UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

7TH INNING STRETCH LLC D/B/A EVERETT AQUASOX; DEWINE SEEDS SILVER DOLLARS BASEBALL, LLC; WHITECAPS PROFESSIONAL BASEBALL CORPORATION, Plaintiffs, v. ARCH INSURANCE COMPANY; FEDERAL INSURANCE COMPANY, Defendants.	Case No. 2:20-cv-08161-SDW-LDW **MOTION DAY: November 16, 2020**

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT ARCH INSURANCE COMPANY'S MOTION TO DISMISS

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Pursuant to Fed. R. Civ. P. 12(b)(6), Defendant Arch Insurance Company ("Arch") respectfully moves this Court to dismiss with prejudice all claims against Arch asserted by Plaintiffs 7th Inning Stretch LLC d/b/a Everett AquaSox ("Everett AquaSox") and DeWine Seeds Silver Dollars Baseball, LLC ("DeWine Seeds") (collectively, "Plaintiffs") in the Second and Third Causes of Action of the First Amended Complaint (Doc. 30).[1]

I. INTRODUCTION

Plaintiffs, owners of two Minor League Baseball teams, have sued Arch for anticipatory breach of their separate commercial property policies and for declaratory judgment. Plaintiffs seek coverage for business income losses and extra expenses they sustained due to COVID-19 and the resulting cancellation of the 2020 Minor League Baseball season. Although the losses caused by the pandemic are certainly unfortunate, they are not covered by the Arch policies. To start, the policy unambiguously excludes from coverage losses caused by or resulting from a virus that makes people sick. COVID-19 is such a virus.

In addition, physical loss or damage to property is a requirement for coverage under Plaintiffs' policies. The Amended Complaint does not (and cannot) allege "direct physical loss of or damage" to Plaintiffs' property or anyone

[1] The First Cause of Action is asserted solely against Defendant Federal Insurance Company.

else's property. Rather, the Amended Complaint alleges that Plaintiffs' business was interrupted by COVID-19, by the government response to COVID-19, including the North Carolina and Washington governors' stay-at-home orders, and by the failure of Major League Baseball to supply players to Plaintiffs, which is the only way Plaintiffs get players for their teams. Plaintiffs allege it is "statistically certain" the virus was present on their premises at some point because COVID-19 spreads so easily. However, Plaintiffs do not actually allege the virus contaminated their property, that a person infected with COVID-19 was on their property, or that the presence of COVID-19 on their property caused actual physical harm to their property or that they undertook any efforts to decontaminate their property. The reality here is that the public health response to COVID-19 as a contagious and easily spread virus is social distancing, and social distancing is not good for spectator sports.

Further, although Plaintiffs complain about the government response to the virus, the allegations do not establish entitlement to civil authority coverage because the Amended Complaint does not (and cannot) allege that the government orders were issued in response to "direct physical loss of or damage to property" other than at the covered locations. At bottom, Plaintiffs allege that their baseball games and the 2020 Minor League Baseball season were cancelled because of the

COVID-19 pandemic, which "deprived Plaintiffs from the primary source of revenue."

For the following reasons, Plaintiffs' claims for anticipatory breach of contract and declaratory judgment against Arch should be dismissed.

First, Plaintiffs' business income losses are not covered by the Arch policies. Plaintiffs do not (and cannot) allege that they sustained "direct physical loss of or damage to property."

Second, Plaintiffs' losses are not covered by the provisions for civil authority coverage in the Arch policies. Plaintiffs do not (and cannot) allege that there was "direct physical loss of or damage" to property other than at Plaintiffs' covered locations or that government orders in North Carolina and Washington, where Plaintiffs' property is located, were issued because of "direct physical loss of or damage" to other people's property.

Third, Plaintiffs' losses are excluded by a virus exclusion in the Arch policies. By its terms, the exclusion bars coverage for "loss, cost, or expense caused by, resulting from, or relating to any virus . . . that causes disease, illness or physical distress or that is capable of causing disease, illness or physical distress." Because the exclusion is clear and unambiguous on its face, it must be enforced as written to bar Plaintiffs' claims against Arch here.

For these reasons, and as argued in detail below, Plaintiffs' claims for anticipatory breach of contract and declaratory judgment should be dismissed with prejudice.

II. STATEMENT OF FACTS

A. Plaintiffs' Allegations

Everett AquaSox and DeWine Seeds are insured under separate property policies issued by Arch. First Amended Complaint ("Am. Compl.") ¶¶ 53, 54 (Doc. 30). Arch issued a Commercial Output Program policy to Everett AquaSox bearing policy number SSCMP0003102 for the period December 30, 2019 to December 30, 2020 (the "Everett AquaSox Policy"). *Id.* ¶ 53. Arch issued a Commercial Output Program policy to DeWine Seeds bearing policy number SSCMP0001302 for the period April 1, 2019 to April 1, 2020 and policy number SSCMP0001303 for the period April 1, 2020 to April 1, 2021 (the "DeWine Seeds Policy"). *Id.* ¶ 54.

Everett AquaSox and DeWine Seeds allege that there are three causes of "physical loss or damage to the ballparks (as well as the areas surrounding them)" and the interruption of their businesses. These are: (i) the "nature of the virus" and "the measures required to mitigate its spread," *id.* ¶ 32; (ii) the "governmental responses to the virus," which Plaintiffs allege have been ineffective, *id.* ¶¶ 33-39;

and (iii) "[Major League Baseball ("MLB")] not supplying players to the Teams," *id.* ¶ 44.

Plaintiffs allege that the Governors of Washington and North Carolina issued statewide stay-at-home orders in March 2020 that required non-essential businesses to close. Am. Compl. ¶¶ 27, 29. Plaintiffs allege that they were forced to close their stadiums for baseball games. *Id.* ¶¶ 27, 29. Plaintiffs failed to attach the foregoing executive orders to the complaint. The orders on their face reflect they were issued to slow the community spread of the virus and not because of loss of or damage to property. Declaration of Julie Nevins ("Nevins Decl."), ¶¶ 3-4 & Exhibits 1&2.

Plaintiffs allege that it is "statistically certain the virus is present at the Teams' ballparks and/or nearby properties" and "carried into each of the stadiums." *Id.* ¶¶ 23, 24, 31. This is because the virus is infectious, spreads easily, and millions have been infected in the U.S. *Id.* ¶¶17-25. In addition, Plaintiffs allege that "persons entered the stadiums . . . before their closures," "employees are permitted within the stadiums through the present, and the teams "continue to host limited non-baseball events within the stadiums." *Id.* ¶ 24.

Plaintiffs do not allege any actual incidences of COVID-19 contamination of the ballparks or stadiums or any actual examples of persons known to be infected with COVID-19 having visited the ballparks or stadiums.

Plaintiffs further allege that, as a result of the virus, the government response, and MLB not supplying players, "the Teams have been deprived of their primary source of revenue" – "fans coming to the ballpark." *Id*. ¶ 45. Of course, it is common knowledge that many games in each season are played away from the home ballpark or stadium.

