present in facilities such as restaurants and thus a danger to the *public health* . . . ." (Pet., p. 12, ¶ 42) (emphasis added). But those risks were not isolated to *only* the Lombardi Plaintiffs' properties—which is why there was no cause for the Lombardi Plaintiffs to condition their claims on "orders or restrictions . . . that restrict restaurant *operations*." *Cf.* (Rule 91A Motion, p. 4) (emphasis added).

The *entirety* of each "area" was the focal point of the "damages," and the Lombardi Plaintiffs' properties are *within* each such area. Emergency access restrictions such as stay at home directives, crowd limits, and restrictions on restaurant patronage in turn caused the Lombardi Plaintiffs' business losses—which is precisely what is covered by the Civil Authority provision.

3. Chubb's Editorial Recasting of the "Period of Restoration"

Chubb proposes to look beyond the Policy's affirmative statements regarding the scope of *coverage*, to back into what it contends the coverage provisions purportedly mean based on the Policy's definition of the *temporal* concept, "Period of Restoration." *Cf.* (Rule 91 A Motion, pp. 14 – 15). This is a particularly dubious tactic, because as written, the definition of "Period of restoration" specifies a timing mandate that: "Begins . . . after the time of direct physical loss *or* damage . . . caused by or resulting from any Covered Cause of Loss at the described premises . . ." and potentially ends on the "date when the property at the described premises should be repaired, rebuilt *or* replaced . . . ." (emphasis added). Nowhere does this provision disclaim or narrow the Business Income Coverage covenant regarding "loss of *or* damage to" property. The definition indeed reaffirms that scope of coverage by referencing "the time of direct physical loss *or* damage." (emphasis added).

Yet Chubb editorializes the words as they appear, by proffering the following characterization of what it *wishes* the words meant, by describing the Period of restoration, "as the time it takes to physically repair ***physical damage*** to the insureds' premises." (Rule 91A Motion, p. 14). But that is not what the Policy definition says, because the plain language refers to "loss or damage," not "physical repair of physical damage." This consequently is a quintessential attempt by Chubb to gloss over contractual ambiguity by asking the Court to rewrite its Policy after-the-fact.

Indeed, Chubb attempts to extrapolate from the isolated phrase "repaired, rebuilt or replaced," that the Policy's consistent differentiation between loss of, versus damage to property, conveys no actual distinction. According to Chubb, "repaired, rebuilt or replaced" only make sense with respect to a remedy for a tangible manifestation of physical harm. *Cf.* (Rule 91A Motion, pp. 14 – 15). This contention is illogical for several reasons.

First, the phrase "repaired, rebuilt or replaced" itself would be the anomalous outlier if it was given import (as a purported reference to only physical damage) in the manner Chubb suggests, because that import is inconsistent with the Policy's repeated differentiation between "loss of" versus "damage to" properties. Second, in *other* Policy sections, Chubb demonstrated it knew how to define the concept of property damage in relation to only "Physical *injury* to *tangible* property . . . [,]" because it did so in a COMMERCIAL GENERAL LIABILITY COVERAGE FORM (which is not an averred basis for coverage in this litigation). *See* (§ V(17); Appx. 015) (emphasis added). Yet under the Business Income Coverage, Chubb elected *not* to similarly define property "loss" *or* even "damage" in this narrow manner.

And finally, the phrase "repaired, rebuilt *or* replaced" simply cannot carry the import Chubb proffers, because Chubb is proposing that the terms "repaired," "rebuilt," *and* "replaced"

redundantly serve as references to correction of tangible property damage. But if that were so, Chubb first should have defined the terms to actually express that sentiment (it did not), and it otherwise had no cause to use three different terms, to superfluously convey the exact same sentiment. The outlier import Chubb seeks to attribute to the phrase "repaired, rebuilt or replaced" consequently cannot displace (or even match) the more reasonable Policy construction proffered by the Lombardi Plaintiffs, whereby their preventive measures led to losses that should be covered.

