CASE NO. 20-17422
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

NATIONAL CASUALTY COMPANY; SCOTTSDALE INDEMNITY COMPANY; SCOTTSDALE INSURANCE COMPANY,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Arizona
Case No. 2:20-cv-01312, Honorable Douglas L. Rayes

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DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendants-Appellees National Casualty Company, Scottsdale Indemnity Company and Scottsdale Insurance Company hereby certify as follows:

National Casualty Company is a wholly-owned subsidiary of Nationwide Mutual Insurance Company, and no other publicly held company owns 10% or more of National Casualty Company's stock.

Scottsdale Indemnity Company is a wholly-owned subsidiary of Nationwide Mutual Insurance Company, and no other publicly held company owns 10% or more of Scottsdale Indemnity Company's stock.

Scottsdale Insurance Company is a wholly-owned subsidiary of Nationwide Mutual Insurance Company, and no other publicly held company owns 10% or more of Scottsdale Insurance Company's stock.

Dated: March 10, 2021

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INTRODUCTION

The District Court dismissed Plaintiffs' business interruption claims based on the virus exclusion in the subject policies, which excludes coverage for loss or damage "caused by" or "resulting from" a virus. Plaintiffs do not argue that the virus exclusion is ambiguous. Instead, Plaintiffs argue there somehow is a fact dispute regarding whether their alleged losses were caused by or resulted from the coronavirus. Specifically Plaintiffs contend there is a fact issue regarding which of the following caused their losses: "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, 265, 272 (¶¶ 7, 71, 105).

Yet, as the District Court correctly held, Plaintiffs' argument is "not plausible" because their own Amended Complaint "explicitly attributes their losses to the virus." 1-ER-4-5. Plaintiffs, for example, repeatedly allege in the Amended Complaint that the coronavirus is present at the insured premises, that the coronavirus is causing physical loss or damage to the insured premises, and that the related governmental orders were issued as a result of the coronavirus. 2-ER-257, 258, 261, 265 (¶¶ 42, 45, 57, 58, 71). Plaintiffs reference the coronavirus more than 60 times in their Amended Complaint. Plaintiffs' alleged losses plainly were caused by and resulted from the coronavirus according to Plaintiffs' own allegations, as the District Court correctly held.

In apparent recognition that the virus exclusion bars their claims, Plaintiffs spend most of their Opening Brief raising a litany of arguments (many for the first time on appeal), ranging from "anti-concurrent cause" policy language not at issue here to "regulatory estoppel" to "federal common law." Aside from having waived some of these arguments, there is little to no case law to support these arguments, which repeatedly have been rejected by other courts. In fact, numerous federal courts have enforced *identical* virus exclusions in other COVID-19 business interruption lawsuits like this one.

The Policies also contain an exclusion that bars coverage for losses caused by or resulting from the suspension, lapse or cancellation of a contract. 3-ER-331 (§ 4(a)(3)(b)). In their Amended Complaint, Plaintiffs repeatedly allege that Major League Baseball failed to comply with its contractual obligations to provide Plaintiffs' teams with players. 2-ER-246, 264, 265 (¶¶ 4, 66, 67, 69, 70). In an argument the District Court labeled "disingenuous," Plaintiffs argue that they never made such allegations. The Amended Complaint, however, speaks for itself. Plaintiffs cannot avoid dismissal by ignoring their own allegations. The District Court's Order should be affirmed.

ISSUES PRESENTED

1. Whether the District Court correctly determined that the virus exclusion in the subject insurance policies bars Plaintiffs' claims as a matter of law? *See* Argument Section I below.

2. Whether the District Court correctly determined that the "regulatory estoppel" doctrine does not apply here? *See* Argument Section II below.

3. Whether the District Court correctly determined that Plaintiffs' claims are barred by the subject insurance policies' exclusion of losses caused by or resulting from the suspension, lapse or cancellation of any license, lease, or contract? *See* Argument Section III below.

STATEMENT OF THE CASE

I. Amended Complaint Allegations.

Plaintiffs are twenty-four entities associated with or providing services for nineteen Minor League Baseball ("MiLB") teams. 2-ER-249-254 (¶¶ 10-28). Plaintiffs allege that Defendants issued commercial first-party property and casualty insurance policies covering them as the named insureds. 2-ER-249-254, 266-267 (¶¶ 10-28, 78-79). Copies of the subject policies are attached as Exhibits A through L to the Amended Complaint (the "Policies"). *See* ER Vols. 3-13. Plaintiffs allege that the Policies are substantially identical. 2-ER-267 (¶ 79).

Plaintiffs allege the Policies provide coverage for "direct physical loss of or damage to Covered Property . . . resulting from any Covered Cause of Loss," for loss of "Business Income . . . due to the necessary 'suspension' of . . . 'operations,'" and for loss of "Business Income . . . caused by action of civil authority that prohibits access to the described premises." 2-ER-268-269 (¶¶ 83-90). Plaintiffs also admit the Policies contain a virus exclusion, which excludes from coverage "loss or damage caused by or resulting from any virus[.]" 2-ER-269 (¶ 91).

Plaintiffs allege they have incurred losses caused by and resulting from the SARS-CoV-2 virus. 2-ER-265 (¶ 71). Specifically, Plaintiffs allege it is "statistically certain the virus has been present at the Teams' ballparks for some period of time since their closures" and that "the virus poses an actual and imminent threat to the ballparks." 2-ER-257, 261 (¶¶ 42-43, 57). Plaintiffs also allege "the virus has caused authorities around the country to issue stay-in-place orders to protect persons and property" and that "authorities in each of the Teams' respective states have issued such orders." 2-ER-258-261 (¶¶ 45-55). Plaintiffs further allege, under these circumstances, Major League Baseball has refused to supply players to Minor League Baseball ("MiLB") teams, including Plaintiffs' teams. 2-ER-264-265 (¶¶ 66-70). In sum, Plaintiffs allege that "the virus, including its continuing, damaging, and invisible presence, and the measures

required to mitigate its spread, constitute . . . direct physical loss or damage to the ballparks . . . and has contributed to cancellations of the Teams' MiLB games." 2-ER-261 (¶ 58).

Plaintiffs contend they have made claims for coverage under the Policies, but allege that Defendants either have denied their claims or intend to do so. 2-ER-269-272 (¶¶ 92-105). Based on these allegations, Plaintiffs assert claims for breach of contract, anticipatory breach of contract and declaratory judgment. 2-ER-280, 281, 283 (¶¶ 129, 137, 146).

II. Relevant Terms Of The Subject Policies.

Generally, the Policies provide coverage for "direct physical loss of or damage to Covered Property at the premises described in the Declarations caused by or resulting from any **Covered Cause of Loss**." 3-ER-313 (§ A) (emphasis added). More specifically, the Policies provide coverage for loss of "Business Income" as follows:

> We will pay for the actual loss of Business Income you sustain due to the necessary "suspension" of your "operations" during the "period of restoration". The "suspension" must be caused by direct physical loss of or damage to property at 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.**

3-ER-337 (§ A(1)) (emphasis added). Business income coverage, however, is not provided for losses "caused by or resulting from" the "[s]uspension, lapse or cancellation of any . . . contract." 3-ER-331 (§ B(4)(a)(3)(b)).

The Policies also provide additional "Civil Authority" coverage where access to the insured premises (and to the surrounding area) is denied by civil authority due to a Covered Cause of Loss causing damage at *other* property within one mile:

> 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 (§ A(5)(a)) (emphasis added).

Thus, regardless of the provision, the Policy only provides coverage for a "Covered Cause of Loss." The definition of a "Covered Cause of Loss," however, unambiguously states that coverage is not provided for losses *excluded* from the

Policies. 3-ER-327 (§ A) ("Covered Causes of Loss means direct physical loss unless the loss is excluded or limited in this policy"). The Policies, in turn, expressly exclude losses caused by or resulting from a virus:

> **EXCLUSION OF LOSS DUE TO VIRUS OR BACTERIA**
>
> * * * *
>
> A. The exclusion set forth in Paragraph B. applies to **all coverage under all forms and endorsements** that comprise this Coverage Part or Policy, including but not limited 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**.
>
> B. We 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.