Plaintiffs allege that they "have made timely claims for coverage with their respective Insurers." Am. Compl. ¶ 70. Plaintiffs allege that Arch issued a reservation of rights letter to DeWine Seeds and requested additional information. *Id*. ¶ 72. Plaintiffs do not allege that Arch has denied their claims. Instead, Plaintiffs allege that the "positions Arch has taken in its letter [and in a communication to brokers] make clear that . . . it has no intention of covering the [DeWine Seeds'] claim" or Everett AquaSox's claim. *Id*. ¶¶ 73, 74.

Everett AquaSox and DeWine Seeds have each asserted two claims for relief against Arch: Count II is for anticipatory breach of contract, and Count III is for a declaratory judgment that their losses are covered under the respective Arch Policies. Count I is for breach of contract against Defendant Federal Insurance Co.

Plaintiffs allege that the Virus Exclusion in the Arch policies is "void, unenforceable, and inapplicable." *Id*. ¶ 63. Plaintiffs allege that the Insurance Services Office, Inc. ("ISO") and the American Association of Insurance Services ("AAIS") made misrepresentations to state insurance regulators about property

policies not covering loss caused by disease-causing agents when ISO and AAIS sought state regulatory approval for form virus exclusion endorsements in 2006. *Id.* ¶¶ 76- 98.

B. The Arch Policies

The Everett AquaSox and the DeWine Seeds Policies (the "Arch Policies") include some of the same policy forms and endorsements. They include a "Property Coverage Part" (CO 1000 10 02), an "Income Coverage Part" (CO 1001 04 02), and a "Virus or Bacteria Exclusion" endorsement (CL 0700 10 06). *See* Am. Compl., Ex. A-C (Doc. 30-1, 30-2, 30-3).

The Property Coverage Part covers "direct physical loss to covered property at a 'covered location' caused by a covered peril." (Doc. 30-1, at 30, Doc. 30-2, at 27; Doc. 30-3, at 28). The perils covered are "risks of direct physical loss unless the loss is limited or caused by a peril that is excluded." (Doc. 30-1, at 41, 56; Doc. 30-2, at 38, 53; Doc. 30-3, at 39, 54). "Covered location" "means a location that is described on the Location Schedule." (Doc. 30-1, at 26; Doc. 30-2, at 23; Doc. 30-3, at 24). The Location Schedule in the Everett AquaSox Policy identifies property located in Washington. Location Schedule, CO 1052 04 02 (Doc 30-1, at 96). The Location Schedules in the DeWine Seeds Policies identify property located in North Carolina. Location Schedule, CO 1052 04 02 (Doc 30-2, at 91, Doc. 30-3, at 92).

Income Coverage

The Income Coverage Part provides coverage for lost net income and extra expenses due to an interruption in business by "direct physical loss or damage to property" ("Business Income Coverage"). Specifically, the Income Coverage Part provides: "'We' provide the coverages described below during the 'restoration period' when 'your' 'business' is necessarily wholly or partially interrupted by direct physical loss of or damage to property at a 'covered location' or in the open (or in vehicles) within 1,000 feet thereof as a result of a covered peril." (Doc. 30-1, at 56, Doc. 30-2, at 53, Doc. 30-3, at 54).[2]

"Restoration period" is defined as "[t]he time it should reasonably take to resume 'your' 'business' to a similar level of service starting from the date of a physical loss of or damage to property at a 'covered location' that is caused by a covered peril and ending on the date: 1) the property should be rebuilt, repaired, or replaced; or 2) business is resumed at a new permanent location." Property Coverage Part, "Definitions" at ¶ 26 (CO 1000 10 02) (Doc. 30-1, at 28, Doc. 30-2, at 25, Doc. 30-3, at 26).

[2] The Business Income Coverage is also subject to the "terms" and conditions of the Property Coverage Part "under the sections titled Agreement, Definitions, Property Not Covered, Perils Covered, Perils Excluded, What Must Be Done In Case Of Loss, Loss Payment, and Other Conditions." Commercial Output Property Income Coverage Part, CO 1001 04 02, at p. 1 (Doc. 30-1, at 56, Doc. 30-2, at 53, Doc. 30-3, at 54).

Civil Authority Coverage

The Income Coverage Part extends coverage for "Interruption by Civil Authority" ("Civil Authority Coverage") and provides:

> "We" extend "your" coverage for earnings and extra expense to include loss sustained while ***access to 'covered locations' or a "dependent location" is specifically denied by an order of civil authority***. This order must be a result of direct physical loss of or damage to property, other than at a "covered location" and must be caused by a covered peril.

Waiting Period – Income Coverage Form, at p. 2 (CO 1281 04 02) (Doc. 30-1, at 105, Doc. 30-2 at 100, Doc. 30-3, at 101) (amending income coverage extensions in Income Coverage Part (CO 1001 04 02) (emphasis added).

The Virus Exclusion

The Arch Policies include an endorsement entitled "Virus or Bacteria Exclusion" (the "Virus Exclusion") that provides:

> "We" do not pay for loss, cost, or expense caused by, resulting from, or relating to any virus, bacterium, or other microorganism that causes disease, illness, or physical distress or that is capable of causing disease, illness, or physical distress.
>
> This exclusion applies to, but is not limited to, any loss, cost, or expense as a result of:
>
> any contamination by any virus, bacterium, or other microorganism; or
>
> any denial of access to property because of any virus, bacterium, or other microorganism.

(Doc. 30-1, at 13, Doc. 30-2, at 10, Doc. 30-3, at 11).

State-Specific Endorsements

The Everett AquaSox Policy includes three Washington-specific endorsements. These are "Common Policy Conditions – Washington," CL 0103 03 10 (Doc. 30-1, at 6), "Loss Payable Endorsement – Washington," CL 0465 01 01 (Doc. 30-1, at 9), "Amendatory Endorsement – Washington," CO 0320 04 02 (Doc. 30-1, at 93).

The DeWine Seeds Policy includes two North Carolina-specific endorsements. These are the "Amendatory Endorsement – North Carolina," CL 0158 09 13 (Doc. 30-2, at 6, Doc. 30-3, at 7) and the "Amendatory Endorsement – North Carolina", CO 0315 09 14 (Doc. 30-2, at 90, Doc. 30-3, at 91).

III. LEGAL ARGUMENT

A. LEGAL STANDARDS

1. Legal Standards for Rule 12(b)(6) Motion to Dismiss.

Under Rule 12(b)(6), a pleading fails to state a claim if it does not contain allegations that support recovery under any recognizable theory. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A motion to dismiss should be granted when taking all factual allegations and inferences as true, the moving party is entitled to judgment as a matter of law. *Mann v. Brenner*, 375 F. App'x 232, 235 (3d Cir. 2010). In evaluating a motion to dismiss, the court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and

determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 374 n.7 (3d Cir. 2002); *Iqbal,* 556 U.S. 662 at 678. The "tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678.

