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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

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	Case No. 2:20-cv-01312-DLR **DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT** **(Oral Argument Requested)** **(Assigned to Honorable Judge Douglas L. Rayes)**

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 Plaintiffs, v. National Casualty Co.; Scottsdale Indemnity Co.; Scottsdale Insurance Co., Defendants.	)

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, defendants National Casualty Company, Scottsdale Indemnity Company and Scottsdale Insurance Company (collectively "Defendants") move to dismiss Plaintiffs' Amended Complaint for failure to state a claim.

Introduction

Plaintiffs are twenty-four entities associated with or providing services for nineteen Minor League Baseball ("MiLB") teams in ten different states. 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 provides as follows and expressly excludes coverage in this case:

> 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.

[Exclusion Of Loss Due To Virus Or Bacteria §§ A & B, Ex. A to Am. Compl. (Doc. 23-1, Page 58).]

It is black-letter law that this Court should apply the Policies – including the clear and unambiguous virus exclusions – as written. Although this Court must apply the substantive law of each state where the insured premises are located, there is no material difference for purposes of this motion. 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.

Furthermore, other courts recently have considered coronavirus business interruption claims like Plaintiffs' claims here, and have dismissed those claims as a matter of law based on similar virus exclusions in the subject insurance policies. *See Turek Enter., Inc. v. State Farm Mut. Auto. Ins. Co.*, Case No. 20-11655 (E.D. Mich. Sept. 3, 2020) (attached as Ex. 1); *Martinez v. Allied Ins. Co. of Am.*, Case No. 2:20-cv-00401 (M.D. Fl. Sept. 2, 2020) (attached as Ex. 2); *Diesel Barbershop, LLC v. State Farm Lloyds*, 2020 WL 4724305 at *6 (W.D. Tex. Aug. 13, 2020) (Ezra, J.); *Gavrilides Mgmt. Co. v. Mich. Ins. Co.*, No. 20-258-CB (Mich. Circuit Ct., Ingham Cty.) (July 1, 2020 Transcript at p. 22 (attached as Ex. 3). This Court should do the same here.

In apparent recognition that the plain language of the virus exclusion bars Plaintiffs' claims, 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 this Court previously has explained, however, regulatory estoppel is a New Jersey state law argument "used to preclude insurers from taking a position contrary to one allegedly presented to a regulatory agency." *Nammo Talley Inc. v. Allstate Ins. Co.*, 99 F.Supp.3d 999, 1005-1006 (D. Ariz. 2015) (citing New Jersey law). Regulatory estoppel "has been rejected by virtually every other state and federal court to address the issue." *SnyderGeneral Corp. v. Great Am. Ins. Co.*, 928 F.Supp. 674 (N.D. Tex. 1996) (collecting cases); *see also Nammo*, 99 F.Supp.3d at 1005-1006 (rejecting regulatory estoppel). Indeed, regulatory estoppel has not been recognized in any of the subject states and should be rejected by this Court. However, even

if the argument were recognized by any of the subject states, Plaintiffs' regulatory estoppel argument still fails because Plaintiffs have not identified any positions taken by Defendants in this litigation inconsistent with any representations made to any regulators.

Lastly, not only are Plaintiffs' claims barred by the virus exclusion, but Plaintiffs' claims also are barred under other independent provisions of the Policies. Plaintiffs, for example, allege that Major League Baseball failed to comply with its contractual obligations to provide Plaintiffs' teams with players. [Am. Compl. ¶¶ 69-70.] The Policies, however, expressly bar coverage for claims "caused by or resulting from . . . Suspension, lapse or cancellation of any license, lease or contract." [Causes Of Loss—Special Form at § 4(a)(3)(b), Ex. A to Am. Compl. (Doc. 23-1, Page 44).] 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.