3-ER-345 (emphasis added).

III. The District Court's November 13, 2020 Order.

The District Court granted Defendants' motion to dismiss the Amended Complaint by Order dated November 13, 2020 based on the plain language of the virus exclusion. 1-ER-2. The District Court expressly rejected Plaintiffs' argument that a fact question existed regarding whether their alleged losses "were caused by the government's orders in response to the virus or the virus itself[.]" 1-ER-5. As the District Court noted, "Plaintiffs' amended complaint explicitly attributes their losses to the virus[.]" 1-ER-5. As the District Court noted, the amended complaint expressly alleges that the "invisible presence" of the

coronavirus is causing "continuing" damage which "constitutes an actual and imminent threat and direct physical loss or damage to the ballparks[.]'" 1-ER-5. The amended complaint also "alleges that the government orders in question were issued as a direct result of the virus." 1-ER-5. Furthermore, "Plaintiffs' amended complaint does not allege any fact supporting an alternative theory for the issuance of the 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." 1-ER-5.

The District Court next addressed Plaintiffs' allegations that Major League Baseball ("MLB") failed to provide players to the teams. The Policies "include an exclusion for losses stemming from the '[s]uspension, lapse or cancellation' of a contract." 1-ER-6. As the District Court noted, "Plaintiffs state in their amended complaint that MLB is contractually obligated to supply Plaintiffs' teams with players but failed to do so." 1-ER-6. While Plaintiffs attempted to argue that they did not make any such allegations, the District Court held that "[a]ny effort to ignore the contractual nature of MLB and MiLB's relationship is disingenuous." 1-ER-6.

Lastly, the District Court addressed and rejected Plaintiffs' "regulatory estoppel" argument. The District Court held that (1) courts in Texas and Indiana have refused to recognize "regulatory estoppel," a doctrine recognized in New

Jersey but rejected in virtually every other state that has considered it; (2) general equitable estoppel principles do not apply; and (3) federal common law does not apply. 1-ER-7. The District Court further held that "Plaintiffs have not alleged that Defendants made representations to them that the virus exclusion did not apply, or that their coverage otherwise differed from that represented in the printed materials." 1-ER-7.

SUMMARY OF THE ARGUMENT

I. Virus Exclusion: Plaintiffs allege their insurance policies provide coverage for the business losses they have suffered stemming from the SARS-CoV-2 coronavirus. Plaintiffs' policies, however, each contain a virus exclusion, which expressly excludes coverage "for loss or damage caused by or resulting from any virus[.]" 3-ER-345 (§ B). The virus exclusion expressly applies to "all coverage under all forms and endorsements" including "forms or endorsements that cover business income, extra expense or action of civil authority." 3-ER-345 (§ A).

In accordance with black-letter law, the District Court correctly enforced the clear and unambiguous virus exclusion as written. Although this case involves the substantive law of each state where the insured premises are located, there is no material difference in that law for purposes of this appeal. *See infra* p. 16. Courts in each of the ten subject states enforce and apply as written clear and

unambiguous policy exclusions like the virus exclusion here, including similar mold, bacteria, and other policy exclusions. *See infra* p. 18 n. 2. Furthermore, numerous other federal courts have considered coronavirus business interruption claims like Plaintiffs' claims here, and have dismissed those claims as a matter of law based on virus exclusions *identical* to those in the subject insurance policies. *See infra* p. 19, n. 3.

As the District Court correctly noted, Plaintiffs do not identify any ambiguity in the virus exclusion and do not dispute that it bars coverage for loss or damage caused by or resulting from a virus. 1-ER-4. Instead, Plaintiffs argue there is a factual dispute regarding whether the coronavirus caused their alleged losses. Plaintiffs, however, repeatedly allege in their Amended Complaint that the coronavirus is present at and causing damage to the insured premises, and that their losses were caused by and resulted from the coronavirus. 2-ER-257, 258, 261, 265 (¶¶ 42, 45, 57, 58, 71). Indeed, Plaintiffs reference the coronavirus more than 60 times in their Amended Complaint. As the District Court correctly held, "Plaintiffs' amended complaint explicitly attributes their losses to the virus" and their arguments to the contrary are "not plausible." 1-ER-4-5. The District Court's holding on this point also is consistent with numerous other federal court decisions rejecting the same arguments Plaintiffs make here.

Plaintiffs next chide the District Court for having "failed to consider" whether the absence of "anti-concurrent cause" language in the virus exclusion renders it unenforceable. Opening Brief at 37. Plaintiffs, however, never raised this issue with the District Court and therefore waived it. *Armstrong v. Brown*, 768 975, 981 (9th Cir. 2014) ("an issue will generally be deemed waived on appeal if the argument was not raised sufficiently for the trial court to rule on it").

Moreover, Plaintiffs' "anti-concurrent cause" argument is meritless. Numerous federal courts have enforced virus exclusions *identical* to the virus exclusion in the subject Policies. One federal court rejected the very same argument Plaintiffs make here. *See 10E, LLC v. Travelers Indem. Co. of Conn.*, 2020 WL 6749361 at *3 (C.D. Cal. Nov. 13, 2020) (absence of anti-concurrent cause language irrelevant where "the plain meaning of the virus exclusion does foreclose coverage under the Policy"). As in *10E*, and according to Plaintiffs' own allegations, Plaintiffs' alleged losses plainly were "caused by" and "resulted from" the coronavirus, which they allege is present at and causing damage to the insured premises. Plaintiffs cannot ignore their own allegations and pretend otherwise. The District Court correctly applied the clear and unambiguous language of the virus exclusion as written. The District Court's Order should be affirmed.

II. Regulatory Estoppel: Unable to overcome the plain language of the virus exclusion, Plaintiffs allege the virus exclusion is unenforceable because the

insurance industry purportedly made misrepresentations to insurance regulators in 2006 regarding the exclusion. This argument has been called "regulatory estoppel." As the District Court correctly held, however, regulatory estoppel is a New Jersey state law argument that has been rejected by virtually every other state and federal court to address the issue. 1-ER-6. And the District Court also rightly concluded that none of the subject states has recognized regulatory estoppel and there is no legal authority suggesting they would do so. 1-ER-6-7.

Despite the fact none of the subject states recognize regulatory estoppel, Plaintiffs next ask this Court to impose the doctrine by judicial fiat under the guise of "federal common law." Plaintiffs, however, fail to cite a single court decision recognizing regulatory estoppel as a matter of federal common law. There are none. And there is no basis for this Court to create new federal common law. As the District Court correctly held, the "rare circumstances in which federal common law exists are absent here." 1-ER-7-8 (citing *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 461 U.S. 630, 641 (1981)).

Plaintiffs also argue that "regulatory estoppel" should be recognized based on state "equitable estoppel" principles. Yet, again, Plaintiffs fail to cite any state law cases in which "equitable estoppel" principles have been applied to alleged misrepresentations to state regulators. To the contrary, each of the subject states recognize that estoppel principles cannot be used to expand the scope of coverage

beyond that contained in the insurance policy, and/or that extrinsic evidence cannot be considered when the language of the policy is clear and unambiguous. *See infra* p. 32-33, n. 7.

But even under Plaintiffs' theory, estoppel requires Defendant to have made a prior representation that is inconsistent with its position in this case. Here, Plaintiffs have not identified any inconsistency in Defendants' position that the virus exclusion applies and bars Plaintiffs' claims. Plaintiffs, for example, allege that non-party Insurance Services Office ("ISO") drafted a standard virus exclusion and submitted it to unidentified state insurance departments. 2-ER-277-279 (¶¶ 121-126). Plaintiffs refer to a 2006 ISO Circular discussing ISO's proposed virus exclusion (which Plaintiffs allege is identical to the virus exclusion in the Policies). 2-ER-277-278 (¶ 122). Yet, the 2006 ISO Circular makes clear that the virus exclusion is intended to "address exclusion of loss due to disease-causing agents such as viruses and bacteria" including virus-related losses arising in a "pandemic." 2-ER-231, 236.