2. New Jersey Choice of Law Rules

This case presents a choice of law issue. The DeWine Seeds Policy covers the property of a North Carolina Minor League Baseball ("MiLB") team, which is located in North Carolina, and the policy includes North Carolina-specific forms. Similarly, the Everett AquaSox Policy covers the property of a Washington MiLB team, which is located in Washington, and the policy includes Washington-specific forms. As demonstrated in Part III.E *infra*, North Carolina and Washington have the most significant connections to the DeWine Seeds and Everett AquaSox coverage disputes, respectively. Although the laws of New Jersey, North Carolina and Washington do not differ on some policy construction principles, there is a substantive difference on the applicability of the doctrines of regulatory estoppel and reasonable expectations, discussed in Part III.E, which requires that North Carolina and Washington be applied here.

"A federal court sitting in diversity applies the choice-of-law rules of the forum state—here, New Jersey—to determine the controlling law." *Maniscalco v.*

Brother Int'l (USA) Corp., 709 F.3d 202, 206 (3d Cir. 2013) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.,* 313 U.S. 487 (1941). There are two steps in a conflicts analysis. *Continental Ins. Co. v. Honeywell Int'l, Inc.*, 188 A.3d 297, 311 (2018). "The first step in a conflicts analysis is to decide whether there is an actual conflict between the laws of the states with interests in the litigation." *Id.* "A conflict of law requires a 'substantive difference' between the laws of the interested states." *Id*. "A 'substantive difference' is one that 'is offensive or repugnant to the public policy of [New Jersey].'" *Id*. "If there is no actual conflict, then the choice-of-law question is inconsequential, and the forum state applies its own law to resolve the disputed issue." *Id.* (citations omitted). However, if there is an actual conflict, the second step requires a determination of which states' law applies.

New Jersey courts apply a "flexible approach [to resolving conflict of law issues] that focuses on the state that has the most significant connections with the parties and the transaction." *Gilbert Spruance Co. v. Pa. Mfrs. Ass'n Ins. Co.*, 134 N.J. 98, 102, 629 A.2d 885 (1993). For contract disputes, New Jersey courts apply section 188 of the RESTATEMENT (SECOND) OF CONFLICTS OF LAWS (1971) ("*Restatement*"), which "provides the choice-of-law rules in respect of contracts in general." *Id.* at 103, 629 A.2d 885. *Restatement* §188 provides: "The rights and duties of the parties with respect to an issue in contract are determined by the local

law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6."[3]

For insurance policy disputes, where the policy risk is principally located in one state, New Jersey courts rely on *Restatement* § 193. *Spruance,* 134 N.J. at 103, 629 A.2d 885. Section 193 provides:

> The validity of a contract of fire, surety or casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be ***the principal location of the insured risk*** during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

Restatement § 193 (emphasis added). The "rationale" of section 193 is as follows:

> [T]he location of the risk is a matter of intense concern to the parties to the insurance contract. And it can often be assumed that the parties, to the extent that they thought about the matter at all, would expect that the local law of the state where the risk is to be principally located would be applied to determine many of the issues arising under the contract. Likewise, the state where the insured risk will be

[3] "Section 188 lists several relevant 'contacts,' according to their relative importance, to be considered in the section 6 analysis, such as the domicile, residence, nationality, place of incorporation and place of business of the parties, and the places of contracting and performance." *Spruance,* 134 N.J. at 103, 629 A.2d 885. Further, pursuant to section 6 of the *Restatement*, "the factors relevant to the choice of the applicable rule of law include (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied." *Restatement* § 6; *Spruance,* 134 N.J. at 103, 629 A.2d 885.

> principally located during the term of the policy has a natural interest in the determination of issues arising under the insurance contract.

Spruance, 134 N.J. at 103-04, 629 A.2d 885 (quoting *Restatement* § 193, comment c). Further, "[i]f the principal location of the insured risk is in a single state for a major portion of the insurance period, that location 'is the most important contact to be considered in the choice of the applicable law, at least as to most issues." *Id.* at 889 (quoting *Restatement* § 193, comment b).

3. Principles of Policy Construction

At its core, this case presents an issue of contract interpretation. The interpretation of an insurance policy, like any contract, is a matter of law to be decided by the court.[4] *Wachovia Bank & Tr. Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518 (1970); *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wash. 2d 165, 171, 110 P.3d 733 (2005); *Passaic Valley Sewerage Comm'rs v. St. Paul Fire & Marine Ins. Co.*, 206 N.J. 596, 608, 21 A.3d 1151 (2011). The basic rule is to determine the intention of the parties from the language of the policy, giving effect to all parts so as to give a reasonable meaning to the terms. *Hancock v. Americo Fin. Life & Annuity Ins. Co.*, 378 F. Supp. 3d 413, 426 (E.D.N.C.

[4] The law of New Jersey, North Carolina and Washington are similar on basic issues of policy construction. However, there is a conflict between the laws of North Carolina and Washington, on the one hand, and New Jersey, on the other hand, with respect to the doctrines of regulatory estoppel and reasonable expectations, which is discussed *infra* Part III.E.

2019), *aff'd,* 799 F. App'x 179 (4th Cir. 2020); *Quadrant,* 154 Wash. 2d at 171, 110 P.3d 733; *State Nat'l Ins. Co. v. Cnty. of Camden*, 10 F. Supp. 3d 568, 574 (D.N.J. 2014). If the policy terms are clear, they must be given their plain and ordinary meaning and enforced as written. *Wachovia Bank*, 276 N.C. at 354, 172 S.E.2d 518; *Quadrant,* 154 Wash. 2d at 171, 110 P.3d 73; *State Nat'l Ins. Co*., 10 F. Supp. at 574. The same rule applies to exclusions, although they are strictly construed. If the exclusion is unambiguous, the court must apply the exclusion as written. *State Auto. Mut. Ins. Co. v. Hoyle*, 106 N.C. App. 199, 202, 415 S.E.2d 764 (1992); *Quadrant,* 154 Wash. 2d at 172, 110 P.3d 733; *Sinopoli v. N. River Ins. Co*., 244 N.J. Super. 245, 251, 581 A.2d 1368 (App. Div. 1990).

A policy provision is ambiguous when, on its face, it is fairly susceptible to two different but reasonable interpretations. *Harleysville Mut. Ins. Co. v. Buzz Off Insect Shield, L.L.C.*, 364 N.C. 1, 10, 692 S.E.2d 605 (2010); *Quadrant,* 154 Wash. 2d at 172, 110 P.3d 733; *Nester v. O'Donnell*, 301 N.J. Super. 198, 210, 693 A.2d 1214 (App. Div. 1997). Strained construction of policy terms to impose liability, finding ambiguity where none exists, should be avoided. *Harleysville*, 364 N.C. 1, 10, 692 S.E.2d 605 (2010); *Quadrant,* 154 Wash. 2d at 172, 110 P.3d 733; *Shannon v. B.L. England Generating Station*, No. CIV. 10-04524 (RBK/KMW), 2013 WL 6199173, at *10 (D.N.J. Nov. 27, 2013). A word or phrase is not considered ambiguous because it is not defined in the policy. *Nationwide Mut. Ins.*

Co. v. Dempsey, 128 N.C. App. 641, 643, 495 S.E.2d 914 (1998); *Black v. Nat'l Merit Ins. Co*., 154 Wash. App. 674, 679, 226 P.3d 175 (2010); *Boddy v. Cigna Prop. & Cas. Cos.*, 334 N.J. Super. 649, 656, 760 A.2d 823 (App. Div. 2000). The use of dictionaries is an accepted method of ascertaining the 'ordinary' meaning of terms. *N. Carolina Farm Bureau Mut. Ins. Co., Inc. v. Martin by & through Martin*, 833 S.E.2d 183, 188 (N.C. Ct. App. 2019); *Kut Suen Lui v. Essex Ins. Co*., 185 Wash. 2d 703, 713, 375 P.3d 596 (2016), *as amended on denial of reconsideration* (Aug. 15, 2016); *Boddy*, 334 N.J. Super. 649, 656, 760 A.2d 823.