Plaintiffs also allege they are entitled to "civil authority" coverage based on the various governmental orders requiring the closure of non-essential businesses. [Am. Compl. ¶¶ 45-55.] The Policies, however, only provide civil authority coverage if "[a]ccess to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage[.]" [Business Income (And Extra Expense) Coverage Form § A(5)(a)(1), Ex. A to Am. Compl. (Doc. 23-1, Page 51).] Plaintiffs do *not* allege anywhere in the Amended Complaint that access has been prohibited to the areas immediately surrounding the insured premises. Accordingly, Plaintiffs are not entitled to civil authority coverage as a matter of law.

Plaintiffs simply have no claim for coverage under the terms of the Policies. Plaintiffs' Amended Complaint should be dismissed with prejudice and Defendants awarded their fees and costs pursuant to A.R.S. § 12-341.01.[1]

[1] Additional grounds to exclude coverage under the Policies exist, including that the coronavirus has not caused direct physical damage to the covered property. In filing this motion to dismiss, Defendants are not waiving the right to raise such additional grounds at a later time, if necessary.

Background

A. Amended Complaint Allegations.

Plaintiffs are twenty-four entities associated with or providing services for nineteen Minor League Baseball ("MiLB") teams. [*See* Am. Compl. ¶¶ 10-28.] Plaintiffs allege Defendants issued commercial first-party property and casualty insurance policies covering them as the named insureds. [*See id.* at ¶¶ 10-28, 78-79.] Copies of the subject policies are attached as Exhibits A through L to the Amended Complaint (the "Policies"). Plaintiffs allege that the Policies are substantially identical. [*See id.* at ¶ 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." [*See* Am. Compl. ¶¶ 83-90.] Critically, however, Plaintiffs also admit the Policies contain an exclusion, which excludes from coverage "loss or damage caused by or resulting from any virus[.]" [*See id.* at ¶ 91.]

Plaintiffs allege they have incurred losses caused by and resulting from the SARS-CoV-2 virus. [*See* Am. Compl. ¶ 71.] Specifically, Plaintiffs allege that 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." [*See id.* at ¶¶ 42-43, 57] Plaintiffs 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." [*See id.* at ¶¶ 45-55] Plaintiff further alleges that, under these circumstances, Major League Baseball has refused to supply players to Minor League Baseball ("MiLB") teams, including Plaintiffs' teams. [*See id.* at ¶¶ 66-70] In sum, Plaintiffs allege "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." [*See id.* at ¶ 58.]

Plaintiffs contend they have made claims for coverage under the Policies, but allege Defendants either have denied their claims or intend to do so. [*See* Am. Compl. ¶¶ 92-105.] Based on these allegations, Plaintiffs assert claims for breach of contract, anticipatory breach of contract and declaratory judgment. [*See id.* at ¶¶ 129, 137, 146.]

B. 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." [Building And Personal Property Coverage Form § A, Ex. A to Am. Compl. (Doc. 23-1, Page 26).] 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.

[Business Income (And Extra Expense) Coverage Form § A(1), Ex. A to Am. Compl. (Doc. 23-1, Page 50).] Business income coverage, however, is not provided for losses "caused by or resulting from . . . [s]uspension, lapse or cancellation of any . . . contract." [Am. Compl. Ex. A, Causes Of Loss—Special Form § B(4)(a)(3)(b) (Doc. 23-1, Page 44)]

The Policies provide additional "Civil Authority" coverage where access to the insured premises (and to the surrounding area) is denied by civil authority due to 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.

[*Id.* at § A(5)(a) (Doc. 23-1, Page 51.] In short, regardless of the provision, the Policies 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:

> When Special is shown in the Declarations, Covered Causes of Loss means direct physical loss unless the loss is excluded or limited in this policy.

[Causes Of Loss – Special Form § A, Ex. A to Am. Compl. (Doc. 23-1, Page 40.] The Policies, in turn, plainly 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.

[Exclusion Of Loss Due To Virus Or Bacteria §§ A & B, Ex. A to Am. Compl. (Doc. 23-1, Page 58) (emphasis added).]