This is entirely consistent with Defendants' position here – Plaintiffs' claims are barred by the Policies' virus exclusion. Numerous federal courts have held there is no inconsistency between the ISO Circular and insurers' reliance on the virus exclusion in COVID-19 business interruption cases like this one. *See infra*

pp. 35-36, n. 9. The District Court's Order should be affirmed for this reason as well.

III. Suspension, Lapse Or Cancellation Exclusion: Plaintiffs repeatedly allege in their Amended Complaint that Major League Baseball failed to comply with its contractual obligations to provide Plaintiffs' teams with players. 2-ER-246, 264, 265 (¶¶ 4, 66, 67, 69-70). The Policies expressly bar coverage for claims "caused by or resulting from . . . Suspension, lapse or cancellation of any license, lease or contract." 3-ER-331 (§ 4(a)(3)(b)). Accordingly, Plaintiffs are not entitled to coverage for losses caused by or resulting from Major League Baseball's failure to provide players to Plaintiffs' teams.

While Plaintiffs argue that they never alleged any suspension, lapse or cancellation of a contract, the District Court labeled this argument "disingenuous." 1-ER-6. Plaintiffs plainly made such allegations in the Amended Complaint, as the District Court correctly held. 1-ER-6 ("Plaintiffs state in their amended complaint that MLB is contractually obligated to supply Plaintiffs' teams with players but failed to do so"). Unable to avoid their own allegations, Plaintiffs raise a host of other meritless arguments, many of which they never presented to the District Court (e.g., citing to irrelevant policy provisions under which they are not seeking coverage and which they never cited either in their Amended Complaint or in their briefing below). The District Court's Order should be affirmed.

STANDARD OF REVIEW

This Court reviews "de novo the district court's judgment granting a 12(b)(6) motion for failure to state a claim upon which relief can be granted." *Kwan v. SanMedica Int'l*, 854 F.3d 1088, 1093 (9th Cir. 2017). "A dismissal under rule 12(b)(6) 'may be based on either a 'lack of a cognizable legal theory' or 'the absence of sufficient facts alleged under a cognizable legal theory.'" *Id.* (citations omitted).

Furthermore, "[i]n order to "survive a rule 12(b)(6) motion to dismiss, a 'plaintiff must allege enough facts to state a claim to relief that is plausible on its face.'" *Id.* at 1096 (citations omitted). "'[C]onclusory allegations of law and unwarranted inferences . . . are insufficient to avoid' dismissal." *Id.* "Legal conclusions may provide a framework for a complaint, but 'they must be supported by factual allegations.'" *Id.* Unsupported conclusions "are not entitled to the assumption of truth." Lastly, this Court may "affirm the dismissal 'based on any ground supported by the record.'" *Id.* at 1093.

CHOICE OF LAW

The District Court correctly determined that, in this diversity action, the laws of the following states (where each team resides) apply: California, Idaho, Indiana, Maryland, Oregon, South Carolina, Tennessee, Texas, Virginia, or West Virginia. 1-ER-3-4. There is no material difference between the law of each of these states

with respect to the interpretation of insurance policies: insurance contracts are to be construed according to their plain and ordinary meaning; when policy language is unambiguous, a court cannot create an ambiguity in an attempt to find coverage; and unambiguous provisions are to be given effect as written.[1] Applying these principles here, the District Court properly dismissed Plaintiffs' claims as discussed below.

ARGUMENT

I. The Virus Exclusion In The Policies Bars Plaintiffs' Claims As A Matter Of Law.

A. The Virus Exclusion Is Clear, Unambiguous, And Plainly Bars Plaintiffs' Alleged Losses.

Plaintiffs' Policies expressly exclude from coverage any loss or damage caused by or resulting from a virus. Specifically, the Policies provide as follows: "We 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

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[1] ***California:*** *Tustin Field Gas & Good, Inc. v. Mid-Century Ins. Co.*, 13 Cal. App. 5th 220, 226 (2017)***; Idaho:*** *Clark v. Prudential Prop. & Cas. Ins. Co.*, 66 P.3d 242, 245 (Idaho 2003)***; Indiana:*** *Erie Indem. Co. for Subscribers at Erie Ins. Exch. v. Estate of Harris by Harris*, 99 N.E.3d 625, 630 (Ind. 2018)***; Maryland:*** *Kurland v. ACE Am. Ins. Co.*, 2017 WL 354254 at *2 (D. Md. Jan. 23, 2017)***; Oregon:*** *Groshong v. Mutual of Enumclaw Ins. Co.*, 985 P.2d 1284, 1289 (Or. 1997)***; South Carolina:*** *Whitlock v. Stewart Title Guar. Co.*, 732 S.E.2d 626, 628 (S.C. 2012)***; Tennessee:*** *Garrison v. Bickford*, 377 S.W.3d 659, 664 (Tenn. 2012)***; Texas:*** *Aggreko, L.L.C. v. Chartis Specialty Ins. Co.*, 942 F.3d 682, 688 (5th Cir. 2019)***; Virginia:*** *Erie Ins. Exch. v. EPC MD 15, LLC*, 822 S.E.2d 351, 355 (Va. 2019)***; West Virginia:*** *W. Virginia Fire & Cas. Co. v. Stanley*, 602 S.E.2d 483, 489 (W. Va. 2004).

distress, illness or disease." 3-ER-345 (§ B). The virus exclusion expressly applies to "all coverage under all forms and endorsements" including "forms or endorsements that cover business income, extra expense or action of civil authority." 3-ER-345 (§ A). The virus exclusion is clear and unambiguous.

Furthermore, Plaintiffs' claims fall squarely within the plain language of the Policies' virus exclusion because Plaintiffs allege their losses were "caused" by and "resulted from" the coronavirus:

> 42. It is statistically certain **the virus has been present** at the Teams' ballparks for some period of time since their closures.
>
> * * * *
>
> 45. The nature of **the virus has caused** authorities around the country to issue stay-in-place order to protect persons and property, and many such orders observe the virus's threat to property. Indeed, authorities in each of the Teams' respective states have issued such orders.
>
> * * * *
>
> 57. For these reasons, it is statistically certain that **the virus is present** at the Teams' ballparks and/or nearby properties or that **the virus poses an actual and imminent threat** to the ballparks.
>
> 58. 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 cancellations of the Teams' MiLB games**.
>
> * * * *

> 71. **As a result of the virus**, attendant disease, resulting pandemic, governmental responses, and MLB not supplying players, the Teams have been deprived of their primary source of revenue . . . .

2-ER-257, 258, 261, 265. Plaintiffs plainly allege losses caused by or resulting from the coronavirus – a cause of loss or damage expressly excluded from coverage under the terms of the Policies.

The District Court was correct to apply as written the clear and unambiguous language of the virus exclusion. Indeed, courts in each of the subject states have enforced as written similar unambiguous mold/fungus and other exclusions as a matter of law.[2] Additionally, since the filing of this lawsuit, other courts have ruled on motions to dismiss business interruption claims relating to COVID-19.

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[2] ***California:*** *Sapiro v. Encompass Ins. Co.,* 221 F.R.D. 513, 522-523 (N.D. Cal. 2004)***; Idaho:*** *Crandall v. Hartford Cas. Ins. Co.*, 2013 WL 502194 at *8-9 (D. Idaho Feb. 8, 2013)***; Indiana:*** *Hartford Cas. Ins. Co. v. Evansville Vanderburgh Public Library,* 860 N.E.2d 636, 647 (Ind. App. 2007)***; Maryland:*** *Carney v. Assurance Co. of Am.*, 2005 WL 899843 at *1-2 (D. Md. Apr. 19, 2005)**;** ***Oregon:*** *Fireman's Fund Ins. Co. v. Oregon Cold Storage, LLC,* 11 Fed. Appx. 969, 970 (9th Cir. 2001)***; South Carolina:*** *South Carolina Farm Bureau Mut. Ins. Co. v. Berlin*, 2005 WL 7082978 at *3 (S.C. Ct. App. Jan. 25, 2005)***; Tennessee:*** *Smith v. Shelby Ins. Co. of Shelby Ins. Group,* 936 S.W.2d 261, 266 (Tenn. App. 1996); ***Texas:*** *Fiess v. State Farm Lloyds,* 202 S.W.3d 744, 753 (Tex. 2006)***; Virginia:*** *Poore v. Main Street Am. Ins. Co.,* 355 F.Supp.3d 506, 513 (W.D. Va. 2018)***; West Virginia:*** *Pilling v. Nationwide Mut. Fire Ins. Co.,* 500 S.E.2d 870, 873 (W. Va. 1997).