B. THERE IS NO BUSINESS INCOME COVERAGE BECAUSE THERE IS NO DIRECT PHYSICAL LOSS OF OR DAMAGE TO PROPERTY

The Arch Policies only provide Business Income Coverage for "direct physical loss of or damage to property." Plaintiffs do not (and cannot) allege this. Plaintiffs allege that it is statistically certain that COVID-19 was on their property, but this is not an allegation of "direct physical loss of or damage to property." "Under a first-party property insurance contract, it is the insured's burden to establish that its loss is within the meaning of the insuring agreement." *Port Auth. of New York & New Jersey v. Affiliated FM Ins. Co.*, 245 F. Supp. 2d 563, 577 (D.N.J. 2001), *aff'd*, 311 F.3d 226 (3d Cir. 2002). Plaintiffs have not and cannot satisfy this burden.

1. Direct Physical Loss of or Damage to Property – North Carolina, Washington, and New Jersey

The Arch Policies provide: "'We' provide the coverages described below ***during the 'restoration period'*** when 'your' 'business' is necessarily wholly or partially ***interrupted*** by ***direct physical loss of or damage to property*** at a 'covered location' or in the open (or in vehicles) within 1,000 feet thereof as a result of a covered peril." ." (Doc. 30-1, at 56, Doc. 30-2, at 53, Doc. 30-3, at 54) (emphasis added).

The phrase "direct physical loss of or damage to property" is not defined in the policies. When a term in an insurance policy is undefined, it should be given its plain and ordinary meaning, and courts may look to dictionary definitions to determine such meaning. *Nationwide Mut. Ins. Co.*, 128 N.C. App. at, 643, 495 S.E.2d 914; *Black*, 154 Wash. App. at 679, 226 P.3d 175; *Boddy*, 334 N.J. Super. at 656, 760 A.2d 823. Merriam-Webster Dictionary defines "direct" as "proceeding from one point to another in time or space without deviation or interruption: STRAIGHT" and "marked by absence of an intervening agency, instrumentality, or influence." https://www.merriam-webster.com/dictionary/direct?src=search-dict-hed (quoting definitions 1.a and 4.a.). Further, "physical" is defined as "of or relating to natural science," "having material existence: perceptible especially through the senses and subject to the laws or nature" and "of or relating to material things." https://www.merriam-webster.com/dictionary/physical (quoting definitions 1.a, 2.a-b). "Damage" is

defined as "loss or harm resulting from injury to person, property, or reputation." https://www.merriam-webster.com/dictionary/damage (quoting definition 1). "Loss" is defined as "destruction, ruin"; "the act of losing possession: DEPRIVATION." https://www.merriam-webster.com/dictionary/loss (quoting definition 1 & 2.a.).

The common meaning of the words "direct," "physical," "damage," and "loss" shows that "direct physical loss of or damage to property" does ***not*** mean intangible or economic loss unrelated to some physical impairment of property. This is true under North Carolina, Washington or New Jersey law. As demonstrated *infra* Part III.E, the laws of North Carolina and Washington apply to the DeWine Seeds' and Everett AquaSox's claims respectively.

No court in North Carolina or Washington has construed "direct physical loss of or damage to property" where property has been contaminated by a disease-causing agent. However, North Carolina and Washington recognize that there must be some physical impairment to property that interrupts business operations to meet the "direct physical loss of or damage to property" requirement.[5] *Harry's*

[5] The North Carolina Insurance Commissioner issued a letter to business owners that stated:

> Standard business interruption policies are not designed to provide coverage for viruses, diseases, or pandemic-related losses . . . . We can't legally force insurers to cover a risk which they didn't intend to cover and which, in some instances, was specifically excluded in the policy.

Cadillac-Pontiac-GMC Truck Co., Inc. v. Motors Ins. Corp., 126 N.C. App. 698, 486 S.E.2d 249 (1997); *Nautilus Group, Inc. v. Allianz Global Risks US,* No. C11-5281BHS, 2012 WL 760940 (W.D. Wash. Mar. 8, 2012).

In *Harry's Cadillac*, a car dealership sought business interruption coverage for profits allegedly lost because a snowstorm had made the dealership inaccessible for a week. *Harry's*, 126 N.C. at 699, 486 S.E.2d 249. The court held that the "business interruption clause does not cover all business interruption losses, but only those losses requiring repair, rebuilding, or replacement." *Id.* at 702. Notably, the business interruption provision stated that it would "pay for the actual loss of Business Income you sustain due to the necessary suspension of your 'operations' during the 'period of restoration.'" *Id.* at 701. The "period of restoration" was defined to end on the date when "the property at the described premises should be repaired, rebuild or replaced." *Id.* Similar to the policy in *Harry's Cadillac*, the DeWine Seeds and the Everett AquaSox Policies tie the coverage of losses to a "restoration period" that ends on the date that "the property should be rebuilt, repaired, or replaced . . . or business is resumed at a new permanent location." (Doc. 30-1, at 28, Doc. 30-2, at 25, Doc. 30-3, at 26).

Nevins Decl. ¶ 3, Ex. 3 (Letter from Mike Causey, Insurance Commissioner of North Carolina).