Argument

I. APPLICABLE LEGAL STANDARDS.

A. Motion To Dismiss.

To withstand a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a plaintiff must proffer "more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Rather, the complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* In other words, plaintiffs must "nudge their claims across the line from conceivable to plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Mere "labels and conclusions" or "a formulaic recitation of a cause of action's elements will not do." *Twombly*, 550 U.S. at 545.

This Court "may consider evidence on which the complaint 'necessarily relies' if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion." *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) (citations omitted); *see also Raygarr LLC v. Emp'rs Mut. Cas. Co.*, 2018 WL 4207998 at *2 (D. Ariz. Sept. 4, 2018) (considering insurance policy referenced throughout complaint). Here, Plaintiffs' claims are based on the Policies, which are referred to throughout (and are attached as exhibits to) the Amended Complaint. Plaintiffs also refer to, and base their claims, on a 2006 ISO Circular. Accordingly, the Court may consider the Policies and the ISO Circular on Defendants' Rule 12(b)(6) motion to dismiss.

B. Choice-Of-Law Analysis.

In diversity cases, this Court applies the choice of law rules of Arizona to determine which states' substantive law applies. *See Abogados v. AT&T, Inc.*, 223 F.3d 932, 934 (9th Cir. 2000). Arizona follows the Restatement (Second) of Conflicts of Laws to determine the controlling law. *See Bates v. Super. Ct.*, 749 P.2d 1367, 1370 (Ariz. 1988). Where a claim is based on an insurance policy, the prevailing state's law will be the "state which

the parties understood was to be the principal location of the insured risk during the time of the policy[.]" Restatement (Second) of Conflict of Laws § 193; *Beckler v. State Farm Mut. Auto. Ins. Co.*, 987 P.2d 768, 772-73 (Ariz. Ct. App. 1999) (applying § 193).

Here, the insured risk for each Plaintiff is located in the state in which each team resides (and where their respective facilities are found). Those states are California, Idaho, Indiana, Maryland, Oregon, South Carolina, Tennessee, Texas, Virginia, and West Virginia. [*See* Am. Compl. ¶¶ 46-55; *see also id.* at Exs. A-L at Declarations.]

For purposes of this Motion, 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.[2] Applying these principles here, Plaintiffs' claims should be dismissed as a matter of law.

II. THE VIRUS EXCLUSION IN THE POLICIES BARS PLAINTIFFS' CLAIMS AS A MATTER OF LAW.

Here, the 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 distress, illness or disease**." [Exclusion Of Loss Due To Virus Or Bacteria §§ A & B, Ex. A to Am. Compl. (Doc. 23-1, Page 58) (emphasis added)]. The virus exclusion expressly applies to "all

[2] ***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).

coverage under all forms and endorsements" including "forms or endorsements that cover business income, extra expense or action of civil authority." *Id.* The Policies are not ambiguous.

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 . . . .

[Am. Compl. ¶¶ 42, 45, 57, 58, 71 (emphasis added).] Plaintiffs thus 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. This Court must apply the clear and unambiguous Policy language as written. Indeed, courts in each of the subject states have enforced similar mold/fungus and other exclusions as a matter of law.[3]