4. The Contractually Disclaimed Exclusions

Chubb purports to invoke two contractual exclusions to avoid its coverage obligations: an "Ordinance Or Law" exclusion, and an "endorsement" exclusion titled "EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA," hereafter, the "Virus Exclusion." *Compare* (Rule 91A Motion, pp. 7; 13, n.18; 16; 18), *with* (Appx. 010, 011). The "Ordinance Or Law" exclusion reads in pertinent part: "We will not pay for loss or damage caused directly or indirectly by . . . [t]he enforcement of or compliance with any *ordinance* or *law* . . . . [r]egulating the . . . use . . . of any property . . . ." (CAUSES OF LOSS – SPECIAL FORM, § B(1)(a); Appx. 011) (emphasis added). And the "Virus Exclusion" provides: "[Chubb] will not pay 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." (Virus Exclusion § B; Appx. 010) (emphasis added).

Neither exclusion can foreclose coverage under the facts averred by the Lombardi Plaintiffs. With respect to the Ordinance Or Law exclusion, the Lombardi Plaintiffs quite simply have not averred any "ordinance" or "law," *see* pp. 6 – 7 *supra*, and it is unclear why Chubb cites to a case referencing a loss "sustained when [a] City enforced section 6-175 of [a] *City Code*." *Cf.* (Rule 91A Motion, p. 18, n.22) (referencing *Wong v. Monticello Ins. Co.*, No. 04-02-00142-CV, 2003 Tex. App. LEXIS 2481, *3 (March 26, 2003) (emphasis added)). None of the directives the

Lombardi Plaintiffs have averred are found in "City Codes"—precisely because they do *not* qualify as ordinances in the pertinent jurisdictions.

But even assuming *arguendo* the Lombardi Plaintiffs had averred an ordinance or law, the Ordinance Or Law exclusion is found in *only* the portion of the Policy titled "CAUSES OF LOSS – SPECIAL FORM." *See* (Appx. 011). And as discussed above, the "BLANKET BUS. INCOME BY VALUE" coverage invoked by the Lombardi Plaintiffs does *not* have a "SPECIAL" designation incorporating that Form. *See* pp. 8 – 10 *supra*. The Ordinance Or Law exclusion consequently has no bearing on the Business Income Coverage or additional Civil Authority coverage the Lombardi Plaintiffs have averred.[6]

Similar defects characterize Chubb's misreading of the Virus Exclusion. At best, there is a drafting ambiguity whether the exclusion even applies to the Business Income Coverage, because in one respect, the text of the exclusion self-limits itself to a purported "COMMERCIAL PROPERTY COVERAGE PART STANDARD PROPERTY POLICY," *see* (Appx. 010), which is *not* a discretely defined or an independently discernible section of the Policy. Arguably, the coverage the Lombardi Plaintiffs have invoked *colloquially* might be referred to as a type of commercial property coverage—but the actual title for the coverage is "BUSINESS INCOME (AND EXTRA EXPENSE) COVERAGE FORM." (Appx. 003).

It is not at all clear how, or why, that specific coverage FORM should be presumed to be a sub-set of Chubb's ill-defined "STANDARD PROPERTY POLICY" reference. Instead of

[6] Without apparent irony, Chub cites a provision in the Ordinance Or Law exclusion that states it applies "even if the property has *not* been *damaged*." *See* (Rule 91A Motion, p. 18) (emphasis added). But there would *never* be a scenario in which a claim could be made *without* property damage if Chubb's Policy construction were accepted—which illumines Chubb's construction is illogical. *Cf. Nautilus Group, Inc. v. Allianz Global Risks US*, C11-5281BHS, 2012 U.S. Dist. LEXIS 30857, *19 (W.D. Wash. March 8, 2012) ("the Policy contains an exclusion for an employee's theft . . . . If theft was not a covered risk, then this provision would be unnecessary.").