Where the subject policy contains a virus exclusion, these courts routinely have dismissed plaintiffs' claims as a matter of law – **including in at least thirteen cases with virus exclusions *identical* to the exclusion here**. *See 10E, LLC v. Travelers Indem. Co. of Conn.*, 2020 WL 6749361 at * 2 (C.D. Cal. Nov. 13, 2020) (enforcing identical virus exclusion); *Mark's Engine Co. No. 28 Rest. LLC v. The Travelers Indem. Co. of Conn.*, 2020 WL 5938689 at *5 (C.D. Cal. Oct. 2, 2020) (same); *Travelers Cas. Ins. Co. of Am. v. Geragos and Geragos*, 2020 WL 6156584 at *2, 5 (C.D. Cal. Oct. 19, 2020) (same); *Pez Seafood DTLA, LLC v. Travelers Ind. Co.*, 2021 WL 234355 at *2, 7 (C.D. Cal. Jan. 20, 2021) (same).[3] The District Court's decision to enforce the clear and unambiguous language of the Policies' virus exclusion is consistent with this growing weight of authority nationally.

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[3] *See also Newchops Rest. Comcast LLC v. Admiral Ind. Co.*, 2020 WL 7395153 at *8 (E.D. Penn. Dec. 17, 2020) (enforcing identical virus exclusion); *AFM Mattress Co., LLC v. Motorists Commercial Mut. Ins. Co.*, 2020 WL 6940984 at *2-3 (N.D. Ill. Nov. 25, 2020) (same); *Real Hosp., LLC v. Traveler's Cas. Ins. Co. of Am.*, 2020 WL 6503405 at *8 (S.D. Miss. Nov. 4, 2020) (same); *Toppers Salon & Health Spa, Inc. v. Travelers Prop. Cas. Co. of Am.*, 2020 WL 7024287 at *3 (E.D. Pa. Nov. 30, 2020) (same); *Mena Catering, Inc. v. Scottsdale Ins. Co.*, 2021 WL 86777 at *8 (S.D. Fla. Jan. 11, 2021) (same); *Whiskey Flats Inc. v. Axis Insurance Company*, 2021 WL 534471 at *4 (E.D. Penn. Feb. 12, 2021) (same); *Edison Kennedy, LLC v. Scottsdale Ins. Co.*, 2021 WL 22314 at *6-7 (M.D. Florida Jan. 4, 2021) (same); *Causeway Automotive, LLC v. Zurich American Insurance Company*, 2021 WL 486917 at *2 (D. N.J. Feb. 10, 2021) ("COVID-19 was the proximate cause of Plaintiffs' losses") (same); *Body Physics v. Nationwide Insurance,* Civil No. 20-9231 (D. N.J. March 10, 2021 Opinion) (same).

As the District Court noted, Plaintiffs do not dispute that the clear and unambiguous language of the virus exclusion bars coverage for loss or damage caused by or resulting from the coronavirus. 1-ER-4 ("Plaintiffs do not dispute that the virus exclusion's meaning . . . is clear and unambiguous"). Plaintiffs instead argue that a fact dispute exists regarding whether the coronavirus caused their alleged losses. As discussed, however, Plaintiffs cannot rewrite their own Amended Complaint, which repeatedly alleges their losses were caused by and resulted from the coronavirus (which is referenced more than 60 times).

Furthermore, Plaintiffs' alleged "causes" of loss all result from the coronavirus. Plaintiffs, for example, allege that their losses were caused by "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, 265, 272 (¶¶ 7, 71, 105). Yet, according to Plaintiffs' own allegations (and common sense), each of these things resulted from the coronavirus. 2-ER-246, 248, 258, 264, 272 (¶¶ 2, 7, 45, 65, 105). Plaintiffs have not identified a cause other than the coronavirus. As the District Court correctly held, "Plaintiffs' amended complaint explicitly attributes their losses to the virus" and accordingly "Plaintiffs' argument that a factual dispute exists as to the cause of their loss is not plausible." 1-ER-4-5.

The District Court's holding is consistent with numerous other federal courts which have rejected similar arguments that the coronavirus somehow was not the

cause of plaintiffs' alleged losses. As one federal court explained, "[w]hile the Orders technically forced the Properties to close . . . the Orders only came about sequentially as a result of the COVID-19 virus . . . Thus, it was the presence of COVID-19 . . . that was the primary root cause of Plaintiffs' businesses temporarily closing." *Diesel Barbershop, LLC v. State Farm Lloyds*, 2020 WL 4724305 at *6 (W.D. Texas Aug. 13, 2020). Another federal court rejected Plaintiffs' very same argument as "Nonsense." *Franklin EWC, Inc. v. The Hartford Fin. Servs. Grp., Inc.*, 2020 WL 5642483 at *2 (N.D. Cal. Sept. 22, 2020) ("Thus, under Plaintiffs' theory, the loss is created by the Closure Orders rather than the virus, and therefore the Virus Exclusion does not apply. Nonsense."). In summary, the virus exclusion is clear and unambiguous, and Plaintiffs repeatedly allege that their losses were caused by and resulted from the coronavirus. The District Court's Order dismissing Plaintiffs' claims as a matter of law should be affirmed.

B. Plaintiffs' "Anti-Concurrent Cause" Arguments Have Been Waived And Are Meritless.

Plaintiffs assert for the first time on appeal that the virus exclusion is unenforceable because it does not contain "anti-concurrent cause" language. Opening Brief at 34. Plaintiffs failed to raise this issue before the District Court and therefore waived it. 2-ER-137; *Armstrong v. Brown*, 768 F.3d 975, 981 (9th

Cir. 2014) ("an issue will generally be deemed waived on appeal if the argument was not raised sufficiently for the trial court to rule on it").

Plaintiffs arguments also are meritless. As noted above, numerous federal courts have enforced virus exclusions *identical* to the virus exclusion at issue here. Indeed, one federal court rejected the very same argument Plaintiffs make here:

> Plaintiff also argues that the language of the virus exclusion indicates that it does not apply to losses caused only indirectly by business restrictions during the pandemic. Plaintiff attempts to bolster this interpretation by pointing to language in the Policy that excludes loss or damage "caused directly or indirectly" by various other causes. . . . By contrast, the virus exclusion contains no "directly or indirectly" language.
>
> This argument would stretch the virus exclusion beyond its plain meaning. . . The virus exclusion forecloses coverage where loss or damage is "caused by or resulting from any virus." . . . "The term 'resulting from' broadly links a factual situation with the event creating liability, and connotes only a minimal causal connection or incidental relationship." . . "[T]he term 'resulting from' is generally equated ... with origination, growth or flow from the event." . . . Even if, as Plaintiff alleges, business restrictions enacted in response to COVID-19 were disproportionate to the magnitude of the public health problem, they would still have a "minimal causal connection" to or "flow from" the COVID-19 virus. Therefore, the plain meaning of the virus exclusion does foreclose coverage under the Policy.

10E, LLC v. Travelers Indem. Co. of Conn., 2020 WL 6749361 at * 3 (C.D. Cal. Nov. 13, 2020) (citations omitted). In short, the absence of anti-concurrent cause language is irrelevant. Under Plaintiffs' own allegations, their alleged losses

plainly were "caused by" and "resulted from" the coronavirus, and their claims thus are barred by the virus exclusion in the Policies.