In *Nautilus,* a business operating in Shanghai, China sought business interruption coverage after the company seal and its business license were physically stolen from its office. The court held there could be coverage because the license and seal were "physically lost" and the business could not operate without them. *Nautilus,* 2012 WL 760940, at *6-7.[6]

The Third Circuit has previously noted that "[i]n ordinary parlance and widely accepted definition, physical damage to property means 'a distinct, demonstrable, and physical alteration' of its structure." *Port Auth. of N.Y. and N.J. v. Affiliated FM Ins. Co*., 311 F.3d 226, 235 (3d Cir. 2002) (citing 10A Couch on Ins. § 148:46 (3d ed. 1998)). The court noted "[f]ire, water, smoke and impact from another object are typical examples of physical damage from an outside source that may demonstrably alter the components of a building and trigger coverage." *Id. Port Authority* concerned whether there was coverage under a property policy for the abatement of asbestos-containing materials from covered premises. The court recognized that the policy covered both physical loss and

[6] Although not a business interruption case, *Fujii v. State Farm Fire & Cas. Co.,* 71 Wash. App. 248, 857 P.2d 1051 (1993), held that there was no coverage under a homeowners' policy for imminent damage to house by a landslide because the covered property – the house – had not sustained a "direct physical loss." "While there was agreement that such damage was likely to occur in the near future unless expensive preventative measures were taken, [the insurer's experts] concluded that no physical damage had yet occurred." *Id.* at 249. Although the case was decided on a summary judgment motion and not a motion to dismiss, the case demonstrates that the threat of future loss does not constitute "direct physical loss."

physical damage and that a "higher threshold" or standard was needed for physical loss or damage "by sources unnoticeable to the naked eye." *Id.* The court held that the proper standard is "'physical loss or damage' occurs only if an actual release of asbestos fibers from asbestos containing materials ***has resulted in contamination of the property*** such that its function is nearly eliminated or destroyed, or the structure is made useless or uninhabitable, or if there exists an imminent threat of the release of a quantity of asbestos fibers that would cause such loss of utility." *Id.* at 236 (emphasis added). The court held that plaintiffs had no claim for coverage because they were unable to "produce evidence concerning the manifestation of an imminent threat of asbestos contamination" and that the "mere presence of asbestos or the ***general threat of its future release is not enough*** to survive summary judgment or to show a physical loss or damage to trigger coverage." *Id*. (emphasis added).

Subsequently, in *Gregory Packaging, Inc. v. Travelers Prop. Cas. Co. of Am.,* No. Civ. 2:12-CV-04418 (WHW) (CLW), 2014 WL 6675934 (D.N.J. Nov. 25, 2014), Judge Walls held that physical contamination of a manufacturing facility by an ammonia discharge that rendered the facility unfit for normal human occupancy until the ammonia was dissipated constituted "direct physical loss of or damage" to property. 2014 WL 6675934, at *6.

In this case, Plaintiffs do not allege that their business was interrupted because their ballparks or stadiums were actually physically contaminated by COVID-19 or that any property was physically lost. Instead, Plaintiffs allege that MiLB games (many of which are played "away" from their ballparks) and the 2020 MiLB season were cancelled because of the "nature of the virus" and "the measures required to mitigate its spread," the "governmental responses to the virus," and "MLB not supplying players to the Teams." Am. Compl. ¶¶ 32, 39, 44 (DE 30). Although Plaintiffs allege that it is "statistically certain the virus is present at the Teams' ballparks and/or nearby properties" and "carried into each of the stadiums," this is not an allegation that the ballparks or stadiums were actually physically contaminated by COVID-19 and that the physical contamination interrupted Plaintiffs' business operations. *Id*. ¶¶ 24, 31.

Plaintiffs do not (and cannot) allege that the virus – much less the government response or the MLB's failure to supply players – caused their covered property to need repair, rebuilding, or replacement or that they had to move to a new location. Rather, they allege they continued to use their stadiums for non-baseball events and employees were permitted in the stadiums. *Id.* ¶ 24. The Arch Policies provide that Business Income Coverage is only available during a period of restoration that ends when the property "should be rebuilt, repaired, or replaced . . . or business is resumed at a new permanent location." (Doc. 30-1, at 28, Doc.

30-2, at 25, Doc. 30-3, at 26). Here, there is no allegation that the ballparks or stadiums need to be "rebuilt, repaired, or replaced." Plaintiffs only allege that "[i]t is statistically certain the virus has been present at the Teams' ballparks" and "carried into each of the stadiums." Am. Compl. ¶¶ 23, 24 (Doc. 30). Plainly, the statistical likelihood of the virus being present on Plaintiffs' property is not "direct physical loss of or damage to property." Moreover, it is not the reason Plaintiffs allege that they "were forced to close their stadium for ballgames. *Id.* ¶¶ 27, 29. Rather, they closed their stadiums for ballgames because of the governors' stay-at-home orders, which were issued to slow the spread of the virus. *Id.* ¶¶ 27, 29; Nevins Decl. ¶¶ 3, 4 & Exhibits 1 & 2; *see infra* Part III.C.

The virus, the government response, and the MLB failure to supply players are not physical impairments to Plaintiffs' property. Indeed, the very fact that Plaintiffs allege the MiLB teams have been using the stadiums for non-baseball events demonstrates that their property was not rendered uninhabitable by some physical impairment or contamination. What made Plaintiffs' property unusable for baseball games was the COVID-19 pandemic, the government stay-at-home orders, and the failure of MLB to supply players – not "direct physical loss of or damage to property."[7]

[7] Further, none of these causes — the virus, the government response, or the MLB failure to supply baseball players — is a covered peril. First, the Virus Exclusion precludes coverage because all of these "causes" are because of COVID-19. *See*

2. Direct Physical Loss of or Damage to Property – Other Jurisdictions

Numerous other jurisdictions are in accord that mere loss of use of property in the absence of physical impairment does not constitute "direct physical loss of or damage to property." *Western Fire Ins. Co. v. First Presbyterian Church*, 437 P.2d 52, 54-56 (Colo. 1968) (finding saturation of a church with gasoline constituted a "direct physical loss" when building could not be occupied, but noting that "so-called 'loss of use' of the church premises, standing alone, does not in and of itself constitute a 'direct physical loss.'"); *Newman Myers Kreines Gross Harris, P.C. v. Great N. Ins. Co*., 17 F. Supp. 3d 323 (S.D.N.Y. 2014) (holding no business interruption coverage where office building was preemptively closed in preparation for storm and there was no damage to offices); *Roundabout Theatre Co., Inc. v. Continental Cas. Co*., 302 A.D.2d 1, 3, 6-8 (1st Dept. 2002) (holding no coverage for cancellation of 35 scheduled performances due to street closure from fallen scaffolding because theatre sustained no physical damage); *Universal Image Prods., Inc. v. Fed. Ins. Co*., 475 F. App'x 569, 573, 575 (6th Cir. 2012) (holding mold and bacteria contamination in a building did not constitute "direct physical loss or damage" because insured had no "tangible damage" and was not

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infra Part III.D. Second, covered peril is defined as "risks of direct physical loss unless the loss is limited or caused by a peril that is excluded." (Doc. 30-1, at 41, 56; Doc. 30-2, at 38, 53; Doc. 30-3, at 39, 54). Alleged government failures in handling the pandemic and breach of contract are also not physical losses.

forced to evacuate premises); *Oregon Shakespeare Festival Ass'n v. Great Am. Ins. Co*., No. 1:15-CV-01932-CL, 2016 WL 3267247, at *1, 2, 6 (D. Or. June 7, 2016), *vacated by stipulation of the parties*, 2017 WL 1034203 (D. Or. Mar. 6, 2017) (holding insured sustained direct physical loss or damage to property when wildfire "smoke, ashes, and dust permeated the interior of the theatre" and insured canceled performances because "smoke … within the theater had to dissipate before business could be resumed"); *Mama Jo's, Inc. v. Sparta Ins. Co*., No. 17-CV-23362-KMM, 2018 WL 3412974, at *10 (S.D. Fla. June 11, 2018), *aff'd,* No. 18-12887, 2020 WL 4782369 (11th Cir. Aug. 18, 2020) (holding no business interruption coverage for expenses incurred to clean dirt and debris from road construction).