discretely and conspicuously identifying the Policy sections to which Chubb intended the Virus Exclusion to apply, Chubb utilized a generic explanation in section "A" of the Virus Exclusion, stating it applies to "forms or endorsements that cover property damage to buildings or personal property and forms or endorsements that cover business income, extra expense or action of civil authority." (Virus Exclusion, § A; Appx. 010). Yet it is left to the reader to infer whether these references encompass *specific* Policy sections or terms, because the quoted language does not reference titles to the specific sections, nor were specific titles listed under the introductory banner of the Virus Exclusion purporting to exhaustively identify coverages the "endorsement modifies . . . ." (*Id.*).[7]

But there is an additional (fatal) flaw with Chubb's purported reliance on the Virus Exclusion. As stated, the Lombardi Plaintiffs have averred claims under the Business Income Coverage, as well as the subsidiary Civil Authority provision. Their claims under the Civil Authority provision are the *only* claims dependent on a temporal sequence whereby the virus actually "caused" damage to surrounding properties, which in turn led to the Lombardi Plaintiffs' business losses. In the event the ambiguous application of the Virus Exclusion somehow can be resolved in Chubb's favor, there may be fact issues whether the surrounding properties indeed were damaged (as stated in various executive orders), implicating the Virus Exclusion's potential application to the Civil Authority coverage.

By contrast, with respect to the Lombardi Plaintiffs' claims under the broader Business Income Coverage, they have *not* (and need not) averred a temporal sequence contingent upon whether the actual virus was present *at* their properties. Instead, the documented risk of "property

[7] Chubb apparently thinks a reader should look to the "top right corner" of Policy pages to discern what Chubb did *not* convey in the covenant that purported to specify what specifically the "endorsement modifies."

damage" and "danger to the public health," (Pet., p. 12, ¶ 42), created an imminent *risk* to the health and safety of patrons and the public, as well as an imminent *risk* of property damage. Operational suspension was necessary "to *prevent* the ongoing danger of the virus." *See* (*Id*. at p. 22, ¶ 92) (emphasis added).

But Chubb did not draft its Policy to negate coverage for *preventive* measures of the kind and has proffered no explanation for the anachronistic notion that steps to *prevent* "loss or damage caused by or resulting from any virus," somehow can be characterized as the "loss or damage *caused* by or resulting *from* [the] virus." *Cf*. pp. 24 – 25 *infra*. Chubb indeed drafted parallel conditions in its "Bodily Injury" coverage, as well as the Business Income Coverage, to require precisely the preventive measures taken by the Lombardi Plaintiffs.

5. The Bodily Injury & Property Damage Prevention Mandates

The Policy includes a "Bodily injury" coverage provision in the parallel CGL Coverage. *See* (Appx. 012). But the Virus Exclusion, by its terms, applies to only the ill-defined "COMMERCIAL PROPERTY COVERAGE PART," *see* (Appx. 10)—*not* the CGL Coverage.

This is critical, because in the CGL Coverage, Chubb contracted to "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' . . .[,]" with "Bodily injury" defined to include "bodily injury, sickness or disease sustained by a person, including [] death resulting from any of these at any time." *See* (CGL Coverage §§ I(A)(1)(a) & V(3); Appx. 012, 014, 016). And because the Virus Exclusion is inapplicable, the covered "injury," "sickness," or "disease" would *include* COVID-19 related illness.

Yet the CGL Coverage imposes a critical condition, which is the "bodily injury, sickness or disease" cannot be "*expected* or intended from the standpoint of the insured." *See* (§ I(A)(2)(a); Appx. 013) (emphasis added). Accordingly, an insured cannot ignore public health

pronouncements about the foreseeable risk of a virus for which "there is little to no pre-existing immunity . . . ." *cf.* (Pet., p. 5, ¶ 21); do nothing to prevent exposure to the class of persons foreseeably at risk; yet later claim CGL Coverage when the persons invariably suffer bodily injury.