Furthermore, even in the absence of "anti-concurrent cause" language, policy exclusions will bar coverage so long as the excluded peril is the "efficient proximate cause" of the alleged loss. Under California law, for example, "coverage only exists if the efficient proximate cause of the damage is covered under the policy." *Boxed Foods Company, LLC v. California Capital Insurance Company*, 2020 WL 6271021 at *5 (N.D. Cal. Oct. 27, 2020). The "efficient proximate cause," in turn, is "a cause of loss that predominates and sets the other cause of loss in motion." *Id.* Like California, the other subject states look to the "efficient proximate cause" of the loss (or similarly require only a minimal causal connection between the excluded peril and the alleged loss).[4]

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[4] ***Idaho:*** *ABK, LLC v. Mid-Century Insurance Company*, 454 P.3d 1175, 1185 (Idaho S.Ct. 2019) ("The efficient proximate cause doctrine is generally recognized as the universal method for resolving coverage issues involving the concurrence of covered and excluded perils")***; Indiana:*** *Westfield Insurance Company v. Orthopedic And Sports Medicine Center Of Northern Indiana, Inc.*, 247 F.Supp.3d 958, 976 (N.D. Ind. 2017) ("Indiana courts consider the 'efficient and predominating cause' of the injury to determine whether an exclusion eliminates coverage under a policy")***; Maryland:*** *McWhorter v. Bankers Standard Insurance Company*, 2020 WL 1322977 at *3 (D. Maryland March 20, 2020) ("Maryland courts have long applied the 'efficient proximate cause' rule to determine the cause of a loss under an insurance contract")**; *Oregon:*** *12W RPO, LLC v. Affiliated FM Insurance Company*, 353 F.supp.3d 1039, 1048 (D. Oregon 2018) ("if the proximate efficient cause is an excluded peril, the loss is not covered")***; South Carolina:*** *American Automobile Insurance Company v. Valentine*, 131 Fed.Appx. 406, 409 (4th Cir. 2005) (enforcing exclusions so long as there is a "'causal connection' between the excluded risk and the loss")***; Tennessee:*** *Auto-Owners Insurance Co. v. England*, 2013 WL 3423817 at *3 (E.D.

Here, of course, there can be no dispute that the coronavirus is the efficient proximate cause of Plaintiffs' alleged losses. It is the coronavirus – an excluded peril – that set into motion the governmental orders and Plaintiff's subsequent alleged loss of use of the insured premises, as numerous federal courts have held. *See, e.g., Boxed Foods Company, LLC v. California Capital Ins. Co.*, 2020 WL 6271021 at *4 (N.D. Cal. Oct. 27, 2020) ("The Civil Authority Orders would not exist absent the presence of COVID-19; COVID-19 is therefore the efficient proximate of Plaintiffs' losses"); *Karen Trinh, DDS, Inc. v. State Farm General Ins. Co.*, 2020 WL 7696080 at *3-4 (N.D. Cal. Dec. 28, 2020) ("but-for COVID-19, the civil authority orders would not exist, and Plaintiff would not have lost business revenue, making the virus—an exclusion under the Policy—the efficient proximate cause of Plaintiff's losses"); *Edison Kennedy, LLC v. Scottsdale Ins. Co.*, 2021 WL 22314 at *6-7 (M.D. Florida Jan. 4, 2021) ("the coronavirus is the peril that caused the government to enact orders restricting business"); *Causeway*

Tenn. July 8, 2013) (looking to the "efficient and predominate cause of the injury"); ***Texas:*** *Travelers Indemnity Co. v. McKillip*, 469 S.W.2d 160, 162 (Tex. 1971) (the insured must prove that its loss "was caused solely by . . . an insured peril" or must segregate the "damage caused by the insured peril from that caused by . . . an excluded peril")***; Virginia:*** *Minnesota Life Insurance Company v. Scott*, 330 F.Supp.2d 661, 666 (E.D. Va. 2004) (exclusion enforceable so long as the "exclusionary language . . . clearly and unambiguously bring[s] the particular act or omission within its scope")***; West Virginia:*** *Murray v. State Farm Fire and Casualty Company*, 203 W.Va. 477, 488 (1998) ("No coverage exists for a loss . . . if the excluded risk was the efficient proximate cause of the loss. The efficient proximate cause is the risk that sets others in motion").

Automotive, LLC v. Zurich American Insurance Company, 2021 WL 486917 at *7 (D. N.J. Feb. 10, 2021) ("COVID-19 was the proximate cause of Plaintiffs' losses"); *Mashallah, Inc. v. West Bend Mutual Insurance Company*, 2021 WL 679227 at *3-4 (N.D. Ill. Feb. 22, 2021) ("both Plaintiffs lose even under the 'efficient' or 'dominant' causation approach"; collecting cases).

In summary, Plaintiffs waived their "anti-concurrent cause" arguments by failing to raise them in the District Court, and in any event, those arguments have no merit. This Court should affirm the District Court's Order dismissing Plaintiffs' claims.

C. The Cases Cited By Plaintiffs Are Inapposite.

Plaintiffs cite to a handful of decisions declining to enforce virus exclusions. These cases are outlier decisions and are a distinct minority among the dozens of federal court decisions enforcing virus exclusions, including virus exclusions identical to the virus exclusion at issue here. The cases cited by Plaintiffs are also factually inapposite because they involve different policy language and different factual allegations regarding presence of the coronavirus at the insured premises.

In *Elegant Massage*, for example, the court noted the policy's use of the phrase "[g]rowth, proliferation, spread or presence" and held this indicated the "Virus Exclusion applies where a virus has spread throughout the property." *Elegant Massage, LLC v. State Farm Mutual Automobile Insurance Company*,

2020 WL 7249624 at *12 (E.D. Va. Dec. 9, 2020). The court held the virus exclusion did not apply because the plaintiffs did *not* allege "a presence of a virus at the covered property." *Id*. Here, in contrast, the subject virus exclusion does not contain the "growth, proliferation, spread" language at issue in *Elegant Massage*. And, in contrast to *Elegant Massage,* Plaintiffs here repeatedly allege that the coronavirus *is* present at their premises.

Similarly, *Henderson Road* involved an exclusion involving the "growth, proliferation, spread" of "microorganisms." *See Henderson Road Restaurant Systems, Inc. v. Zurich American Ins. Co.*, 2021 WL 168422 at *14 (N.D. Ohio Jan. 19, 2021). The parties also stipulated that "none of Plaintiffs' Insured Premises were closed as a result of the known or confirmed presence of SARS-CoV-2 or COVID-19 at any of the Insured Premises." *Id.* In contrast, again, Plaintiffs' Policies here have a different virus exclusion that does not contain the "growth, proliferation, spread" phrase, and Plaintiffs also repeatedly allege not only the presence of the coronavirus at their premises, but also that the coronavirus is a cause of their alleged losses. Like *Elegant Massage*, the *Henderson Road* decision simply has no relevance here.[5]

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[5] Both *Elegant Massage* and *Henderson Road* are in conflict not only with the vast number of decisions around the country, but also with other decisions within their own judicial districts. The Eastern District of Virginia, for example, has enforced a virus exclusion similar to the one at issue in *Elegant Massage* and dismissed

The *Urogynecology* decision also involved an exclusion for the "growth, proliferation, spread" of a virus, and in any event, the court noted the parties had failed to provide it with all the policy forms necessary to construe the exclusion. *See Urogynecology Specialist of Fla. LLC v. Sentinel Ins. Co., Ltd.*, 2020 WL 5939172 at *4 (M.D. Fla. Sept. 24, 2020). Several courts have distinguished *Urognyecology* on this basis. *See, e.g., Dye Salon, LLC v. Chubb Indemnity Ins. Co.*, 2021 WL 493288 at *10 (E.D. Mich. Feb. 10, 2021) (noting *Urogynecology* court lacked complete copy of policy); *1210 McGavock Street Hospitality Partners, LLC v. Admiral Indem. Co.*, 2020 WL 7641184, at *6 (M.D. Tenn. Dec. 23, 2020) (same). Here, of course, the complete Policies are before the Court.