Further, some trial courts have recently rejected claims for COVID-19 business interruption coverage with policy language similar to the Income Coverage Part in the Arch Policies where the complaints alleged financial losses as a result of government stay-at-home orders and failed to allege any physical impairment to property caused by COVID-19. *See, e.g., Sandy Point Dental, P.C. v. Cincinnati Ins. Co.,* No. 20 CV 2160, 2020 WL 5630465, at *3 (N.D. Ill. Sept. 21, 2020) ("In essence, plaintiff seeks insurance coverage for financial losses as a

result of the closure orders. The coronavirus does not physically alter the appearance, shape, color, structure, or other material dimension of the property).[8]

C. THERE IS NO CIVIL AUTHORITY COVERAGE BECAUSE THERE IS NO DIRECT PHYSICAL LOSS OF OR DAMAGE TO PROPERTY

The Arch Policies extend coverage for Civil Authority Coverage for "loss sustained while access to 'covered locations' or a dependent location is specifically denied by an order of civil authority." However, the policy states that the "order ***must be a result of*** direct physical loss of or damage to property, other than at a 'covered location' and must be caused by a covered peril." (Doc. 30-1, at 105, Doc. 30-2 at 100, Doc. 30-3, at 101) (emphasis added).

Just as Plaintiffs do not (and cannot) allege that COVID-19 has caused direct physical loss or damage to Plaintiffs' covered property, Plaintiffs do not (and

[8] The court in *Sandy Point Dental* cited several other recent trial court orders with similar holdings. *Id.*, at *2 (citing "*Social Life Magazine, Inc. v. Sentinel Ins. Co. Ltd*., No. 1:20-CV-03311 (S.D.N.Y. 2020) ECF No. 25, Ex. B at 5:3-4 (denying a motion for preliminary injunction because the coronavirus does not cause direct physical loss and instead "damages lungs")); *Diesel Barbershop, LLC v. State Farm Lloyds*, No. 5:20-cv-641-DAE, 2020 WL 4724305, at *5 (W.D. Tex. Aug. 13, 2020) (granting motion to dismiss because coronavirus did not cause a direct physical loss); *Gavrilides Mgmt. Co. v. Mich. Ins. Co*., No. 20-258-CB (Mich. 2020) ECF. No. 25, Ex. C (explaining that direct physical loss to property requires tangible alteration or damage that impacts the integrity of property, and dismissing case because plaintiff failed to allege that the coronavirus had any impact to the premises); *Rose's 1, LLC v. Erie Ins. Exch.*, No. 2020 CA 002424 B, 2020 WL 4589206, at *5 (D.C. Super. Aug. 6, 2020) (granting summary judgment for insurer on restaurant's claims of lost business caused by coronavirus closure orders because there was no direct physical loss to property).").

cannot) allege that COVID-19 has caused "direct physical loss of or damage to property" at other people's property.

The Civil Authority Coverage provision expressly requires that the government order be issued because of direct physical loss of or damage to property. However, the North Carolina and Washington civil authority orders alleged in the First Amended Complaint – the statewide stay-at home order entered by Washington Governor Jay Inslee, effective March 25, 2020, and the Executive Order No. 121 entered by North Carolina Governor Roy Cooper, effective March 30, 2020 – do not state that they were issued as a result of "direct physical loss of or damage to property." Nevins Decl. ¶¶ 3, 4. A court can consider "document[s] *integral to or explicitly relied upon* in the complaint." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) (emphasis in original). Further, the First Amended Complaint does not allege that the civil authority orders were issued as a result of "direct physical loss of or damage to property."

The Arch Policies require that the civil authority orders be issued as a result of "physical loss of or damage to property." In cases with similar policy language, courts held there was no coverage because the government orders were not issued as a result of physical loss of or damage to property. *See United Air Lines, Inc. v. Ins. Co. of State of Pa.*, 439 F.3d 128, 130 (2d Cir. 2006) (holding, in part, that there was no civil authority coverage because order grounding planes was based on

the fear of future terrorist attacks and not because of adjacent property damage); *Dickie Brennan & Co., Inc., v. Lexington Ins. Co*., 636 F.3d 683, 686-87 (5th Cir. 2011) ("'[c]ivil authority coverage is intended to apply to situations where access to an insured's property is prevented or prohibited by an order of civil authority issued as a direct result of physical damage to other premises in the proximity of the insured's property.'"); *Syufy Enters. v. Home Ins. Co. of Ind.*, No. 94-0756 FMS, 1995 WL 129229, at *2 (N.D. Cal. Mar. 21, 1995) (holding there was no civil authority coverage because curfews were imposed to "prevent 'potential' looting, rioting and resulting property damage" and not because of property damage to adjacent property).

D. THE VIRUS EXCLUSION PRECLUDES COVERAGE

Even if Plaintiffs could establish entitlement to Business Income and/or Civil Authority Coverage, the Virus Exclusion bars coverage for Plaintiffs' alleged losses. Exclusions that are clear, unambiguous and not violative of public policy should be enforced as written. *State Auto. Mut. Ins. Co. v. Hoyle*, 106 N.C. App. 199, 202, 415 S.E.2d 764 (1992); *Quadrant,* 154 Wash. 2d at 172, 110 P.3d 733; *Sinopoli v. N. River Ins. Co*., 244 N.J. Super. 245, 251, 581 A.2d 1368 (App. Div. 1990).

Plaintiffs' alleged losses fall within the unambiguous terms of the Virus Exclusion. The Virus Exclusion provides: "'We' do not pay for loss, cost, or

expense ***caused by, resulting from, or relating to any virus***, bacterium, or other microorganism that causes disease, illness, or physical distress or that is capable of causing disease, illness, or physical distress." (Doc. 30-1, at 13, Doc. 30-2, at 10, Doc. 30-3, at 11) (emphasis added). The "exclusion applies to, but is not limited to, any loss, cost or expense as a result of . . . any contamination by any virus . . . or denial of access to property because of any virus." *Id.*

Plaintiffs' alleged losses fall squarely within the Virus Exclusion. Plaintiffs do not dispute that COVID-19 is a virus. Indeed, the First Amended Complaint refers to COVID-19 as a virus throughout.

Plaintiffs also allege a direct connection between COVID-19 and the interruption of its business, which is playing baseball for spectators. Plaintiffs allege: "The nature of the virus, including its continuing, damaging, and invisible presence, and the measures required to mitigate its spread . . . have contributed to cancellations of the Teams' MiLB games." Am. Compl. ¶ 32 (Doc. 30). Although Plaintiffs also allege that the government response to the virus, including government stay-at-home orders, and the MLB failure to supply players caused their business interruption, Am. Compl. ¶¶ 39, 44, those causes are, likewise, directly linked to the virus. But for COVID-19, the government would not have responded and MLB would not have failed to supply players.