Similarly, a condition in, *inter alia*, the Business Income Coverage imposes a mitigation mandate regarding the risk of property damage. Business Income Coverage § C addresses specified "Loss Conditions," and imposes "Duties in the Event Of Loss," including the duty to "[t]ake all reasonable steps to protect the Covered Property from further damage . . . ." (Business Income Coverage, § C & C(2)(a)(4); Appx. 005). The Lombardi Plaintiffs consequently did not have the luxury to ignore warnings like publicly disseminated declarations "the virus is physically causing *property damage* due to its proclivity to attach to surfaces for prolonged periods of time . . . ." (Pet. p. 15, ¶ 53) (emphasis added).

Chubb nevertheless proffers an illogical construction of its Policy as a whole. It first disregards the averred facts clearly fall within the scope of the Business Income Coverage—then presses a Hobson's choice whether an insured should yield to the need for preventive measures (actually mandated by the Policy), or forgo the preventive measures given Chubb's refusal to cover corresponding losses. This proposition is textually unsupported and illogical (indeed contrary to sound public policy).

III. APPLICABLE LAW

A. Rule 91A Principles

A "court may *not* consider evidence in ruling on [a Rule 91A] motion and must decide the motion based *solely* on the pleading of the cause of action, together with any pleading exhibits permitted by" Texas Rule of Civil Procedure 59. *See* TEX. R. CIV. P. 91a.6 (emphasis added). In so doing, a court must "construe the pleadings *liberally* in favor of the plaintiff, look to the

pleader's intent, and accept as true the factual allegations in the pleadings to determine if the cause of action has a basis in law or fact." *In re RNDC Tex., LLC*, No. 05-18-00555-CV, 2018 Tex. App. LEXIS 4186, *2 (Tex. App.—Dallas June 11, 2018, no pet.) (emphasis added).

B. Applicable Principles of Insurance Contract Construction

A contract of insurance is "controlled by rules of interpretation and construction which are applicable to contracts generally." *Richards v. State Farm Lloyds*, 597 S.W.3d 492, 497 (Tex. 2020) (quoting *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995)). Accordingly, a court should strive "to give meaning to every sentence, clause, and word to avoid rendering any portion inoperative." *Balandran v. Safeco Ins. Co. of Am.*, 972 S.W.2d 738, 741 (Tex. 1998). A court should also "consider the entire agreement and, to the extent possible, resolve any conflicts by harmonizing the agreement's provisions, rather than by applying arbitrary or mechanical default rules." 597 S.W.3d at 497.

When an insurance policy does not define its terms, a court should give those terms "their ordinary and generally-accepted meanings . . . ." *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 126 (Tex. 2010). And if after applying the rules of construction, "a contract is subject to two or more reasonable interpretations, it is ambiguous[,]" with the consequences of the ambiguity charged against the insurer. *See* 972 S.W.2d at 741.

Pursuant to these principles, it is not enough for an insurer to ignore confusion caused by the manner in which it drafted its policy or adopt the hubristic stance its construction purportedly is the more erudite of *competing* constructions. The insurer instead must prove there is *no* other rational construction of the policy. *See National Union Fire Ins. Co. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991) ("if a contract of insurance is susceptible of more than one reasonable interpretation, we must resolve the uncertainty by adopting the construction that most favors *the*

insured.") (emphasis added); 972 S.W.2d at 741, n.1 ("uncertain contractual language is construed against the party selecting that language."). Chubb has not come close to carrying this burden.

IV. RESPONSE ARGUMENTS

A. Chubb Promotes Confusion by Directing this Court to Non-Binding, Substantively Immaterial Cases

No court in Texas (or its appears elsewhere) has construed the language in the Chubb Policy *specifically* at issue in this litigation, relative to the grounds for coverage *specifically* averred by the Lombardi Plaintiffs. It consequently could not be the case "this exact issue" has been resolved anywhere; by any court. *Cf.* (Rule 91A Motion, p. 9). Chubb's superlatives regarding the "majority view across the country" and regarding what purportedly has been done by "[c]ourts across the country" therefore is specious. (*Id*. at 8, 9).