Lastly, Plaintiffs' reliance on the *Lombardi* state court decision has no relevance or persuasive value because it contains no supporting legal or factual analysis. It is only two sentences long and contains no explanation for the basis of the decision. The referenced legal brief is also irrelevant and is not properly before

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plaintiff's COVID-19 business interruption lawsuit. *See Barroso, Inc. v. Twin City Fire Insurance Company*, Case No. 1:20-cv-632 (E.D. Va. Nov. 10, 2020 Order (Doc. 39); Nov. 10, 2020 Transcript (Doc. 41)). And, in the Northern District of Ohio, every other decision has enforced virus exclusions as a matter of law. *See Santo's Italian Cafe LLC v. Acuity Insurance Company*, 2020 WL 7490095 at *13 (N.D. Ohio Dec. 21, 2020); *Ceres Enterprises, LLC v. Travelers Insurance Company*, 2021 WL 634982 at *10 (N.D. Ohio Feb. 18, 2021); *Mikmar, Inc. v. Westfield Insurance Co.*, 2021 WL 615304 at *9 (N.D. Ohio Feb. 17, 2021); *Family Tacos, LLC v. Auto Owners Ins. Co.*, 2021 WL 615307 at *9 (N.D. Ohio Feb. 17, 2021).

the Court. *See* February 19, 2021 Defendants-Appellees' Response In Opposition To Motion Requesting Judicial Notice (DktEntry 21). Plaintiffs' cited cases are thus inapposite and provide no basis for disturbing the District Court's Order.

II. Plaintiffs' Regulatory Estoppel Arguments Fail As A Matter Of Law.

A. None Of The Subject States Recognize Regulatory Estoppel.

In recognition that the virus exclusion bars their claims, Plaintiffs allege that the virus exclusion is unenforceable because the insurance industry purportedly made misrepresentations to insurance regulators in 2006 regarding the exclusion. 2-ER-272-280 (¶¶ 106-128). This argument has been called "regulatory estoppel." As the District Court explained, however, "regulatory estoppel is a New Jersey state law defense, espoused in *Morton Inter. v. Gen. Acc. Ins. Co. of Am.*, 629 A. 2d 831 (N.J. 1993), which no state whose laws apply has adopted." 1-ER-6. In fact, regulatory estoppel "has been rejected by virtually every other state and federal court to address the issue." 1-ER-6 (quoting *SnyderGeneral Corp. v. General Am. Ins. Co.*, 928 F. Supp. 674, 682 (N.D. Tex. 1996)).

Here, Plaintiffs fail to cite any cases in which courts in any of the subject states have adopted regulatory estoppel or any cases suggesting any of those states would do so. Indeed, Plaintiffs even concede that courts in several of the subject states have expressly rejected application of regulatory estoppel in COVID-19 business interruption lawsuits similar to this one. Opening Brief at 49 n. 13; *see*

also Independence Barbershop, LLC v. Twin City Fire Insurance Company, 2020 WL 6572428 at *4 (W.D. Texas November 4, 2020) ("Texas law does not allow for overlooking the text of unambiguous policy provisions under the doctrine of regulatory estoppel"); *1210 McGavock Street Hospitality Partners, LLC v. Admiral Indemnity Co.*, 2020 WL 7641184 at *6 (M.D. Tenn. Dec. 23, 2020) (refusing to apply regulatory estoppel because "no Tennessee court has adopted it" and, under Tennessee law, "extrinsic evidence may not be introduced to modify the terms of an unambiguous contract"); *Franklin EWC, Inc. v. Hartford Financial Services Group, Inc.*, 2020 WL 7342687 at *3 (N.D. Cal. Dec. 14, 2020) ("California courts reject the regulatory estoppel doctrine"); *Roundin3rd Sports Bar LLC v. The Hartford*, 2021 WL 647379 at *8 (C.D. Cal. Jan. 14, 2021) ("the Court rejects Plaintiff's argument that the regulatory estoppel doctrine applies"); *Pez Seafood DTLA, LLC v. The Travelers Indemnity Co.*, 2021 WL 234355 at *7 n.6 (C.D. Cal. Jan. 20, 2021) ("California courts have not adopted the doctrine of 'regulatory estoppel'").

Plaintiffs incorrectly assert that regulatory estoppel has been recognized in West Virginia, citing to *Joy Technologies Inc. v. Liberty Mut. Ins. Co.*, 421 S.E.2d 493 (W.Va. 1992). As the District Court recognized, however, the *Joy* case contains no discussion of estoppel principles. *See* 1-ER-6 (n.4) ("*Joy* . . . does not discuss estoppel"). To the contrary, the *Joy* court simply found that the defendant

insurer's prior regulatory submissions to the West Virginia Insurance Commissioner established the meaning of the policy's pollution exclusion. *Joy* at 499 ("where a definite meaning has been ascribed to language used in an insurance policy, that meaning should be given to the language by the courts"). Unlike in *Joy*, Plaintiffs here have failed to identify any regulatory submission by Defendants, let alone any regulatory submission that contains a differing meaning of the virus exclusion.

Plaintiffs also make a passing reference to a 1993 Indiana amicus brief for the proposition that Indiana would recognize regulatory estoppel. Yet, amicus briefs do not constitute the law of a state, and in the ensuing seventeen years, not a single Indiana court has recognized regulatory estoppel. In fact, in a case applying Indiana law, the Seventh Circuit refused to apply the New Jersey *Morton* decision because the subject policy exclusion was clear and unambiguous (like the policy exclusion here). *See Cincinnati Ins. Co. v. Flanders Elect. Motor Service, Inc.*, 40 F.3d 146, 153 (7th Cir. 1994) ("we will not look beyond the unambiguous policy language").

In short, none of the subject states have recognized regulatory estoppel and there is no indication they would do so. The District Court thus properly refused to apply "regulatory estoppel," and its Order dismissing Plaintiffs' claims should be affirmed.

B. Federal Common Law Does Not Apply.

Unable to cite any state law supporting their regulatory estoppel arguments, Plaintiffs remarkably ask this Court to impose it upon each of the subject states by judicial fiat pursuant to "federal common law." Plaintiffs, however, fail to cite a single court decision recognizing "regulatory estoppel" under federal common law. Presumably, this is because there are none.

There also is no basis for this Court to create a new federal common law doctrine. The United States Supreme Court has held federal courts may only create "federal common law" in "narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 461 U.S. 630, 641 (1981). None of these situations exist here. Indeed, Plaintiffs do not even attempt to identify an interest justifying the creation of a new federal common law doctrine, particularly one that conflicts with existing state law on this issue. Rather, they expressly admit that "regulatory estoppel" is intended to protect "the integrity of the state insurance commissions." Opening Brief at 45. At most, this is a matter of state law. As the District Court correctly held, the "rare

circumstances in which federal common law exists are absent here." 1-ER-8. The District Court's Order should be affirmed.[6]

C. Equitable Estoppel Does Not Apply.

In yet another fallback position, Plaintiffs argue that each state recognizes general equitable estoppel principles in insurance coverage disputes. Quite the opposite – each of the subject states recognize that estoppel principles cannot be used to expand the scope of coverage beyond that contained in the insurance policy, and/or that extrinsic evidence cannot be considered when the language of the policy is clear and unambiguous.[7] At most, as the District Court held, "'[t]he

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[6] Plaintiffs' citation to judicial estoppel cases is curious given that Plaintiffs do not argue that judicial estoppel somehow applies. It does not. In contrast to judicial estoppel, regulatory estoppel relates to representations made to *state regulatory agencies*, a matter uniquely within the purview of state law. In that regard, Plaintiffs' reliance on the Western District of Tennessee's *Mueller Copper* decision is misplaced. That court did not look to "federal common law" to determine whether "regulatory estoppel" applied in the first instance. To the contrary, the court expressly indicated that it was applying Pennsylvania state law. *See Mueller Copper Tube Products v. Penn. Man. Ass'n Ins. Co.*, 2006 WL 8435027 at *2 (W.D. Tenn. Dec. 14, 2006) ("Pennsylvania law governs"). Pennsylvania state law is *not* at issue in this case.