[3] ***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,

In addition, since the filing of this lawsuit, other courts have ruled on motions to dismiss business interruption claims relating to COVID-19. Where, as here, the subject policy contains a virus exclusion, courts have dismissed plaintiffs' claims as a matter of law. *See Turek Enterprises, Inc. v. State Farm Mut. Auto. Ins. Co.*, Case No. 20-11655 (E.D. Mich. Sept. 3, 2020) (attached as Ex. 1) ("the Virus Exclusion negates any coverage for Plaintiff's loss of income or extra expense") ; *Martinez v. Allied Ins. Co. of Am.*, Case No. 2:20-cv-00401 (M.D. Fl. Sept. 2, 2020) (attached as Ex. 2) (enforcing virus exclusion "[b]ecause Martinez's damages resulted from COVID-19, which is clearly a virus"); *Diesel Barbershop, LLC v. State Farm Lloyds*, 2020 WL 4724305 at *6 (W.D. Tex. Aug. 13, 2020) (Ezra, J.) (enforcing virus exclusion where "Plaintiffs have pleaded that COVID-19 is in fact the reason for the Orders being issued and the underlying cause of Plaintiffs' alleged losses"); *Gavrilides Mgmt. Co. v. Mich. Ins. Co.*, No. 20-258-CB (Mich. Circuit Ct., Ingham Cty.) (July 1, 2020 Transcript at p. 22 (attached as Ex. 3)) ("even if there were allegations in the complaint alleging actual physical loss or damage . . . there is a virus exclusion that would also apply"). Like these courts, this Court also should apply the virus exclusion as written and dismiss Plaintiffs' claims as a matter of law.

III. PLAINTIFFS' REGULATORY ESTOPPEL ARGUMENT FAILS AS A MATTER OF LAW.

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. [*See* Am.

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).

Compl. ¶¶ 105-128.] This argument has been called "regulatory estoppel." As this Court previously has explained, however, regulatory estoppel is a New Jersey state law argument "used to preclude insurers from taking a position contrary to one allegedly presented to a regulatory agency." *Nammo Talley Inc. v. Allstate Ins. Co.*, 99 F.Supp.3d 999, 1005-1006 (D. Ariz. 2015). This Court further held that Arizona has never recognized regulatory estoppel and refused to apply it. *Id.*

In fact, as other courts have noted, the "regulatory estoppel argument has been rejected by virtually every other state and federal court to address the issue." *SnyderGeneral Corp. v. Great Am. Ins. Co.*, 928 F.Supp. 674 (N.D. Tex. 1996) (collecting cases). Here, regulatory estoppel has not been recognized in any of the subject states. As in *Nammo*, this Court should refuse to apply it here.[4]

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[4] Regulatory estoppel has been rejected in Texas. *SnyderGeneral Corp. v. Great Am. Ins. Co.*, 928 F.Supp. 674 (N.D. Tex. 1996). In the remaining nine states, courts have not squarely addressed regulatory estoppel. These states' contract interpretation principles, however, indicate such an argument would be rejected. Each of the states recognize, for example, that estoppel principles cannot be used to expand the scope of coverage beyond that contained in the insurance policy, or that extrinsic evidence cannot be considered when the language of the policy is clear and unambiguous. ***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)***; 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)***; 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).

Not only is regulatory estoppel unrecognized in the subject states, but Plaintiffs' regulatory estoppel argument also fails because Plaintiffs' allegations are insufficient to state a claim. 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. [Am. Compl. ¶¶ 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). [*Id.* at ¶ 122.] A copy of the ISO Circular is attached as Ex. 4.

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 consistent. Here, Defendants are arguing that the virus exclusion in the Policies excludes coverage for any losses caused by or resulting from the coronavirus. Consistent with Defendants' position, the ISO Circular states that the ISO virus endorsement is intended to "address exclusion of loss due to disease-causing agents such as viruses and bacteria." [Ex. 4 at p.1 of 12.] 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." [*Id.* at p. 6 of 12 (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.[5]

[5] Plaintiffs' regulatory estoppel arguments also appear to be premised in part on the assertion that, in 2006, the virus exclusion constituted a "reduction" (and not a "clarification") of coverage. [Am. Compl. ¶¶ 113, 116, 127-128.] These allegations are irrelevant. The issue here is whether the Policies exclude losses caused by or resulting from a virus, and *not* whether the virus exclusion constituted a "reduction" in coverage fourteen years ago. Because Defendants' position here is consistent with the ISO Circular – losses caused by or resulting from a virus are excluded – Plaintiffs' regulatory estoppel argument fails as a matter of law.