The Third Circuit has upheld an unambiguous microorganism exclusion that barred coverage for property damage caused by bacteria. *See Certain Underwriters at Lloyds of London Subscribing to Policy No. SMP3791 v. Creagh*, 563 F. App'x 209, 211 (3d Cir. 2014) (holding, under Pennsylvania law, that claim for costs to restore property damaged by bacteria from decomposing body was barred by microorganism exclusion that precluded claims "directly or indirectly arising out of or relating to: mold, mildew, fungus, spores or other microorganism of any type, nature, or description"). Other courts are in accord. *See, e.g., Lambi v. Am. Mut. Ins. Co*., No. 4:11-cv-00906-DGK, 2012 WL 2049915, at *4-5 (W.D. Mo. June 6, 2012) (communicable disease exclusion in homeowners' policy barred insurance coverage for virus claims), *aff'd*, 498 F. App'x 655 (8th Cir. 2013).

Further, several COVID-19 business interruption coverage claims have recently been dismissed because of unambiguous virus exclusions. *See, e.g., Turek Enters., Inc. v. State Farm Mut. Auto. Ins. Co*., No. 20-11655, 2020 WL 5258484, at *8 (E.D. Mich. Sept. 3, 2020) (holding "the Virus Exclusion bars coverage for any loss that would not have occurred but for some '[v]irus, bacteria or other microorganism that induces or is capable of inducing physical distress, illness, or disease.'"); *Mauricio Martinez, DMD, P.A. v. Allied Ins. Co. of Am*., No. 2:20-CV-00401-FTM-66NPM, 2020 WL 5240218, at *2 (M.D. Fla. Sept. 2, 2020) (dismissing complaint and enforcing virus exclusion that precluded loss "caused

'directly or indirectly'" by "[a]ny virus, bacterium or other microorganism that induces or is capable of inducing physical distress, illness, or disease."); *Wilson v. Hartford Cas. Co.,* No. CV 20-3384, 2020 WL 5820800, at *8 (E.D. Pa. Sept. 30, 2020) (dismissing breach of contract and declaratory judgment for business interruption and civil authority coverage based on unambiguous Limited Fungi, Bacteria, or Virus exclusion).

The same conclusion should be reached here. Plaintiffs' losses were "caused by, result[ed] from, or relat[ed] to" COVID-19 and, therefore, there is no coverage.

E. THE VIRUS EXCLUSION IS ENFORCEABLE

Plaintiffs allege that the Virus Exclusion is void and unenforceable. Am. Compl. ¶ 63 (Doc. 30). Plaintiffs are wrong.[9] Plaintiffs appear to be relying on a doctrine called "regulatory estoppel," which was established by the New Jersey Supreme Court in *Morton Int'l, Inc. v. General Accident Ins. Co. of Am.*, 134 N.J. 1, 629 A.2d 831 (1993), in arguing to invalidate the Virus Exclusion. However, regulatory estoppel cannot be used to invalidate the Virus Exclusion in the Arch Policies. First, pursuant to New Jersey's choice of law rules North Carolina and Washington law apply to the DeWine Seeds Policy and the Everett AquaSox

[9] Legal conclusions should not be accepted as true on a motion to dismiss. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Policy, respectively, and neither North Carolina nor Washington has adopted the regulatory estoppel doctrine. Second, the Virus Exclusion is unambiguous. Accordingly, there is no basis to look outside the Arch Policies to extrinsic evidence to construe the Virus Exclusion.

1. There is an Actual Conflict Between the Laws of Washington, North Carolina, and New Jersey Regarding the Application of Regulatory Estoppel.

There is a substantive difference between the law of New Jersey and the laws of Washington and North Carolina regarding regulatory estoppel. Regulatory estoppel has not been adopted in North Carolina or Washington, and there is no reason to believe that it would be adopted in either of those states. In fact, according to the Middle District of North Carolina, "[s]ince *Morton*, a number of courts have faced similar arguments based on claims of 'regulatory estoppel' or 'regulatory fraud'" and "[m]ost courts have rejected these claims." *Wysong & Miles Co. v. Emps. of Wausau*, 4 F. Supp. 2d 421, 427 (M.D.N.C. 1998) (citing cases from California, Florida, Minnesota, New York, North Carolina, Ohio, Washington); *see also* 1 PRACTICAL TOOLS FOR HANDLING INS. CASES § 1:20 & n.38 (Sept. 2020).[10]

[10] The regulatory estoppel doctrine has been rejected in number of jurisdictions. *SnyderGeneral Corp. v. Great Am. Ins. Co.*, 928 F. Supp. 674, 682-83 (N.D. Tex. 1996), *aff'd sub nom*, *SnyderGeneral Corp. v. Cont'l Ins. Co.*, 133 F.3d 373 (5th Cir. 1998) (Texas law); *Transamerica Ins. Co. v. Duro Bag Mfg. Co.,* 50 F.3d 370, 373 (6th Cir. 1995) (Kentucky law); *Federated Mut. Ins. Co. v. Botkin Grain Co.*,

Morton used regulatory estoppel as a policy construction tool. The New Jersey court refused to construe the plain language of the standard pollution exclusion as written because it concluded that the Insurance Rating Board ("IRB"), which drafted the exclusion and sought approval for it from state regulators, had misrepresented the scope of the exclusion to the regulators. *Morton*, 134 N.J. at 78-80, 629 A.2d . The exclusion provided: "This insurance does not apply * * * (f) to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental." *Id.* at 28, 629 A.2d 831. The IRB explained the exclusion to state regulators as follows: "Coverage for pollution or contamination is not provided in most cases under present policies because the damages can be said to be expected or intended and thus are excluded by the definition of occurrence. The above exclusion

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64 F.3d 537, 541-42 (10th Cir. 1995) (Kansas law); *Indep. Petrochemical Corp. v. Aetna Cas. & Sur. Co.*, 842 F. Supp. 575, 583 (D.D.C. 1994), *aff'd sub nom*, *Charter Oil Co. v. Am. Emps.' Ins. Co.*, 69 F.3d 1160 (D.C. Cir. 1995) (Missouri law); *Sinclair Oil Corp. v. Republic Ins. Co.*, 967 F. Supp. 462, 469 (D. Wyo. 1997) (Wyoming law); *Anderson v. Minn. Ins. Guar. Ass'n*, 534 N.W.2d 706 (Minn. 1995) (Minnesota law); *see also Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Ins. Corp.,* 636 So. 2d 700, 705 (Fla. 1993) (holding it is inappropriate to consider drafting history of unambiguous pollution exclusion) (Florida law).

clarifies this situation so as to avoid any question of intent. Coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident * * *." *Id.* at 36, 629 A.2d 831.

The court concluded that the regulators "would not readily have understood that the pollution-exclusion clause eliminated *all* coverage for pollution-related claims except in cases of abrupt and accidental discharges," *id.* at 848, and that as "a matter of equity and fairness, the insurance industry should be bound by the representations of the IRB," *id.* at 75-76, 629 A.2d 831.