[7] ***California*****:** *Nautilus Ins. Co. v. Worldwide Aeros Corp.*, 171 Fed. Appx. 182, 185-186 (9th Cir. 2006); *Mayer Hoffman McCann, P.C. v. Camico Mut. Ins. Co.*, 161 F.Supp.3d 858, 868 (N.D. Cal. 2016)**;** ***Idaho:*** *City of Idaho Falls v. Home Ind. Co.*, 126 Idaho 604, 607 (Idaho S.Ct. 1995)***; Indiana:*** *Illinois Farmers Ins. Co. v. Overman*, 186 F.Supp.3d 938, 944 (N.D. Ind. 2016); *Glander v. Mutual of Omaha Ins. Co.*, 347 F.Supp.2d 604, 612 (N.D. Ind. 2004)***; Maryland*****:** *Scottsdale Ins. Co. v. Bounds*, 2013 WL 937905 at *6 (D. Md. Mar. 8, 2013); *W.C. And A.N. Miller Dev. Co. v. Continental Cas. Co.*, 2014 WL 5812316 at *4 (D. Md. Nov. 7, 2014); ***Oregon:*** *DeJonge v. Mut. of Enumclaw*, 315 Or. 237, 241 (Or. 1993); *Port of Portland v. Water Quality Ins. Syndicate*, 796 F.2d 1188, 1194 (9th Cir. 1986)***;***

doctrine of estoppel prevents the insurer from denying coverage based on printed provisions in the policy that conflict with representations by the insurer or its agents on which the policy holder reasonably relied.'" 1-ER-7 (collecting cases). Plaintiffs, however, "have not alleged that Defendants made representations to them that the virus exclusion did not apply, or that their coverage otherwise differed from that represented in the printed materials." 1-ER-7. The District Court's holding on this point is factually and legally correct, and Plaintiffs fail to point to any contrary legal authority or Amended Complaint allegations (because there are none).

Lastly, Plaintiffs oddly fault the District Court for relying on two cases – *Reno Contracting* and *Spring Vegetable* – which Plaintiffs themselves cited in their briefing to the District Court. 1-ER-7; 2-ER-150 (n. 6). As the District Court correctly pointed out, these cases demonstrate that equitable estoppel principles cannot be applied to expand coverage as Plaintiffs attempt to do here. 1-ER-7.

South Carolina: *East Bridge Lofts Property Owners Ass'n, Inc. v. Crum & Forster Specialty Ins. Co.*, 2015 WL 12831694 at *7 (D. S.C. Dec. 22, 2015); *Preservation Capital Consultants, LLC v. First Am. Title Ins. Co.*, 406 S.C. 309, 320 (S.C. 2013); ***Tennessee:*** *Clark v. Sputniks, LLC*, 368 S.W.3d 431, 438 (Tenn. 2012); *Black v. State Farm Mut. Auto. Ins. Co.*, 101 S.W. 3d 427, 428 (Tenn. App. 2003)***; Texas:*** *Snydergeneral Corp. v. Great American Ins. Co.*, 928 F.Supp. 674, 683 (N.D. Tex. 1996)***; Virginia:*** *Ins. Co. of North America v. Atlantic Nat'l Ins. Co.*, 329 F.2d 769, 775 (4th Cir. 1964); *Builders Mut. Ins. Co. v. Parallel Design & Dev. LLC*, 2010 WL 6573365 at *2 (E.D. Virg. Oct. 5, 2010)***; West Virginia;*** *Potesta v. U.S. Fidelity & Guar. Co.*, 202 W.Va. 308, 319-320 (W.Va. 1998); *Blake v. State Farm Mut. Auto. Ins. Co.,* 224 W.Va. 317, 323 (W.Va. S.Ct. 2009).

The District Court's analysis of equitable estoppel principles was correct and should be affirmed.

D. Defendants' Position Here Is Consistent With The 2006 ISO Circular.

Even if estoppel principles somehow apply here – and they do not – Plaintiffs' arguments still fail because estoppel requires the existence of a prior inconsistent position. Here, Plaintiffs have not identified any inconsistency in Defendants' position that the virus exclusion applies and bars Plaintiffs' claims.[8]

Generally, Plaintiffs allege that non-party Insurance Services Office ("ISO") drafted a standard virus exclusion and submitted it to unidentified state insurance departments in 2006. 2-ER-277-279 (¶¶ 121-126). Plaintiffs refer to a 2006 ISO Circular discussing ISO's proposed virus exclusion (which Plaintiffs allege is identical to the virus exclusion in the Policies). 2-ER-277-278 (¶ 122); 2-ER-230 (copy of ISO Circular).

A review of the ISO Circular makes clear that Defendants have not taken any position in this litigation that is opposite from, or inconsistent with, anything expressed in the ISO Circular. To the contrary, Defendants' position is completely

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[8] While not addressed by the District Court, Defendants raised this issue below and this Court can affirm on this basis as well. 2-ER-171; *Kwan v. SanMedica Int'l*, 854 F.3d 1088, 1093 (9th Cir. 2017) (court may affirm "'based on any ground supported by the record'").

consistent. Here, Defendants are arguing that the virus exclusion in the Policies excludes coverage for any losses caused by or resulting from the coronavirus. The ISO Circular, in turn, states that the ISO virus endorsement is intended to "address exclusion of loss due to disease-causing agents such as viruses and bacteria." 2-ER-231. The Circular also explains that "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." 2-ER-236 (Current Concerns). In short, the ISO virus exclusion provides unequivocally that virus-related losses (even those arising in a pandemic) are not covered. There is no inconsistency between the ISO Circular and Defendants' arguments.

Indeed, numerous federal courts have held there is no inconsistency between the ISO Circular and insurers' reliance on the virus exclusion in COVID-19 business interruption cases like this one.[9] This is true even in Pennsylvania and

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[9] *Border Chicken AZ LLC v. Nationwide Mutual Insurance Company*, 2020 WL 6827742 at *5 (D. Ariz. Nov. 20, 2020) ("the ISO Circular is clear that the Virus Exclusion is meant to exclude losses caused by pandemics"); *Boxed Foods Company, LLC v. California Capital Insurance Company*, 2020 WL 6271021 at *6 (N.D. Cal. Oct. 27, 2020) ("Even if Defendant based its Virus Exclusion on ISO's standardized language, such language contemplates widespread diseases like SARS and COVID-19"); *Newchops Restaurant Comcast LLC v. Admiral Indemnity Company*, 2020 WL 7395153 at *9 (E.D. Penn. Dec. 17, 2020) ("Admiral's position here is consistent with the ISO's statement"); *Brian Handel*

New Jersey – two of the few states that have recognized regulatory estoppel. *See, e.g., Humans & Resources, LLC v. Firstline National Insurance Company*, 2021 WL 75775 at *9 (E.D. Penn. Jan. 8, 2021) ("this Court is flatly unable to discern how [the ISO and AAIS statements] are contradictory or contrary to the position which Defendant takes here"); *Delaware Valley Plumbing Supply, Inc. v. Merchants Mutual Insurance Company*, 2021 WL 567994 at * (D.N.J. Feb. 16, 2021) ("The industry filings cited by Plaintiff make clear that the Virus Exclusion clause would bar coverage for loss or damages caused by a virus like COVID-19 . . . Plaintiff's regulatory estoppel argument fails").

In summary, none of the subject states in this lawsuit have recognized "regulatory estoppel," and there is *nothing* to indicate the subject states would do so. This Court should reject Plaintiffs' request to create a sweeping new legal doctrine previously unrecognized in any of the subject states. Plaintiffs also have failed to identify any specific representations made by Defendants to state regulators, let alone any representations inconsistent with Defendants' position here. Plaintiffs' regulatory estoppel arguments should be rejected and the District Court's Order should be affirmed.