First, the insurances policies, underlying pleadings, and requests for coverage in the other cases are extraneous materials that do not qualify as *pleadings* or *attachments* that may be considered by the Court in this Rule 91A dispute. *See* 2018 Tex. App. LEXIS 4186 at *2. Chubb consequently cannot demonstrate whether the other policies share in common *all* of the material provisions of Chubb's Policy the Lombardi Plaintiffs have discussed herein. Nor can Chubb demonstrate the insureds in the other cases *factually* averred grounds for coverage that parallel what the Lombardi Plaintiffs have averred.[8]

The limited insight that can be discerned from reviewing the cases indeed suggests the opposite. For instance, the following cases cited by Chubb regarding the meaning of "loss"

[8] Chubb previously characterized these observations as "bizarrely unfounded" suggestions the Court is not allowed to consider cases from other courts. Chubb's commentary solely is a reflection of its misapprehension of Rule 91A evidentiary proscriptions. The fact that some court, somewhere, engaged in construction of some insurance policy, under the substantive law of those jurisdictions; means nothing. Coverage in *this* matter will depend upon the language in Chubb's Policy relative to bases for coverage asserted by the Lombardi Plaintiffs—based on Texas law. As discussed herein, the other cases do nothing to benefit Chubb in any of those respects.

construed policies that covered *only* physical loss to or damage to property, through principal coverage or incorporated restrictive provisions: *de Laurentis v. United Servs. Auto. Ass'n,* 162 S.W.3d 714, 721 (Tex. App.-Houston [14th Dist.] 2005, pet. filed); *Ross v. Harford Lloyd Ins. Co.*, No. 4:18-CV-00541-O, 2019 U.S. Dist. LEXIS 112175, *2 (N.D. Tex. July 4, 2019); *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-CV-461-DAE, 2020 U.S. Dist. LEXIS 147276, *6 (W.D. Tex. Aug. 13, 2020); *Rose's 1, LLC v. Erie Ins. Exchange*, No. 2020 CA 002424 B, 2020 D.C. Super. LEXIS 10, * 1 (Sup. Ct. of D.C. Aug. 6, 2020); *Roundabout Theatre Co. v. Cont'l Cas. Co.*, 751 N.Y.S.2d 4, 5, 8 (N.Y.A.D. 1st Dept. 2002).[9] Chubb, by contrast, covenanted to cover "loss *of* or damage *to*" property.

Indeed, in *Turek Enterprises, Inc. v. State Farm Mutual Automobile Ins. Co.*, which Chubb cites without regard to its actual significance, *cf.* (Rule 91A Motion, p. 17), that court recognized precisely the distinction the Lombardi Plaintiffs make regarding the legal difference between the phrase "loss of" versus "damage to": "Plaintiff suggests that 'physical loss *to* Covered Property' includes the *inability to use* Covered Property. . . . This interpretation seems *consistent* with one definition of 'loss' but ultimately renders the word 'to' meaningless. . . . Plaintiff's interpretation *would* be plausible if, instead, the term at issue were 'accidental direct physical loss *of* Covered Property.'" Case No. 20-11655, 2020 U.S. Dist. LEXIS 161198, **16 – 17 (N.D. Mich. Sept 3, 2020) (emphasis added). *See also Source Food Tech., Inc. v. U.S. Fid. & Guar. Co.*, 465 F.3d 834, 838 (8th Cir. 2006) ("Source Food's argument might be stronger if the policy's language included the word 'of' rather than 'to,' as in 'direct physical loss *of* property' or even 'direct loss *of* property.'").

[9] The "transcripts" Chubb references (to skirt Rule 91A proscriptions on extraneous materials) also refer to policies that insured only "loss *to*" or possibly "damage *to*" property. *Cf.* (Rule 91A Motion, pp. 9, 10).