Should any doubt remain, other courts have rejected plaintiffs' reliance on the ISO Circular in an effort to avoid the terms of a virus exclusion. *See Turek* at 16-17 (the "ISO Circular is extrinsic evidence that may not be 'used as an aid in the construction of the [unambiguous] contract'") (alteration in original). The subject states likewise prohibit extrinsic evidence where, as here, the virus exclusion is unambiguous. *See* fn. 4 *infra*.

In summary, applying the virus exclusion is a straightforward process. As this Court held in a similar case, the "policy says loss caused by mold is excluded. Enforcing the policy as written, this Court concludes loss caused by mold is excluded." *Cooper v. Am. Family Mut. Ins. Co.*, 184 F. Supp. 2d 960, 963 (D. Ariz. 2002). Here, as in *Cooper*, this Court should enforce the Policies as written and conclude that the virus exclusion bars Plaintiffs' claims as a matter of law.

IV. PLAINTIFFS' CLAIMS ARE BARRED BY ADDITIONAL PROVISIONS OF THE POLICIES.

Not only are Plaintiffs' claims barred by the virus exclusion, but Plaintiffs' claims also are independently barred by other provisions of the Policies. First, Plaintiffs allege that Major League Baseball is obligated to supply Plaintiffs' teams with players pursuant to a "Professional Baseball Agreement" and "player development contracts." [Am. Compl. ¶¶ 69-70.] Despite these contractual obligations, Plaintiffs allege that Major League Baseball has failed and refused to provide players to Plaintiffs' teams. [*Id.*] The Policies, however, expressly exclude coverage for "[a]ny increase of loss caused by or resulting from . . . Suspension, lapse or cancellation of any license, lease or contract." [Causes Of Loss—Special Form at § 4(a)(3)(b), Ex. A to Am. Compl. (Doc. 23-1, Page 44).] Plaintiffs are not entitled to coverage for losses caused by or resulting from Major League Baseball's failure to provide players to Plaintiffs' teams. Furthermore, the Policies require "direct physical loss of or damage to" the insured premises. [Business Income (And Extra Expense) Coverage Form § A(1), Ex. A to Am. Compl. (Doc. 23-1, Page 50).] The failure of Major League Baseball to provide players to Plaintiffs' teams does not constitute any

such direct physical loss or damage, and any allegation to the contrary is implausible on its face. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Second, Plaintiffs allege they are entitled to "civil authority" coverage based on the various governmental orders requiring the closure of non-essential businesses. [Am. Compl. ¶¶ 45-55.] The Policies, however, only provide civil authority coverage if access has been prohibited both to the insured premises *and* "to the area immediately surrounding the damaged property[.]" [Business Income (And Extra Expense) Coverage Form § A(5)(a)(1), Ex. A to Am. Compl. (Doc. 23-1, Page 51).] Plaintiffs do *not* allege anywhere in the Amended Complaint that access has been prohibited to the areas immediately surrounding the insured premises. Plaintiffs also admit that access has *not* been denied to the insured premises. [Am. Compl. ¶ 43 ("Team employees are permitted within the stadiums" and "Some Teams continue to host limited non-baseball events within the stadiums").] Because access has not been denied to either the insured premises or the surrounding area, Plaintiffs are not entitled to civil authority coverage.

Conclusion

For all the reasons set forth above, this Court should dismiss Plaintiffs' claims with prejudice and award Defendants their fees and costs pursuant to A.R.S. § 12-341.01.

RESPECTFULLY SUBMITTED this 11th day of September, 2020.

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CERTIFICATION

Pursuant to this Court's July 6, 2020 Order and LRCiv 12.1(c), Defendants' counsel hereby certifies that prior to filing this motion they conferred with counsel for plaintiffs regarding the issues raised by this motion. The parties were unable to reach agreement.

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