D.M.D., P.C. v. Allstate Insurance Co., 2020 WL 654893 at *5 (E.D. Penn. Nov. 6, 2020) ("Defendant takes the same position here as the ISO and AAIS did by arguing that the virus exclusion eliminates coverage for any damage or loss as a result of the causes enumerated therein").

III. Plaintiffs' Claims Are Also Barred By The Policies' Suspension, Lapse Or Cancellation Exclusion.

A. Plaintiffs Allege A Suspension, Lapse Or Cancellation Of Their Contracts With MLB.

The Policies expressly *exclude* coverage for "[a]ny increase of loss caused by or resulting from . . . Suspension, lapse or cancellation of any license, lease or contract." 3-ER-331 (§ 4(a)(3)(b)). Plaintiffs do not argue that the exclusion is ambiguous. Rather, as they did in the District Court, Plaintiffs make the remarkable assertion that they did not allege any suspension, lapse or cancellation of a contract.

As the District Court held, this argument is "disingenuous." 1-ER-6. Plaintiffs plainly alleged such a suspension, lapse or cancellation of their contracts with MLB:

> 4. The operating model for MiLB teams is dependent on receiving players, coaches, and other team personnel from the MLB team with which they have any an **affiliation agreement** requiring that MLB team to provide players and other personnel . . . .
>
> * * *
>
> 66. Fans come to MiLB baseball games to see the players. But the Teams do not employ or manage the baseball players who draw fans to the park. Rather, Major League Baseball teams supply the players to each Team through **player development contracts**.
>
> 67. . . . But under the **player development contracts**, the parent Major League Baseball club

> manages the players, including by paying their salaries and by determining which teams they play for and when.
>
> * * *
>
> 69. The **Professional Baseball Agreement** entered into between Major League and Minor League Baseball and the **Player Development Contract** between MLB and MiLB teams set forth obligations of the MLB teams to supply players to the MiLB teams. Pursuant to those agreements, MLB teams were to provide players to MiLB teams to enable the start of the MiLB season in early-April 2020. However**, MLB has informed MiLB that it will not be providing MiLB with players for the 2020 season**. As a result, MiLB's 2020 season has been cancelled.
>
> 70. **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-246, 264, 265 (emphasis added). Plaintiffs cannot avoid dismissal by pretending that these allegations do not exist. The District Court's Order enforcing the exclusion is plainly supported by Plaintiffs' own allegations in the Amended Complaint, and accordingly, the District Court's Order should be affirmed.

B. Plaintiffs' Remaining Arguments Are Meritless.

Plaintiffs next resort to raising a host of irrelevant issues and arguments, many of which Plaintiffs never presented to the District Court. These arguments are all meritless.

First, Plaintiffs argue that they have alleged a "breach of their contract" rather than a "suspension, lapse or cancellation." Opening Brief at 53. This is a

distinction without a difference. Regardless of whether a "breach" occurred, Plaintiffs plainly alleged the suspension, lapse or cancellation of their contracts with MLB.

The *Prmconnect* case cited by Plaintiffs also fails to offer them any support on this point. In *Prmconnect*, thieves broke into one of plaintiff's business locations and stole computer equipment and accessories. *Prmconnect, Inc. v. Drumm*, 2016 WL 7049049 at *1 (N.D. Ill. Dec. 5, 2016). Plaintiff's insurer denied plaintiff's claim because plaintiff's insurance policy had not been updated to include the business location where the theft occurred. *Id.* Plaintiff then sued its accounting firm for failing to update the insurance policy. *Id.* While the court did address a suspension/lapse/cancellation policy clause, the court held the clause did not apply because there was no allegation regarding the "cancellation of a contract." *Id.* at *5. Indeed, plaintiff's alleged losses in that case arose from a theft, not the cancellation of a contract.

Here, in contrast, Plaintiffs expressly allege they incurred losses when MLB failed to provide players pursuant to both a "Professional Baseball Agreement" and "player development contracts" – a clear suspension, lapse or cancellation of the contracts. 2-ER-246, 264, 265 (¶¶ 4, 66-67, 69-70). *Prmconnect* simply has no factual or legal relevance.

Second, Plaintiffs cite to a Contingent Business Interruption policy provision, which they now say provides 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[.]" Opening Brief at 53. This, however, is a new issue: Plaintiffs did not even seek coverage under this provision in their Amended Complaint, let alone raise it with the District Court. Regardless, the provision plainly does not apply because there is no loss due to "premises operated by others." Plaintiffs, for example, do not allege that the failure to supply players had anything to do with "premises" operated by MLB. Indeed, there is no mention of any MLB premises anywhere in the Amended Complaint.

Third, Plaintiffs argue that the suspension/lapse/cancellation exclusion only applies to "any increase in loss" and that they did not allege MLB's failure to provide players "increased or exacerbated their alleged losses." Opening Brief at 55. Plaintiffs again ignore their own allegations. As discussed, Plaintiffs have alleged the coronavirus is present at, and is causing physical damage to, their premises. Plaintiffs also allege authorities in each of their states have issued "stay at home" orders under which they were "forced to close their stadiums for baseball games." 2-ER-258-261 (¶¶ 46-55). Plaintiffs further allege that the virus's presence and the related governmental orders have "**contributed** to the cancellation of the Teams' MiLB games." 2-ER-261-262 (¶ 58) (emphasis added).

It is under these circumstances that Plaintiffs allege MLB has failed to provide players to the Teams. 2-ER-264-265 (¶¶ 66-70). In other words, MLB's failure to provide players increased or exacerbated the alleged losses resulting from the coronavirus, as Plaintiffs' own allegations make clear.

Fourth, in another new argument, Plaintiffs argue the Policies provide coverage where the "suspension, lapse or cancellation is directly caused by the 'suspension' of 'operations[.]'" Opening Brief at 56. It is difficult to understand how this policy language would apply here. Plaintiffs do *not* allege that Plaintiffs' own suspension of operations caused MLB to stop providing players to the Teams. Rather, they allege the opposite – that "MLB has informed MiLB that it will not be providing MiLB with players for the 2020 season. As a result, MiLB's 2020 season has been cancelled." 2-ER-265 (¶ 69).

Fifth, in yet another new argument, Plaintiffs contend that the exclusion renders coverage illusory. Having failed to raise this issue in the District Court, Plaintiffs have waived it. Regardless, the mere enforcement of an exclusion does not render coverage illusory. If that were so, no policy exclusion would be enforceable. This is not the law—clear and unambiguous exclusions are enforceable in each of the subject states as discussed above. Coverage is only considered illusory where there is no possibility of coverage whatsoever. *See, e.g., Merino v. Allstate Indemnity Co.*, 231 Fed.Appx. 682, 683 (9th Cir. 2007) ("a

policy is illusory only if it provides no coverage whatsoever"), *National Casualty Co. v. Launch Media, Inc.*, 220 Fed. Appx. 527, 529 (9th Cir. 2007) (policy not illusory where other claims "remain potentially covered by the policy").

That plainly is not the case here. The Policies generally provide coverage for "direct physical loss of or damage to" the insured premises. 3-ER-313 (§ A), 3-ER-337 (§ A(1)). The suspension/lapse/cancellation exclusion does not eliminate coverage for any and all claims where such direct physical loss or damage has occurred, but instead excludes (among other things) an increase in loss caused by the cancellation, suspension, or lapse of a contract. Enforcement of the exclusion does not render coverage illusory here.

In summary, Plaintiffs plainly alleged the suspension, lapse or cancellation of their contracts with MLB. As the District Court held, their arguments to the contrary are "disingenuous." 1-ER-6. The District Court's Order enforcing the suspension/lapse/cancellation exclusion should be affirmed.

CONCLUSION

For the foregoing reasons, the District Court's November 13, 2020 Order should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief contains 10,310 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6). I certify that this brief complies with the word limit of Cir. R. 32-1.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing DEFENDANTS-APPELLEES' ANSWERING BRIEF on this 10th day of March 2021 with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system, which will send notice to all counsel of record for the parties.

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ADDENDUM

There are no materials to be included in an Addendum under Ninth Circuit Rule 28-2.7.