Moreover, other courts around the country—which Chubb has elected not to acknowledge—likewise have construed "loss" (particularly "loss of") to include loss of the ability to use.[10] This is conclusive Chubb has not proffered the *only* reasonable construction of its Policy language, because reasonable minds clearly have disagreed with Chubb's position.

Indeed, it appears only two cases Chubb has cited actually purported to construe coverage provisions containing the phrase "loss of," yet the plaintiffs in those cases alleged business disruptions *solely* to comply with governmental directives—*not* to preempt COVID-19 risks (as is *mandated* under language in Chubb's Policy). *See Malaube, LLC v. Greenwich Ins. Co.*, Case No. 20-22615-CIV, 2020 U.S. Dist. LEXIS 156027, **9 – 10 (S.D. Fla. Aug. 26, 2020); *10E, LLC v. Travelers Indem. Co.*, 2:20-cv-04418-SVW-AS, 2020 U.S. Dist. LEXIS 156827, **2 – 3 (Aud. 28, 2020). Whether or not the other courts' construction of *those* coverage averments was correct consequently is immaterial to the coverage averments asserted in *this* lawsuit, wherein the Lombardi Plaintiffs have averred imminent risk of person-to-person spread and property damage from COVID-19 necessitated their operational disruptions.

These considerations consequently are disqualifying of Chubb's feigned air of certainty, whereby it invites this Court to be the *first* indefinable court in the state (and perhaps the country) to rule *Chubb's* Policy has unambiguous import conclusively favoring Chubb. Chubb has not provided this Court any basis to conclude dismissal is warranted based on the current state of the law[11]—or facts averred by the Lombardi Plaintiffs.

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[10] *See, e.g., Blue Springs Dental Care v. Owners Ins.* No. 20-CV-00383-SRB, 2020 U.S. Dist. LEXIS 172639, ** 3, 19 – 20 (W.D. Miss. Sept. 21, 2020); *Total Intermodal Servs. v. Travelers Prop. Cas. Co. of Am.,* No.: CV 17-04908 AB, 2018 U.S. Dist. LEXIS 216917, **8 – 9 (D.C. Ca. July 11, 2018); *Manpower Inc. v. Ins. Co. of Pa.*, No. 08C0085, 2009 U.S. Dist. LEXIS 108626, ** 18 – 19 (E.D. Wis., Nov. 3, 2009).

[11] *Cf. Optical Servs. USA/JCI v. Franklin Mut. Ins. Co.*, BER-L-3681-20, 2020 N.J. Super. Unpub. LEXIS 1782, **24 – 25 ("The defendant argues that there is a plain meaning of 'direct physical loss' and the closure of the plaintiffs'

B. Chubb Disregards the Plain Language of the Policy

The common meaning of "loss of," as used in the business Income Coverage, is not limited to physical damage—as recognized by authority even Chubb cites. *See* p. 21 *supra*. *See also* D. Malecki, Commercial Property Coverage Guide, Sixth Edition (2015) ("Physical loss is not synonymous with damage or physical damage. Too often, when reference is made to an insuring agreement, physical loss is not mentioned, as if it does not exist. It does exist, and it is different from physical damage.") (Appx. 025);[12] *Second Injury Fund v. Conrad,* 947 S.W.2d 278, 284 (Tex. App.— Fort Worth 1997, no pet.) ("Loss is a generic and relative term. . . . It is not a word of limited, hard and fast meaning."). Accordingly, Chubb's use of the phrase at best creates uncertainty, which must be resolved in favor of the Lombardi Plaintiffs. *See* 811 S.W.2d at 555.