In its reasoning, the court relied on a policy construction doctrine known as the "reasonable expectations" doctrine. The *Morton* court wrote: "An insurance doctrine closely related to 'estoppel' holds that insurance contracts should be enforced to accord with the objectively-reasonable expectations of the insured even if the contract's technical provisions would not be found ambiguous by a sophisticated reader." *Id.* at 76, 629 A.2d 831. The court then used what it assumed to be the "reasonable expectations" of state insurance regulators as a proxy for the "reasonable expectations" of insureds. The court wrote:

> [T]he typical commercial insured may have had little, if any, awareness that the terms of CGL coverage had been changed, much less any "objectively-reasonable expectation" of the scope of the new coverage, except to the extent of an assumption that unchanged premiums ordinarily would be consistent with a continuing level of coverage. To the extent that in the early 1970s informed "reasonable expectations" of the scope of coverage of the pollution-exclusion

> clause existed, such expectations were those of state regulators that had reviewed the IRB memorandum and understood that "coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident * * *." We are fully persuaded that the "reasonable expectations" of the New Jersey insurance regulatory authorities should be imputed to those insureds to whom CGL policies with standard pollution-exclusion clauses were issued after the clause had been approved on the basis of the IRB memorandum.

Id. at 77-78, 629 A.2d 831 (internal citation omitted).

As set forth below, neither regulatory estoppel nor reasonable expectations are recognized doctrines in North Carolina or Washington.

(a) North Carolina

In the only North Carolina case to analyze the application of regulatory estoppel to a coverage dispute, the court dismissed claims based on regulatory estoppel intended to void the application of a pollution exclusion. *Wysong*, 4 F. Supp. 2d at 430-32. The court explained that "[i]n North Carolina, insureds cannot use the doctrine of estoppel to bring within the coverage of a policy risks not covered by its terms or risks expressly excluded from its terms" even "in cases where insurance companies acted in ways that were arguably inconsistent with the express provisions of the policies they had issued." *Id.* at 432. Further, the court noted that the *Morton* court did not "address the reasonableness of reliance on representations made to a regulatory official," but instead "explained its ruling as one of contract interpretation." *Id.* at 428.

The *Wysong* case demonstrates that a North Carolina court is not likely to adopt the regulatory estoppel doctrine in the future. First, as a general rule in North Carolina, coverage cannot be created by estoppel. *Wysong,* 4 F. Supp. 2d at 432. Second, the regulatory estoppel doctrine established by *Morton* is premised on the reasonable expectations doctrine, and the reasonable expectations doctrine is not a recognized doctrine in North Carolina.

(b) Washington

There are no Washington cases analyzing regulatory estoppel under Washington law. Further, there is no reason to believe that Washington would adopt the regulatory estoppel doctrine. First, as a general rule, estoppel cannot create coverage contrary to the express terms of the policy. *Saunders v. Lloyd's of London,* 113 Wash.2d 330, 335, 779 P.2d 249 (1989). "In support of this rule, courts have reasoned that an insurance company should not be required by waiver or estoppel to pay for a loss for which it charged no premium." *Underwriters at Lloyds v. Denali Seafoods, Inc.,* 729 F. Supp. 721, 726-27 (W.D. Wash. 1989), *aff'd*, 927 F.2d 459 (9th Cir. 1991). A limited exception exists where "a party's conduct ***subsequent*** to issuance of a policy misleads another party." *Saunders,* 113 Wash.2d at 341, 779 P.2d 249 (emphasis added). In this case, Plaintiffs complain of representations made by persons other than Arch over ten (10) years prior to the issuance of the DeWine Seeds and Everett AquaSox Policies.

Second, "[t]he 'reasonable expectation' doctrine has never been adopted in Washington." *Findlay v. United Pac. Ins. Co.*, 129 Wash. 2d 368, 378, 917 P.2d 116, 121 (1996); *see also Quadrant*, 154 Wash. 2d 165, 172, 110 P.3d 733, 737 (2005) ("[I]n Washington the expectations of the insured cannot override the plain language of the contract.").

2. Washington Law Applies to the Everett AquaSox Coverage Dispute and North Carolina Law Applies to the DeWine Seeds' Coverage Dispute

The law of Washington should be applied to Everett AquaSox's claims. *See supra* Part III.A.2 (discussing New Jersey choice of law rules). First, DeWine Seeds' covered property is located in North Carolina, (Doc. 30-1, at 96), and Everett AquaSox's covered property is located in Washington, (Doc. 30-2, at 91; 30-3, at 92). Neither insureds' covered property is located in New Jersey. DeWine Seeds' risks under its policies are located in the State of North Carolina. Likewise, Everett AquaSox's risks under its policies are located in Washington. *Restatement* § 193; *Gilbert Spruance Co. v. Pennsylvania Mfrs' Ass'n Ins. Co.*, 134 N.J. 98, 102-04, 629 A.2d 885 (1993).

Second, New Jersey does not have a more significant relationship to the coverage issues in this case than North Carolina and Washington do. The DeWine

Seeds Policy includes North Carolina specific endorsements.[11] (Doc. 30-1, at 6, 9, 93). Likewise, the Everett AquaSox Policies include Washington-specific endorsements. (Doc. 30-2, at 6, 90, Doc. 30-3, at 7, 91). None of the policies include New Jersey forms.

3. The Virus Exclusion is Unambiguous and Should Not Be Construed Using Extrinsic Evidence

In any event, whether or not any statements made by ISO or AAIS about the form virus exclusions in 2006 were false or misleading (which Arch does not concede), those statements are irrelevant to the construction of the Virus Exclusion. The law is well-settled in New Jersey, North Carolina, and Washington that unambiguous policy language must be enforced according to its terms. *Register v. White*, 358 N.C. 691, 695, 599 S.E.2d 549 (2004); *Quadrant*, 154 Wash. 2d 165, 171, 110 P.3d 733 (2005); *Passaic Valley Sewerage Comm'rs v. St. Paul Fire & Marine Ins. Co.*, 206 N.J. 596, 608 (2011). Courts do not resort to extrinsic evidence as an interpretive aid when a policy is unambiguous. *Metric Constructors, Inc. v. Indus. Risk Insurers*, 102 N.C. App. 59, 62, 401 S.E.2d 126, 128, *aff'd*, 330 N.C. 439, 410 S.E.2d 392 (1991); *Quadrant*, 154 Wash. 2d at 171,

[11] In addition, the North Carolina Insurance Commissioner issued a letter to business owners explaining that standard business interruption policies "are not designed to provide coverage for viruses." *See supra* n. 5.

110 P.3d 733; *Chubb Custom Ins. Co. v. Prudential Ins. Co. of Am.,* 195 N.J. 231, 238 (2008).

As demonstrated above, the Virus Exclusion is unambiguous, and the terms should enforced as written.

IV. CONCLUSION

For the foregoing reasons, Arch respectfully requests that the Court grant its Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Eric S. Aronson, hereby certify that on October 14, 2020, I caused a copy of the foregoing Memorandum of Law in Support of Motion to Dismiss to be served via electronic filing on all counsel of record.

By: *s/ Eric Aronson*