Similar failings characterize the Ordinance Or Law exclusion and Virus Exclusion, which are subject to the even more unforgiving principle of Texas law that applies to exclusionary provisions, whereby a court "must adopt the construction . . . urged by the *insured* as long as that construction is not unreasonable, *even if* the construction urged by the *insurer* appears to be *more* reasonable or a more accurate reflection of the parties' intent." 972 S.W.2d at 741 (quoting *National Union Fire Ins. Co.*) (emphasis added). Chubb, for instance, did not define "ordinance" or "law" in a manner that unambiguously embraces the executive directives alleged by the Lombardi Plaintiffs. *See* pp. 6 – 7 *supra*. It also failed to clearly and unambiguously subject the pertinent Business Income Coverage to "SPECIAL" restrictions as a threshold for incorporation of the Ordinance Or Law exclusion. *See* pp. 8 – 10 *supra*.

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business does not qualify . . . . This is a blanket statement unsupported by any common law in the State of New Jersey or by a blanket review of the policy language.").

[12] *See* **Exhibit 9** attached hereto.

Similarly, if Chubb intended the Virus Exclusion to at all apply to a Policy section titled, "BUSINESS INCOME (AND EXTRA EXPENSE) COVERAGE FORM", Chubb was obligated to use non-obtuse language to clearly and unambiguously do so. *See* pp. 15 – 16 *supra*. *Cf. Urogynecology Specialist of Fa. LLC v. Sentinel Ins. Co., Ltd.*, Case No. 6:20-cv-01174-ACC-EJK, U.S. Dist. Ct. M.D. Fa., Dkt. 21, Page 6 of 8 ("the 'Limited Fungi, Bacteria or Virus Coverage' section of the Policy . . . starts by stating that it modifies certain coverage forms. Those forms are not provided in the Policy itself . . . .").[13] And if Chubb intended the language of the exclusion to foreclose something more than the causal effects of the *actual* virus—it was incumbent upon Chubb to utilize common industry language to do precisely that. For instance, in *Diesel Barbershop, LLC v. State Farm Lloyds*—as but one example in the cases Chubb cites—the court considered a comprehensive pandemic exclusion, excluding all conceivable virus implications irrespective of sequence:

> We do not insure under *any* coverage for *any* loss which would not have occurred in the absence of [the virus]. We do not insure for such loss *regardless* of: (a) the *cause* of the excluded event; or (b) *other causes* of the loss; or (c) whether other causes acted concurrently or in *any sequence* with the excluded event to produce the loss . . .

2020 U.S. Dist. LEXIS 147276, *7 (emphasis added). Chubb elected *not* to utilize a comprehensive exclusion of the kind and cannot have the Court rewrite its Policy after the fact.

Chubb moreover has ignored the over-breadth it attributes the Virus Exclusion is irreconcilable with the structure of its Policy as a whole, whereby it *mandated* precisely the preventative and mitigation steps taken by the Lombardi Plaintiffs. *See* pp. 17 – 18 *supra*. For

[13] The holding in *Urogynecology Specialist* also is significant because the insurer in the case apparently *conceded* operational disruptions attributable to COVID-19 qualified for coverage.

instance, in *Real Asset Management v. Lloyd's of London*, the United States Court of Appeals for the Fifth Circuit held: "The duty to mitigate is such a recognized defense in the recovery of damages that some courts have awarded insureds the expenses of mitigating when an insured has taken *protective* measures." 61 F.3d 1223, 1229, n.11 (5th Cir. 1995) (emphasis added). In so doing, the court cited with approval *Slay Warehousing Co. v. Reliance Ins. Co.*, wherein the Eighth Circuit held: "the obligation to pay the expenses of *protecting* the exposed property may arise from either the insurance agreement *itself*, . . . or an *implied duty* under the policy based upon general principles of law and equity . . . ." 471 F.2d 1364, 1367 – 68 (8th Cir. 1973) (emphasis added).

Chubb's Policy implicates *both* protection triggers. It consequently cannot now balk when the plain language of its coverage provisions, coupled with its prevention edicts, support coverage. The Rule 91A Motion consequently should be denied, and the Lombardi Plaintiffs should be awarded their response cost and attorneys' fees pursuant to Texas Rule of Civil Procedure 91a.7.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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I hereby certify that on February 8, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: February 8, 2021

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